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FINANSDEPARTEMENT

Royal Ministry of Finance

EFTA Surveillance Authority
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Your ref	Our ref	Date
Case No: 81437	17/5203 SL FR/KR	19.01.2018

Complaint - Norwegian excise duties on chocolate and sugar products and non-alcoholic beverages

1. INTRODUCTION

Reference is made to the Authority's letter 14 December 2017 forwarding a complaint[1] alleging that the Norwegian authorities are granting unlawful state aid with the excise duties on chocolate and sugar products and non-alcoholic beverages.

As will follow, the Ministry maintains that the measures do not constitute state aid according to Article 61(1) of the EEA agreement, and that the measures not are discriminatory.

2. LEGAL CONTEXT IN BRIEF

The legal question is in brief whether the tax increases on chocolate and sugar products and non-alcoholic beverages (as put into effect 1 January 2018) constitute state aid.

Generally, the case raises fundamental questions on the extent to which the state may levy tax on certain goods, with the main object of raising revenue for the state, without breaching the state aid rules.

The main, underlying question is whether the tax schemes are selective under Article 61 (1) EEA. The complainant seems to argue that the selectivity test is in reality a competitive analysis of the substitutability of the products falling within or outside the scope of the tax base. The Ministry disagrees with this approach. Such an approach would imply that many – if not most – fiscally motivated taxes would be illegal under EEA law, contrary to the states' sovereignty in tax matters. Thus, the Ministry is of the view that, from a state aid perspective,

[1] Letters of 13 and 19 December 2017.

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a fiscal tax measure may legitimately be imposed on certain products even if there is a substitutable product outside the scope of that tax, provided non-discriminatory under Article 14 EEA and provided the more detailed scope is not set out clearly arbitrary etc.

The complainant also raises questions regarding existing or new aid, respectively. Due to the short time to provide the Ministry's comments to the complaint and since the Ministry's principal point of view is that the tax regimes do not entail state aid, issues on existing vs new aid are not part of this letter. The Ministry may of course come back to these questions at a later stage if necessary.

3. INTRODUCTION - AN OVERVIEW OF THE NORWEGIAN SYSTEM OF EXCISE DUTIES

According to Norwegian constitution section 75 letter a) taxes – both direct and indirect – are adopted annually by the Parliament. Indirect taxes consist of Value Added Tax (VAT) and excise duties. Both VAT and the excise duties are consumption taxes. Whilst VAT as a main rule covers all services and goods, excise duties cover defined products.

Indirect taxes represent a very important part of the income side of the Norwegian state budget and comprise for approximately 30 per cent of total tax revenue. Thus, indirect taxes are important to finance the Norwegian welfare state.

Excise duties are levied on specific goods and services and are mainly fiscally justified. The income from the excise duties go directly to the treasury, without any earmarking on how the income is to be spent. Most of the excise duties are subject to goods where the duty is paid by the manufacturer and importer. Excise duties on goods are levied on both imported and domestically produced products.

Provisions on collection, inspection etc. are laid down in Act May 19th 1933 No. 11 concerning excise duties, the tax payment act June 17th 2005 No. 67, and act May 27th 2016 NO. 14 on tax administration. Further provisions regarding the taxes on chocolate and sugar products and non-alcoholic beverages are set out in the Regulation of December 11th 2001 no. 1451 concerning excise duties[2] (hereinafter "the Regulation").

The excise duty on chocolate and sugar products was introduced in 1922 as a luxury tax. An excise duty on non-alcoholic beverages was introduced in 1924. Today both taxes are considered fiscally justified, although it is acknowledged that they may also have health benefits.[3]

Both taxes are levied on both imported and domestic products. In addition, the same tax rates apply in these two situations. Hence, the two taxes like other excise duties, are designed to meet the criteria of neutrality. This also means that the taxes are non-discriminatory.

[2] Cf. Annex 1 – "The Excise Duty Regulations Chapter 3. Special provisions regarding certain excise duties" (unofficial English translation)

[3] Cf. National Budget 2018: https://www.regjeringen.no/no/dokumenter/prop.-1-ls-ls0-20172018/id2574326/sec2#KAP9-14

Most excise duties, including the excise duty on chocolate and sugar products and non-alcoholic beverages, are based on principles of self-declaration, i.e. the tax subject shall on his or her own calculate and pay the tax to the tax authorities.

As a starting point, excise duties are to be paid at the time of importation and production. However, for registered tax subjects the obligation to pay the tax is postponed to the point when the goods leave the warehouse. Domestic manufacturers of taxable goods etc. are obligated to register as tax subject for excise duties and determine the excise duties on a tax form. Importers of taxable goods can choose to register. Importers that are registered determine the excise duties on a tax form, while unregistered importers determine the tax through the customs declaration.

4. LEGAL ASSESSMENT – THE TESTS TO APPLY – INTERPLAY BETWEEN ARTS. 14 AND 61 EEA

4.1 Introduction

The Ministry will in this section provide a more detailed legal assessment to demonstrate why the excise duties on chocolate and sugar products and on non-alcoholic beverages do not constitute state aid.

From a state aid law perspective, it is of importance that both duties are *indirect taxes*, i.e. taxes of particularly defined products. In addition, both excise duties are *fiscal measures*, primarily set up to provide income to the state to contribute to the financing of the welfare state. In such cases, it must be distinguished between two separate, albeit closely linked, questions.

First, there is the question of the legality of the *choice of tax base itself*, and secondly, the question of whether the *more detailed boundaries* of that tax base have been designed in a manner compatible with EEA law.

As is set out further below, the legislative choice to tax chocolate and sugar products and non-alcoholic beverages is, in principle, a decision to be taken solely by the EEA states itself, provided non-discriminatory, and is a question that in the Ministry's view should be assessed under Article 14 EEA. Such a measure can nevertheless, exceptionally, imply state aid under Article 61(1) EEA, but only if the boundaries of the taxes are set out *"in a clearly arbitrary way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question"*.[4]

The sovereignty of the states to choose their tax base is set out in consistent case law, as defined in leading EU literature. Reference is made, from a state aid perspective, to Hancher et al. *EU State Aids* (4th ed. 2012) on page 340, holding (emphasis added):

> *«From this starting point we must also accept that the Member States are free to levy a tax which concerns only a certain group of enterprises, because the*

[4] Notion of Aid (NoA) Guidelines, para. 129

> *state is free to levy taxes on specific goods and services. A tax on beer producers in order to support wine producers is not prohibited; the same holds true for a tax on road hauliers which strengthens the competitiveness of rail freight undertakings. The Member State is free to change its "general tax scheme". The mere fact that there is competition between taxed and non-taxed market participants does not stand in the way of the fiscal sovereignty of the Member States.»*

