

## IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

## EFTA SURVEILLANCE AUTHORITY DECISION

No 342/09/COL

of 23 July 2009

**on an exemption from the Norwegian CO<sub>2</sub> tax on gas and LPG on the use of gas for purposes other than the heating of buildings (Norway)**

THE EFTA SURVEILLANCE AUTHORITY<sup>(1)</sup>,

HAVING CALLED on interested parties to submit their comments pursuant to those provisions,

HAVING REGARD to the Agreement on the European Economic Area<sup>(2)</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,

Whereas:

**I. FACTS**

**1. Procedure**

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice<sup>(3)</sup>, in particular to Article 24 thereof,

By letter dated 9 March 2007 from the Norwegian Ministry of Government Administration and Reform to the European Union (forwarding a letter from the Ministry of Finance dated 8 March 2007), both received and registered by the Authority on 9 March 2007 (Event No 412984), the Norwegian authorities notified a planned amendment to its CO<sub>2</sub> tax on mineral products, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. The Norwegian authorities intend to amend the CO<sub>2</sub> tax in such a manner to include taxation of natural gas and liquefied petroleum gas ('LPG'), on which no CO<sub>2</sub> tax is currently levied.

HAVING REGARD to Article 1(2) of Part I and Articles 4(4), 6 and 7(5) of Part II of Protocol 3 to the Surveillance and Court Agreement<sup>(4)</sup>,

After various exchanges of correspondence<sup>(7)</sup>, by letter dated 23 November 2007, the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of this provision.

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement<sup>(5)</sup>, and in particular the Chapters on Aid for Environmental Protection and on the Application of the State Aid Rules to Measures relating to Direct Business Taxation,

The Authority's Decision No 597/07/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto<sup>(8)</sup>. The Authority called on interested parties to submit their comments thereon.

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3<sup>(6)</sup>,

The Authority received two comments from interested parties, the first from Norsk Bioenergiforening (the Norwegian Bio Energy Association) on 11 July 2008 (Event No: 485500); and the second from Norges Naturvernforbund, Zero Emission Resource Organisation and *Natur og Ungdom* on 16 July 2008 (Event No: 486001).

<sup>(1)</sup> Hereinafter referred to as 'the Authority'.

<sup>(2)</sup> Hereinafter referred to as 'the EEA Agreement'.

<sup>(3)</sup> Hereinafter referred to as 'the Surveillance and Court Agreement'.

<sup>(4)</sup> Hereinafter referred to as 'Protocol 3'.

<sup>(5)</sup> Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* L 231, 3.9.1994, p. 1 and EEA Supplement No 32, 3.9.1994, p. 1 (hereinafter referred to as 'the State Aid Guidelines'). The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

<sup>(6)</sup> Decision No 195/04/COL of 14 July 2004 published in OJ L 139, 25.5.2006, p. 57 and EEA Supplement No 26, 25.5.2006, p. 1. The consolidated version of this Decision is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

<sup>(7)</sup> For more detailed information on the correspondence between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure.

<sup>(8)</sup> Published in OJ C 146, 12.6.2008, p. 2 and EEA Supplement No 32, 12.6.2008, p. 17.

The Norwegian authorities also submitted further comments on 20 December 2007 (Event No: 458478) and on 13 March 2008 (Event No: 512262) and have subsequently also been engaged in informal discussions with the Authority.

## 2. Description of the proposed measure

### 2.1. Overview

The Norwegian state imposes a tax, levied on the use of certain mineral products, on CO<sub>2</sub> emissions. At present, CO<sub>2</sub> taxes in Norway are only levied on the use of mineral oil and petrol. It is proposed that this tax be extended to the use of natural gas and LPG, but only when used for the purposes of heating buildings.

