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Legislation

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([1]) Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

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Commission

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[1] Text with EEA relevance

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 222/2003

of 5 February 2003

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables [1], as last amended by Regulation (EC) No 1947/2002 [2], and in particular Article 4(1) thereof,

Whereas:

(1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

(2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 6 February 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

[1] OJ L 337, 24.12.1994, p. 66.
[2] OJ L 299, 1.11.2002, p. 17.

ANNEX

to the Commission Regulation of 5 February 2003 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	052	110,2
	204	51,5
	212	123,3
	628	109,3
	999	98,6
0707 00 05	052	122,9
	999	122,9
0709 10 00	220	45,8
	999	45,8
0709 90 70	052	144,1
	204	166,7
	999	155,4
0805 10 10, 0805 10 30, 0805 10 50	052	47,3
	204	48,3
	212	39,4
	220	49,4
	624	84,4
	999	53,8
0805 20 10	204	69,8
	999	69,8
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	052	63,8
	204	57,1
	220	73,2
	464	132,1
	600	79,0
	624	78,3
	999	80,6
0805 50 10	052	61,4
	220	69,4
	600	62,3
	999	64,4
0808 10 20, 0808 10 50, 0808 10 90	400	96,2
	404	99,4
	720	87,9
	999	94,5
0808 20 50	388	88,8
	400	116,3
	528	83,9
	720	42,5
	999	82,9

(1) Country nomenclature as fixed by Commission Regulation (EC) No 2020/2001 (OJ L 273, 16.10.2001, p. 6). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 223/2003

of 5 February 2003

on labelling requirements related to the organic production method for feedingstuffs, compound feedingstuffs and feed materials and amending Council Regulation (EEC) No 2092/91

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [1], as last amended by Commission Regulation (EC) No 473/2002 [2], and in particular Article 1(3) and the second indent of Article 13 thereof,

Whereas:

(1) Under Article 1(3) of Regulation (EEC) No 2092/91 a Regulation must be adopted providing for labelling requirements as well as inspection requirements and precautionary measures for feedingstuffs, compound feedingstuffs and feed materials, as far as these requirements are related to the organic production method.

(2) The petfood market and the market in feed for fur animals are separate from the market in feedingstuffs for other farmed livestock. Moreover, the labelling, production and inspection rules provided for in Articles 5, 6, 8 and 9 respectively of Regulation (EEC) No 2092/91 do not apply to aquaculture animals or aquaculture products. This Regulation should therefore apply only to feedingstuffs for organically-reared livestock, excluding petfood, feed for fur animals and feed for aquaculture animals.

(3) The specific measures on labelling feedingstuffs for organically-reared livestock must allow producers to identify feed that may be used in accordance with the provisions on the organic production method. The indication referring to the organic production method should not be presented in a way that draws more attention to it than to the description or the name of the feedingstuff referred to respectively in Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs [3], as last amended by Directive 2002/2/EC of the European Parliament and of the Council [4], and in Council Directive 96/25/EC of 29 April 1996 on the circulation and use of feed materials, amending Directives 70/524/EEC, 74/63/EEC, 82/471/EEC and 93/74/EEC and repealing Directive 77/101/EEC [5], as last amended by Directive 2001/46/EC of the European Parliament and of the Council [6].

(4) The percentage of organically-produced feed materials, the percentage of in-conversion products and the total percentage of feedingstuffs of agricultural origin should moreover be indicated by weight of dry matter so that producers may comply with the daily rationing rules laid down in Part B of Annex I to Regulation (EEC) No 2092/91. Part B of Annex I to that Regulation should therefore be amended also.

(5) A number of trade marks of products intended for animal feed which do not meet the requirements of Regulation (EEC) No 2092/91 carry indications which may be considered by operators to be a reference to the organic production method. Provision should be made for a transitional period to allow holders of those trade marks to adapt to the new rules. However, this transitional period should be granted only to trade marks bearing the above indications where an application for registration was made before the publication of Council Regulation (EC) No 1804/1999 of 19 July 1999 supplementing Regulation (EEC) No 2092/91 to include livestock production [7], and where the operator has been duly informed of the fact that the products have not been produced by the organic production method.

(6) The minimum inspection requirements and precautionary measures applicable to units preparing feedingstuffs require the implementation of special measures, which should be incorporated into Annex III to Regulation (EEC) No 2092/91.

(7) The principle of separating all equipment used in units preparing organic compound feedingstuffs from equipment used in the same unit for conventional compound feedingstuffs is considered to be an effective means of preventing the presence of products and substances not allowed by the organic production method. That principle should hence be incorporated as a provision into Annex III to Regulation (EEC) No 2092/91. The immediate implementation of that provision however is assumed to have an important economic impact on the compound feedingstuffs industry in several Member States and consequently on the organic farming sector. For that reason, and in order to allow the organic sector

[1] OJ L 198, 22.7.1991, p. 1.
[2] OJ L 75, 16.3.2002, p. 21.
[3] OJ L 86, 6.4.1979, p. 30.
[4] OJ L 63, 6.3.2002, p. 23.
[5] OJ L 125, 23.5.1996, p. 35.
[6] OJ L 234, 1.9.2001, p. 55.
[7] OJ L 222, 24.8.1999, p. 1.

to adapt to the new requirements of separated production lines, a possibility of derogation to this provision should be foreseen for a period of five years. Moreover, this issue has to be re-examined thoroughly in the near future on the basis of further information and experience gained.

(8) Regulation (EEC) No 2092/91 should therefore be amended.

(9) The measures provided for in this Regulation are in accordance with the opinion of the Committee referred to in Article 14 of Regulation (EEC) No 2092/91,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation shall apply to the feedingstuffs, compound feed and feed materials referred to in Article 1(1)(c) of Regulation (EEC) No 2092/91, where these products carry or are intended to carry references to the organic production method. This Regulation shall not apply to pet foods, feed for fur animals or feed for aquaculture animals.

Article 2

For the purpose of this Regulation, the definitions laid down in Article 4 of Regulation (EEC) No 2092/91 shall apply.

In addition:

1. 'feed materials from the organic production method' shall mean organically-produced feed materials or prepared from such materials,

2. 'feed materials from products in conversion to organic farming' shall mean in-conversion feed materials or products prepared from such materials.

Article 3

1. The labelling, advertising and commercial documentation relating to the products referred to in Article 1 may refer to organic production methods only where:

(a) the products have been produced, prepared or imported by an operator who is subject to the inspection measures laid down in Articles 8 and 9 of Regulation (EEC) No 2092/91;

(b) the products and the materials of which they are composed and any other substance used in the preparation of those products have not been subjected to treatments involving the use of ionising radiation;

(c) the conditions referred to in points 4.12, 4.13, 4.14, 4.16, 4.17 and 4.18 of Part B of Annex I to Regulation (EEC) No 2092/91 are met as required;

(d) feed materials from the organic production method do not enter simultaneously with the same feed materials produced by conventional means into the composition of the product;

(e) feed materials from products in conversion to organic farming do not enter simultaneously with the same feed materials produced by conventional means into the composition of the product.

2. Without prejudice to Articles 4 and 5, the reference to the organic production method referred to in paragraph 1 shall be made solely by the following indication:

(a) 'organically-produced', where at least 95 % of the product's dry matter is comprised of organically-produced feed material(s);

(b) 'may be used in organic production in accordance with Regulation (EEC) No 2092/91' in the case of products comprising variable quantities of feed materials from the organic production method and/or feed materials from products in conversion to organic farming and/or conventional materials.

Article 4

1. The indication referred to in Article 3(2):

(a) must be separate from the wording referred to in Article 5 of Directive 79/373/EEC or in Article 5(1) of Directive 96/25/EC;

(b) must not be presented in a colour, format or character font that draws more attention to it than to the description or name of the animal feedingstuff referred to in Article 5(1)(a) of Directive 79/373/EEC or Article 5(1)(b) of Directive 96/25/EC respectively;

(c) must be accompanied, in the same field of vision, by an indication by weight of dry matter referring:

(i) to the percentage of feed material(s) from the organic production method,

(ii) to the percentage of feed material(s) from products in conversion to organic farming,

(iii) to the total percentage of animal feed of agricultural origin,

(d) must be accompanied by the name and/or the code number of the inspection body or authority to which the operator who carried out the final preparation is subject;

(e) must be accompanied by a list of names of feed materials from the organic production method;

(f) must be accompanied by a list of names of feed materials from products in conversion to organic farming.

2. The indication referred to in Article 3(2) may be also accompanied by a reference to the requirement to use the feedingstuffs in accordance with the rules laid down in Part B of Annex I to Regulation (EEC) No 2092/91 on the composition of daily rations.

3. Member States shall decide on the name and/or code number for the inspection body or authority referred to in paragraph 1(d) and shall notify the Commission accordingly.

Article 5

The trade marks and sales descriptions bearing an indication referred to in Article 2 of Regulation (EEC) No 2092/91 may be used only if at least 95 % of the product's dry matter is comprised of feed material from the organic production method.

Article 6

Notwithstanding Articles 3, 4 and 5, the trade marks bearing an indication referred to in Article 2 of Regulation (EEC) No 2092/91 may still be used until 1 July 2006 in the labelling and advertising of the products referred to in Article 1 which do not comply with this Regulation if the following conditions are met.

(a) registration of the trade mark was applied for before 24 August 1999 and the trade mark is in conformity with Council Directive 89/104/EEC [1]; and

(b) the trade mark is already reproduced with a clear, prominent, and easily readable indication that the products are not produced according to the organic production method as laid down in Regulation (EEC) No 2092/91.

Article 7

Part B of Annex I and Annex III to Regulation (EEC) No 2092/91 are amended in accordance with the Annex hereto.

Article 8

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 6 August 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission

Franz FISCHLER

Member of the Commission

[1] OJ L 40, 11.2.1989, p. 1.

ANNEX

1. The following sentence is added at the end of point 4.4 of Part B of Annex I to Regulation (EEC) No 2092/91:

'These figures shall be expressed as a percentage of the dry matter of feedingstuffs of agricultural origin.'

2. Annex III to Regulation (EEC) No 2092/91 is amended as follows.

2.1. The text of Point 2 of the General Provisions is replaced by the following:

'the operators already in activity at the date mentioned in Article 2 of Regulation (EC) No 2491/2001 shall also be subject to the provisions referred to in point 3 and to the initial inspection provisions foreseen in sections A, B, C, D and E of the specific provisions of this Annex.'

2.2. The text of Point 4 of the General Provisions is replaced by the following:

'the operator responsible must notify any change in the description or of the practical measures referred to in point 3 and in the initial inspection provisions foreseen in sections A, B, C, D and E of the specific provisions of this Annex to the inspection body or authority in due time.'

2.3. The following words are added after 'Article 11' in the first indent of the third subparagraph of point 3 of the General Provisions:

'and/or Regulation (EC) No 223/2003'

2.4. The following is added at the end of the second indent of point 6 of the General Provisions:

'and, where relevant, the composition of the compound feedingstuffs.'

2.5. Point 7(b) of the General Provisions is replaced by the following:

'the name of the product or a description of the compound feedingstuff accompanied by a reference to the organic production method in accordance with, as applicable, Article 5 of this Regulation or Article 3 of Regulation (EC) No 223/2003.'

2.6. The title of Part C of the Specific Provisions is replaced by the following:

'C. Imports of plants, plant products, livestock, livestock products and foodstuffs comprising plant and/or livestock products, animal feedingstuffs, compound feedingstuffs and feed materials from third countries.'

2.7. The following part E is inserted:

'E — UNITS PREPARING ANIMAL FEEDINGSTUFFS, COMPOUND FEEDINGSTUFFS AND FEED MATERIALS

This section applies to any unit involved in the preparation, as defined in Article 4 point 3 of products referred to in Article 1(1)(c) on its own account or on behalf of a third party.

1. **INITIAL INSPECTION**

The full description of the unit referred to under point 3 of the General Provisions of this Annex must:

— indicate the facilities used for the reception, preparation and storage of the products intended for animal feed before and after the operations concerning them,

— indicate the facilities used for the storage of other products used to prepare feedingstuffs,

— indicate the facilities used to store products for cleaning and disinfection,

— indicate, where necessary, the description of the compound feedingstuff that the operator intends to produce, in accordance with Article 5(1)(a) of Directive 79/373/EEC, and the livestock species or class for which the compound feedingstuff is intended,

— indicate, where necessary, the name of the feed materials that the operator intends to prepare.

The measures to be taken by operators, referred to in point 3 of the General Provisions of this Annex, to guarantee compliance with this Regulation must include:

— in particular an indication of the precautionary measures to be taken in order to reduce the risk of contamination by unauthorised substances or products, the cleaning measures implemented and the monitoring of their effectiveness,

— identification of all elements of their activities crucial for guaranteeing at all times that the products referred to in Article 1(1)(c) prepared in such units comply with this Regulation and with Regulation (EC) No 223/2003,

— the establishment and implementation of, compliance with and updating of appropriate procedures, based on the principles of the HACCP (Hazard Analysis and Critical Control Points) system.

The inspection body or authority shall use these procedures to carry out a general evaluation of the risks attendant on each preparation unit and to draw up an inspection plan. This inspection plan must provide for a minimum number of random samples depending on the potential risks.

2. **Documentary accounts**

For the purposes of proper inspection of the operations, the documentary accounts referred to in point 6 of the General Provisions of this Annex shall include information on the origin, nature and quantities of feed materials, additives, sales and finished products.

3. **Preparation units**

When preparing products, operators must ensure that:

(a) organically-produced feedingstuffs or feedingstuffs derived therefrom, in-conversion feedingstuffs or feedingstuffs derived therefrom, and conventional feedingstuffs are effectively physically separated;

(b) all equipment used in units preparing compound feedingstuffs covered by this Regulation is completely separated from equipment used for compound feedingstuffs not covered by this Regulation.

Notwithstanding the provisions of point (b) of the first subparagraph, until 31 December 2007, operations may take place using the same equipment provided that:

— separation in terms of time is guaranteed and suitable cleaning measures, the effectiveness of which has been checked, have been carried out before commencing preparation of the products covered by this Regulation; operators must record these operations,

— operators must ensure that all appropriate measures are implemented, depending on the risks evaluated in accordance with point 1, and, where necessary, guarantee that products which do not conform to this Regulation cannot be placed on the market with an indication referring to organic farming.

The derogation provided for in the second subparagraph is subject to prior authorisation by the inspection body or authority. Such authorisation might be provided for one or more preparation operation(s).