Similarly, but from an internal market perspective related to the provision of internal taxation in Article 110 TFEU, see for example Barnard, *The substantive law of the EU* (4th ed. 2013) page 54 (emphasis added):[5]

> *«These cases [on internal taxation] demonstrate that national taxation policy is, by its very nature, discriminatory. It is a matter for an elected government to decide whether to tax product X at a lower rate than product Y. Provided such a discrimination or, to use a more neutral term, differentiation, is based on objective criteria unrelated to origin (nationality) of the goods, the tax does not fall within the purview of Article 110 TFEU. This highligts a key difference between Article 110 TFEU and the other Treaty provisions discussed in this book: Article 110 TFEU is essentially* permissive*; it allows Member States both to raise revenue and to determine the content of their own taxation policy. The other Treaty provisions are essentially* restrictive*: states cannot impose custons duties, prohibit exports etc."*

These starting points are particularly important when assessing separate taxes as in the present case (as opposed to, for instance, a derogation from a normal tax rate), and when the tax is fiscally motivated (as opposed to taxes for a special purpose, such as a health tax or an environmental tax). Indeed, the complainant seems to have a different view on the selectivity test in such cases, arguing that the selectivity test in reality is a competitive analysis of the substitutability of the products falling within or outside the scope of the chosen tax base. According to the complainant, if such a competitive relation exists, the tax base is selective, and in a case such as the present, where the tax is a fiscal measure, the tax would constitute prohibited state aid with a limited chance of complying with any of state aid derogations.

However, such an understanding of the selectivity test would imply that most fiscal taxes would be prohibited as illegal state aid. There will nearly always be some products falling inside the scope of a fiscally motivated tax that are substitutable with those falling outside the tax scope, and a fiscally motivated tax would be difficult to substantiate under Article 61(3) EEA. Advocate General Kokott has, in line with this, warned against a too broad understanding of the selectivity of national provisions, inter alia because that would risk adversely affecting the division of competences between the Member States and the European Union.[6]

Moreover, such an understanding of the selectivity test would also risk rendering the separate state aid condition of distortion of competition void of any content. Finally, it is difficult to see how the substitutability approach to the selectivity test would be applied in practice.

[5] Footnotes and parenthesis omitted

[6] Opinion in Case C-66/14 *Finanzamt Linz*, paras. 113-115.

Widening the scope of a certain tax base to cover not only product A but also potentially competing product B, in order to escape the selectivity test, would more often than not merely create new sets of delimitations, now between product A and B, within the tax scope, and product C, outside the scope.

Based on the above, the Ministry is of the view that, from a state aid perspective, a fiscal tax measure may legitimately be imposed on certain products even if there is a substitutable product outside the scope of that tax, provided non-discriminatory under Article 14 EEA and provided the more detailed scope is not set out clearly arbitrary etc. The Ministry will now look further into these two perspectives and demonstrate that this approach is the correct one. This approach will, as opposed to the approach suggested by the complainant, respect the sovereignty of the states in determine what products to tax (setting the tax base), whereas as the same time providing sufficient legal boundaries from an EEA law perspective.

4.2 Assessment under Article 14 EEA

Article 14 EEA provides that EEA States cannot impose higher internal taxation on important products than on *similar domestic products*. Even if the products are not "similar", internal taxation can be incompatible with that provision if it implies
as to afford *indirect protection* of other, domestic products.

Case law under the parallel Article 110 TFEU demonstrates that this provision forms the legal provision under which the choice of tax base is to be assessed. A number of cases have been assessed under this provision, and the Ministry cannot see that the CJEU has continued to scrutinize the legality of the tax base under the state aid rules when the legislative choice has passed the boundaries of Article 110 TFEU.[7] The states' choice of establishing the tax base is only struck down if indeed similar foreign and domestic products are discriminated or if the national rule is in other ways protectionist.

This Article 14 test on discrimination implies that the impact of the tax on domestic and foreign products has to be assessed and compared. However, case law demonstrates that there is a fairly high threshold for an internal taxation to be discriminatory or protectionist under this provision. As the Ministry sees it, it must be clear that the two excise duties assessed in the present case are compatible with Article 14 EEA.

The excise duties are indeed applied in the same way for imported and domestically produced products. There is no distinction based on the origin of the products. The duties are therefore clearly not directly discriminatory. Neither do they in fact impose a particular burden on imported products. Such an indirect discrimination would only be found under the provision on internal taxation if all, or nearly all, of the products with the most favourable taxation are domestic products. Only in such a case are foreign products discriminated against similar domestic products, and only then can it be a question of protective taxation.

The CJEU did, on the one hand, strike down the favourable French taxation of dark tobacco cigarettes as indirectly discriminatory as these cigarettes were almost exclusively produced in France, whereas light-tobacco cigarettes came from other Member States.[8] On the other hand, motor vehicle taxes were held to be non-discriminatory even if *only* important products came

[7] See for instance the case law cited in Barnard, *The substantive law of the EU,* at p. 53 *et seq.*
[8] Case C-302/00 *Commission v. France*, para. 30

within the most heavily taxed category as long as *both foreign and domestic products* came within the most favourable category.[9]

It does hence not suffice to demonstrate discrimination that importers are hit harder by the tax. Even if only foreign products fall under the most heavily taxed position, there is no discrimination as long as the favourably taxed products are produced both domestically and abroad, and even if most of them are domestic products.[10][7]

The motor vehicle tax cases just mentioned are illustrative. Case C-113/94 *Casarin* concerned a progressive tax with three categories: The highest tax for cars above 18 CV, cars with 17-18 CV in a middle category; and cars with the 15-16 CV band with the lowest tax. The Court held, inter alia (emphasis added):[11]

> *"A system of taxation cannot be regarded as discriminatory solely because only imported products, in particular those from other Member States, come within the most heavily taxed category…*
>
> *…*
>
> *The 15-16 CV and 17-18 CV tax bands, however, include both imported vehicles and vehicles of domestic manufacture. In the 17-18 CV band, it is apparent from the documents in the case that the vehicles are nearly all of foreign manufacture and that domestic manufacturers have a market share of only about 5% of total car sales in that band. In the 15-16 CV band, while the majority of vehicles sold are indeed of domestic manufacture, firstly, consumers do nevertheless have a wide choice of imported vehicles in that band, and secondly, as appears from paragraph 6 of this judgment, the progression coefficients for the 15-16 CV and the 17-18 CV bands are the same, in round figures, so that consumers who are looking for a vehicle from the top of the range will not thereby be induced to purchase a vehicle in the 15-16 CV band.*
>
> *In a system such as that at issue in the present case, therefore, it does not appear that the increase in the progression coefficient can have the effect of favouring the sale of vehicles of domestic manufacture.*