The CO<sub>2</sub> tax is levied on the use of the products mentioned in the Norwegian tax chapter. Both imported and domestic products are subject to the tax. The CO<sub>2</sub> tax is contained in a budgetary chapter concerning environmental taxes levied on mineral products, under the title 'Om miljøavgifter på mineralske produkter mv'. Heading A of this chapter deals with the CO<sub>2</sub> tax on mineral products' CO<sub>2</sub> emissions (avgift på mineralske produkter). Section A1 provides for the levy of the tax on mineral oil and petrol. It reads as follows <sup>(9)</sup>:

*'Fra 1. januar 2007 skal det i henhold til lov 19 mai 1933 nr. 11 om særavgifter betales CO<sub>2</sub>-avgift til statskassen på følgende mineralske produkter etter følgende satser: ...*

- a) Mineralolje: kr. 0,47 per liter. (...)
- b) Bensin: kr 0,80 per liter;'

an English language translation of which is:

*'From 1 January 2007, according to Act of 19 May 1933 No 11 regarding special duties, CO<sub>2</sub> tax shall be paid to the Exchequer on the following mineral products at the following rates...*

- (a) Mineral oil: NOK 0,47 per litre. (...)
- (b) Petrol: NOK 0,80 per litre.'

Section A2 contains exemptions from the tax, depending on the use of the product. Section A2.1 contains general exemptions for various activities, in particular the use of the mineral oil as a raw material in the production process (Section A2 lit.1.c). Section A2.2 and Section A2.3 contain further exemptions relating to the use of mineral oil and petroleum respectively.

<sup>(9)</sup> This and other translations of Norwegian legislation in this decision have been undertaken by the Authority.

In its budget proposal for 2007, the Norwegian Government proposed an amendment to the relevant chapter of the budget, which was accepted by the Parliament. The proposal was contained in legislative proposal St.prp. nr. 1 (2006–2007), II A and B reads:

'A

*Fra 1 juli 2007 gjøres følgende endringer:*

*§ 1 første ledd nye bokstaver c og d skal lyde:*

- c) *Naturgass: kr. 0,47 pr. standardkubikkmeter*
- d) *LPG: kr. 0,60 pr. kg.*

B

*§2 første ledd ny nr. 4 skal lyde:*

- 4. *Gass til annen bruk en oppvarming mv. i boliger og næringsbygg.'*

an English language translation of which is:

'A

As of 1 July 2007 the following amendments shall apply:

In Section 1, first paragraph, new letters c and d shall read:

- (c) Gas: NOK 0,47 per standard cubic metre
- (d) LPG: NOK 0,60 per kilogram

B

Section 2, first paragraph, new number 4 shall read:

- 4. Gas used for purposes other than heating of houses and commercial buildings.'

By adding new paragraphs (c) and (d) to Section 1 (under heading A), the scope of the CO<sub>2</sub> tax is extended to include natural gas and LPG. The new provision referred to under heading B introduces an exemption for natural gas and LPG used for all purposes other than the heating of houses and commercial buildings.

The Norwegian authorities contend that the purpose of amending the tax is to encourage more use of green alternatives to natural gas and LPG in heating buildings. They state that it is only for a technical reason that the CO<sub>2</sub> tax on natural gas and LPG has been adopted as a general tax as opposed to a specific

one for that purpose; the reason being that the authorities' scope for control is increased when a general tax is introduced. The Norwegian authorities state that only when a measure is adopted as a general tax are all producers of taxable goods obliged to register with the authorities as being liable for the tax and obliged to keep accounts of their sales. According to the Norwegian authorities, had the tax been adopted as a more limited tax on heating buildings, no registration and no keeping of accounts would have been necessary for traders which sell the natural gas or LPG for purposes other than heating buildings.

### 2.2. *The objective of the tax*

The objective of the CO<sub>2</sub> tax is to reduce carbon emissions — according to the Norwegian authorities the purpose is to: 'set a price on the environmental damage caused by the use of the taxed products and encourage the use of less environmentally harmful products. The tax is applied to ensure a more efficient use of resources and thus lead to positive environmental benefits. The tax is broad and general.'