The Commission will start to examine the provisions of point (b) of the first subparagraph before 31 December 2003. Account being taken from that examination, the date of 31 December 2007 may be revised if necessary.

4. **Inspection visits**

In addition to the complete annual visit, the inspection body or authority must make targeted visits based on a general evaluation of the potential risks of non-compliance with this Regulation; the inspection body or authority shall pay particular attention to the critical control points pointed out for the operator, with a view to establishing whether the surveillance and checking operations are carried out as they should be. All the premises used by the operator for the conduct of his activities may be inspected as frequently as the attendant risks warrant.

5. **Transporting products to other production/preparation units or storage premises**

Operators must ensure that the following conditions are met:

(a) during transport, organically-produced feedingstuffs or feedingstuffs derived therefrom, in-conversion feedingstuffs or feedingstuffs derived therefrom, and conventional feedingstuffs must be effectively physically separated;

(b) the vehicles and/or containers which have transported products that are not covered by this Regulation may be used to transport products covered by this Regulation if:

— suitable cleaning measures, the effectiveness of which has been checked, have been carried out before commencing the transport of products covered by this Regulation; operators must record these operations,

— operators must ensure that all appropriate measures are implemented, depending on the risks evaluated in accordance with point 1, and, where necessary, guarantee that products which do not conform to this Regulation cannot be placed on the market with an indication referring to organic farming,

— the inspection body or authority of the operator has been informed of such transport operations and has agreed thereto. Such agreement might be provided for one or more transport operation(s);

(c) the finished products referred to in this Regulation are transported separately from other finished products physically or in time;

(d) during transport, the quantity of products at the start and each individual quantity delivered in the course of a delivery round must be recorded.

6. **Receipt of products**

On receipt of a product referred to in Article 1, operators must check the closure of the packaging or container where it is required and the presence of the indications referred to in point 7 of the General Provisions of this Annex. Operators must carry out a cross-check of the information on the label referred to in point 7 of the General Provisions against the information on the accompanying documents. The results of this verification must be explicitly mentioned in the accounts referred to in point 6 of the General Provisions.'

COMMISSION REGULATION (EC) No 224/2003

of 5 February 2003

determining the aid referred to in Council Regulation (EC) No 1255/1999 for the private storage of butter and cream and derogating from Article 29 of Regulation (EC) No 2771/1999 laying down detailed rules for the application of Regulation (EC) No 1255/1999 as regards intervention on the market in butter and cream

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products [1], as last amended by Commission Regulation (EC) No 509/2002 [2], and in particular Article 10 thereof,

Whereas:

(1) Article 34(2) of Commission Regulation (EC) No 2771/1999 [3], as last amended by Regulation (EC) No 1614/2001 [4], stipulates that, without prejudice to Article 38 of that Regulation, the amount of the aid referred to in Article 6(3) of Regulation (EC) No 1255/1999 for private storage is to be fixed each year. To this end, account should be taken of the fixed, daily and financial costs of storage, and of the movements in the European Central Bank's interest rate in the case of the financial costs.

(2) Article 29(1) of Regulation (EC) No 2771/1999 stipulates the period in which entry into store must take place. The current situation on the butter market justifies bringing the entry date of 15 March for butter and cream storage operations in 2003 forward to 1 March, as an exceptional measure.

(3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Milk and Milk Products,

HAS ADOPTED THIS REGULATION:

Article 1

The aid referred to in Article 6(3) of Regulation (EC) No 1255/1999 shall be calculated per tonne of butter or butter equivalent for contracts concluded in 2003 on the following basis:

(a) EUR 24 for the fixed costs,

(b) EUR 0,35 for the costs of cold storage for each day of contractual storage, and

(c) an amount per day of contractual storage, calculated on the basis of 91 % of the intervention price for butter in force on the day the contractual storage begins and on the basis of an annual interest rate of 2,75 %.

Article 2

Article 29(1) of Regulation (EC) No 2771/1999 notwithstanding, entry into store in 2003 may take place from 1 March.

Article 3

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission

Franz FISCHLER

Member of the Commission

[1] OJ L 160, 26.6.1999, p. 48.
[2] OJ L 79, 22.3.2002, p. 15.
[3] OJ L 333, 24.12.1999, p. 11.
[4] OJ L 214, 8.8.2001, p. 20.

COMMISSION REGULATION (EC) No 225/2003

of 5 February 2003

amending Regulation (EC) No 2125/95 as regards the list of competent Chinese authorities for issuing certificates of origin and duplicates for preserved mushrooms

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organisation of the markets in processed fruit and vegetable products [1], as last amended by Commission Regulation (EC) No 453/2002 [2], and in particular Article 15(1) thereof,

Whereas:

(1) By a note verbale of 5 December 2002, the Chinese authorities sent the Commission a complete update of the list of Chinese authorities competent for issuing the certificates of origin and duplicates required for the release for free circulation of preserved mushrooms originating in that third country, as referred to in Article 10(1) of Commission Regulation (EC) No 2125/95 of 6 September 1995 opening and providing for the administration of tariff quotas for preserved mushrooms [3], as last amended by Regulation (EC) No 1286/2002 [4]. Annex II of that Regulation should be amended as a result.

(2) In the same note the Chinese authorities asked the Commission to accept temporarily the use of certificates or origin or duplicates bearing the stamps and signatures of the authorities referred to in Annex II of Regulation (EC) No 2125/95, as amended by Regulation (EC) No 1286/2002, in parallel to the certificates of origin and duplicates bearing the new stamps and signatures, when applying to release preserved mushrooms from China for free circulation in the European Community. In order to ensure that imports continue to run smoothly, this option should be provided for until 31 May 2003.

(3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Products Processed from Fruit and Vegetables,

HAS ADOPTED THIS REGULATION:

Article 1

Annex II to Regulation (EC) No 2125/95 is replaced by the Annex hereto.

Article 2

Until 31 May 2003, an importer may submit, when applying to release preserved mushrooms originating in China into free circulation in the Community, certificates of origin and duplicates bearing the stamps and signatures of the Chinese authorities listed in the Annex to Regulation (EC) No 2125/95 as amended by Regulation (EC) No 1286/2002.

Article 3

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission

Franz FISCHLER

Member of the Commission

[1] OJ L 297, 21.11.1996, p. 29.
[2] OJ L 72, 14.3.2002, p. 9.
[3] OJ L 212, 7.9.1995, p. 16.
[4] OJ L 179, 9.7.2002, p. 21.

ANNEX

'ANNEX II

List of competent Chinese authorities for issuing the certificates of origin and duplicates referred to in Article 10(1):
— General Administration of Quality Supervision
— Entry-exit Inspection and Quarantine Bureau of the People's Republic of China in:

Beijing	Jiangxi	Shenzhen
Shanxi	Zhuhai	Ningxia
Inner Mongolia	Sichuan	Tianjin
Hebei	Chongqing	Shanghai
Liaoning	Yunnan	Ningbo
Jilin	Guizhou	Jiangsu
Shandong	Shaanxi	Guangxi
Zhejiang	Gansu	Heilongjiang
Anhui	Qinghai	Hainan
Hubei	Tibet	Henan
Guangdong	Fujian	Xinjiang
Xiamen		Hunan'

COMMISSION REGULATION (EC) No 226/2003
of 5 February 2003
fixing the import duties in the rice sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3072/95 of 22 December 1995 on the common organisation of the market in rice ([1]), as last amended by Commission Regulation (EC) No 411/2002 ([2]),

Having regard to Commission Regulation (EC) No 1503/96 of 29 July 1996 laying down detailed rules for the application of Council Regulation (EC) No 3072/95 as regards import duties in the rice sector ([3]), as last amended by Regulation (EC) No 1298/2002 ([4]), and in particular Article 4(1) thereof,

Whereas:

(1) Article 11 of Regulation (EC) No 3072/95 provides that the rates of duty in the Common Customs Tariff are to be charged on import of the products referred to in Article 1 of that Regulation. However, in the case of the products referred to in paragraph 2 of that Article, the import duty is to be equal to the intervention price valid for such products on importation and increased by a certain percentage according to whether it is husked or milled rice, minus the cif import price provided that duty does not exceed the rate of the Common Customs Tariff duties.

(2) Pursuant to Article 12(3) of Regulation (EC) No 3072/95, the cif import prices are calculated on the basis of the representative prices for the product in question on the world market or on the Community import market for the product.

(3) Regulation (EC) No 1503/96 lays down detailed rules for the application of Regulation (EC) No 3072/95 as regards import duties in the rice sector.

(4) The import duties are applicable until new duties are fixed and enter into force. They also remain in force in cases where no quotation is available from the source referred to in Article 5 of Regulation (EC) No 1503/96 during the two weeks preceding the next periodical fixing.

(5) In order to allow the import duty system to function normally, the market rates recorded during a reference period should be used for calculating the duties.

(6) Application of Regulation (EC) No 1503/96 results in import duties being fixed as set out in the Annexes to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The import duties in the rice sector referred to in Article 11(1) and (2) of Regulation (EC) No 3072/95 shall be those fixed in Annex I to this Regulation on the basis of the information given in Annex II.

Article 2

This Regulation shall enter into force on 6 February 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

([1]) OJ L 329, 30.12.1995, p. 18.
([2]) OJ L 62, 5.3.2002, p. 27.
([3]) OJ L 189, 30.7.1996, p. 71.
([4]) OJ L 189, 18.7.2002, p. 8.

ANNEX I

Import duties on rice and broken rice

(EUR/t)

CN code	Duties [5]				
	Third countries (except ACP and Bangladesh) [3]	ACP [1] [2] [3]	Bangladesh [4]	Basmati India and Pakistan [6]	Egypt [8]
1006 10 21	[7]	69,51	101,16		158,25
1006 10 23	[7]	69,51	101,16		158,25
1006 10 25	[7]	69,51	101,16		158,25
1006 10 27	[7]	69,51	101,16		158,25
1006 10 92	[7]	69,51	101,16		158,25
1006 10 94	[7]	69,51	101,16		158,25
1006 10 96	[7]	69,51	101,16		158,25
1006 10 98	[7]	69,51	101,16		158,25
1006 20 11	264,00	88,06	127,66		198,00
1006 20 13	264,00	88,06	127,66		198,00
1006 20 15	264,00	88,06	127,66		198,00
1006 20 17	264,00	88,06	127,66	14,00	198,00
1006 20 92	264,00	88,06	127,66		198,00
1006 20 94	264,00	88,06	127,66		198,00
1006 20 96	264,00	88,06	127,66		198,00
1006 20 98	264,00	88,06	127,66	14,00	198,00
1006 30 21	[7]	133,21	193,09		312,00
1006 30 23	[7]	133,21	193,09		312,00
1006 30 25	[7]	133,21	193,09		312,00
1006 30 27	[7]	133,21	193,09		312,00
1006 30 42	[7]	133,21	193,09		312,00
1006 30 44	[7]	133,21	193,09		312,00
1006 30 46	[7]	133,21	193,09		312,00
1006 30 48	[7]	133,21	193,09		312,00
1006 30 61	[7]	133,21	193,09		312,00
1006 30 63	[7]	133,21	193,09		312,00
1006 30 65	[7]	133,21	193,09		312,00
1006 30 67	[7]	133,21	193,09		312,00
1006 30 92	[7]	133,21	193,09		312,00
1006 30 94	[7]	133,21	193,09		312,00
1006 30 96	[7]	133,21	193,09		312,00
1006 30 98	[7]	133,21	193,09		312,00
1006 40 00	[7]	41,18	[7]		96,00

[1] The duty on imports of rice originating in the ACP States is applicable, under the arrangements laid down in Council Regulation (EC) No 1706/98 (OJ L 215, 1.8.1998, p. 12) and amended Commission Regulation (EC) No 2603/97 (OJ L 351, 23.12.1997, p. 22).

[2] In accordance with Regulation (EC) No 1706/98, the duties are not applied to products originating in the African, Caribbean and Pacific States and imported directly into the overseas department of Réunion.

[3] The import levy on rice entering the overseas department of Réunion is specified in Article 11(3) of Regulation (EC) No 3072/95.

[4] The duty on imports of rice not including broken rice (CN code 1006 40 00), originating in Bangladesh is applicable under the arrangements laid down in Council Regulation (EEC) No 3491/90 (OJ L 337, 4.12.1990, p. 1) and amended Commission Regulation (EEC) No 862/91 (OJ L 88, 9.4.1991, p. 7).

[5] No import duty applies to products originating in the OCT pursuant to Article 101(1) of amended Council Decision 91/482/EEC (OJ L 263, 19.9.1991, p. 1).

[6] For husked rice of the Basmati variety originating in India and Pakistan, a reduction of EUR/t 250 applies (Article 4a of amended Regulation (EC) No 1503/96).

[7] Duties fixed in the Common Customs Tariff.

[8] The duty on imports of rice originating in and coming from Egypt is applicable under the arrangements laid down in Council Regulation (EC) No 2184/96 (OJ L 292, 15.11.1996, p. 1) and Commission Regulation (EC) No 196/97 (OJ L 31, 1.2.1997, p. 53).

ANNEX II

Calculation of import duties for rice

	Paddy	Indica rice		Japonica rice		Broken rice
		Husked	Milled	Husked	Milled	
1. Import duty (EUR/tonne)	(1)	264,00	416,00	264,00	416,00	(1)
2. Elements of calculation:						
(a) Arag cif price (EUR/tonne)	—	196,73	216,92	263,35	287,46	—
(b) fob price (EUR/tonne)	—	—	—	235,63	259,74	—
(c) Sea freight (EUR/tonne)	—	—	—	27,72	27,72	—
(d) Source	—	USDA and operators	USDA and operators	Operators	Operators	—

(1) Duties fixed in the Common Customs Tariff.

COMMISSION REGULATION (EC) No 227/2003

of 5 February 2003

correcting Regulation (EC) No 214/2003 re-establishing the preferential customs duty on imports of uniflorous (bloom) carnations originating in the West Bank and the Gaza Strip

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4088/87 of 21 December 1987 fixing conditions for the application of preferential customs duties on imports of certain flowers originating in Cyprus, Israel, Jordan and Morocco and the West Bank and the Gaza Strip [1], as last amended by Regulation (EC) No 1300/97 [2], and in particular Article 5(2)(b) thereof,

Whereas:

(1) The purpose of Commission Regulation (EC) No 214/2003 [3] is to repeal Commission Regulation (EC) No 24/2003 of 6 January 2003 suspending the preferential customs duties and re-establishing the Common Customs Tariff duty on imports of multiflorous (spray) carnations originating in the West Bank and the Gaza Strip [4] and re-establish the preferential customs duties on imports of multiflorous (spray) carnations originating in the West Bank and the Gaza Strip.