Similarly, in Case C-132/88 *Commission v. Greece*, also concerning taxation of motor cars, the Court dismissed that a special tax on cars with horse powers above a certain threshold, was discriminatory, even if, as in the Casarin case, *"only imported products, in particular*

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[9] Case C-113/94 *Casarin*, paras. 21-25; and Case C-132/88 *Commission v. Greece*, paras. 19-20

[10] See also Craig and de Búrca*, EU Law, Text, Cases and Materials* (4th ed. 2008) pp. 652-653, and Barnard, *The substantive law of the EU* pp. 60-61, both referring inter alia to the motor vehicle tax cases

[7]

[11] Paras. 21 and 24-25

those from other Member States, come within the most heavily taxed category".[12] The Court continued (emphasis added):[13]

> *20 If it is assumed that the particular features of the system of taxation at issue actually discourage certain consumers from purchasing cars of a cylinder capacity greater than 1 800 cc, those consumers will choose either a model in the range of cars having cylinder capacities between 1 600 and 1 800 cc or a model in the range of cars having cylinder capacities below 1 600 cc. All the models in the first-mentioned range are of foreign manufacture. The second range includes cars of both foreign and Greek manufacture. Consequently, the Commission has not shown how the system of taxation at issue might have the effect of favouring the sale of cars of Greek manufacture.*

This demonstrates that even if only foreign products would have been subject to the tax in question, this would not have been sufficient in order to establish a discriminatory effect as long as there is both domestic and foreign production of the substitutable products outside the scope of the tax.

There are indeed no indications that the chocolate and sugar duty or the duty for non-alcoholic beverages is discriminatory or protective under Article 14 EEA. Although there does not exist any systematic review of the matter, there is clearly both foreign and domestic production of the different categories of products falling under the scope of these two excise duties. The Ministry is not aware of any category of products falling *outside* the scope of the duties, similar to or in other ways substitutable with products falling *inside* the scope of the duties, that are exclusively, or almost exclusively, produced domestically.

As long as there is no discriminatory element in the framing of the tax base, it must be for the state to choose, for instance, to tax chocolate and not chips or ice cream.

4.3 Assessment under Article 61 EEA

As demonstrated above; when fiscal taxes such as the two relevant excise duties are assessed under EEA law, it must be determined whether the tax base is set up in a way discriminating foreign products, cf. Article 14 EEA. There are good reasons why the tax base is not to be assessed under the strict selectivity-test – focusing on the competitive relation between products falling inside and outside the scope of the tax – as proposed by the complainant. That would imply that many – if not most – fiscally motivated taxed would be illegal under EEA law.

The position of the complainant is also contrary to the established case law under Article 14 EEA (Article 110 TFEU). Even though the application of the internal market rules does not as such rule out that the national measure must be assessed also under the state aid rules, the case law presented above would de facto be ignored with the strict selectivity test advocated by the complainant. It is recalled, in that regard, that most of the case law concerns non-harmonized areas within EU law, making the interplay between the internal market rules and the state aid rules parallel to the one within the EEA.

[12] Para. 18
[13] Para. 20

This does not mean, however, that the excise duties are sheltered from state aid scrutiny. Even though the question has been controversial and debated, it does not seem to be ruled out that a separate tax measure can represent an advantage derived from state resources to those producers manufacturing products that fall just outside the scope of the tax. Without elaborating on the conditions of *advantage* and *state resources* here, the Ministry understands the Commission's practice and guidelines, also adopted by ESA, to the effect that the *selectivity test* is applied in a way acknowledging the special features of this situation. This is a different test than the one proposed by the complainant.

The complainant refers to some cases from the Commission, in particular the Danish "fat tax" and the Finnish "confectionary tax". However, it should be noted that the Commission did not make final/formal decisions in these two cases. Moreover, neither the Finnish confectionary tax nor the Danish fat tax is comparable to the Norwegian chocolate and sugar levy as regards purpose, design, extent and implementation. In particular, it is important that the two other levies, and most notably the Danish fat tax, was set out as a special-purpose levy for health objectives, implying a different assessment of, for instance, the relevant reference system and logic of the system.

Additionally, it is also notable that the Finnish excise duty on soft drinks is continued for 2018[14], moreover that other states – like France and Hungary – do indeed levy sugar- and artificially- sweetened beverages.

4.4 Selectivity - the reference system and a possible derogation from that system?

The first step in the selectivity test is normally to define the reference system. The reference system is defined as the consistent set of rules that generally apply, based on objective criteria, to all undertakings falling within the scope of the tax as defined by its objective.[15]

It may be true for excise duties, such as a health tax or an environmental tax, that the reference system, depending on the circumstances, is defined broader than the actual tax measure.[16] That cannot be relevant, however, to the present case concerning *fiscal measures*. The objective of such measures is to ensure income to the state rather than to ensure another, external objective. As long as the tax base is determined non-discriminatorily, as demonstrated in relative to Article 14 EEA above, the Ministry sees no authority for extending the reference system beyond the scope of the tax measure itself.

It is on this basis not relevant when the complainant on this point refers to the case concerning the Danish "fat tax" as this was a special health tax. It was under that premise that the Commission argued that the reference system was wider than the tax measure itself.[17]

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[14] http://budjetti.vm.fi/indox/sisalto.jsp?year=2018&lang=sv&maindoc=/2018/tae/hallituksenEsitysRuotsi/hallituksenEsitysRuotsi.xml&opennode=0:1:133:141:143:163:

[15] NoA Guidelines para. 134

[16] Complaint, section 4.4.2.2

[17] State aid SA.33159 (2011/NN – Denmark. See recital 92: "The objective pursued by the general reference system in question […] is to promote better diets and improve health and mean life expectancy of the Danish population. […] Moreover, with regard to the scope and structure of the exemptions from the general tax

The present case does not concern any derogation from the excise duties but rather the boundaries of these duties. As long as the tax measures themselves comprise the reference system, there is hence no derogation from the reference system that in most cases is necessary to make the measure *prima facie* selective.[18]

The case should therefore, in the Ministry's view, be assessed under the special rule provided for in paragraph 129 of the Notion of State Aid Guidelines, as already cited above and set out in more detail the next section.

