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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	19.02.2018

Complaint – Norwegian excise duty on chocolate and sugar products

1. Introduction

Reference is made to the EFTA Surveillance Authority's letter 19 January 2018 forwarding a complaint[1] alleging that the Norwegian excise duty on chocolate and sugar products constitutes incompatible state aid.

The complaint from Hval Sjokoladefabrikk (hereinafter "the HVAL-complaint") is considered to be supplementary to the previous complaint[2] from NHO Mat og drikke on the same matter (hereinafter "the NHO-complaint") and therefore part of the same case.

The Ministry is invited to comment on the HVAL-complaint within 19 February 2018. The Ministry's comments to the NHO-complaint follows from the Ministry's letter 19 January 2018 to the Authority.

2. The Ministry's comments

The Ministry notes that the HVAL-complaint seems to take the same incorrect approach to the state aid questions as the NHO-complaint, pursuing that the selectivity test is a competitive analysis of the substitutability of the products falling within and outside the scope of the tax base. As thoroughly addressed in letter 19 January 2018 the Ministry opposes this angle of incidence to the selectivity test. To recall, the Ministry is of the view that, from a state aid perspective, a fiscal tax measure may legitimately be

[1] Letter of 17 January 2018
[2] Letter of 13 and 19 December 2017

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imposed on certain products, without entailing selective state aid, even if some substitutable products fall outside the scope of that tax, provided that the tax measure is non-discriminatory under Article 14 EEA and that the more detailed scope is not set out in a clearly arbitrary way.

The Ministry's understanding of the selectivity test is supported by Advocate General Kokott in her opinion delivered on 9 November 2017 in Joined Cases C-236/16 and C-237/16 Asociación Nacional de Grandes Empresas de Distribución (ANGED).[3] According to the contested Spanish tax legislation (tax on environmental damage caused by large sales areas), only retail establishments whose premises exceed an area of 2 000 m² are to be taxed. This is based on the assumption that retail establishments with a large area generate a higher volume of customers and goods traffic than smaller retail establishments, please see para 48 and 72 of the opinion. Smaller retail establishments (below the threshold of 2 000 m² in total area) are not taxed. In addition, there is an exemption for certain retail establishments, cf. para 91 and para 92 of the opinion. The opinion addresses whether such tax differentiation constitutes an indirect infringement of the fundamental freedoms and/or unlawful state aid.

The opinion in Joined Cases C-236/16 and C-237/16 is of particular interest to the case at hand for three reasons.

Firstly, it recognises the wide discretion enjoyed by the Member States when drafting tax legislation, please see para 47 cf. para 92-93 and para 51.

Secondly, the opinion recognises that the use of thresholds in the legislation, including the tax legislation, is perfectly acceptable under state aid law, please see para 55 and para 103-104.

Thirdly, the opinion supports the Ministry's understanding of the wording in the Notion of Aid Guidelines para 129 concerning "*clearly arbitrary*"as described in our letter dated 19 January 2018.[4] Please see para 80 – 84, and para 88 -89 of the opinion.

In conclusion, AG Kokott proposes that the question from the referring national court should be answered as follows:

"*Article 107(1) TFEU may not be interpreted as meaning that the non-taxation of retail establishments with a total area of less than 2 000 m² would constitute aid. The same holds for the exemption from tax for establishments engaged in the sale of: (a) machinery, vehicles, tools and industrial supplies; (b) construction materials, plumbing materials, doors and windows, for sale only to professionals; (c) nurseries for gardening and cultivation; (d) motor vehicles, in dealerships and repair workshops, and (e) motor fuel.*

[3] Request for a preliminary ruling from the Supreme Court of Spain.

[4] This understanding is also supported by the Polish retail tax (SA 44531) recital 47 and 49 and Hungarian tobacco tax (SA 41187) recital 34.

The Ministry thus maintains that the selectivity test as described in our letter 19 January 2018 is the one that should be used in the case at hand. This approach will respect the sovereignty of the states in setting the tax base, and at the same time provide sufficient legal boundaries from an EEA perspective.

What in fact is "new" in the HVAL-complaint (compared to the NHO-complaint) is the allegation that the duty as such should be considered "new" aid from 1998, alternatively 2002, and in any event by 1 January 2018 at the latest due to what is claimed to be *"substantial alterations made to its legal basis, system, product scope and content since the entering into force of the EEA Agreement.."*.

Respective to this, the Ministry would like to emphasize that the Norwegian authorities in the letter of 19 January provide a detailed legal assessment[5] demonstrating why the excise duty as such does not constitute state aid. This state aid assessment concerns the tax as such, not merely the tax increase taking effect as of 1 January 2018.

The Ministry's principal point of view is hence that the excise duty (regardless of any previous amendments in the duty) does not breach the state aid rules. Thus, it is not at this stage of the process considered necessary to examine the more hypothetical "existing vs. new aid" questions.

On this background, the Ministry finds that, at this stage, the letter of 19 January also sufficiently addresses the issues brought forward in the HVAL-complaint.

Alternatively, and for the Authority's information please see letter of today to the Authority with overviews/tables showing the amendments in the legal design of the excise duty and tax rates for the period 1994 - 2018.

3. Conclusion

The Ministry maintains that the excise duty 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.

[5] See section 4. "Legal assessment – the test to apply – interplay between Arts 14 and 61"

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

Yours sincerely,

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