(2) The title, the recitals and the operative part of Regulation (EC) No 214/2003 contain an error in that they refer to uniflorous (bloom) carnations rather than multiflorous (spray) carnations. Regulation (EC) No 214/2003 should therefore be corrected with retrospective effect for imports of multiflorous (spray) carnations originating in the West Bank and the Gaza Strip,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 214/2003 is hereby corrected as follows:

1. In the title and recitals 5 and 6, the words 'uniflorous (bloom) carnations' are replaced by 'multiflorous (spray) carnations'.
2. In Article 1(1), the words 'uniflorous (bloom) carnations' are replaced by 'multiflorous (spray) carnations'.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

It shall apply to imports of multiflorous (spray) carnations from 4 February 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

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[1] OJ L 382, 31.12.1987, p. 22.
[2] OJ L 177, 5.7.1997, p. 1.
[3] OJ L 28, 4.2.2003, p. 39.
[4] OJ L 2, 7.1.2003, p. 29.

COMMISSION REGULATION (EC) No 228/2003
of 5 February 2003
amending the corrective amount applicable to the refund on cereals

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals ([1]), as last amended by Regulation (EC) No 1666/2000 ([2]), and in particular Article 13(8) thereof,

Whereas:

(1) The corrective amount applicable to the refund on cereals was fixed by Commission Regulation (EC) No 38/2003 ([3]), as amended by Regulation (EC) No 198/2003 ([4]).

(2) On the basis of today's cif prices and cif forward delivery prices, taking foreseeable developments on the market into account, the corrective amount at present applicable to the refund on cereals should be altered.

(3) The corrective amount must be fixed according to the same procedure as the refund. It may be altered in the period between fixings,

HAS ADOPTED THIS REGULATION:

Article 1

The corrective amount referred to in Article 1(1)(a), (b) and (c) of Regulation (EEC) No 1766/92 which is applicable to the export refunds fixed in advance in respect of the products referred to, except for malt, is hereby altered to the amounts set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 6 February 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 2003.

For the Commission
Franz FISCHLER
Member of the Commission

([1]) OJ L 181, 1.7.1992, p. 21.
([2]) OJ L 193, 29.7.2000, p. 1.
([3]) OJ L 5, 10.1.2003, p. 9.
([4]) OJ L 27, 1.2.2003, p. 29.

ANNEX

to the Commission Regulation of 5 February 2003 altering the corrective amount applicable to the refund on cereals

(EUR/t)

Product code	Destination	Current 2	1st period 3	2nd period 4	3rd period 5	4th period 6	5th period 7	6th period 8
1001 10 00 9200	—	—	—	—	—	—	—	—
1001 10 00 9400	—	—	—	—	—	—	—	—
1001 90 91 9000	—	—	—	—	—	—	—	—
1001 90 99 9000	A00	0	0	0	0	0	—	—
1002 00 00 9000	C03	- 20,00	- 20,00	- 20,00	- 20,00	- 20,00	—	—
	A05	0	0	0	0	0	—	—
1003 00 10 9000	—	—	—	—	—	—	—	—
1003 00 90 9000	A00	0	0	0	0	0	—	—
1004 00 00 9200	—	—	—	—	—	—	—	—
1004 00 00 9400	A00	0	- 0,93	- 1,86	- 2,79	- 3,72	—	—
1005 10 90 9000	—	—	—	—	—	—	—	—
1005 90 00 9000	A00	0	0	0	0	0	—	—
1007 00 90 9000	—	—	—	—	—	—	—	—
1008 20 00 9000	—	—	—	—	—	—	—	—
1101 00 11 9000	—	—	—	—	—	—	—	—
1101 00 15 9100	A00	0	0	0	0	0	—	—
1101 00 15 9130	A00	0	0	0	0	0	—	—
1101 00 15 9150	A00	0	0	0	0	0	—	—
1101 00 15 9170	A00	0	0	0	0	0	—	—
1101 00 15 9180	A00	0	0	0	0	0	—	—
1101 00 15 9190	—	—	—	—	—	—	—	—
1101 00 90 9000	—	—	—	—	—	—	—	—
1102 10 00 9500	A00	0	0	0	0	0	—	—
1102 10 00 9700	A00	0	0	0	0	0	—	—
1102 10 00 9900	—	—	—	—	—	—	—	—
1103 11 10 9200	A00	0	0	0	0	0	—	—
1103 11 10 9400	A00	0	0	0	0	0	—	—
1103 11 10 9900	—	—	—	—	—	—	—	—
1103 11 90 9200	A00	0	0	0	0	0	—	—
1103 11 90 9800	—	—	—	—	—	—	—	—

NB: The product codes and the A series destination codes are set out in Commission Regulation (EEC) No 3846/87 (OJ L 366, 24.12.1987, p. 1) as amended.

The numeric destination codes are set out in Commission Regulation (EC) No 2020/2001 (OJ L 273, 16.10.2001, p. 6).

The other destinations are as follows:

C03 Switzerland, Liechtenstein, Poland, Czech Republic, Slovak Republic, Norway, Faroe Islands, Iceland, Russia, Belarus, Bosnia and Herzegovina, Croatia, Slovenia, former Republic of Yugoslavia with the exception of Slovenia, Croatia and Bosnia and Herzegovina, Albania, Romania, Bulgaria, Armenia, Georgia, Azerbaijan, Moldova, Ukraine, Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, Turkmenistan, Morocco, Algeria, Tunisia, Libya, Egypt, Malta, Cyprus and Turkey.

COUNCIL DIRECTIVE 2003/9/EC
of 27 January 2003
laying down minimum standards for the reception of asylum seekers

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(b) of the first subparagraph of Article 63 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Having regard to the opinion of the Committee of the Regions [4],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus maintaining the principle of non-refoulement.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common minimum conditions of reception of asylum seekers.

(4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.

(5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.

(6) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

(8) The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception.

(9) Reception of groups with special needs should be specifically designed to meet those needs.

(10) Reception of applicants who are in detention should be specifically designed to meet their needs in that situation.

(11) In order to ensure compliance with the minimum procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.

(12) The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers.

(13) The efficiency of national reception systems and cooperation among Member States in the field of reception of asylum seekers should be secured.

(14) Appropriate coordination should be encouraged between the competent authorities as regards the reception of asylum seekers, and harmonious relationships between local communities and accommodation centres should therefore be promoted.

(15) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

(16) In this spirit, Member States are also invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons.

(17) The implementation of this Directive should be evaluated at regular intervals.

[1] OJ C 213 E, 31.7.2001, p. 286.
[2] Opinion delivered on 25 April 2002 (not yet published in the Official Journal).
[3] OJ C 48, 21.2.2002, p. 63.
[4] OJ C 107, 3.5.2002, p. 85.

(18) Since the objectives of the proposed action, namely to establish minimum standards on the reception of asylum seekers in Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved by the Community, the Community may adopt measures in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(19) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 18 August 2001, of its wish to take part in the adoption and application of this Directive.

(20) In accordance with Article 1 of the said Protocol, Ireland is not participating in the adoption of this Directive. Consequently, and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Directive do not apply to Ireland.

(21) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive and is therefore neither bound by it nor subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

PURPOSE, DEFINITIONS AND SCOPE

Article 1

Purpose

The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States.

Article 2

Definitions

For the purposes of this Directive:

(a) 'Geneva Convention' shall mean the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) 'application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately;

(c) 'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) 'family members' shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(e) 'refugee' shall mean a person who fulfils the requirements of Article 1(A) of the Geneva Convention;

(f) 'refugee status' shall mean the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State;

(g) 'procedures' and 'appeals', shall mean the procedures and appeals established by Member States in their national law;

(h) 'unaccompanied minors' shall mean persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States;

(i) 'reception conditions' shall mean the full set of measures that Member States grant to asylum seekers in accordance with this Directive;

(j) 'material reception conditions' shall mean the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance;

(k) 'detention' shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

(l) 'accommodation centre' shall mean any place used for collective housing of asylum seekers.

Article 3

Scope

1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.

3. This Directive shall not apply when the provisions of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [1] are applied.

4. Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees.

Article 4

More favourable provisions

Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive.

CHAPTER II

GENERAL PROVISIONS ON RECEPTION CONDITIONS

Article 5

Information

1. Member States shall inform asylum seekers, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally.

[1] OJ L 212, 7.8.2001, p. 12.

Article 6

Documentation

1. Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined.

If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify this fact.

2. Member States may exclude application of this Article when the asylum seeker is in detention and during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State. In specific cases, during the examination of an application for asylum, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the asylum seeker.

4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain in the territory of the Member State concerned or at the border thereof.

5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State.

Article 7

Residence and freedom of movement

1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

4. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.

5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.

The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 8

Families

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum seeker's agreement.

Article 9

Medical screening

Member States may require medical screening for applicants on public health grounds.

Article 10

Schooling and education of minors

1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be confined to the State education system.

Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements.

Article 11

Employment

1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals.

Article 12

Vocational training

Member States may allow asylum seekers access to vocational training irrespective of whether they have access to the labour market.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 11.

Article 13

General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.

2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.

Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

5. Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions.

Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.

Article 14

Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;

(b) accommodation centres which guarantee an adequate standard of living;

(c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:

(a) protection of their family life;

(b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) recognised by Member States.

Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres referred to in paragraph 1(a) and (b).

3. Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.

4. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers of the transfer and of their new address.

5. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work.

6. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.

7. Legal advisors or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the Member State concerned shall be granted access to accommodation centres and other housing facilities in order to assist the said asylum seekers. Limits on such access may be imposed only on grounds relating to the security of the centres and facilities and of the asylum seekers.

8. Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

— an initial assessment of the specific needs of the applicant is required,

— material reception conditions, as provided for in this Article, are not available in a certain geographical area,

— housing capacities normally available are temporarily exhausted,

— the asylum seeker is in detention or confined to border posts.

These different conditions shall cover in any case basic needs.

Article 15

Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness.

2. Member States shall provide necessary medical or other assistance to applicants who have special needs.

CHAPTER III

REDUCTION OR WITHDRAWAL OF RECEPTION CONDITIONS

Article 16

Reduction or withdrawal of reception conditions

1. Member States may reduce or withdraw reception conditions in the following cases:

(a) where an asylum seeker:

— abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or

— does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or

— has already lodged an application in the same Member State.

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions;

(b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception conditions.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

2. Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.

4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to emergency health care.

5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken.

CHAPTER IV

PROVISIONS FOR PERSONS WITH SPECIAL NEEDS

Article 17

General principle

1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation.

Article 18

Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.

2. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Article 19

Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.

2. Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:

(a) with adult relatives;

(b) with a foster-family;

(c) in accommodation centres with special provisions for minors;

(d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

3. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.

Article 20

Victims of torture and violence

Member States shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts.

CHAPTER V

APPEALS

Article 21

Appeals

1. Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or a review before a judicial body shall be granted.

2. Procedures for access to legal assistance in such cases shall be laid down in national law.

CHAPTER VI

ACTIONS TO IMPROVE THE EFFICIENCY OF THE RECEPTION SYSTEM

Article 22

Cooperation

Member States shall regularly inform the Commission on the data concerning the number of persons, broken down by sex and age, covered by reception conditions and provide full information on the type, name and format of the documents provided for by Article 6.

Article 23

Guidance, monitoring and control system

Member States shall, with due respect to their constitutional structure, ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.

Article 24

Staff and resources

1. Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.

2. Member States shall allocate the necessary resources in connection with the national provisions enacted to implement this Directive.

CHAPTER VII

FINAL PROVISIONS

Article 25

Reports

By 6 August 2006, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary.

Member States shall send the Commission all the information that is appropriate for drawing up the report, including the statistical data provided for by Article 22 by 6 February 2006.

After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 26

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 February 2005. They shall forthwith inform the Commission thereof.

When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field relating to the enforcement of this Directive.

Article 27

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 28

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Union.

Done at Brussels, 27 January 2003.

For the Council

The President

G. PAPANDREOU

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 August 2002

on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (ex NN 43/2000)

(notified under document number C(2002) 3141)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/81/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having invited interested parties to submit their comments [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In 1997 the Economic and Financial Council adopted a Code of Conduct for business taxation with the objective of tackling harmful tax competition [2]. As a result of the commitment made in response to the Code, the Commission published in 1998 a notice on the application of State aid rules to measures relating to direct business taxation [3] (the notice), stressing its determination to apply the rules rigorously and to respect the principle of equality of treatment. On the basis of this notice, the Commission undertook to examine or re-examine case by case the tax arrangements in force in the Member States.

(2) In this context, the Commission wrote to the Spanish authorities on 12 February 1999 seeking information on various measures including the tax schemes in the Basque Country and Navarre for coordination centres. None of these measures had been notified to the Commission. By letter dated 21 April 1999, the Spanish authorities supplied the information requested.

(3) By letter dated 22 June 2000, the Spanish authorities informed the Commission that the tax schemes for coordination centres in Ávala and Guipúzcoa had been repealed.

(4) By letter dated 8 May 2001, Spain informed the Commission that the tax scheme for coordination centres in Navarre had been repealed and that the Vizcaya scheme was still in force but had not been applied. Since, according to the information available, no aid had been granted under the Ávala, Guipúzcoa and Navarre schemes, the Commission dropped its inquiry into them and limited its investigation to the scheme for coordination centres in Vizcaya, which was still in force.

(5) By letter dated 11 July 2001, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of coordination centres in Vizcaya.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments on the aid.

[1] OJ C 304, 30.10.2001, p. 6.
[2] OJ C 2, 6.1.1998, p. 1.
[3] OJ C 384, 10.12.1998, p. 3.
[4] See footnote 1.

(7) By letter dated 20 November 2001, the Spanish authorities informed the Commission that the Vizcaya Provincial Council had adopted a draft law repealing the tax scheme for coordination centres.

(8) By letters dated 18 March 2002 and 8 April 2002, the Commission asked Spain for further information on the repeal of the tax scheme for coordination centres and on the beneficiaries of the scheme. By letter dated 25 April 2002, Spain informed the Commission that the coordination centres scheme would be finally abolished on 30 April 2002, and that the sole beneficiary had already renounced its coordination centre status. By letter dated 3 June 2002, Spain confirmed that the scheme had been abolished.