5. THE SELECTIVITY TEST

The question to be assessed in the following is whether the boundaries are set clearly arbitrary and to favour undertakings in a comparable situation based on the logic of the system:

The important part of the Guidelines hence seems to be paragraph 129 and in particular, the tests set out in the last part of that paragraph (emphasis added):

> *"However, the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned. It must be emphasised that Article 107(1) of the Treaty does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used. This means that in certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system as defined by the Member State concerned. It is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question."*

It follows from this that it is not ruled out that the boundaries of a separate tax may imply a selective advantage to those falling outside the scope of the tax. This is due to the state aid prohibition not distinguishing between measures of state intervention in terms of their causes or aims, but defines them in relation to their effects. However, in such cases it is often less obvious that there is an advantage in the form of state resources, as compared to for instance a derogation from a normal tax rate. Additionally, and important here, the selectivity test is not the standard derogation test (as there is no derogation from a reference system), but rather the test, as it follows from the above, whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, *"in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question"*.

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scheme, and a distinction among the taxable and non-taxable foodstuff products the Commission has doubts as to whether this system in general is in line with the alleged objectives as presented by Danish authorities."

[18] Noa Guidelines para. 128

Hence, in order to be selective, the first aspect is that the boundaries have to be applied "in a clearly arbitrary or biased way". Certainly, the language of the Guidelines calls for a cautious approach. It is not a question whether another framing of the scope would have been better, and not every inconsistency will render the measure selective. The word "arbitrary" implies a high threshold, in particularly when only the "*clearly"* arbitrary boundaries are caught by the provision.

The second aspect is that the national measure and its boundaries must have the consequence of treating comparable situations differently, with regard to the logic of the system. Both of these aspects must be present, cf. the wording "so as …". The logic of the system must indeed be assessed on the basis of the measure in question. For instance; are the boundaries of the chocolate and sugar levy set clearly arbitrarily so as to favour certain undertakings with regard to the objective of the system, which is to tax sweets and non-alcoholic beverages suitable for immediate consumption (at the spot, there and then)?

With this test, much of what is presented by the complainant is less relevant, focusing more on a kind of competitive/suitability analysis and different health effects rather than on the "underlying logic of the system in question," to rephrase the Guidelines at paragraph 129.

There are few relevant examples from Commission practice and case law. This illustrates that the Commission has been very reluctant to assess indirect taxes under the state aid rules.[19] However, it seems that the available cases do support that there is a high threshold for finding that the boundaries of a tax measure have been designed in an arbitrary way.

In cases where the Commission has struck down on national measures on the basis of this test, it has indeed underlined that the tax was "specially designed" to favour certain retailers over others,[20] or that the state had "deliberately designed" the tax measure "so as to arbitrarily favour certain undertakings … and disadvantage others".[21]

This reasoning from these Commission cases does not apply to the present tax measure. Instead, it seems more comparable with what the CJEU set out in *Gibraltar*, referring to what was not caught by the state aid rules, namely "a random consequence of the regime".[22] Any possible inconsistency within the two excise duties assessed here, if demonstrated, must be seen as a random consequence of the system chosen for defining the boundaries of the duties.

[19] See Englisch, *EU State Aid Rules Applied to Indirect Tax Measures*, EC Tax Review 2013-1 at pp. 9 and 10, referring inter alia to the fact that excise duties other than so called green taxes have largely not been scrutinized

[20] Polish retail tax (SA 44351) recital 47 and 49

[21] Hungarian tobacco tax (Sa 41187) recital 34

[22] Joined cases C-106/09 and C-107/09 P *Commission and Spain v. Gibraltar*, paras. 83 and 106

6. THE EXCISE DUTY ON CHOCOLATE AND SUGAR PRODUCTS – SELECTIVITY

6.1 Introduction

Two main elements have been decisive when defining the scope of this excise duty. First, the scope is set for the tax to be levied on chocolate and sugar products as "finished goods"[23] or consumable goods, i.e. products that you would normally buy in a shop/kiosk and eat immediately. Second, what is included is, in short, it is what we in Norway call "godteri" (English: sweets). The objective of the tax is hence to raise revenue to the state by taxing products fulfilling these two elements.

Products used as a factor in the production of (other) goods (input/raw material) therefore fall outside the scope of the tax. The same is the case for products that cannot naturally be regarded as "sweets", such as biscuits (as the main rule), cakes and ice cream.

Moreover, the tax is levied both on chocolate and sugar products which contain sugar/sweeteners and on products without sugar/sweeteners. Thus, the tax is not differentiated according to the content of sugar/sweetener in the product as long as the product is "sweets" for immediate consumption.

When it comes to the more detailed definition of what products that are regarded as being chocolate or sugar product subject to the excise duty, the Regulation is referring to specific commodity codes in the Norwegian Customs Tariff (hereinafter also referred to as only "the tariff") that, in turn, is based directly on the Harmonized Commodity Description and Coding System. In other words, the scope of the excise duty is based on an external, well-established and objective classification system, with the necessary adaptions as explained below.

Please find enclosed examples of goods that respectively fall within and outside of tax liability ("Annex 2").

6.2 The link from the Regulation to positions in the Harmonized Commodity Description and Coding System (HS)

The complainant argues that tariff is a technical instrument designed for other purposes and that references to very concrete goods numbers in the customs tariff nomenclature would often have the effect of treating similar products differently.

The tariff, however, plays a more general and vital role than set out in the complaint.
The HS is thus a universal economic language and code for goods, and an indispensable tool for international trade. All goods imported to Norway are classified according to the tariff. As mentioned, the tariff is based on the Harmonized Commodity Description and Coding System generally referred to as "Harmonized System" or simply "HS". The HS is a multipurpose international product nomenclature developed by the World Customs Organization (WCO), and is governed by an international convention[24]. The HS comprises about 5,000 commodity

[23] Cf. St prp nr 1 (1997-98) Skatte- avgifts- og tollvedtak point 6.12, page 56, left column and the last sentence in the first section (attached)

[24] http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx#article_1

groups; each identified by a six digit code, arranged in a legal and logical structure and supported by well-defined rules to achieve uniform classification. The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98 % of the merchandise in international trade is classified in terms of the HS. The HS is also extensively used by governments, international organizations and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis.

The use of tariff goods to identify goods is not confined to customs laws. Excise or VAT laws and regulations commonly refer to tariff headings to determine the tax treatment of specific categories of goods. When customs tariff headings are used for domestic tax purposes as sales or consumption taxes, its rules of application and interpretation serve well for such national purposes too. Examples for other states using the link to the tariff headings are Finland, cf. the law on excise duty on soft drinks[25] and Hungary, cf. the Act CIII of 2011 on public Health Product Tax[26]

Reference is also made to the VAT directive in EU (Council Directive 2006/112/EU) Article 98 (3) framing the conditions for the Member States´ discretion to have more than one VAT tax rate. Here it is explicitly stated that Member State may use the HS to define categories of goods covered by a low rate regime. Additionally, it is recalled that the scope of the EEA Agreement is determined directly on the HS Nomenclature, cf. Article 8 (3) EEA.

