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EFTA SURVEILLANCE
AUTHORITY

Royal Ministry of Trade and Industry
Economic Policy Department
P.O. BOX 8014 DEP
N 0030 Oslo
Norway

Dear Sir or Madam,

Subject: Comments by the EFTA Surveillance Authority to Norway concerning notification 2013/9005/N

The Norwegian notification 2013/9005/N under the information procedure laid down in the Act referred to at point 1 of Chapter XIX of Annex II to the Agreement on the European Economic Area (*Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations*), as amended and as adapted to the EEA Agreement (“Directive 98/34/EC”), regarding a draft regulation on marketing of food and beverages to children, has prompted the EFTA Surveillance Authority (“the Authority”) to make the following comments:

1. Introduction

The notified draft regulation concerns an introduction of a prohibition on the marketing of unhealthy foods and beverages to children. “*Children*” are defined in Section 3(a) as persons up to and including the age of 15 years. “*Unhealthy foods and beverages*” are defined in Appendix 1 to the draft regulation. According to Section 3(c), “*marketing*” is understood as any action taken for commercial purposes in order to promote sales to consumers, with the exceptions listed in this Section.

The prohibition contains services related elements (Section 4 second paragraph (a) to (f)) and also product related issues (Section 3(c) point 3 read in conjunction with Section 4 second paragraph (g)).

The stated aim of the notified draft is to promote health by preventing obesity and diet-related diseases.

In Section 7 of the draft it is stated that the regulation will enter into force on 1 January 2015. It is the understanding of the Authority that the Norwegian Government intends first to assess the impact of the self-regulatory scheme developed recently by Norwegian food business operators, after two years of its functioning, and only then to decide whether or not the adoption of the present draft regulation is still necessary.

2. Assessment

The Authority would like to draw the attention of the Norwegian Government to the general rules governing the free movement of goods laid down in Article 11 of the EEA Agreement.

Article 11 EEA

Article 11 of the EEA Agreement prohibits quantitative restrictions on imports and all measures having equivalent effect. It is settled case law of the Court of Justice of the European Union (“the Court of Justice”) that all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect and thus are in breach of the principle of free movement of goods.¹

In its judgment in *Keck and Mithouard*² the Court held that “rules that lay down requirements to be met by such goods (...) constitute measures of equivalent effect prohibited by Article [34 TFEU]”. Furthermore, it held that “[b]y contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment”. Consequently, selling arrangements are subject to a discrimination test.

Since its judgement in *Keck and Mithouard*, the Court in principle treats advertising restrictions as selling arrangements.³ However, certain rules related to advertising which affect the conditions that the goods must meet, are treated by the Court as rules related to products.⁴ Furthermore, in certain cases, the Court linked the scope of the advertising restriction with discrimination, namely, where it considered that an “an absolute prohibition of advertising the characteristics of a product is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are more familiar”.⁵

Based on the above, a general prohibition on marketing to children of certain foods and beverages, and in particular the prohibition on packaging and wrapping used to tempt children into purchasing unhealthy foods and beverages by means of effects such as the use of gifts, toys, coupons, discounts, collectibles, competitions or games that may particularly appeal to children, such as that provided for by the Norwegian draft regulation in question, can be considered as an obstacle to trade under Article 11 of the EEA Agreement.

Justification grounds

Measures that fall foul of Article 11 of the EEA Agreement can be maintained by the Contracting Parties if they are justified on one of the public-interest grounds enumerated

¹ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5; Case E-5/98 *Fagtun* [1999] EFTA Ct. Rep. 51, paragraph 29; Case C-110/05 *Commission v Italy* [2009] ECR I-0519, paragraph 33.

² Joint Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

³ See, for example, Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843; Case C-405/98 *Gourmet International Products* [2001] ECR I-1795.

⁴ Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 13.

⁵ *Gourmet International Products*, cited above, paragraph 21; Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, paragraph 53.

in Article 13 of the EEA Agreement or by mandatory requirements developed in the case law of the EFTA Court and the Court of Justice.⁶ The protection of public health is recognized in Article 13 EEA as a possible basis for exemption from the free movement of goods. It is for the Contracting Parties to decide on the degree of protection which they wish to afford to public health and the way in which that protection is to be achieved; however, they may do so only within the limits set by the EEA Agreement and must comply with the principle of proportionality. Under this principle, the measure must be suitable, necessary and proportionate to the aim pursued. In particular, it must be established that the same objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade.⁷

Accordingly, the Authority would like to underline that the draft national legislation at issue must be assessed in relation to the principle of proportionality, in particular with regard to the definition of children and with regard to the scope of products covered by the draft regulation.

The Authority also notes that similar issues may arise under the EEA rules governing the free movement of services.

Last but not least, in the event that the outcome of the evaluation of the self-regulatory scheme and other alternative measures is negative, and the Norwegian Government intends to adopt a regulatory measure, the Authority recalls that according to Article 8(1), paragraph 4 of Directive 98/34/EC, any “*changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive*” that may be introduced, for example, following the assessment of the self-regulatory scheme, require a new notification to the Authority.

The Authority invites the Norwegian Government to take note of the observations contained in this letter.

For the EFTA Surveillance Authority,

Yours faithfully,



Sverrir Haukur Gunnlaugsson
College Member

⁶ Case 120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8; Case E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 28; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 29; Case C-110/05 *Commission v Italy*, cited above, paragraph 59.

⁷ Case E-4/04 *Pedical AS v Sosial- og helsedirektoratet* [2005] EFTA Ct. Rep. 1, paragraphs 55-56.