II. **DESCRIPTION OF THE AID**

(9) A special tax scheme was introduced in Vizcaya for management, coordination and financial operations centres. The details of the scheme are governed by Articles 53 and 54 of Provincial Regulation No 3/1996 of 26 June 1996 on corporation tax and Provincial Decree No 81/1997 of 10 June 1997 adopting the Corporation Tax Regulations.

(10) A management, coordination and financial operations centre (coordination centre) is a legal person subject to corporation tax, whose main purpose is to manage, direct, supervise and centralise the transactions and services of the international group of firms to which it belongs.

(11) To qualify for the Vizcaya tax scheme, a group must meet the following requirements:

(a) the aggregate own funds of the group must be more than ESP 1 250 million (EUR 7,51 million);

(b) the group must include firms resident in at least two foreign countries;

(c) at least 25 % of the group's own funds must be held by firms that are not resident in Spain;

(d) annual turnover must exceed ESP 8 000 million (EUR 48,1 million), of which at least 25 % must relate to foreign operations.

(12) In addition, a coordination centre must:

(a) employ at least eight persons full-time;

(b) fulfil one of the following conditions:

(i) its authorised capital must not be less than ESP 250 million (EUR 1,50 million), or its own funds not less than ESP 600 million (EUR 3,61 million);

(ii) its annual turnover must be more than ESP 1 000 million (EUR 6,01 million). If the centre performs management and coordination activities only, its turnover must be greater than ESP 150 million (EUR 0,902 million).

(13) Under Article 54 of Provincial Regulation No 3/1996, a coordination centre may calculate its tax base in one of two ways: either by the classical method, i.e. by deducting expenses from taxable income, or by an alternative method. In the latter case, taxable profits are reckoned as 25 % of the coordination centre's expenditure, excluding financial costs. The amount thus obtained is then liable to corporation tax at the standard rate. This is known as the 'cost plus' method.

(14) To qualify for the coordination centres scheme, an undertaking must obtain the prior approval of the tax authorities, which is granted for a period of up to five years. Approval is automatic if the conditions of the scheme are fulfilled; it may be renewed on request.

III. **GROUNDS FOR INITIATING THE PROCEDURE**

(15) In its assessment of the information submitted by Spain in the course of its preliminary assessment, the Commission considered that the exclusion of financial costs from the calculation of profits under the cost plus method could confer an advantage on coordination centres. It also considered that this advantage was granted through state resources, affected trade between Member States and was selective. It also considered that none of the exceptions to the general prohibition on State aid provided for in Articles 87(2) and 87(3) of the Treaty applied. The Commission therefore had doubts about the compatibility of the measure with the common market and decided to initiate the formal investigation procedure.

IV. **COMMENTS FROM INTERESTED PARTIES**

(16) Comments were received from the Vizcaya Provincial Council. They may be summarised as set out in recitals 17 to 23.

(17) The Vizcaya coordination centres scheme is in the process of being abolished.

(18) Tax measures adopted in Vizcaya have been based on the experience of other Member States. The Vizcaya legislation on coordination centres was based essentially on the Belgian coordination centres scheme in force at the time. The Commission had taken no State aid action against the Belgian scheme, which covered more than 300 coordination centres. Nor did the subsequent changes to the Belgian scheme elicit the slightest comment from the Commission as to its classification as State aid under Article 92 (now Article 87) of the EC Treaty. The Vizcaya Provincial Council was therefore sure that the legislation it was about to adopt was consistent with Community law.

(19) If there had been any doubt before 1996 as to the aid nature of the Belgian scheme or its compatibility with the common market, it is reasonable to assume that the Commission would have taken action under the former Article 93 of the Treaty (now Article 88). It is not too far-fetched to conclude that, by remaining silent, the Commission took a position in this matter consistent with Lorenz ([5]), approving the Belgian scheme either because it was not State aid or because it was a tax measure manifestly compatible with the common market. It was only later that the Commission stated that the Belgian scheme had not deserved to be described as State aid.

(20) The lack of any reservations on the part of the Commission with regard to the well-known Belgian scheme is a sufficient basis for a legitimate expectation. When it adopted the scheme, the Vizcaya Provincial Council would not know that the contested legislation might be regarded as State aid, still less that after a preliminary examination, there would be doubts about its compatibility with the common market.

(21) If the Vizcaya coordination centre scheme were found to be State aid incompatible with the common market, the legitimate expectation would prevent the Commission from ordering the recovery of any aid granted under the scheme. Similarly, there would be a legitimate expectation on the part of the beneficiary of the scheme as to the legality of the Provincial Council's action, since the Provincial Council had been aware for many years of the existence of the Belgian scheme and since the Commission had raised no objections.

(22) Apart from the question of legitimate expectations, there is also the principle of equality of treatment. At the same time as initiating this proceeding under Article 88(2) of the Treaty, the Commission proposed appropriate measures under Article 88(1) to Belgium in respect of its coordination centres scheme. This means that the Commission considered the Belgian scheme to be an existing aid.

(23) Since there is no specific feature of the Belgian scheme compared with the Vizcaya scheme that objectively warrants the former being regarded as existing aid but the latter as new aid, both schemes should be treated equally by the Commission. Where a scheme is regarded as existing aid, the Commission may not require recovery of the aid, even if it declares the scheme to be incompatible with the common market. It is difficult to see how an instruction to recover the aid in the case of the Vizcaya scheme is warranted, when the scheme is essentially the same as the Belgian one.

V. **COMMENTS FROM THE SPANISH AUTHORITIES**

(24) In their written comments, which forwarded the information supplied by the Vizcaya Provincial Council, the Spanish authorities informed the Commission of the adoption of the Vizcaya legislation abolishing the coordination centre scheme. They also forwarded a copy of the comments from the Vizcaya Provincial Council, summarised above. In addition, Spain confirmed that contrary to the information supplied in their letter of 8 May 2001, one firm had been approved as a coordination centre under the scheme prior to the date of that letter, but had renounced that status on 27 November 2001.

VI. **ASSESSMENT OF THE AID**

(25) Having considered the opinion of the Spanish authorities and the Vizcaya Provincial Council, the Commission maintains its position, expressed in its letter of 11 July 2001 ([6]) to the Spanish authorities initiating the procedure under Article 88(2) of the EC Treaty, that the scheme under examination constitutes unlawful, operating aid which falls within the scope of Article 87(1) of the EC Treaty.

State aid

(26) Neither the Spanish authorities nor the Vizcaya Provincial Council have challenged the Commission's preliminary assessment, given in its letter of 11 July 2001 ([7]), that the coordination centres scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty. The Commissions showed that the scheme appeared to satisfy the four cumulative criteria which must be met in order for a measure to constitute State aid. This assessment may be summarised and refined as follows.

([5]) Case 120/73, Lorenz v. Germany [1973] ECR 1471.

([6]) See footnote 1.

([7]) See footnote 1.

(27) Under the coordination centres scheme, eligible undertakings may opt for an alternative method of calculating their tax liability. In the context of transfer pricing ([8]), tax authorities may apply such alternative methods to ensure that transactions between associated enterprises are at arm's length. The arm's length principle provides that the taxable profits from transactions between associated firms should be charged as if the transaction had been carried out between unrelated parties under normal market conditions. As regards transfer pricing, the international rules (the arm's length principle) were established by Article 9 of the OECD Model Tax Convention on Income and on Capital, as implemented in the OECD Transfer Pricing Guidelines of 1995. Since such analysis requires that individual facts and circumstances are taken into account, the OECD Guidelines do not recommend the use of fixed margins.

(28) As stated in point 9 of the notice ([9]), an advantage may be conferred by reducing the firm's tax burden, and in particular by reducing its taxable income. The Vizcaya coordination centres scheme allows firms to choose the cost plus method for calculating their taxable income. The method may result in a reduction of the tax paid, if it does not reflect the economic reality of the underlying transactions. Depending on the nature of the firm's business, the cost plus method together with a fixed mark-up may lead to the economic reality being underestimated and therefore to the payment of less tax than under the more traditional, comparable unrelated price (CUP) method. This risk is particularly great where the firm conducts high value-added transactions. It is therefore incumbent on the tax authorities to ensure that the cost plus method applied is appropriate to the individual enterprise, or, as the case may be, the particular sector, in order that the tax paid is comparable to that under the more traditional (CUP) method.

(29) The Vizcaya coordination centres scheme makes it possible to exclude financial costs from the calculation of the taxable income. This increases the probability that the tax paid by firms will be lower than that using the more traditional (CUP) method. The difference will be even greater if the main function of the coordination centre is to carry out financial transactions. Neither the Spanish authorities nor the Vizcaya Provincial Council have supplied any evidence that the cost plus method applicable under the scheme results in an equivalent level of taxation to the classical method. The Commission therefore concludes that the scheme confers an advantage on coordination centres and on the groups to which they belong.

(30) The lowering of the tax base leads to a reduction in Vizcaya's tax revenue. This is equivalent to the use of State resources.

(31) The scheme affects competition and trade between Member States, since the groups to which coordination centres belong must generate at least 25 % of their turnover in two foreign countries. Firms covered by the scheme are therefore likely to be active in sectors in which intra-Community trade is intense. By strengthening the financial position of such groups, the measure will distort or threaten to distort intra-Community trade.

(32) The scheme is selective. Only those enterprises which satisfy the particular criteria set out in Provincial Regulation No 3/1996 can benefit from the coordination centres scheme.

(33) Neither the Spanish authorities nor the Vizcaya Provincial Council have given any reasons why the tax measures in question are necessary for the functioning and effectiveness of the Spanish tax system and therefore do not constitute State aid (point 23 of the notice ([10])).

Compatibility

(34) Neither the Spanish authorities nor the Vizcaya Provincial Council have challenged the Commission's assessment in its letter of 11 July 2001 ([11]) that none of the exceptions provided for in Articles 87(2) and 87(3), under which State aid may be considered compatible with the common market, applies in the present case. The Commission has no reason, therefore, to change its assessment, which is summarised in recitals 35 to 39.

(35) Since the coordination centre scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty, its compatibility must be assessed in the light of the exceptions provided for in Articles 87(2) and 87(3).

(36) The exceptions provided for in Article 87(2), which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

([8]) Transfer prices are the prices at which a firm transfers goods or provides services to associated firms.
([9]) See footnote 3.
([10]) See footnote 3.
([11]) See footnote 1.

(37) Nor does the exception provided for in Article 87(3)(a), which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

(38) Similarly, the coordination centres scheme cannot be considered to be a project of common European interest or to remedy a serious disturbance in the economy of Spain, as provided for by Article 87(3)(b). Nor does it have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d).

(39) Finally, the coordination centres scheme must be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. The tax advantages granted by the coordination centres scheme are not related to investments, to job creation or to specific projects. They simply constitute a reduction of charges that should normally be borne by firms in the course of their business and must therefore be considered as operating aid, the benefits of which cease as soon as the aid is withdrawn. According to the established practice of the Commission, such aid cannot be considered to facilitate the development of certain activities or of certain economic areas.

Legitimate expectations

(40) Where illegally granted State aid is found to be incompatible with the common market, the normal requirement is that the aid should be recovered from the beneficiaries. Through recovery of the aid, the competitive position that existed before the aid was granted is restored as far as possible. However, Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([12]) (now Article 88) states that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case law of the Court of Justice and the Commission's own decisions have established that where, as a result of the Commission's actions, the beneficiary of a measure has a legitimate expectation that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.

(41) In Van den Bergh & Jurgens ([13]), the Court ruled that it:

'

has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

(42) In Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws ([14]), the Commission noted the similarities between the Spanish scheme in question and a French scheme which it had approved on the grounds that it did not constitute aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87(1) of the EC Treaty).

(43) In the present case, the Commission notes that the Vizcaya coordination centres scheme bears close similarities to the scheme introduced in Belgium by Royal Decree No 187 of 30 December 1982 on the tax treatment of coordination centres. Both schemes concern intra-group activities and both use cost plus methods to determine the tax base. In its decision of 2 May 1984, the Commission considered the scheme not to be an aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87(1) of the EC Treaty). Even if this decision was not published, the fact that the Commission had not raised any objections to the Belgian coordination centres scheme was publicised both in the XIVth Report on Competition Policy and in an answer to a parliamentary question ([15]).

(44) In this context, the Commission notes that its decision on the Belgian coordination centres scheme was taken before the entry into force of the Vizcaya coordination centres scheme. The Commission also notes that the sole beneficiary of the scheme was approved as a coordination centre before the Commission's decision of 11 July 2001 ([16]) opening the formal investigation procedure. Furthermore, the sole beneficiary renounced its rights under the scheme before the closure of the present formal investigation procedure. Therefore, the arguments of the Vizcaya Provincial Council that both it and the beneficiary of the scheme had a legitimate expectation which, if the scheme were found to be incompatible with the common market, would prevent the Commission from ordering the recovery of any aid granted, are sound. This legitimate expectation covers firms approved under the scheme before the opening of the formal investigation procedure in respect of any aid granted up to the closure of that procedure.

([12]) OJ L 83, 27.3.1999, p. 1.
([13]) Case C-265/85 *Van den Bergh en Jurgens BV* v. *Commission* [1987] ECR, p. 1155, paragraph 44.
([14]) OJ L 60, 1.3.2001, p. 57.
([15]) Written question No 1735/90, OJ C 63, 11.3.1991.
([16]) See footnote 1.

Equality of treatment

(45) The Vizcaya Provincial Council argues that the Vizcaya coordination centres scheme should have been subject to a proposal for appropriate measures under Article 88(1) EC, thereby subjecting it to the same treatment as the Belgian coordination centres scheme. However, this argument presumes a margin of discretion that the Commission does not have. In Piaggio ([17]), the Court ruled that the Commission's classification of the scheme at issue as an existing aid, when that scheme had not been notified in accordance with Article 88(3) EC, could not be accepted.

(46) In the present case, the Vizcaya legislation enacting the coordination centres scheme was not notified to the Commission prior to its entry into force. Therefore, the Commission cannot consider it to be an existing aid scheme.

VII. **CONCLUSIONS**

(47) The Commission concludes that the Vizcaya coordination centres scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty and that none of the derogations provided for in Article 87(2) or Article 87(3) apply. The Commission also finds that Spain has unlawfully implemented the scheme in question, in breach of Article 88(3) of the EC Treaty. However, the Commission notes that legislation to repeal the scheme was adopted on 30 April 2002 and entered into force on 9 May 2002 ([18]). The Commission also notes that the only firm approved under the scheme renounced its rights on 27 November 2001. Both the Spanish authorities and the sole beneficiary of the scheme were entitled to entertain legitimate expectations that the scheme did not constitute State aid. Therefore, the Commission does not need to require recovery of the aid.