Furthermore, several Directives as for instance 92/83/EEC, 92/84/EEC, 2003/96/EC and not at least to be metioned; the Energy Taxation Directive[27], are referring to explicit headings in the HS to determine the tax treatment of goods. To draw an illustrating example to underline our point in this concern; for instance an energy tax that is fully designed in line with the Energy Tax Directive (in accordance to the minimum rates of the Directive, and with the exemptions provided by the Directive) will probably be considered as system logical and non-selective. However, in this regard it could also be argued that despite the fact that it must be presumed that the Energy Tax Directive is a complete logical system, the directive will also entail examples of apparent boundaries between substitutable products.

The excise duty has not always been linked to headings in the tariff. The link from the Regulation to tariff headings was first introduced as from 1 April 1997[28]. The background was a public hearing[29] by the customs authority, with proposals to make more clarity in which goods fell within and outside the duty.

The link in the Regulation to the tariff secures an equal tax treatment of imported and domestic products. This ensures a non-discriminatory treatment between domestic products and products produced abroad. Further, it reduces the administrative burdens both for the tax subject and for the tax authorities in determining whether the product in question is taxable or

[25] http://www.finlex.fi/sv/laki/alkup/2016/20161535

[26] http://njt.hu/cgi_bin/njt_doc.cgi?docid=139165.346582

[27] Cf. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:283:0051:0070:EN:PDF (see Articles 1 and 2)

[28] Cf. St prp nr 1 (1997-98) Skatte-, avgifts og tollvedtak, punkt 6.12 på side 55 (attached)

[29] See letter 11 June 1997 from the customs authority attached

not. The tax subjects are, irrespective of the excise tax, obliged to determine the correct position in the HS/the tariff for all their products. By linking the excise duty to this established system, their assessment of whether the product in question is taxable or not is clearly simplified compared to any other, nationally based definitions of products falling within the scope of the tax. For the tax authorities, the link to the tariff enhances the possibility to exercise control with the taxation of the product.

6.3 Application of the HS/the tariff when defining the scope of the excise duty

In the Regulation on the excise duty for chocolate and sugar products, there is a reference to certain numbers in the tariff which contain goods that after a natural and logical understanding fall within the category of chocolate or sugar products targeted; sweets for immediate consumption. When defining the scope, one has sought to encompass all numbers that include what one typically and logically considers being such chocolate or sugar products. The Ministry will here provide an overview of this regulation with reference to the tariff[30].

All products falling under the scope of the excise duty on chocolate and sugar products are included in Section IV of the tariff on "prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes". The section consists of the following chapters:

- 16 Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates
- 17 Sugars and sugar confectionery
- 18 Cocoa and cocoa preparations
- 19 Preparations of cereals, flour, starch or milk; pastrycooks' products
- 20 Preparations of vegetables, fruit, nuts or other parts of plants
- 21 Miscellaneous edible preparations
- 22 Beverages, spirits and vinegar
- 23 Residues and waste from the food industries; prepared animal fodder
- 24 Tobacco and manufactured tobacco substitutes

As is apparent, most of these chapters do not include chocolate or sugar products for the "immediate" consumption. The excise duty is therefore limited to the relevant chapters, i.e. chapters 17, 18, 19 and 21. Within these chapters, the selection and clarifications can briefly be explained as follows.

Chapter 17 on "sugars and sugar confectionery" does mostly include sugar as a raw material or as an ingredient. The duty therefore does not include, for instance, code 17.01 "Cane or beet sugar and chemically pure sucrose, in solid form". What is included, is the relevant subsections under code 17.04 "Sugar confectionery (including white chocolate)". Three subsections are included in its entirety: chewing gum, (17.04.1000), caramels (17.04.9091) and pastilles, sweets and drops (17.04.9092). One subsection is *not* included – marzipan paste

[30] See https://tolltariffen.toll.no/PageFiles/519079/Nor-CustomsTariff-2018.pdf

(17.04.9010), whereas the category "Other" (ex[31] 17.04.9099) is included with the clarification that this is limited to sugar confectionery shaped as plates, figures etc.

The example of marzipan illustrates the scope of the excise duty. Marzipan paste falls outside the scope, whereas marzipan shaped as figures, rods or balls are included (under "other" in ex 17.04.9099). The reason is that while marzipan paste is considered to be input/raw material in production of other goods, the marzipan shaped as figures etc. is considered as a "finished product" or a product ready for immediate consumption. It is therefore logical to tax the marzipan shaped as figures etc. as "sweets".

Chapter 18 of the tariff concerns "Cocoa and cocoa preparations". Most of the subheadings contain products that are raw materials etc., such as heading 18.01 "Cocoa beans, whole or broken, raw or roasted". Again, what is included is the only heading that seems relevant for products seen as "sweets", i.e. "Chocolate and other food preparations containing cocoa" (code 18.06). This code, however, also includes products that clearly fall outside the scope of the duty, such as "cocoa powder" (18.06.10). What is included are three categories of preparations containing cocoa provided it is presented in blocks, slabs or bars, whether in "other products" (18.06.2090), "filled" products (18.06.3100) or "not filled" products (18.06.3200), and a residual category of other kind of chocolate with cocoa, the latter limited – in line with the scope – to products formed as figures etc. (ex 18.06.3200).

Chapter 19 concerns "Preparations of cereals, flour, starch or milk; pastrycooks' products". The only subcategory that includes products relevant for the excise duty is 19.05, encompassing inter alia "Bread, pastry, cakes, biscuits and other bakers' wares". In line with the scope of the duty, crispbread (19.05.10), gingerbread (19.05.20) and toasted bread (19.05.40) is excluded, whereas biscuits (sweet biscuits, waffles and wafers) are included (codes ex 19.05.3100 and ex 19.05.3200).

Biscuits however cover a wide range of products. Thus it is clarified, in the Norwegian Regulation, that biscuits are included only if they are i) completely coated with chocolate and/or sugary pulp or ii) partially coated with chocolate and/or has an intermediate layer of chocolate and/or sugary pulp, when the pulp constitutes more than 50 percent of the total weight of the biscuit. Biscuits not fulfilling these criteria are not taxed because they are considered as a cake/pastry, which falls outside the natural scope for a tax on "sweets".