The objective of extending the CO<sub>2</sub> tax to natural gas and LPG is further described in the budget proposal for 2007, which refers to the so-called 'Soria Moria Statement'<sup>(10)</sup>:

'Domestic use of gas is not subject to CO<sub>2</sub> tax. From 2005 gas used in some industries is subject to the climate quota system concerning CO<sub>2</sub>. Other gas usages are not subject to means which incentivise the reduction of CO<sub>2</sub>, i.e. gas used in dwellings, industrial houses and mobile sources. In the Soria Moria Statement it is announced that the Government will examine the CO<sub>2</sub> tax to prevent that gas as heating is preferred to more environmental favourable alternatives.'

### 2.3. *National legal basis for the aid measure*

The expansion of the CO<sub>2</sub> tax to include natural gas and LPG has been passed by the Norwegian *Stortinget* (Parliament). The Government's proposal was put forward in St.prp. nr. 1 (2006–2007) *Skatte-, avgifts- og tollvedtak* and was adopted by the Parliament on 28 November 2006.

In addition to the Parliamentary provision, it is intended that there will be an amendment of the Regulation on Excise Duties (*Forskrift om endring av Forskrift om særavgifter*). New Section 3-6-5 of the Regulation sets out the exemption from the CO<sub>2</sub> tax for natural gas and LPG used for purposes other than heating buildings. Section 3-6-5(1) states that natural gas and LPG which is used for purposes other than the heating of buildings, commercial buildings and other dwellings is tax exempted. The exemption does not cover any direct or indirect heating<sup>(11)</sup>. Gas which is used in units lower than 20 kg is exempted from the tax under Section 3-6-5(2) of the Regulation.

<sup>(10)</sup> The Soria Moria Statement is a policy statement drawn up by the three political parties forming the current Norwegian Government.

<sup>(11)</sup> As opposed to the heating of buildings.

### 2.4. *Recipient*

The Norwegian authorities state that 94 % of the consumption of natural gas and LPG is for purposes other than the heating of buildings. Only a small percentage of domestic (Norwegian) consumption is related to the heating of buildings because the main consumption of natural gas is for industrial purposes, of which the manufacturing sector forms the dominant part. According to Statistics Norway, approximately 80 % of the net domestic consumption of gas is related to manufacturing, mining and quarrying. The Norwegian authorities further state that half of the consumption of gas in the manufacturing sector is undertaken by StatoilHydro's methanol production plant at Tjeldbergodden. Another large consumer is Hydro, which uses gas in the production of aluminium.

### 2.5. *Budget and duration*

The Norwegian authorities have not informed the Authority of a specific duration or budget for the tax exemption.

### 2.6. *Grounds for initiating the procedure*

The Authority expressed doubts that the exemption constituted a general measure as had been asserted by the Norwegian authorities. The Authority was concerned that the measure favoured (at least indirectly) certain sectors of the economy to the detriment of others. On the basis that the exemption applied only to certain undertakings or the production of certain goods, it was considered that the exemption relieved undertakings from charges that they would normally have to bear in a manner such as to distort competition and effect trade within the EEA.

On the assumption that the exemption did amount to State aid within the meaning of Article 61(1) of the EEA Agreement, the Authority expressed doubts that a total tax exemption could be considered compatible with either Article 61(2) or 61(3) of the Agreement.

## 3. **Comments from third parties**

The Authority received two comments from third parties.

The Norwegian Bio Energy Association<sup>(12)</sup> concurred with the preliminary conclusions of the Authority expressed in the decision opening the formal investigation, that the measure does indeed amount to a State aid within the meaning of Article 61(1), contending specifically that the measure is selective and inconsistent with the nature and general scheme of the tax system. The organisation added, more broadly, that it considers there to be a lack of logic in the Norwegian CO<sub>2</sub> tax system as a whole, referring to a lack of consistency in terms of the sectors and energy sources taxed (asking, for example, why the transport sector and the processing industry are, in effect, exempt), and of the respective levels of taxation.