HAS ADOPTED THIS DECISION:

Article 1

The illegal State aid scheme implemented by Spain under Articles 53 and 54 of Vizcaya's Provincial Regulation No 3 of 26 June 1996 on corporation tax and implemented by Provincial Decree No 81/1997 of 10 June 1997 is incompatible with the common market.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 22 August 2002.

For the Commission

Mario MONTI

Member of the Commission

([17]) Case C-295/97 *Piaggio* v. *Ifitalia & others*, [1999] ECR I-3735.

([18]) See Provincial Regulation No 4 of 30 April 2002 (*Boletín Oficial de Vizcaya* No 87, 9.5.2002).

COMMISSION DECISION

of 29 January 2003

confirming measures notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste

(notified under document number C(2003) 361)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2003/82/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 94/62/EC of the European Parliament and the Council of 20 December 1994 on packaging and packaging waste [1], and in particular Article 6(6) thereof,

Having consulted the Committee set up under Article 21 of Directive 94/62/EC,

Whereas:

I. PROCEDURE

1. Directive 94/62/EC

Directive 94/62/EC on packaging and packaging waste, based on Article 95 (ex Article 100a) of the Treaty, aims to harmonise national measures concerning the management of packaging and packaging waste in order to prevent any impact thereof on the environment or to reduce such impact, thus providing a high level of environmental protection, and to ensure the functioning of the internal market and to avoid obstacles to trade as well as distortions and restrictions of competition within the Community. To this end, Article 6(1) of the Directive lays down, *inter alia*, quantified targets to be achieved by Member States for recovery and recycling of packaging waste.

Article 6(1)(a) of the Directive establishes that, no later than 30 June 2001, between 50 % as a minimum and 65 % as a maximum by weight of the packaging waste will be recovered. Pursuant to Article 6(1)(b), within this general target, and within the same time limit, between 25 % as a minimum and 45 % as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled, with a minimum of 15 % by weight for each packaging material.

Article 6(6) of the Directive introduces a monitoring procedure to ensure coherence between the different strategies chosen by Member States, particularly with a view to ensure that targets set in one Member State do not hinder compliance by other Member States with the Directive or represent distortions of the internal market.

Under that provision, the Commission is to confirm such measures after appropriate verification.

2. The measure notified

2.1. *Background*

In Belgium, the Federal State is competent to transpose Directive 94/62/EC as regards product-related issues (such as, for instance, Article 9 and Annex II). The fixing of targets for recovery and recycling of the packaging materials contained in the packaging waste, as laid down in Article 6 of Directive 94/62/EC, comes into the exclusive competence of the Regions.

In order to ensure a coherent and consistent transposition and implementation of Directive 94/62/EC and in particular its Article 6, the three Belgian Regions concluded a Cooperation Agreement on the prevention and management of packaging waste on 30 May 1996 (hereinafter Cooperation Agreement) [2].

Article 3(2) of the Cooperation Agreement of 1996 contained the following recycling and recovery targets to be achieved by the concerned economic operators, in each of the three Regions, i.e. Flanders, Wallonia and Brussels, both as regards household packaging waste and industrial packaging waste:

	Recycling	Recovery	Minimum recycling rate by weight for each packaging waste
1998	Minimum: 45 %	Minimum: 70 %	15 %
1999	Minimum: 50 %	Minimum: 80 %	15 %

[1] OJ L 365, 31.12.1994, p. 10.

[2] It sets out the obligation for economic operators (packaging fillers and users, including importers in case the packaging was filled outside Belgium) to take-back and recycle/recover the packaging materials contained in the packaging waste put on the market (Article 6 of the Cooperation Agreement), either individually or by contracting a third party (Articles 7(1) of the Cooperation Agreement), and to achieve quantified targets for recycling and recovery (Article 3(2) of the Cooperation Agreement).

The Cooperation Agreement was notified by the Belgian authorities on 13 July 1996 pursuant to Article 6(6) and was confirmed by Commission decision 1999/652/EC of 15 September 1999 [1].

2.2. *Revision of the Cooperation Agreement*

On 1 August 2001, the Belgian authorities notified to the Commission a draft revision of the Cooperation Agreement, in the context of the procedure established by Directive 83/189/EC [2]. The aim of the notified measure is to increase the recycling and recovery targets established by Article 3 of Cooperation Agreement of 1996.

The revised Article 3 of the Cooperation Agreement would establish the following targets:

	Recycling	Recovery	Minimum recycling rate by weight for each packaging waste
2000	50 %	80 %	15 %
2001	60 %	80 %	20 %
2002	65 %	85 %	25 %
2003	70 %	90 %	30 %

Those revised targets are based on a cost-benefit analysis conducted by the Belgian authorities.

Article 3(2) states that the calculation method for the attainment of those recycling and recovery targets will be established by the Interregional Commission for Packaging (Interregionale Verpakkingscommissie) [3]. It stipulates furthermore that the overall recovery target equals the sum of the attained recycling target, organic recycling and energy recovery and that mechanical recycling can be counted for the attainment of the recycling target. As from 1 January 2003, the Interregional Commission of Packaging will formulate new proposals for the overall recycling and recovery targets as from 2003. Those future targets will depend on the evolution of recycling and recovery capacities and the modes of selective collection.

Finally it should be noted that the revised Cooperation Agreement will not enter into force retroactively. The increased targets will only apply as from the moment of publication of the revised Cooperation Agreement in the Belgian official journal.

[1] OJ L 257, 2.10.1999, p. 20.
[2] OJ L 109, 26.4.1983, p. 8. This Directive has been replaced by Directive 98/34/EC, OJ L 204, 21.7.1998, p. 37.
[3] For 2001, the calculation method will mirror the 1996 calculation method.

3. **Opinions**

Article 6(6) of the Directive states that the Commission shall take a decision, after a verification of the measures in cooperation with Member States. To this end, the Commission consulted the Member States on this notification in the context of the Committee established by Article 21 of Directive 94/62/EC (Article 21 Committee).

A first exchange of views took place during the Article 21 Committee meeting of 6 February 2002. Member States were invited to send written comments to the Commission. During the Article 21 Committee meeting of 6 February 2002, the delegation from Belgium explained that in their view there was no problem with Belgium setting higher national targets for packaging recycling. In their opinion export markets were able to absorb the additional quantities of waste packaging and therefore that there would be no capacity problems which would prevent the Commission from accepting the Belgian proposal. France questioned this assumption and indicated that they may be opposed to the proposed higher national targets in Belgium. Spain and Italy also stated their general concern on the internal market effects of higher national targets.

On 29 April 2002, France submitted written comments on the Belgian notification to the Commission. The French authorities mentioned a specific concern that the increased recycling rates of the revised Cooperation Agreement may lead to capacity problems in the French glass recycling sector. Since Belgium no longer disposes of glass recycling capacity [4], it will export its glass to recycling capacities in neighbourhood-countries, including to France. In France, the recycling capacities for glass are limited. Increased exports of glass to France could create capacity problems in France. Moreover, the Belgian exported glass is cheaper than the French glass. Therefore, the French authorities expressed their concern that the Belgian measure could create distortions of the internal market and hinder France in attaining their obligations under the Directive.

On 15 May 2002, the Commission asked Belgium to clarify certain elements of its notification. In response to this request, the Commission received additional information from the Belgian authorities on 20 June 2002.

During the Article 21 Committee of 25 July 2002, the Commission presented an overview of the information provided by the Belgian authorities and the French authorities' concerns. Some other Member States, notably Italy and Spain, indicated their doubts as to whether Belgium has appropriate recycling capacities for glass. Belgium clarified they lost their recycling capacity for glass, due to competition on the internal market.

[4] As indicated by the Belgian authorities in their notification, the situation for glass on the Belgian market has changed since the notification of the initial Cooperation Agreement in 1996. Indeed, the Verlipack group, which was the only Belgian group to use container glass from households with a recycling capacity of approximately 160 000 tonnes of glass per year, has disappeared from the market in 1999. The Belgian authorities argue, however, that no capacity problems in the glass sector will occur because of the existence of neighbouring recycling capacity located in other Member States.

II. **ASSESSMENT**

In this case, Belgium has asked for a derogation from Article 6(1)(a) and (b) of Directive 94/62/EC. Article 6(6) of the Directive allows Member States to go beyond targets set in Article 6(1)(a) and 6(1)(b) if the Member State provides to this effect appropriate capacities for recycling and recovery. The measures must be taken in the interest of a high level of environmental protection and on the condition that they avoid distortions of the internal market and do not hinder compliance by other Member States with the Directive. Nor may they constitute an arbitrary means of discrimination or a disguised restriction on trade between Member States.

Hereinafter, the Commission will assess whether the Belgian notified measure is consistent with those considerations.

(a) **Appropriate capacities for recovery and recycling**

This requirement is interpreted by the Commission as not imposing on Member States self-sufficiency with respect to recycling and recovery. Member States may also have recourse to capacities located in other Member States and third countries in order to fulfil their recycling and recovery targets. This, however, makes it difficult to carry out a precise quantification of available capacities, since recycling takes place in an open international market.

This criterion serves also the purpose of ensuring that measures taken in one Member State do not result in problems of compliance with the Directive for other Member States; therefore it should be seen in conjunction with the other criteria laid down in Article 6(6). In practice, compliance with this criterion is a signal for compliance with criteria (b) and (c). In particular, if targets are set exceeding those laid down in Article 6(1), it should be ensured that this is not to the detriment of collection and recycling schemes in other Member States.

Consultation of the other Member States revealed that some Member States have doubts as to whether Belgium disposes of the appropriate capacities for recovery and recycling for glass and France indicated concerns related to its own glass recycling capacities. The Belgian authorities stated that there are no capacity problems, because there are sufficient recycling capacities at the borderline areas (notably in Germany, the Netherlands and France). Moreover, in their view, a restrictive application of the criteria of Article 6(6) of Directive 94/62/EC would be contrary to the internal market, since it is because of the competition on this internal market that Belgium has lost its glass recycling capacity on its territory. Furthermore, the notified measure does not have a negative impact, because in practice, the proposed targets are already attained. In 1999, the agreed body for household waste in Belgium announced a recycling rate of 73,0 % and the agreed body for industrial waste announced a recycling rate of 77,9 %. As regards the price of Belgian glass, the Belgian authorities clarified that public tenders determine the price of Belgian glass. On the basis of those tenders, it seems that as from 2002, exports to France will decrease and exports to the Netherlands and Germany will increase.

It should be noted that since the last notification of 1996, the situation on the Belgian market for glass has changed because the most important Belgian recycling centre has disappeared because of competition on the internal market. However, the situation for metal packaging, non ferrous metals, mechanical recycling of synthetic materials, and paper and board on the Belgian market has not changed since the 1996 notification. For those materials, Belgium has sufficient recycling capacities on its territory.

On the basis of the foregoing, the Commission concludes that since there is no obligation to recycle packaging within a country, the measure needs to be seen in the context of an overall assessment of the European and/or global market for recycled material. Therefore, unless there is a general market saturation which is due to technical and market limitations and cannot be overcome by additional financing, it should be assumed that appropriate capacities are available, independently of whether this is within or outside the concerned Member State. In general, this seems the case for the targets envisaged by Belgium. Nevertheless, there are some signs for saturation of the glass market. From the available information, it is, however, impossible to generally conclude that additional material cannot find appropriate capacities.

(b) **Potential distortions of the internal market**

Distortions of the internal market occur when high recycling rates are accompanied by a high degree of financing through e.g. licence fees, resulting in lower prices for secondary materials. If in another country the level of ambition is lower and less financing is provided, the domestically collected secondary materials will be more expensive than imported material. If, in addition, recycling capacities are limited, it may be difficult for those countries with low ambitions to find a market for their own collected material.

Consultation of the other Member States revealed that some Member States fear distortions of the internal market. The Belgian authorities state that a risk of internal market distortions does not exist in the light of the small size of the Belgian market and of the progressive application of the notified measure. In practice, the notified measure would not have any impact because the attained recycling targets for glass in Belgium are already much higher than the ones proposed by the notified measure (Belgium reported a recycling rate of 87,5 % of glass packaging in 2001). Glass recycling is awarded on the basis of public tenders, which the determine the price for the Belgian glass. Finally, the maximum collection capacity on the Belgian market seems to be attained, and therefore it is to be expected that in the future, the amount of collected glass will not substantially increase.

The Commission finds that the fact that the small size of the Belgian market cannot be used as a reason for being treated differently than larger countries. Similarly, existing high recycling rates and unlikely further increases do not exclude that there are already distortions of the internal market. However, as glass recycling is awarded on the basis of public tenders, it can be assumed that the price is equal to the European and/or global market price for cullet. Therefore, the level of provided financing cannot be expected to be substantially different from other countries. Therefore, it is difficult to determine with a sufficient degree of certainty that the Belgian targets have or will have distorting effects on the internal market.

On the basis of the foregoing, the Commission concludes that it does not dispose of sufficient elements showing that the Belgian recycling and recovery targets would lead to potential distortions of the internal market.

(c) **Non-hindrance of compliance by other Member States with the Directive**

The purpose of this criterion is to assess whether a national measure hinders other Member States to comply with the targets of the Directive. As outlined in point b, this can be the case if a high degree of financing is provided in one country whereas in other countries the level of financing is lower and if recycling capacities are limited.

The assessment of the notified measures in light of this criterion should primarily be made taking into account the opinion of the Member States whose compliance with the targets of the Directive could be endangered by measures set up in other Member States. France has indicated that the notified measure could endanger this Member States' obligations under the Directive with respect to glass.

In line with the reasoning in point b, the Commission could not find sufficiently clear evidence that the measure notified by Belgium would be capable of hindering compliance of this Member State's obligations under the Directive.

(d) **No arbitrary means of discrimination**

The Belgian measure apply without distinction to all packaging waste, whether arising from domestic or imported products. Consultations of the other Member States have not indicated any possible arbitrary means of discrimination.

(e) **No disguised restriction on trade between Member States**

This concept refers to possible restrictions on imports of products from other Member States and to indirect protection of domestic production. The packaging wastes to which the Belgian measure refers are goods which fall under the scope of Articles 28 to 30 of the EC Treaty and consequently measures taken in the field of waste management are also capable, in certain circumstances, of restricting trade or protecting domestic production. In this particular case, the content of the Belgian measure and its application do not seem to allow for the conclusion that restriction on trade are caused by the Belgian notified measure.