Biscuits represent an interesting example of the scope of the excise duty. On the one hand, it is clear that some biscuits have little resemblance with "sweets", such as biscuits traditionally used in a breakfast or together with cheese and wine. Some biscuits would, on the other hand, come close to traditional chocolate. Other biscuits could be seen as falling in a middle category as cakes. Any line to be drawn for the excise duty in relation to biscuits would be difficult as well as debatable. One choice is to include only those biscuits that can be seen as being fairly close to traditional chocolate. As set out just above, to be taxable the biscuit has to have a full chocolate or sugar cover, alternatively a layer of chocolate etc. constituting more than half of the biscuit by weight. The Ministry acknowledges that other choices are possible, but fails to see that other criteria would imply a more appropriate borderline.

[31] "Ex" is an abbreviation for "extract", and is referring to a selection of goods within the position. Not all the goods included in the relevant position of the tariff are subject to tax. Only sugar confectionery in solid form and shaped as plates, figures etc. are levied tax.

Next, the excise duty includes a limited number of products under chapter 21 of the tariff on "Miscellaneous edible preparations". Again, as is evident, most products under this chapter are irrelevant for the excise duty on chocolate and sugar products. There is a final category under heading of "Food preparations not elsewhere specified or included" (21.06), with a subcategory "Other". A limited number of such "other" products are included, all of which are naturally regarded as "sweets" for immediate consumption: drops and pastilles (21.06.9041), chewing gum, but not nicotine chewing gum (21.06.9044 in the Regulation, also specified in codes 21.06.9041 and 21.06.9043 in the customs tariff), and other sweets (ex 21.06.9098).

Finally, letter e) of section 3-17-1 of the Regulation includes products falling under other codes in the tariff because they have been incorporated with or packed with products falling under the scope of the excise duty. However, chocolate and sugar products in or on cakes falling within commodity code 19.05.9031, are not subject to the duty.

In sum, this means that the excise duty includes those headings within the tariff that are naturally seen as sweets for consumption. Other products, including chocolate and sugar products used as raw material or ingredients, are not covered by the tax. It has only been necessary to make a few national clarifications and limitations, notable in relation to biscuits as set out above, in order for the duty to have a consistent scope.

The complainant's examples of products that are not taxed (the complaint page 9) are logical within the tax. The examples are biscuits, nuts and ice cream and thus outside the scope of the tax.

6.4 Summing up on the selectivity etc. of the excise duty

On the basis of the above, the Ministry will sum up what it regards to be the correct selectivity assessment for the excise duty on chocolate and sugar products and also provide some other final comments. It is recalled that the complainant argues for a selectivity test based on whether products falling inside and outside the scope of the tax are in competition/are substitutable. This, however, cannot be the correct test to apply. The tax base must, under Article 14 EEA, be set out in a non-discriminatory way. In addition, under Article 61 EEA, the more detailed boundaries cannot be set in a clearly arbitrary or biased way so as to favour certain undertakings in a comparable situation having regard to the objective of the tax. Beyond these requirements, the states are free to decide what products to tax and on what level, cf. the states' sovereignty in tax matters within the EEA.

Finally, a requirement for an equal treatment of all substitutable products, as proposed by the complainant, would in practice prevent EU and EEA States from adopting indirect taxes, in particular taxes for fiscal purposes. That cannot be the correct interpretation. Basically, the selection of taxable goods ("godteri"/"sweets") is made to draw a line towards other goods not subject to tax (as cakes, ice cream etc.). An excise duty must, by definition define the scope of the tax by include some products and excluding others. The boundary issues, highlighted in the complaint, are in the present case relatively few in the light of the scope of the tax.

Generally, the Ministry is of the opinion that the scope is set in a natural and logical way. The selection of taxable goods is, in any event, not "clearly arbitrary or biased", and it is not made in order to favour certain goods before others that logically – on the basis of the object of the tax – should have been assessed equally.

The Ministry would nevertheless like to emphasize that it is possible to either extend or reduce the tax liability, i.e. respectively more or fewer products can be taxed. However, no matter where you draw the line between taxed and non-taxed products border cases are unavoidable. An extension of the tax to also encompass snacks, cakes and ice cream are previously assessed several times. The conclusion is still the same; an extension of the tax liability will imply new border cases[32]. In this regard, the committee's assessments in NOU 2007:8 is also worth mentioning. The committee acknowledges that substitutable products are treated differently and that this is undesirable. However, other boundaries are not found to be more appropriate as they would necessarily create new boundary issues. Reference is made to page 105 of the report.

It is the Ministry`s opinion that the tax on chocolate and sugar duty is indeed logically limited and, in any event, not clearly arbitrary. It is of significance, in this regard, that the scope of the tax is based on a legitimate selection of goods according to the international system for the categorization and the classification of goods (the HS).

Moreover, the Ministry would like to reiterate that it is, in principle, within the national state`s sovereignty to determine which goods are to be taxed, where the purpose of the duty is fiscally justified. Due to the principle of subsidiarity and the important role taxation plays in a democracy, taxation is an area where Member States should have wide discretion and the final word. Within the EU this is emphasized by demanding unanimity to adopt secondary legislation. Since taxation as such is not covered by the EEA Agreement, there is no reason that Norway should not at least have the same discretion as Member States when it comes to designing our taxes.

As it follows from the above, the Ministry is of the opinion that the choice of chocolate and sugar products as the tax base is indeed a choice that is non-discriminatory and thus in compliance with Article 14 EEA. Furthermore, it is the Ministry`s opinion that the boundaries of the excise duty on chocolate and sugar products are logically and consistently applied. Thus, the Ministry maintains that specific boundaries of the chosen tax base are not at all designed in a biased way or in a clearly arbitrary manner so as to favour certain products before others, cf. Article 61 EEA and the Commission Guidelines on the Notion of State Aid paragraph 129. In that regard, the Ministry would like to emphasize that even if it, in principle, is possible to either extend or reduce the tax base so that more or fewer products are taxable, difficult delineations will be an unavoidable consequence irrespective of where you draw the line between taxed and non-taxed products. The Ministry considers that a change in the scope of the duty will give rise to further and even more difficult boundaries, and cannot see that other definitions of the scope of the tax would be more appropriate.

[32] See for instance the National Budget 1998 (St prp nr 1 Skatte-, avgifts- og tollvedtak 6.12, page 55.)

7. EXCISE DUTY ON NON-ALCOHOLIC BEVERAGES – SELECTIVITY

7.1 Objective

The objective of the excise duty on non-alcoholic beverages is to raise revenue by taxing certain, defined products. The scope is defined by three main characteristics. It concerns (i) non-alcoholic and (ii) liquid beverages that are (iii) added sugar or artificial sweeteners. The taxable beverages are products – and that is the fourth and closely related element – that you would normally buy in a shop/kiosk/restaurant. The tax is, as other excise duties, designed to tax consumption.