<sup>(12)</sup> An independent association whose objective is to promote a rational utilisation of bio energy in Norway url: [www.nobio.no](http://www.nobio.no)

The Authority also received a letter enclosing the collective comments of three environmental conservation organisations; Friends of the Earth Norway (*Norges Naturvernforbund*<sup>(13)</sup>), Nature and Youth (*Natur og Ungdom*<sup>(14)</sup>) and the Zero Emission Resource Organisation<sup>(15)</sup>. These organisations contend that the CO<sub>2</sub> tax should be levied on all emissions of CO<sub>2</sub> and also argue that the transport sector and the processing industry should be subject to the tax. They also propose different levels of taxation to those specified in the legislation.

#### 4. Comments by the Norwegian authorities

In two letters sent to the Authority after the opening of the formal investigation, the Norwegian authorities repeated their views that, firstly, the measure is in practice (if not formally) a specific tax on heating buildings as opposed to a general tax on natural gas and LPG from which certain uses are exempt, and secondly, that the measure is not selective as the tax on heating buildings is levied on all sectors and undertakings consuming gas.

## II. ASSESSMENT

### 1. The presence of State aid

State aid within the meaning of Article 61(1) EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

‘Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.’

#### 1.1. Presence of state resources

The aid measure must be granted by the State or through state resources. The granting of a tax exemption involves a loss of tax revenues which is equivalent to the granting of state resources (see point 3(3) of the Authority’s State Aid Guidelines on Business Taxation).

#### 1.2. Favouring certain undertakings or the production of certain goods

Firstly, the aid measure must confer on the beneficiaries advantages that relieve them of charges that are normally borne from their budgets. Taxation is such a charge, and relief from paying such a charge provides an advantage to the beneficiaries.

Secondly, the aid measure must be selective in that it favours ‘certain undertakings or the production of certain goods’.

Environmental taxes do not amount to a State aid within the meaning of Article 61(1) of the EEA agreement in so far as they are general measures which do not favour particular firms or sectors of industry. However, exceptions to a general tax do fall within Article 61(1) if they are aimed at certain firms or sectors, unless those exceptions are justified by the nature or general scheme of the tax system.

The Norwegian authorities argue that the limitation of the tax to the heating of buildings is a general measure which is open to all undertakings and sectors. All sectors and undertakings using natural gas or LPG to heat buildings are liable to the tax for this use, whereas sectors and undertakings which (also) use natural gas or LPG in the production process or for any other purpose than heating of buildings are not liable to taxation on the gas used for those other purposes. A manufacturer who also uses natural gas or LPG for the heating of, for example, administrative buildings would pay the tax for that use in the same way as any other undertaking, whereas the manufacturer would not be subject to any taxation for the natural gas or LPG used in the production process.

As referred to above, the Norwegian authorities have also submitted that they consider the notified measure not to be an exemption from a CO<sub>2</sub> tax on gas for certain sectors, but rather the introduction of a limited tax on the use of gas for the heating of buildings, i.e. the tax (on heating buildings) is a burden for those upon whom the tax is levied rather than an exemption and advantage for the many who consume gas in a way which is not subject to the tax. The Norwegian authorities emphasise that 94 % of the gas used in Norway is used for purposes other than heating buildings, in other words only 6 % of the gas consumed will be taxed.

The Authority notes, however, that under Norwegian statute natural gas and LPG have been introduced as new products in Section 1 of the budgetary chapter which provides for a CO<sub>2</sub> tax on mineral products, and the relief from taxation for uses other than heating has been incorporated into the section of the budgetary chapter which deals with exemptions from the tax. The Authority is also conscious of the judgment of the EFTA Court in the Norwegian electricity tax exemption case<sup>(16)</sup> where the Kingdom of Norway argued that, notwithstanding legislative provisions which referred to certain sectors (mining and manufacturing) being exempt from the tax on electricity, the reality was that only certain uses of electricity were exempt. The EFTA court noted the established case law which states that it is the effect and not the form of an aid which is decisive and concluded also (at paragraph 79 of its judgment) that:

‘First, the Regulation introduced an exemption from a general rule that electricity consumption is liable to tax. To understand it the way the Applicants do, namely that the Regulation establishes tax liability only for a particular

<sup>(13)</sup> url: <http://www.naturvern.no/engl>

<sup>(14)</sup> url: <http://www.nu.no/english>

<sup>(15)</sup> url: [http://www.zero.no/zero/view?set\\_language=en](http://www.zero.no/zero/view?set_language=en)

<sup>(16)</sup> Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnford, PIL and others, and the Kingdom of Norway v EFTA Surveillance Authority* [2005] EFTA Court Report, p. 117.

use of electricity, would run counter to the structure of the tax scheme in question and reverse the usual relationship between rule and exemption as confirmed by the explicit use of the term “exemption” in the Regulation. Second, it is clear that the exemption in question benefits those undertakings which belong to the exempted economic sectors and thereby favours certain undertakings within the meaning of Article 61(1) EEA.’

Furthermore, the Authority is conscious of the principle reaffirmed by the European Court of Justice in its recent judgment in the *British Aggregates* case<sup>(17)</sup>. The Court (setting aside the judgment of the Court of First Instance in this respect) confirmed that in assessing the applicability of Article 87(1) of the EC Treaty, no account can be taken of the purpose or objective of a particular measure, and the only test when assessing selectivity is the extent to which the measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. In his opinion on the case<sup>(18)</sup>, Advocate General Mengozzi also questioned the focus the Court of First Instance had had on the formal aspect of the measure in question, stating that: ‘In terms of the impact on competition ... there is no great difference between, on the one hand, the imposition of a general tax with an exemption for certain beneficiaries, and, on the other hand, the imposition of a tax on certain taxable persons to the exclusion of others who are in a comparable position.’<sup>(19)</sup>

In assessing whether the measure is selective or amounts to a general measure as argued by the Norwegian authorities, the Authority must identify the system of reference, i.e. it must compare the position of undertakings who receive the benefit of the exemption, with that of any other undertakings which are in the same legal and factual situation who do not receive the benefit<sup>(20)</sup>. The Authority identifies the system of reference, therefore, as all sectors and undertakings subject to the CO<sub>2</sub> tax, meaning those who consume or produce mineral oil, petroleum, LPG or natural gas.

Given that the exemption applies only to the use of LPG and natural gas (and further only to certain uses of LPG and natural gas), the Authority considers the measure to be selective as it favours only certain undertakings and the production of certain goods. The Authority also notes in this context that the Court of Justice, in its *Adria Wien Pipeline GmbH* ruling<sup>(21)</sup>, found that at an energy tax exemption (applicable only to undertakings primarily engaged in the production of goods) was selective, noting that ‘neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy’.

<sup>(17)</sup> *British Aggregates Association v Commission* judgment of 22 December 2008, Case C-487/06.

<sup>(18)</sup> Opinion delivered on 17 July 2008, Case C-487/06.

<sup>(19)</sup> Paragraph 100 of the opinion.

<sup>(20)</sup> Case C-143/99 *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH and Finanzlandesdirektion für Kärnten* [2001] ECR I-8365 at paragraph 41.

<sup>(21)</sup> See footnote 20 for the reference.

On the basis that the measure is selective, the Authority must, therefore, assess whether this selectivity is justified by the nature or general scheme of the taxation system. In order to do so the Authority must first of all assess the objective of the tax in question and subsequently decide whether the exemption is consistent with that logic. The objective of the CO<sub>2</sub> tax is to reduce carbon emissions. In this case each of the mineral products (mineral oil, petroleum, natural gas and LPG) is covered by the same legal provision introducing taxation for environmental purposes. It is not apparent to the Authority how the environmental logic of pricing the effects of carbon emissions can be reconciled within a system that excludes sectors that consume natural gas or LPG from taxation, when these sectors could be able to reduce CO<sub>2</sub> emissions by either curtailing the use of gas or switching to more environmentally friendly products. It is for the EEA State which has introduced such a differentiation to show that it is justified by the nature or general scheme of the system in question<sup>(22)</sup>. The Norwegian authorities have not contended that the exemption falls within the nature or general scheme of the tax and as no such justification has been adduced (or is apparent), the Authority concludes that the measure is not justified by the nature and general scheme of the CO<sub>2</sub> tax system.