III. **CONCLUSION**

The Commission, in the light of the information provided by Belgium and of the outcome of the consultation of the Member States described in the above considerations, concludes that the measure notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC should be confirmed since it has been verified that:

— appropriate capacities for recovery and recycling of the material collected under the Belgian targets are available,

— the measure does not lead to distortions of the internal market,

— the measure does not hinder compliance by other Member States with the Directive,

— the measure does not constitute an arbitrary means of discrimination,

— the measure does not constitute a disguised restriction on trade between Member States.

It should be noted, however, that signs of saturation of the market for collected cullet have been reported. Belgium is encouraged to observe the glass market with particular care and to make sure that the levels of collection in Belgium do not exceed the capacities of the glass market,

HAS DECIDED AS FOLLOWS:

Article 1

The measure notified by Belgium which exceed the maximum recovery and recycling target laid down respectively in Article 6(1)(a) and (b) of Directive 94/62/EC are hereby confirmed.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 29 January 2003.

For the Commission

Margot WALLSTRÖM

Member of the Commission

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION
No 149/02/COL
of 26 July 2002
regarding environmental tax measures
(Norway)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area [1], in particular to Articles 61 to 63 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice [2], in particular to Article 24 and Article 1 of Protocol 3 thereof,

Having regard to the Procedural and Substantive Rules in the Field of State Aid [3], in particular Chapter 15 thereof [4],

Whereas:

I. FACTS

Procedure

By decision of 23 May 2001, the EFTA Surveillance Authority adopted new Environmental Guidelines (see Decision No 152/01/COL). Pursuant to point 69 of these guidelines, the Authority proposed, as appropriate measures under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, that EFTA States should bring their existing environmental aid schemes into line with these guidelines before 1 January 2002.

By letter from the Authority dated 23 May 2001 (Doc. No 01-3596-D), the Norwegian Government was informed about the adoption of these new guidelines and asked to signify its agreement to the appropriate measures. By letter from the Ministry of Trade and Industry dated 6 July 2001, received and registered by the Authority on 10 July 2001 (Doc. No 01-5475-A), the Norwegian Government signified its agreement to the appropriate measures.

The implementation of the new Environmental Guidelines was discussed between representatives from the Authority and the Norwegian authorities on various occasions (i.e. at bilateral meetings in April, June and September 2001).

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[1] Hereinafter referred to as the 'EEA Agreement'.
[2] Hereinafter referred to as the 'Surveillance and Court Agreement'.
[3] 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 EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994; EEA Supplements No 32, 3.9.1994, last amended by the Authority's Decision No 370/01/COL of 28 November 2001 (OJ C 34, 7.2.2002, p. 15); hereinafter referred to as the 'Authority's State Aid Guidelines'.
[4] Chapter 15 of the Authority's State Aid Guidelines on Aid for Environmental Protection, as adopted by the Authority's Decision No 152/01/COL of 23 May 2001 (OJ L 237, 6.9.2001, p. 16), hereinafter referred to as the 'Environmental Guidelines'.

By letter from the Ministry of Finance dated 31 January 2002, received and registered by the Authority on 5 February 2002 (Doc. No 02-1004-A), the Norwegian Government informed the Authority of the measures in place and submitted its comments as regards compliance with the new Environmental Guidelines.

By letter dated 28 February 2002, the Authority acknowledged receipt of this letter (Doc. No: 02-1539-D). The Authority emphasised that, having assessed the information submitted to it, the various schemes in place could not be regarded as complying with the requirements laid down in the new Environmental Guidelines. The Authority observed in this respect that the Norwegian Government had acknowledged this fact and informed the Authority of plans to remedy the situation. However, the Authority took the view that the plans and intentions referred to by the Norwegian Government were not sufficient, since they did not contain any concrete proposals or commitments which would have ensured full compliance with the new Environmental Guidelines as from 1 January 2002.

Having identified its main doubts concerning the compatibility of certain derogations from environmental taxes with the Environmental Guidelines, the Authority requested the Norwegian Government to present concrete proposals of adequate implementing measures and commitments ensuring that the requirements set out in the new Environmental Guidelines were met from the prescribed date. In addition, the Norwegian Government was requested to submit additional information, including a justification of the aid measures in question under the State aid rules. These proposals, commitments and additional information were to reach the Authority within two months from receipt of the letter dated 28 February 2002.

The Authority stressed that, in the absence of any concrete proposals, commitments and additional information as requested by the Authority within that deadline, the Authority would proceed to open the formal investigation procedure.

By letter from the Ministry of Finance dated 15 May 2002, received and registered by the Authority on 24 May 2002 (Doc. No 02-3995-A), the Norwegian Government submitted additional information. The Norwegian Government informed the Authority, *inter alia*, of the mandate of a working group which was established in order to assess the consequences of the new Environmental Guidelines for the Norwegian electricity tax system. This working group was asked to deliver a preliminary report by 1 July 2002. Against this background, the Norwegian Government asked the Authority to allow for additional time in order to comply with the requirements laid down in the new Environmental Guidelines.

By e-mail dated 5 July 2002, the Norwegian authorities sent the Authority a copy (in Norwegian) of a preliminary report of the working group.

The Authority notes that it has not been formally informed by the Norwegian Government about that report, nor has the Norwegian Government expressed its views on the conclusions presented in the report or explained its further approach regarding the findings of the report. It should also be noted that this report reached the Authority after the deadline for submitting information and proposals had expired. In light of these circumstances, the Authority has not taken the content of this preliminary report into consideration when assessing the various tax measures.

Description of aid measures

The following description is based partly on information provided by the Norwegian Government and partly on information at the Authority's disposal.

The Authority regrets that the Norwegian Government has not submitted copies of the relevant legal provisions governing the various tax measures at issue. Furthermore, the Authority observes that, even though the Authority had specifically asked the Norwegian Government to submit supportive documents allowing the Authority to verify the structure and logic of the Norwegian environmental tax system, including all relevant background documents on the objectives pursued by the environmental taxes and the various exemptions, no such information was provided by the Norwegian Government.

Tax on electricity consumption

The tax on electricity consumption was first introduced in 1971. According to the Norwegian Government (see description given in letter of 31 January 2001), the objective of the tax was to ensure a more efficient use of electric power and thus lead to positive environmental effects that would not otherwise occur.

The tax covers all domestic use of electricity, subject to certain exemptions and, until 1993, reduced rates for different industries. According to the Norwegian Government, these exemptions and reduced rates were introduced to offset losses of competitiveness. In this respect, the Norwegian Government submitted data on electricity consumption by the industries covered by the exemption and on increased costs for these industries should the exemption from the electricity tax be abolished.

Since 1990, all users in Finnmark and seven municipalities in North Troms (Karlsøy, Kvænangen, Kåfjord, Lyngen, Nordreisa, Skjervøy and Storfjord) have been exempted from the tax. This exemption applies to both household consumption and all commercial activities.

Until 1992, the tax covered all industries, but certain sectors benefited from reduced rates (this was the case for all or part of the power-intensive industry [1]) as well as the pulp and paper industry). In 1993, these industries were completely exempted. As from 1 January 1994, the exemption was extended to the whole manufacturing industry, mining and greenhouse industry. According to the Norwegian Government, the limitation of the exemption to power-intensive industries was abandoned, since the definition was unclear and could not be maintained. From 1997, labour market enterprises that exercise industry production are also exempted from the tax. Other sectors of industry are subject to the tax.

According to the Norwegian Government, the tax base was extended, as from 1 January 2001, to cover the use of electricity in administration buildings in the manufacturing industry and mining enterprises. According to the Norwegian Government, this amendment resulted in a situation where only electricity used in production processes was exempted from the tax. In order to be defined as an administration building a minimum of 80 % of the building's space has to be used for administration purposes. This meant that if production activities occupied above 20 % of the space, the electricity delivered to that building was not to be taxed. This was, according to the Norwegian Government, seen as the only practical definition.

According to the Norwegian Government, the existing exemptions from the tax (i.e. sectoral and regional derogations) cover about 45 % of the total electricity consumption and about 70 % of electricity consumption in all industries in Norway.

The following table gives an overview of the applicable tax rates and exemptions since 1993, based on figures submitted by the Norwegian Government.

Table 1: Electricity tax in øre per kWh (expressed in 2002-prices)

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Tax rate	5,60	6,12	6,09	6,14	6,34	6,34	6,41	8,95	11,47	9,30
Reduced rate	2,80 [1]	- [2]	—		—	—	—	—	—	—
Exemptions	Power-intensive industry, pulp and paper industry and green-houses	Manufac-turing industry and mining exempted	As in 1994	As in 1994	Exemption was extended so as to include labour market companies under-taking industry produc-tion	As in 1997	As in 1997 [3]	As in 1999	As in 1999 but excluding electric power used in adminis-trative buildings from exemption	

[1] The Norwegian Government pointed out that the manufacturing industry and mining paid only 2,3 øre per kWh.
[2] The manufacturing industry and mining were, as from 1 January 1994 fully exempted from the tax.
[3] However, according to the Norwegian Government, the exemption for users with electric boilers was abolished.

[1] The main sectors of the power-intensive industry are the aluminium and ferro alloy industries.

In addition, the Norwegian Government submitted information on the revenues and calculated tax expenditures under the tax on electricity consumption. Tax expenditure is calculated as revenue forgone by the State due to the tax exemptions of tax reductions. For the purpose of these calculations, possible behavioural changes caused by an abolishment of the tax exemption are not taken into account.

Table 2: Tax on electricity consumption: Revenues and tax expenditures expressed in million NOK

	1999	2000	2001	2002
Revenues	3 267	4 205	6 530	6 206
Tax expenditure due to sectoral exemptions	2 735	3 940	5 595	4 605
Tax expenditure due to regional exemption	100	140	190	160

The Authority notes that the relevant legal provisions governing the electricity tax would seem to stipulate as a general rule that all domestic consumption of electricity is liable to taxation ([1]). On the other hand, the relevant provisions formulate exemptions for certain industries or regions ([2]). The sectoral derogations are defined with reference to their statistical classification.

In some cases, the scope of the exemption has been further clarified/limited, so that electricity used on administrative buildings would not be covered by the exemption ([3]).

CO_2 tax

The CO_2 tax on mineral oil and petrol was introduced in 1991 and on coal and coke in 1992. When the tax was first introduced, it was an integrated element of the existing excise tax-systems on mineral oil, petrol and coal and coke. As part of the green tax reform in 1999, the CO_2 tax was proposed as a separate tax in the legislation. The rate of the CO_2 tax on mineral oil was set at NOK 0,490 per litre ([4]). The rate of the CO_2 tax on coal and coke was increased, in the period between 1994 and 2002, from (2002) NOK 0,410 to (2002) NOK 0,490 per kg.

The tax levied on coal and coke covers products used for energy purposes. According to the Norwegian Government, the use of coal and coke as raw materials or as reducing agents in industrial processes is exempted from the CO_2 tax. This exemption was adopted in 1992 when the CO_2 tax on coal and coke was introduced. According to the Norwegian Government, coal and coke are used as raw materials or reducing agents in the production of carbides, ferro alloys and primary aluminium and magnesium. These industries were also energy-intensive and would not be viable without the exemption. In its letter dated 31 January 2002, the Norwegian Government stated that the reason for the exemption was that available techniques were based on the use of carbon material and that the producers in question were exposed to international competition.

Furthermore, the CO_2-tax is not levied on coal and coke used for energy purposes in production of cement and leca. This exemption was established in 1992, as the tax came into force. The reason for this exemption is, according to the Norwegian Government, that possible large-scale substitutes to coal and coke would be unprofitable and that the industry concerned would be exposed to international competition.

The paper and pulp industry has paid a reduced rate of NOK 0,245 per litre since January 1993.

([1]) See the Norwegian Parliament's decision on the electricity tax in the context of the State Budget for 2002, Vedtak om forbruksavgift på elektrisk kraft, 28 November 2001, paragraph 1 as well as Chapter 3 of the Regulation on Excise Duties, paragraph 3.12.1.
([2]) See the Norwegian Parliament's decision on the electricity tax in the context of the State Budget for 2002, Vedtak om forbruksavgift på elektrisk kraft, 28 November 2001, paragraph 1 as well as Chapter 3 of the Regulation on Excise Duties, paragraph 3.12.4.
([3]) Chapter 3 of the Regulation on Excise Duties, paragraph 3.12.5.
([4]) According to information submitted by the Norwegian Government, the rate expressed in 2002 NOK has not changed since 1994.

The Norwegian Government has submitted information regarding revenues and tax expenditures under the CO_2 tax ([1]).

Table 3: CO_2 tax revenues and tax expenditures in million NOK ([1])

	1999	2000	2001	2002
Revenues	6 904	6 567	6 600	7 018
Tax expenditure	2 125	2 175	2 230	2 270

([1]) The Norwegian Government explained that the figures were calculated using the CO_2 tax on mineral oil at a rate of NOK 0,49 per litre as a benchmark.

The Authority notes that based on the relevant legal provisions governing the CO_2 tax, certain uses of the taxable products are exempted from the tax. Pursuant to paragraph 3.6.3 of Chapter 3 of the Regulation on Excise duties, products used as raw material are eligible for refund of the tax to the extent that CO_2 emissions into the air are less than the carbon content of the respective product would indicate. According to paragraph 3.6.4 of Chapter 3 of the Regulation on Excise Duties, coal and coke used as reducing agents are exempted from the tax. The exemption covers only the amount of the products necessary for the reduction process. Furthermore, coal and coke used for the manufacture of clinker in combination with the production of cement and leca are exempted from the tax.

In addition, the Customs and Excise Duties Department issued explanatory notes to the exemptions referred to above which can further illustrate the background for the exemptions at issue ([2]).

As regards the use of coal and coke as raw materials for industrial processes, the notes say that when coal and coke are a part of the finished product, either permanent or temporary, in a way that implies no emissions of CO_2, or that the emissions are lower than if it had been a normal combustion, the use of coal and coke is exempted from tax. This is the case if coal and coke are used, *inter alia*, as raw materials for production of graphite electrodes and electrode mass and e.g. by production of calcium carbide.

As regards the use of coal and coke as reducing agents in industrial processes, the notes state that in some cases, coal and coke are a necessary part of the chemical process, but will not be included as a part of the finished product. In such cases the level of CO_2 emissions is comparable to emissions from use of coal and coke for energy purposes. The reason for the exemption is said to be that there are no alternative materials for such processes other than coal and coke.

