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Brussels, 20 January 2006
Case No: 47654
Event No: 358434

EFTA SURVEILLANCE AUTHORITY

Dear Sir/ Madam,

Subject: Norwegian environmental taxes, the Authority's Decision 148/04/COL of 30 June 2004
- Recovery

Reference is made to the letter by the Norwegian mission dated 2 December 2005, forwarding letters by the Norwegian Ministry of Modernisation dated 30 November 2005 and the Ministry of Finance dated 29 November 2005. The letter was received and registered by the EFTA Surveillance Authority (hereinafter 'the Authority') on 5 December 2005 (Event No. 353162).

In their letter, the Norwegian authorities suggest a pragmatic approach to deal with the recovery resulting from the Authority's decision No 148/04/COL of 30 June 2004, which, according to the Norwegian authorities, might concern 10 000 companies. Below, the Authority will comment on the suggested procedure and also ask the Norwegian authorities to provide more detailed information on the envisaged approach.

1 STATUS QUO OF THE RECOVERY

The Authority would appreciate an update on the status quo of the recovery process. According to the Authority's information, one of the next steps in the procedure was that the Norwegian Customs and Excise Duty Directorate would contact the potential aid beneficiaries by letter, giving them potentially an opportunity to comment. If the Authority is not mistaken, it was also envisaged to include a question in this letter inquiring about the purposes for which (fuel purposes or other, i.e. for non-fuel purposes, in which the energy has rather been used as an 'ingredient'in the production process) the electricity was used.

1.1 Please provide the Authority with a copy of that letter (and other relevant letters in this respect) and communicate how many undertakings this letter was sent to.

1.2 Please inform the Authority about the next steps of the recovery by setting out a time frame for the single steps to be taken until the final recovery will have been completely effectuated (see answer 4 of the Norwegian authorities letter of 29 November 2005).

Norwegian Mission to the European Union
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2. THE ENVISAGED NON RECOVERY OF AID GIVEN IN RELATION TO ELECTRICITY USED FOR NON-FUEL PURPOSES

2.1 Comment on the Norwegian argument that the Authority should exercise discretion with regard to the recovery of aid relating to electricity consumption used for non-fuel purposes

In their letter the Norwegian authorities state that they do not dispute the legality of the Authority's decision 148/04/COL, as upheld by the EFTA Court. However, they invite the Authority to exercise some discretion in the recovery process and to accept, by applying the principles of the Energy Tax Directive 2003/96/EC, that the amount of the tax exemption which relates to the use of electricity for non-fuel purposes[1] does not need to be recovered. The Norwegian authorities refer to the situation in Sweden, resulting from the recovery order in case C42/2003, which – according to the Norwegian authorities – does not extend the recovery to such electricity uses.

The Authority does not agree with this suggestion. Starting point for the recovery is Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement (hereinafter SCA), which places an obligation on the Authority to require recovery and remedy an unjustified distortion of competition, except for where that would be contrary to a general principle of law or caught by the ten year's limitation period as stipulated in Article 15 in Part II of Protocl 3 SCA. The recovery order in decision 148/04/COL unequivocally ask for the recovery of the unpaid electricity tax for the whole manufacturing and mining sector without making a distinction based on different uses of electricity. The recovery order has been upheld in full by the EFTA Court's judgment of 21 July 2005 which did not introduce any limitations as to the execution of the Authority's decision 148/04/COL. The Authority therefore does not see any possibility to now reach a different conclusion and to execute the recovery only for part of the industry.

Even if – for the sake of argument – the Authority was willing to apply the principles of the Energy Taxation Directive, the Authority finds no support for the Norwegian position. The Authority assumes that the reference of the Norwegian authorities to the Energy Taxation Directive aims at Article 2 (4) (b) and consideration 22 of the Directive which, however, only state that the Directive does not apply to such uses and does not provide a minimum rate for them. If the Norwegian authorities wish to argue, however, that it is within the nature and logic of the tax system to exclude non fuel uses from taxation, the Authority points out that this argument was elaborated upon in great detail by the Authority and the other applicants in front of the EFTA Court. While there is no automatism that a use-based tax exemption will match the logic of the tax system, the Authority reiterates that the nature and logic of taxation has to be established individually for the tax system under consideration, a fact which the Energy Taxation Directive does not put into question. Further, the tax exemption concerned has to reflect the legislative choice and logic so established. It suffices to point out that a tax exemption for particular uses simply did not exist in the Norwegian case, while the tax exemption assessed by the Authority and considered as incompatible state aid by the EFTA Court did not aim at a certain use, but was designed to provide a sectoral exemption based on statistical classification. The Authority cannot deviate from these findings in the recovery process.

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[1] Non fuel and dual purposes, chemical reduction, electrolytic and metallurgical as well as mineralogical purposes are throughout the letter referred to as either 'non fuel' or 'ingredient'purposes.

Thirdly, as the execution of the Authority's decision is to be judged on its own merits and is not dependent on how the execution of other recovery decisions in other EEA States are effectuated, the Authority will not comment further on the 'parallel treatment' argument in relation to the Swedish recovery situtation. It suffices that the Authority so far has not been made aware of any other circumstances or national provisions, which – outside the illegal manufacturing tax exemption – would lawfully exempt the uses in question.

2.2 Invitation to state the position

The Authority asks the Norwegian authorities to communicate to it whether they intend to execute the recovery in the above sense, i.e. for the manufacturing sector and mining industry as a whole, including aid given in relation to electricity used for non fuel purposes. The Authority wishes to remind the Norwegian authorities of Article 1 (2) in Part I of Protocol 3 to the Surveillance and Court Agreement according to which the Authority can refer the matter directly to the EFTA Court, if an EFTA State does not comply with the Authority's decision.