The Authority determines, therefore, that the measure in question is selective in that it favours certain undertakings or the production of certain goods and cannot be justified according to the nature or general scheme of the tax system.

### 1.3. *Distortion of competition and effect on trade between Contracting Parties*

The aid measure must threaten to distort competition and affect trade between the Contracting Parties.

Reductions in levels of taxation payable by undertakings strengthen their financial position in comparison with their competitors. The aid scheme applies to all sectors, with potential beneficiaries active on a large number of markets in which there is trade within the EEA. Two of the beneficiaries are, for example, Hydro and StatoilHydro, companies which both operate internationally. The tax exemption must, therefore, be considered to have an effect on trade between the Contracting Parties and have the potential to distort competition<sup>(23)</sup>.

## 2. Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, ‘the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision’.

<sup>(22)</sup> See Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraphs 43–47.

<sup>(23)</sup> See in this respect Case 730/79 *Phillip Morris v Commission* [1989] ECR 2671

By submitting the notification of the tax exemption from the CO<sub>2</sub> taxation on gas by letter dated 9 March 2007 from the Norwegian Ministry of Government Administration and Reform, the Norwegian authorities have complied with the notification requirement. The Norwegian authorities have also confirmed that the tax and the tax exemptions are yet to be implemented.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

### 3. Compatibility of the aid

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement unless they qualify for a derogation under Article 61(2) or (3) of the EEA Agreement. Article 61(3)(c) EEA provides that State aid may be considered compatible with the functioning of the EEA Agreement where it facilitates the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest.

Since the decision to open a formal investigation into the measure, the Authority has adopted new Guidelines on State aid for environmental protection<sup>(24)</sup> under Article 61(3)(c). According to paragraph 204 of the Guidelines, the Authority will apply the new Guidelines to all notified aid measures in respect of which it is called upon to take a decision after the Guidelines are adopted, even where the projects were notified prior to their publication.

According to the Environmental Aid Guidelines, aid in the form of reductions of, or exemptions from, environmental taxes may be considered compatible with the functioning of the EEA Agreement on the condition that the tax reductions or exemptions: (i) contribute at least indirectly to improving the level of environmental protection; (ii) do not undermine the general objective pursued; and (iii) are, in the case of taxes which have been harmonised within the European Community, in particular those harmonised through Directive 2003/96/EC on taxation of energy products and electricity (the 'Energy Taxation Directive')<sup>(25)</sup>, compatible with the principles of relevant Community legislation and comply with the limits and conditions set out therein<sup>(26)</sup>.

- (i) Does the tax reduction/exemption improve environmental protection? and

<sup>(24)</sup> These guidelines correspond to the European Community guidelines on State aid for environmental protection which were adopted on 23 January 2008 (OJ C 82, 1.4.2008, p. 1).

<sup>(25)</sup> The minimum taxation level fixed by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51), as amended.

<sup>(26)</sup> Paragraphs 151–152 of the Environmental Aid Guidelines. See also paragraphs 70(15) and 10.

- (ii) Does the tax reduction/exemption undermine the general objective of the tax?

While it is not immediately obvious how a reduction in an energy tax could improve environmental protection or be consistent with the general objective of the tax, the Environmental Aid Guidelines state that the potential to derogate from environmental taxes for certain sectors or groups of undertakings may enable national authorities to maintain a higher environmental tax level in general. This could thereby contribute more to internalising the costs of environmental damage and give further incentives to improving environmental protection<sup>(27)</sup>.