The Norwegian Government submitted figures about the CO_2 emissions caused by the various industries as well as estimates regarding the costs due to the CO_2 tax.

SO_2 tax

In 1970, a tax on mineral oil was introduced. The Norwegian Government explained that, pursuant to Regulation of 17 September 1976 No 2 ([3]), all or part of that tax could be reimbursed on application, if the emission from the use of the product was less than the content of sulphur would indicate. All users of mineral oil were eligible to apply for reimbursement. This showed, according to the Norwegian Government, that the SO_2 tax targets in fact the sulphur dioxide actually emitted.

([1]) As regards the concept of 'tax expenditure', see explanation above.
([2]) Toll- og avgiftsdirektoratets kommentarer Fritak for industriell bruk, kull og koks (jf. Stortingets vedtak om co2-avgift § 3 nr.1 bokstav d og § 3 nr.4 bokstav a, jf. forskriften §§ 3-6-3 og 3-6-4).
([3]) The Authority notes that this Regulation was not submitted to it.

As from 1993, the tax was based on the content of sulphur in the oil and increased according to the percentage of the content of sulphur. The tax base covered petroleum, gas oil, solar oil, auto diesel, diesel oil and fuel oil or any oil that might be used as fuel oil. In 1999, the sulphur-based tax levied on mineral oil was changed into a SO_2 tax.

At the same time, the tax base was extended so as to include coal and coke. However, SO_2 emissions due to the use of coal and coke were taxed at a reduced rate. The Regulation on sulphur tax on mineral products of 18 December 1998 No 961 [1] provided for the application of a differentiated tax depending on the different categories of coal and coke, based on the presumed sulphur content. Following the extension of the scope of the SO_2 tax, the reimbursement scheme under Regulation of 17 September 1976 No 2 (see above) was extended so as to cover also the new products subject to the tax.

The scope of the tax was further extended in 1999, so as to include also SO_2 emissions from oil refinery plants. In order to avoid possible double taxation, the Regulation on sulphur tax on mineral products of 18 December 1998 No 961 paragraph 1, No 3 was implemented. This provision stipulated that if products already taxed caused the emission covered by the tax, the former tax should be deducted from the tax payable on the emission. Hence, as far as the oil refineries used mineral oil in the refinery process the amendment in 1999 was in reality merely a technical one. From being taxed on emission indirectly through the reimbursement scheme, the tax was formed directly as an emission tax. Oil refineries were thus singled out as a candidate where it was considered as more efficient to apply the SO_2 tax directly on the emission from the refinery. In the Norwegian Government's view, only as far as the emissions were caused by sources not previously taxed, the emission tax on oil refineries could be said to represent a 'new' tax. Because oil refineries use raw oil to produce mineral oil products, there is emission from this process as such. Raw oil is, however, not taxed as a product and thus not part of the reimbursement scheme.

According to the figures presented by the Norwegian Government, the basic SO_2 tax rate on mineral oil decreased from (2002) NOK 0,084 per litre in 1994 to (2002) NOK 0,070 per litre in 2002. The rate of the SO_2 tax in coal and coke and oil refineries decreased from (2002) NOK 3,24 per kg SO_2 in 1999 to (2002) NOK 3,14 per kg in 2002.

As from 1 January 2002, the SO_2 tax on use of coal and coke and on oil refineries was abolished. The Norwegian Government explained that the industry, which was previously covered by the SO_2 tax, would instead be regulated through emissions permits in accordance with the Pollution Control Act. According to the Norwegian Government, the abolishment of the tax is to be seen against the background of the Norwegian States commitments under the 1999 Gothenburg Protocol, which sets a ceiling on Norwegian SO_2 emissions of 22 000 tonnes in 2010. The Norwegian Government explained that in order to achieve that emission limit, Norwegian SO_2 emissions would have to decrease by 7 000 tonnes. Calculations made by the Norwegian State Pollution Control Authority showed that this reduction was best made by the process industry. To this end, a letter of intent was signed, on 19 September 2001, between the Ministry of Environment and the Norwegian Federation of Norwegian Process Industries (PIL), on behalf of undertakings in the following sectors: oil refineries, chemical/ceramic materials, cement, ferro alloys and aluminium.

The Norwegian Government stated that in the environmental field there are different kinds of instruments or measures that should be considered in order to choose the most efficient one to reach the target set, the tax instrument being one of them. In St.prp. No 54 (1997-1998), several measures were considered in order to reduce the overall emission of SO_2, and it was chosen to implement a tax on the use of coal and coke with a reduced rate. However, a study published by the Norwegian Pollution Control Authority showed that only minor emission reduction could be achieved by this reduced rate. Hence, the tax was abolished and other measures, such as the Agreement of Intent entered into with PIL, were introduced.

[1] The Authority notes that this Regulation was not submitted to it.

According to the Agreement of Intent, the Federation of Norwegian Process Industries declares on behalf of the companies listed in an Appendix to the Agreement ([1]), that they would develop technology and build cleansing plants that will reduce Norway's emission of SO_2 by a minimum of 5 000 tonnes. Furthermore, PIL will make concrete proposals on how such an emission reduction may be carried out and at the same time make proposals on how a total reduction of 7 000 tonnes may be achieved.

The Agreement further stipulates that emissions from individual operations will be regulated by the Norwegian Pollution Control Authority (SFT) through licences in accordance with the Pollution Act associated with implementation of the EC Directive on integrated pollution control (the IPPC Directive) for existing industry which is to be operated in accordance with the Directive's requirements by 30 October 2007. To the extent permitted by the Pollution Act, the environmental protection authorities aim to design the emission licences in such a way that the industry is given the opportunity to meet the reduction requirements by cooperating in taking joint emission reducing measures where the industry finds this most efficacious. The emission licences are also to provide rules on the more detailed terms for joint implementation, including that the requirements in the IPPC Directive on use of BAT ([2]) in the individual plants are complied with. Furthermore, the emission licences are to be formulated in accordance with the requirements for alternative methods for relief from duty in the EFTA Surveillance Authority's guidelines for environmental support.

According to the Agreement of Intent, PIL is to put forward proposals for methodology to calculate/measure the emission of SO_2 from individual companies by 1 June 2002.

The Norwegian Government declared that it had the intention for regulation, in accordance with the Pollution Act, to be the main tool to reduce the SO_2 emissions from industrial processes until the deadline for emission reduction measures has been reached, at the latest by 2010. The legally binding obligations will thus be contained in the companies' licences. Accordingly, the Government undertook to put forward a proposal to the Norwegian Parliament that the duty on emission of SO_2 from use of coal and coke and from the refineries be removed from 1 January 2002.

It is finally stated that the Agreement with PIL is to be regarded as an agreement of intent that does not bind the parties legally. The Norwegian authorities also made a proviso that this agreement was in line with the EFTA Surveillance Authority's guidelines for environmental support.

With a view to implementing the agreement of intent, PIL has established a so-called process industries' environment fund'. The fund is organised as an independent trust. Each individual participating company has apparently signed an implementation agreement with the fund. The most important element in the implementation agreement is that the companies undertake to pay a sum to the fund that corresponds to the current SO_2 tax. The fund's resources will be used to finance cleansing plants prioritised according to the costs until the agreement of intent target is reached.

Based on the figures provided by the Norwegian Government, the following table gives an overview of revenues and tax expenditures ([3]) under the SO_2 tax.

Table 4: SO_2 tax revenues and expenditure in million NOK

	1999	2000	2001	2002
Revenues	344	117	140	98
Tax expenditure	540	525	540	600

([1]) The sectors enumerated in the Appendix are: oil refineries, chemical/ceramic materials, cement, ferro alloys and aluminium.
([2]) 'Best available techniques' (BAT).
([3]) For an explanation of the concept of tax expenditures, see above.

The Norwegian Government also provided information on the SO_2 emissions caused by the use of coal and coke and oil refineries as well as estimates regarding costs due to the SO_2 tax.

II. APPRECIATION

Scope of the present decision

The Authority points out that the present decision is limited to assessing whether the Norwegian Government complied with its obligations stemming from the appropriate measures proposed by the Authority and accepted by the Norwegian Government. Consequently, the current investigation only concerns the examination of compatibility under Article 61(3)(c) of the EEA Agreement in combination with the new Environmental Guidelines of aid schemes covering the period as from 1 January 2002.

The present investigation covers only aid measures in the form of exemptions from the electricity tax, derogations from the CO_2 tax as well as through the partial abolishment of the SO_2 tax. With respect to other measures which were communicated by the Norwegian Government in its letter dated 31 January 2002, the Authority reserves the right to assess these measures at a later stage.

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

The Norwegian Government claimed in its letter dated 15 May 2002 that, contrary to the views expressed in the letter dated 31 January 2002, certain of the measures in question could be regarded as falling outside the scope of Article 61(1) of the EEA Agreement. The Authority was invited to review these measures against the background of the Norwegian Government's interpretation of the concept of State aid with respect to environmental taxes.

The Norwegian Government claimed that it would result from the EC Commission's practice ([1]) and case law from the European Court of Justice ([2]) that it is within the EEA State's discretion to decide which products to be taxed and what particular use of certain products should be taxed. The Norwegian Government takes the view that measures which are restricted to a particular input factor or to a particular use of certain products, or a particular conduct, are general in nature. Such measures would not favour certain undertakings or the production of certain goods. As regards a possible justification of the measures, in light of the objectives pursued by the measures in question, the Norwegian Government makes reference to case law and the Commission's proposal for a Council Directive restructuring the Community framework for the taxation of energy products which illustrated circumstances in which favourable tax treatment was regarded as being justified by the nature and general scheme of the tax system at issue ([3]).

([1]) In the respect, the Norwegian Government referred, in particular, to the Commission's Decision of 3 April 2002 regarding the dual-use exemption from the climate change levy in the United Kingdom (State aid No C 18/2001 and C 19/2001) as well as the Commission's Decision regarding the electricity reform in Denmark (State aid N 416/99).

([2]) In this respect, the Norwegian Government referred to the following cases: Judgment of the European Court of Justice of 2 July 1974, Case 173/73, Italy v. Commission [1974] ECR 709, Judgment of the European Court of Justice of 2 February 1988, Joined cases 67, 68 and 70/85, van der Kooy v. Commission [1988] ECR 219, Judgment of the European Court of Justice of 17 June 1999, Case C-75/97, Belgium v. Commission (Maribel bis/ter) [1999] ECR I-3671 and Judgment of the European Court of Justice of 8 November 2001, Case C-143/99, Adria Wien Pipeline.

([3]) In addition to the case law referred to above, the Norwegian Government mentioned the judgment of the European Court of Justice of 22 November 2001, Case C-53/00, Ferring.

By virtue of Article 61(1) of the EEA 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 the Contracting Parties, be incompatible with the functioning of this Agreement.'

State aid within the meaning of Article 61(1) of the EEA Agreement covers '…measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effects …' ([1]).

Consequently, a system under which the public authorities grant to certain undertakings a tax exemption that relieves them of some of their costs and confers on them financial advantages which improve their competitive position constitutes State aid within the meaning of Article 61(1) of the EEA Agreement if the aid is capable of affecting trade between the Contracting Parties and distorting competition.

The introduction of environmental taxes is not as such caught by Article 61(1) of the EEA Agreement, insofar as they are general measures which do not favour particular firms or sectors of industry ([2]). Exceptions to a general tax do, however, fall under that provision, if they are targeted at certain firms or sectors of industry, and without these exemptions being justified by the nature or general scheme of the tax system in question ([3]).

As a first step, and when assessing whether or not a measure is targeted at certain firms or sectors of industries, both the legal provisions governing the tax measure in question and its effects have to be taken into account ([4]). Therefore, a measure may be selective if the legal provisions explicitly limit the tax benefits to certain sectors of the industry. In the absence of such explicit provisions, the measure may still be selective if the application of certain criteria laid down in the tax provisions or the definition of the scope of the tax measures in question results in only certain, clearly identifiable, sectors of industry actually benefiting from favourable tax treatment.

The assessment of whether or not certain measures constitute exemptions or derogations from a general rule/common system takes, as a starting point, the structure of a given tax measure: based on the legal provisions governing the tax measures in question, it needs to be determined whether there are general rules from which exceptions are granted ([5]). However, it should be stressed that the denomination of the measures in question is not decisive ([6]). For the qualification as a derogation it is not determining whether a specific measure is designed as an exemption or as a limitation of the scope of the measure. What needs to be assessed is whether the measure at issue constitutes a derogation, by virtue of its actual nature, from the general system in which it is set ([7]). This assessment needs to be based on the objectives pursued by the measures at issue.

([1]) Judgment of The European Court of Justice of 17 June 1999, Case C-75/97, Belgium v. Commission, (Maribel bis/ter) [1999] ECR I-3671, paragraph 23.

([2]) See point 17B.3.1.(1) of Chapter 17 B of the Authority's State Aid Guidelines on the application of State aid rules to measures relating to direct business taxation.

([3]) See point 17B.3.1.(4) of Chapter 17B of the Authority's State Aid Guidelines; see also Judgment of the European Court of Justice of 2 July 1974, Case 173/73, Italy v. Commission [1974] ECR 709, paragraph 15.

([4]) In this respect, it should be emphasised that Article 61(1) of the EEA Agreement '…does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects'; 'Maribel bis/ter', paragraph 25; see also Judgment of the European Court of Justice of 29 February 1996,Case C-56/93, Belgium v. Commission [1996] ECR I-723, paragraph 79.

([5]) See point 17B.3.1.(4) of Chapter 17B of the Authority's State Aid Guidelines.

([6]) See Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 17 September 1998, Case C-6/97, Italian Republic v. Commission [1999] ECR I-2981, paragraph 27 footnote 17: 'What matters is not the formal name given to the measure (exemption, reduction, bonus, deduction,relief etc.) but its nature as a fiscal provision creating an exceptional situation in favour of one or more taxable persons.'

([7]) See Opinion of Advocate General Darmon delivered on 17 March 1992, Joined Cases C-72 and 73/91 [1993] ECR I-887, paragraph 50.

The Authority recalls that the European Court of Justice held in the Adria Wien case that, when assessing whether or not State aid rules are applicable, 'the only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question' ([1]).