3 APPLICATION OF THE DE MINIMIS RULES

The Norwegian authorities suggest contacting – taking a safety margin into account – companies with an electricity consumption which exceeds 150 GWh for recovery purposes (and not all undertakings which profited from the tax exemption). The Authority is not opposed to that idea in principle, but finds it necessary to clarify further aspects to avoid aid remaining unrecovered. These aspects concern:

- the combination with the *de minimis* scheme in relation to the Norwegian social security tax;
- the combination with other *de minimis* aid schemes not relating to the Norwegian social security tax; and
- the calculation of the 'moving' three year period according to article 3 (1) of the Act referred to under point 1e) in Annex XV of the EEA Agreement (hereinafter Regulation 69/2001)

3.1 The combination of *de minimis aid* in relation to the electricity tax with *de minimis aid* resulting from the social security tax scheme

The Norwegian Government states that 75 % of the undertakings which are *not* envisaged to be contacted, are located in an area where the *de minimis rule* in relation to the social security tax is *not* assigned (i.e. they are located in zone 1, see Authority's Decision 218/03/COL). For the remaining 25% of the *non* contacted undertakings, to which the *de minimis* rules apply (zone 2-4), the Norwegian authorities seem to suggest that there is no need to contact them.

The Authority is not entirely certain how to interpret the sentence on page 2 of the letter by the Norwegian authorities that '*for undertakings located in other areas, the number of undertakings to contact differ negligible when setting the level of de minimis to one third of the permitted amount vs. the full amount'*. The Authority would appreciate a detailed explanation on how it can be guaranteed that the 25% of companies not contacted will not have received any aid exceeding the *de minimis* threshold. Hereby the *de minimis aid* in relating to the social security tax and the *de minimis ai*d in relation to the electricity tax would have to be assessed in cumulation, see consideration 8 and Article 3 (1) of Regulation 69/2001.

The Authority would like to point out that while it is willing to discuss with the Norwegian authorities pragmatic ways of recovery, it cannot yet judge, on the basis of the information given, whether the method used by the Norwegian authorities ensures that any support not covered by the *de minimis* regulation will be recovered.

The Authority would assume that for the social security *de minimis* schemes, information is available on how much aid the company received under the application of the *de minimis* scheme related to the social security. According to Article 3 (1) of Regulation 69/2001, the Norwegian authorities should also have received information, when having applied the *de minimis* rule in relation to the social security, on how much other *de minimis* aid the company received in the previous three years. I.e. the Authority assumes that the Norwegian authorities are able to identify how much *de minimis* aid has already been used up by the *de minimis aid* relating to social security. Further, the Authority would like to point out that for some of the undertakings, it is obvious that depending on the zone in which they are located and the number of persons they employ, they will have completely used up the *de minimis* already (which means that no application of *de minimis* is possible regarding the current recovery with regard to the electricity tax).

3.2 The combination of *de minimis aid* in relation to the electricity tax with other *de minimis* aid

The Authority would further like to point out that one needs to ensure in relation to <u>*all*</u> undertakings which are not contacted (i.e. including the 75% of the companies which are not profiting from *de minimis* aid relating to the social security tax) that a combination with other *de minimis* aid does not exceed the threshold of 100 000 Euros over a three year period.

The Authority does not yet find that the Norwegian suggestion can guarantee that such a cumulation in excess of the *de minimis* threshold does not take place and would like the Norwegian authorities to explain how this can be guaranteeed.

3.3 Obligation to inform the aid beneficiary about the *de minimis* character of the aid and to obtain information on previous *de minimis* aid

Further, in relation to the suggestion of the Norwegian authorities *not* to contact a large number of undertakings in relation to the *de minimis* aid regarding the electricity tax, the Authority would like to remind the Norwegian authorities that according to Article 3 (1) of Regulation 69/2001, the EFTA State is obliged to inform the individual beneficiaries of *de minimis* aid of the *de mimimis* character of the aid and obtain information on previous *de minimis* aid amounts.

3.4 The 'moving'time period of three years

The Norwegian authorities informed the Authority about its intention to map the *de minimis aid* previously granted to the undertaking so that the threshold of 100 000 Euros will not be exceeded. The Authority understands this statement in such a manner that upon recovery the Norwegian authorities will scrutinise the period from 6 February 2000 until 6 February 2003 in order to establish how much *de minimis* aid had been granted and only allow so much additional *de minimis* aid, this time in relation to the electricity tax, that the amount of 100 000 Euros will not be exceeded. The Authority would invite the Norwegian authorities to comment in detail if that understanding should not be correct. The Authority would like to remind the Norwegian authorities that for new *de minimis* grants, these amounts would have to be taken into account and the stipulations of Regulation 69/2001 would have to be respected.

The Authority would also like to learn from the Norwegian authorities how it will deal with a second group of undertakings which received aid exceeding the 100 000 Euro threshold, either because the electricity tax exemption already exceeded this amount or because the cumulation with the social security *de minimis* aid or other *de minimis* aid. In the Authority's view, any such aid resulting from the exemption of the electricity tax would have to be recovered in full.

Do not hesitate to contact the case-handler in charge, Ms. Annette Kliemann (+32.2.286 18 80) in case of further queries.

Yours faithfully,

Amund Utne
Director
Competition and State Aid Directorate


Signed version