The main rule is that all kinds of non-alcoholic beverages that are either added sugar or artificial sweeteners are subject to tax. Products where no sugar or artificial sweeteners are added are not levied tax. That includes, in addition to water, products where sugar is a natural part of the product itself, such as fruit juices and milk. The definitions of sugar and artificial sweeteners are set out in the Regulation.[33]

The general tax rate is the same regardless of the amount of sugar or artificial sweeteners added to the product, i.e. the tax is not differentiated according to sugar/sweeteners content or what kind of sweetener that is used.

According to the Parliamentary decision § 1 (1) on the tax on non- alcoholic beverages, the tax is divided into two main categories of products: 1) drinking products and 2) concentrate ("syrup"). The term "concentrate", is referring to syrup for the making of soft drinks through dispensers, for instance in hamburger restaurants and gas stations etc. From the perspective of the consumer, also concentrate represent beverages for immediate consumption there and then (typically in the restaurant). The tax rates on concentrate and drinking products represent an equal tax rate on the "finished" product. Within these two tax categories of tax rates, drinking products based on fruit, berries or vegetables and added artificial sweetener are levied a reduced tax rate.

> *The Parliamentary decision section 1 (1) reads (unofficial English version):*
>
> *§ 1 From 1 January 2018, pursuant to the Act on May 19, 1933, No. 11 on excise duties, a duty shall be paid to the Treasury on importation and domestic production of the following non-alcoholic goods with the following amounts per litre:*
> *a) Beverages:*
> *1. added sugar or artificial sweetener: NOK 3,39,*
> *2. based on fruit, berries or vegetables and added artificial sweetener: NOK 1,70,*
> *b) Syrup:*
> *1. added sugar or artificial sweetener used for the commercialization of non-alcoholic beverages in dispensers, fountains and the like: NOK 20,65,*
> *2. Based on fruit, berries or vegetables and added artificial sweeteners used for the commercialization of non-alcoholic beverages in dispensers, fountains and similar: NOK 10.32.*

[33] Cf. section 3-4-4 (sugar) and section § 3-4-5 (artificial sweeteners)

The assessment above is not altered by the examples of borderline issues and the limited exemptions/delimitations from the tax that the complainant highlights on page 15 and 16 in the complaint.

7.2 Exemptions/delimitations (i.a. with reference to the complaint page 15 and 16)

As mentioned in 7.1, the scope of the tax is set to target liquid beverages for immediate, instant drinking. It is therefore rational and logical not to include powder products that may, mixed with water etc., be turned into beverages (cf. "the Lipton vs. isTe and the Rett i koppen vs. Solbærsirup examples" in the complaint). An extension of the tax to include powder products is also considered to be more or less impossible. The taxation of powder products would imply several new delimitation issues, for instance towards different kinds of soups not meant for taxation (as a "meal"),

A main criterion for the tax liability is that the drinking product/concentrate is added either sugar or artificial sweeteners. It is therefore regarded both logical and consistent and within the tax system not to levy tax on drinking products/concentrates that are not added sugar or artificial sweeteners. Hence, several kinds of juices, water, coffees etc. are not subject to the tax. Mixtures of products where none are subject to tax (for instance the mixture of water and a juice where none of them are added sugar or artificial sweeteners) are likewise not subject to tax. Furthermore, drinking products as squash (in Norwegian called "saft") and juice reconstructed from concentrate, and that are not added sugar/ artificial sweeteners, does also accordingly fall outside the scope of the tax. These rules are set in the Regulation concerning Excise duties section 3-4-1, second paragraph letter a) and b)[34].

It is within the logic of the system to only levy beverages intended for drinking purposes. Accordingly, it is necessary to draw a line towards ice cream products (cf. "the Solo example" in the complaint). It seems more rationale and logical to exclude all ice cream products rather than to define some kinds of ice cream that have similarities with beverages. The fact that ice cream does not fall within the scope of the tax is set in the Regulation section 3-4-1, second paragraph, letter c.

It is irrelevant to the tax liability whether the beverage is carbonated or not. This means that water (carbonated or not), that is flavoured with only a small quantity of artificial sweetener, is levied the tax. This is for instance the case for the drinking product yellow "bonaqua" flavoured with lemon and fructose (sugar)[35]. On the other hand, water and other products which are not added artificial sweeteners listed in the Regulation are not levied the tax. This is for instance the case for the product "Noisy"[36]. Thus, the difference in the taxation of these rather "similar products" is justified within the logic of the system, that is to levy only beverages added sugar or artificial sweeteners. It is, as set out above, in our opinion irrelevant for the state aid assessment whether such different types of products are substitutes or not.

[34] Please see Annex 1 "The Excise Duty Regulations Chapter 3. Special provisions regarding certain excise duties" - Unofficial English translation

[35] Please see Annex 2 «Non-alcoholic beverages, examples", cf. the same example in the complaint

[36] Please see Annex 2 «Non-alcoholic beverages, examples, cf. the same example in the complaint

Milk products added less than 15 grams sugar per litre are not levied the tax, see the Parliamentary decision on the excise duty on non-alcoholic beverages section 1 (3). This is a quite marginal and limited exemption adopted in order to give incentives for schoolchildren to drink flavoured milk. Other milk products, as for instance chocolate milk that are added over 15 grams sugar per litre are levied the tax. In 2012, this exemption was estimated to approximately 0.3 pct. of total volume included in the tax on non-alcoholic beverages.

The tax also encompasses all kinds of drinking products/concentrates based on fruit, berries or vegetables (in Norwegian called "saft"). However, "saft" /squash which is only added artificial sweetener is levied a reduced tax rate. Still, it is a fact that most of "saft" products, whether imported to Norway or produced here, are added sugar, and therefore levied with the ordinary tax rate. The volume of the exemption amounts only to approximately 0.5 per cent of total volume included in the tax on non-alcoholic beverages.

It is the Ministry's view that the delimitation of the taxable beverages is logical, consistent with the set objective to the extent possible, also taking account of the need to establish an administratively feasible tax. The tax base is set out in a non-discriminatory way. Moreover, the more detailed delimitation cannot in any way be regarded as arbitrary.

8. SIMILAR REGULATIVE TECHNIQUES REGARDING VAT IN OTHER STATES

There are several examples where other states use the HS to demarcate the scope of taxes/tax exemptions. As stated above, VAT is a general consumption tax much similar to specific consumption taxes (Excise duties). VAT is to a large extent harmonized under EU law. Nevertheless, the Member States are granted certain discretion under secondary legislation. It is clear that when exercising this discretion, Member States are fully bound by the general principles of the Treaty, including state aid rules.