The Authority is, however, concerned that a *total* exemption from energy taxation may not fulfil the relevant criteria, notwithstanding that it may enable higher levels of taxation to be levied on other sources of energy. The Authority considers, therefore, that the answers to these questions are to an extent reliant on whether the principles contained in the Energy Tax Directive are complied with<sup>(28)</sup>.

- (iii) Does the tax correspond to a tax harmonised by the Energy Taxation Directive and, if so, are the principles in the Directive complied with?

As referred to in paragraph 10 of the Authority's Environmental Aid Guidelines, although the Energy Taxation Directive has not been incorporated into the EEA Agreement, with a view to ensuring a uniform application of State aid provisions and equal conditions of competition throughout the EEA, the Authority will in general apply the same points of reference as those of the Community's guidelines when assessing the compatibility of environmental aid with the functioning of the EEA Agreement<sup>(29)</sup>.

According to paragraph 153 of the (Authority's) Environmental Aid Guidelines, aid in the form of tax reductions of or, exemptions from, taxes which correspond to environmental taxes that have been harmonised within the Community is considered to be compatible with the functioning of the EEA Agreement for a period of 10 years provided the beneficiaries pay tax at least at the level corresponding to the Community minimum tax level set by the relevant applicable Directive. The CO<sub>2</sub> tax is a tax on the use of products that is, at least in part, subject to Community harmonisation by the Energy Taxation Directive. According to Article 17(1) of the Energy Taxation Directive, taxes on the consumption of energy may in certain circumstances be reduced down to the minimum levels fixed by the Directive. The minimum levels are currently EUR 41 per 1 000 kg for LPG and EUR 0,3 per gigajoule for natural gas (industrial/commercial use).

<sup>(27)</sup> Paragraph 57 of the Environmental Aid Guidelines.

<sup>(28)</sup> A principle recently accepted by the European Commission in Case N 22/08 of 19 May 2008 (OJ C 184, 22.7.2008, p. 6) relating to Sweden and by the Authority in its Decision No 502/08/COL on CO<sub>2</sub> tax exemption and reduced oil tax rate (also Norway).

<sup>(29)</sup> Assessment of the compatibility of tax exemptions under the Community's guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1) is based on compliance with the Energy Taxation Directive.

In this case no tax is paid on the use of natural gas and LPG for purposes other than heating of buildings and in consequence the Community minimum levels of energy taxation are not complied with<sup>(30)</sup>. The only provision in the Energy Taxation Directive that provides for a reduction down to zero is Article 17(2). This Article only applies to tax exemptions granted to energy-intensive businesses<sup>(31)</sup> (subject to the conditions set out in Article 17(4)). The notified exemption is not limited to such users.

For these reasons, the Authority considers that the tax exemption is not consistent with the points of reference for tax exemptions contained in the Energy Taxation Directive and can therefore not be considered compatible with the EEA Agreement under paragraph 153 of the Environmental Aid Guidelines.

According to paragraph 154 of the Environmental Aid Guidelines, aid in the form of reductions of, or exemptions from, environmental taxes other than those referred to in paragraph 153 (relevant to this case are exemptions which are below the Community minimum tax level, and, to the extent applicable, taxes which are not covered by Community legislation), can be considered to be compatible with the functioning of the EEA Agreement, again for a period of 10 years, provided that the conditions set out in paragraphs 155 to 159 of the Guidelines are fulfilled. These require further analysis of the necessity and proportionality of the aid.

In accordance with paragraph 158 of the Environmental Aid Guidelines, the Authority would consider the aid to be *necessary* if the following cumulative conditions were met: (1) the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation; (2) the environmental tax without reduction must lead to a substantial increase in production costs and, if so; (3) the increase cannot be passed on to consumers without leading to important sales reductions. In this case the Authority has concerns, given the Norwegian authorities' stated view that the intention behind the expansion of the tax to include natural gas and LPG was to impose a tax on heating so as to encourage more environmentally friendly alternatives, that the beneficiaries (i.e. those undertakings who use natural gas and LPG for *non-heating* purposes) were indeed truly chosen based on objective and transparent criteria. In any event, the Authority has not been provided with any information concerning the extent to which the CO<sub>2</sub> tax leads to a substantial increase in costs that cannot be passed to consumers, and therefore doubts that the aid is necessary. The Authority has no evidence, therefore, (for example through projections of a likely decrease in turnovers or market shares)

<sup>(30)</sup> The Authority emphasises, however, that this should not be read as to imply that the Kingdom of Norway is obliged to comply with Community legislation which has not been implemented in the EEA Agreement — the reference to the Energy Tax Directive serves only as a basis for assessing the compatibility of a State aid measure with the functioning of the EEA Agreement under Article 61(3) of the Agreement.

<sup>(31)</sup> As defined in Article 17(1)(a) of the Energy Taxation Directive.

to enable it to conclude that the exemption is necessary as the tax increase could not be passed on to consumers without leading to significant sales reductions.

With respect to the *proportionality* of the aid, each beneficiary would (according to paragraph 159 of the Environmental Aid Guidelines) have to fulfil one of the following criteria: (1) it must pay a proportion of the national tax which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA (the beneficiaries benefiting at most from a reduction corresponding to the increase in production costs from the tax, using the best performing technique and which cannot be passed on to customers); (2) it must pay at least 20 % of the national tax unless a lower rate can be justified; or (3) it must enter into agreements with the EFTA State whereby it commits itself to achieve environmental objectives with the same effect as would be achieved under paragraphs (1) or (2) or if the Community minima were applied. In this case the Authority has no information regarding best performing technique, though it is clear that that is not a requirement of the tax measure; the condition requiring payment of 20 % of the national tax has no relevance given that this would in any event represent an amount considerably greater than the minimum levels under the Energy Tax Directive; and the Authority has no information relating to the existence of any agreements with the Norwegian authorities that can achieve the same environmental objectives. The Authority does not consider, therefore, that the exemption is proportionate.

#### 4. Conclusion

The Authority determines, therefore, that the exemption has not been shown to be necessary or proportionate and is not compatible with the Authority's Environmental Aid Guidelines.

The Authority does not exclude, however, that in certain circumstances more limited exemptions from the tax could be considered compatible with the EEA Agreement. Exemptions limited, for example, to undertakings suffering net costs as a result of participation in the Norwegian emissions trading scheme, with the extent of the exemption limited to covering those costs, could in some circumstances be regarded necessary and proportionate<sup>(32)</sup>.

Furthermore exemptions complying with the Energy Taxation Directive, limited to 10 years, where the beneficiaries pay at least the community minimum tax level could be implemented in accordance with Article 25 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)<sup>(33)</sup>, which has been incorporated into the EEA Agreement.

<sup>(32)</sup> See paragraph 58 of the European Commission's decision in Case 41/06 'Relief from the CO<sub>2</sub> tax due to the EU Emission Trading System — Denmark' (not yet published). Such an exemption would require separate notification to the Authority.

<sup>(33)</sup> OJ L 214, 9.8.2008, p. 3, incorporated into Annex XV to the EEA Agreement by Decision of the EEA Joint Committee No 120/2008 (OJ L 339, 18.12.2008, p. 111 and EEA Supplement No 79, 18.12.2008, p. 20), and in force from 8.11.2008.

The Norwegian authorities' proposals do not, however, contain such limitations, and the Authority has, therefore, not assessed these possibilities further. The Authority concludes, therefore, that the measure is not compatible with the EEA Agreement,

HAS ADOPTED THIS DECISION:

*Article 1*

The aid measure which the Norwegian authorities are planning to implement is not compatible with the functioning of the EEA Agreement.

*Article 2*

The aid measure may not be implemented.

*Article 3*

This Decision is addressed to the Kingdom of Norway.

*Article 4*

Only the English language version is authentic.

Done at Brussels, 23 July 2009.

*For the EFTA Surveillance Authority*

Per SANDERUD  
*President*

Kristján A. STEFÁNSSON  
*College Member*

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