According to Article 98 of the VAT directive, Member States may choose to apply reduced tax rates, on certain conditions. Most of the Member States use this discretion. Article 98 (3) further sets out that in order to demarcate the reduced rate area, the Nomenclature (HS system) may be used. This underlines that using the HS system indeed is considered – also by the EU – as a logic and suitable way to demarcate the line between no tax/high tax or high tax/low tax, even outside the area of custom duties. Moreover, as regards the possibility to apply zero rates (exemption with the right to deduction) or rates below the minimum rates in the VAT system, Article 110 states that Member States may continue to apply this regimes provided (our underlining) they were put in place before 1991 and they are in accordance with the Community law.

Thus, Member States must design their reduced rate area in a way that they are non-discriminatory, they must respect the principle of free movement of goods and services, and indeed not enhance illegal state aid. To put it simple Member States may continue this very favourable tax treatment provided the scope of the tax reduction is demarcated in accordance with the general principles in the Treaty, including state aid law. By using the HS as a reference for demarcating the scope of the tax, as prescribed by Article 98 (3), the tax is presumably in line with community law, and does consequently not pose any state aid concerns.

An example of how Member States use this discretion is UK. In UK basic foodstuffs are zero rated whilst other foodstuffs are taxed at the general rate of 20 percent. It is a very comprehensive tax advantage directly affecting the price with a 20 percent advantage. You can see a VAT notice from HM Revenue and customs link explaining in detail what foodstuffs to standard rate and what foodstuff to zero rate. As seen, a lot of quite similar products are taxed at different rates based on an assessment whether being a general food product or a basic foodstuff. An example is that Jaffa cakes are zero rated as being a cake or pastry whilst biscuits covered or partly covered in chocolate are standard rated. These products seems almost similar. The only difference seems to be that the base is soft as for Jaffa cakes even if it is covered with chocolate, whilst hard for chocolate biscuits. This and many other similar border line products can be seen in the linked enclosure. As stated above, this is then regarded as not being selective taxation. As for non-alcoholic beverages, some are zero rated for example milk and flavoured milk drinks whilst flavouring for milk shakes are taxed at the general rate.

9. EXCISE DUTIES AND EFFECTS ON PRICES

Excise duties are indirect taxes, meaning that it is a tax on consumption, but is levied on the importer/producer that can shift the tax burden on to the consumer. Thus, excise duties will - depending on the actual market conditions – to a certain extent be shifted over to the consumers by increasing the prices. Tax paid to the tax authority from the company would most likely not be equal to the tax burden that falls on the company itself.

The tax authorities have no information on how much of the revenue from the taxes on chocolate and sugar confectionery or non-alcoholic beverages that are imposed on domestic production and import, respectively. The reason why is that there is no requirement that the producer or importer should report on these criteria

From January 1st 2018, the tax rate on chocolate and sugar products was increased from NOK 20.19 in 2017 to NOK 36.92 per kg. The tax increase is estimated to increase accrued revenue from excise duty on chocolate and sugar products by NOK 1 120 mill. in 2018.

The Ministry assumes that the average price on chocolate and sugar products was approximately NOK 220 per kilogram in 2017. If the tax is completely passed on to the consumers, the tax increase of NOK 16.73 per kilogram will increase the *average* price on chocolate and sugar products by NOK 19.24 per kilogram, or by approximately 8.7 pct. in nominal terms. In this calculation, it is taken into account that it is 15 per cent VAT on the excise duty.

There are, however, a number of different items subject to the excise duty on chocolate and sugar products. Thus, average effect on prices will be different from the effect on individual products. Table 1 shows some products subject to the excise on chocolate and sugar product, their price and weight, and increases in excise and prices (included 15 pct. VAT) as of 1 January 2018. It is assumed that the tax increase is completely passed on to the consumers.

Notice that there will be significant variation in the prices of the products, depending on where the products are sold, the products brand, size of the packages etc.

Table 1. Effect of the tax increase on the prices of some products subject to the excise duty on chocolate and sugar products in nominal terms.

Product	Price (NOK)	Weight (gram)	Increase in excise (incl. VAT) (NOK)	Increase in price[1] (per cent)
Milk chocolate	38.90	200	3.85	9.9%
Chewing gum	13.90	14	0.27	1.9%
Pastilles/drops	15.50	24	0.46	3.0%
Mixed sweets	39.90	280	5.39	13.5%
Caramels	3.50	15	0.29	8.3%

[1] Assumed that the tax increase is completely passed on to the consumers

Tax rates on non-alcoholic beverages are shown in table 2. Average price of non-alcoholic beverages was assumed to be approximately NOK 29 per litre in 2017. Provided the tax increase will be passed on to the consumer, the prices on non-alcoholic beverages will rise by 5.7 pct. on *average* in nominal terms (taken into account VAT of 15 pct. in grocery stores, kiosks etc. and 25 pct. in restaurants, bars etc.). Thus, the average tax increase is by no mean dramatic. As with chocolate and sugar products, the prices varies depending on the products and where they are sold. Table 3 gives some examples of the effect of the tax increase on prices. Accrued revenue from excise duty on non-alcoholic beverages is estimated to increase by NOK 900 mill. in 2018, as a consequence of the tax increase.

Table 2. Tax on non-alcoholic beverages. NOK per litre

	2017 (NOK per litre)	2018 (NOK per litre)
Finished products	3.34	4.75
Concentrate (syrup)	20.32	28.91
Lemonade and syrup based on fruit, berries or vegetables, without added sugar	1.67	1.70
Concentrate based on fruit, berries or vegetables, without added sugar	10.16	10.32

Table 3. *Effect of the tax increase on the prices of some products subject to the excise duty on non-alcoholic beverages in nominal terms.*

Product	Price (NOK)	Price per litre	Increase in excise (incl. VAT) (NOK)	Increase in price[1] (per cent)
Cocal Cola 1,5 litre x 4 bottles	105.00	17.50	9.72	9.3%
Coca Cola 0,5 litre bottle	24.50	49.00	0.81	3.3%
Coca Cola 0,33 litre in restaurant[2]	40.00	120.00	0.58	1.5%
Squash ("saft") 1,5 litre	50.00	33.33	2.43	4.9%

[1] Assumed that the tax increase is completely passed on to the consumers
[2] 25 pct. VAT

10. CONCLUSION

The Ministry maintains that the tax increases on chocolate and sugar products and non-alcoholic beverages do not constitute state aid according to art 61(1) of the EEA agreement, and that the measures do not constitute a discriminatory measure under Article 14 EEA.

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

Yours sincerely,

Tor Lande
Deputy Director General

Grethe H. Dahl
Act. Deputy Director Genereal

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

Enclosure