As a second step, it has to be ascertained whether there is a 'justification for this exemption on the basis of the nature or general scheme of this system' ([2]). When assessing a possible justification with respect to environmental tax measures, special attention must be paid to the environmental policy considerations underlying the national legislation at issue and it needs to be examined whether, having these considerations in mind, a different treatment of economic operators is justified or whether undertakings/sectors benefiting from the tax advantages are equally contributing to the negative environmental effects the tax in question was designed to penalise ([3]).

Finally, the Authority would like to point out that it is, in principle, for the EFTA State concerned to design its environmental tax systems as it sees fit. This includes the EFTA State's freedom to decide which products and activities should be brought within the scope of a specific environmental tax system. However, in exercising its freedom to determine the national environmental tax system, the EFTA State concerned has to ensure that, in order not to be in conflict with the EEA State aid rules, measures which are benefiting certain sectors of industry are in line with the environmental objectives underlying the tax measures in question. It is for the Government concerned to present information allowing the Authority to verify that the favourable tax measures adopted can be regarded as an implementation of the objectives inherent to the tax system in question.

It is against this background that the Authority assessed the various tax measures.

Electricity tax

According to the Norwegian Government, as from 1 January 2001, the preferential tax measure in question could not be regarded as an exemption from the electricity tax system directed to a particular sector of the economy (manufacturing and mining sector), as opposed to e.g. the service sector. The tax would have to be regarded as a tax that is limited in scope covering all use of electricity other than electricity used for production purposes.

The Norwegian Government took the view that the distinction depending on the specific use of electricity as opposed to a distinction according to specific sectors of industry could not be regarded as constituting aid.

Based on the relevant rules, as laid down in the Regulation on Excise Duties (Chapter 3) as described above, the Authority takes the view that the system governing the electricity tax is currently designed in such a way that the general rule is that all consumption of electricity is liable to taxation. The Norwegian Government's argument that the general rule underlying the current electricity tax system would be that only electricity used for purposes other than production processes would be liable to taxation does not seem to find support in the relevant rules referred to above. These rules clearly establish that certain industries, defined by reference to their classification by the Central Bureau of Statistics of Norway, shall be exempt from the tax. This definition of the scope of the exemption results in certain sectors of industry not benefiting from the exemption although it may not be excluded that also within these sectors electricity is used for production processes.

It results clearly from the relevant case law that exemptions defined by reference to specific sectors are to be regarded as selective measures which cannot, in principle, be justified by the nature or logic of the tax system in question ([4]).

([1]) Judgment of the European Court of Justice of 8 November 2001, Case C-143/99, Adria Wien Pipeline [2001] ECR I-8365, paragraph 41.
([2]) Judgment of the European Court of Justice of 2 July 1974, Italy v. Commission, Case 173/73 [1974] ECR 709, paragraph 15.
([3]) See Judgment of the Court of Justice of 22 November 2001, Case C-53/00, Ferring SA v. Agence centrale des organismes de sécurité sociale (ACOSS) [2001] ECR I-9067, paragraphs 17 to 22.
([4]) In the Adria Wien-judgment, the European Court of Justice held that '…any justification for the grant of advantages to undertakings whose activity consists primarily in the production of goods is not to be found in the nature or general scheme of the taxation system…', paragraph 49. Furthermore, in the Maribel-case, the Court held 'that the limitation of the increased reductions to certain sectors rendered those reduction measures selective, so that they fulfilled the condition of specificity.', paragraphs 28 to 31.

In addition, the Authority is not convinced that the exemptions could be regarded as reflecting the Norwegian Government's choice to impose a tax only on certain kinds of consumption of electricity. As the Norwegian Government has stated itself (see letter dated 31 January 2002), the exemptions for various industries were introduced to offset losses of competitiveness. The Authority also notes that the Norwegian Government has not explained how the limitation of the exemption to the effect that electricity used in administrative buildings would be subject to the tax actually ensures that only electricity used for production processes would benefit from the tax exemption. In this respect, the Authority notes in particular that the Norwegian Government has not given any definition of what would be regarded as production processes and administrative purposes. Furthermore, the Authority has doubts whether it would be in line with the objectives purportedly pursued by the electricity tax, namely to reduce electricity consumption, to exclude the use of electricity for certain purposes, such as the use of electricity for production processes as opposed to other uses.

Finally, it is also clear from case law that the regionally differentiated application of tax measures constitutes a selective measure caught by Article 61(1) of the EEA Agreement [1].

In light of the above considerations, and based on the information in the Authority's possession, the Authority has concluded that the exemptions from the electricity tax for certain industries and regions, as laid down in paragraph 3.1.4 of Chapter 3 of the Regulation on Excise Duties, could constitute a selective measure which seems to derogate from the general system of taxation on consumption of electricity.

These derogations confer a financial benefit to undertakings covered by the exemptions, since these companies are relieved of charges that would normally be borne from their budgets. This advantage is granted through State resources as the State suffers a loss of State revenues. Based on the figures provided by the Norwegian authorities, the loss in tax revenues due to the sectoral and regional exemptions for 2002 was estimated to amount to NOK 4 605 million and NOK 160 million, respectively [2]. The recipient firms exercise an economic activity on markets on which there is or could be trade between the Contracting Parties or on which firms from other EEA countries might wish to establish themselves. The exemptions therefore distort or threaten to distort competition and could affect trade between the Contracting Parties.

Consequently, the derogations from the electricity tax for certain industries and regions could be regarded as constituting aid within the meaning of Article 61(1) of the EEA Agreement.

CO_2 tax

Derogation for coal and coke used as raw materials or reducing agents

The Norwegian Government took the view that the derogations from the CO_2 tax for coal and coke used as raw materials and for coal and coke used as reducing agents could fall outside the scope of Article 61(1) of the EEA Agreement.

The Norwegian Government claimed that both derogations were defined by a particular use of the products in question and not as an exemption/reduction directed to certain undertakings or for the production of certain goods. This derogation was open for all undertakings that use coal and coke for this purpose. In such a situation, the Norwegian Government took the view that the tax exemption for certain uses of the products could only be regarded as 'selective' if certain undertakings would not benefit from the tax exemption even though they would also use the products for the purposes described in the exemption clause.

In the alternative, the Norwegian Government claimed that, at least the derogation for the use of coal and coke as raw materials could be justified by the underlying principle actually pursued.

[1] EFTA Court judgment 20 July 1999 regarding the Norwegian regionally differentiated social security tax, Case E-6/98, The Government of Norway v. EFTA Surveillance Authority [1999] Report of the EFTA Court, p. 74.
[2] According to the Norwegian Government, these figures were taken from Budsjettinnstilling S. nr. 1 (2001-2002).

The Norwegian Government claimed that the objective of the CO_2 tax was the reduction of CO_2 emissions. The tax was levied on mineral oil products used for energy purposes. To the extent that certain uses of mineral oil products other than for energy purposes do not result in CO_2 emissions, the exemptions/refunds could be regarded as justified by the logic of the measure in question.

In this respect, the Norwegian Government stated that processing coal and coke into the end product caused no or negligible emission of CO_2. The expressed reason for this is either the 'low' temperature (4 500 °C) or the lack of oxygen in this process. As the purpose of the tax is to target the emission of CO_2, the derogation for the use of coal and coke as raw materials was, in the Norwegian Government's view, justified by the underlying objective actually pursued.

In the Norwegian Government's view, the underlying objective for introducing a tax on the use of coal and coke was in part to reduce the use of these products for energy purposes, and in part to avoid the risk of conversion from use of mineral oil, that was already taxed, to the use of the not taxed coal and coke. Taking these objectives into account, the Norwegian Government claimed that the derogation for the use of coal and coke as raw materials and reducing agents, which are not used for energy purposes, could be regarded as justified. Furthermore, the Norwegian Government argued that as it did not see any alternative products that could be used in this particular process, both derogations could be said to be justified also on these grounds.

The Authority observes that the refund possibility for coal and coke used as raw materials as well as the exemption for coal and coke used as reducing agents are not defined with respect to a specific sector of the industry. However, it would seem that coal and coke are only used for the specified purposes in particular industries. Consequently, the exemptions limited to these purposes would appear to necessarily benefit only these industries. In addition, the Authority observes that the Norwegian Government itself seems to regard these exemptions as being targeted at specific industries, namely in the production of carbides, ferro alloys and primary aluminium and magnesium and states that these industries would not be viable without the exemption ([1]).

The Authority does not exclude at this stage that certain exemptions/reductions may be regarded as justified where it can be demonstrated that certain uses of the taxable product in question do not contribute to the negative environmental effects that the tax in question seeks to penalise.

The Authority notes, however, that the Norwegian Government has not submitted verifiable information on CO_2 emissions from the use of coal and coke as raw materials in the different industries covered by the exemption. Furthermore, the Norwegian Government has not explained how the refund mechanism established under paragraph 3.6.3(1) of Chapter 3 of the Regulation on excise duties is applied in practice. Consequently, the Authority was not in a position to ascertain that the exemption is applied in a way that would limit the exemption to processes not causing CO_2 emissions.

As regards the exemptions from the CO_2 tax for coal and coke used as reducing agents (see paragraph 3.6.4 of Chapter 3 of the Regulation on excise duties), the Authority notes that, according to the explanatory notes issued by the Customs and Excise Duties Directorate, the use of coal and coke as necessary parts of the chemical process results in emission of CO_2 at a similar level compared to emissions from use of coal and coke for energy purposes. Consequently, the exemption would seem to be in contradiction to the objectives of the CO_2 tax, namely to impose a levy on products causing CO_2 emissions. According to the Norwegian Government, the reason for the exemption was that there were no alternative materials for such processes other than coal and coke.

In this respect, the Authority notes that the Norwegian Government has not submitted any further information which would have enabled the Authority to verify that those industries benefiting from the exemption are actually in a situation where it could be said that there were no alternative materials for the industrial processes in question. Furthermore, the Norwegian Government has not explained why in such circumstances CO_2 taxes should not be levied.

It results from the Environmental Guidelines that aid measures in relation to environmental taxes must take into account the basic principles of environmental policy objectives when assessing their compatibility under the EEA State aid rules. The basic principles, as referred to in the guidelines are the 'polluter pays' principle. Accordingly, and pursuant to point 19 of the guidelines, '…aid should no longer be used to make up for the absence of cost internalisation. If environmental requirements are to be taken into account in the long term, prices must accurately reflect costs and environmental protection costs must be fully internalised.'

([1]) The Authority also takes note of the Norwegian Government's paper on Climate Change Policy, where in Table 2 reference is made to 'sectors exempt from taxation: …coal and coke for processing purposes (iron alloy, carbide and aluminium industry)' (underlined here).

In light of the foregoing considerations, the Authority has doubts that the refund of the CO_2 tax regarding coal and coke used as raw materials and the exemption regarding coal and coke used as reducing agents can be justified by the nature and logic of the tax system at issue. In addition, the Authority notes that the Norwegian Government stated in its letter dated 31 January 2002, that the industries benefiting from the exemptions were energy-intensive industries which were exposed to international competition and would not be viable without the exemptions. This seems to indicate that the underlying reason for the exemptions are not inherent to the tax system at issue.

Exemption for the use of coal and coke for energy purposes in the manufacture of cement and leca

According to the Norwegian Government, the reason for exempting the use of coal and coke for energy purposes in the manufacture of cement and leca was partly that large-scale substitutes for coal and coke would be unprofitable, and partly that the industry was exposed to international competition. The former might indicate, according to the Norwegian Government, that the amount of the energy product required would be decided by the manufacturing process, and that only substitution and not reduction of the use of coke was an alternative. As far as this was the case, the Norwegian Government argued that it would seem to result from the EC Commission's decision in the dual-use case that the limited scope for a producer to change the type and amount of the energy product required for the process would have to be taken into account. However, the Norwegian Government recognised that the exemption for the manufacture of cement and leca might require further assessment. The Norwegian Government therefore informed the Authority that this exemption would be assessed in more detail with the State Budget for 2003.

The Authority notes that this exemption is limited to a specific sector of industry and is also contrary to the general rule established under the CO_2 tax system that all uses of coal and coke for energy purposes should be subject to tax. The exemption is therefore a sector-specific measure and cannot, in principle, be justified by the nature or logic of the tax system in question ([1]). In this respect, the Authority notes that the Norwegian Government has not demonstrated that it would only be the cement industry which required a special treatment in light of the alleged problems of not having access to substitutes for coal and coke. Furthermore, and as stated above ([2]), even if it should result that there are no alternative products to be used by the cement industry, this does not in itself justify a derogation from the rules, to the extent that such a derogation runs counter to the environmental objectives actually pursued.

The Authority concludes that the Norwegian Government has not submitted sufficient information demonstrating that the exemptions in question could be regarded as being justified by the nature and general scheme of the CO_2 tax system.

The Authority is aware of the EC Commission's decision regarding the dual-use case in the United Kingdom ([3]) as well as the EC Commission's proposal regarding a new framework for energy taxation within the European Union ([4]). The Authority does not exclude that the considerations underlying the EC Commission's assessment may be of relevance for the exemptions from the CO_2 tax on coal and coke used as raw materials or reducing agents. However, the Authority would like to point out that the objectives pursued by the EC Commission's proposal on energy taxation, and which, according to the EC Commission, justified certain exemptions from the tax concerned, may not necessarily be those pursued by the Norwegian tax system. This issue will, however, be assessed in the course of the formal investigation procedure.

([1]) In the Adria Wien-judgment, the European Court of Justice held that '…any justification for the grant of advantages to undertakings whose activity consists primarily in the production of goods is not to be found in the nature or general scheme of the taxation system…'., paragraph 49. Furthermore, in the Maribel-case, the Court held that 'that the limitation of the increased reductions to certain sectors rendered those reduction measures selective, so that they fulfilled the condition of specificity.', paragraphs 28 to 31.

([2]) See above, where reference is made to the requirements of cost-internalisation, as stipulated in point 19 of the Environmental Guidelines.

([3]) Commission's decision of 3 April 2002 regarding the dual-use exemption from the climate change levy in the United Kingdom (State aid No C 18/2001 and C 19/2001)

([4]) COM (1997) 30 final, OJ 1997 C 139/14.

Reduced rate for paper and pulp

Finally, as regards the reduced rate for the paper and pulp industry, the Authority notes that this reduction is sector-specific. The Norwegian Government has not submitted arguments which would have justified such a derogation by the nature or general scheme of the CO_2 tax system.

Conclusions

The derogations resulting from paragraphs 3.6.3 and 3.6.4 of Chapter 3 of the Regulation on Excise Duties, as well as the reduced rate for the paper and pulp industry, confer a financial benefit to undertakings covered by the exemptions. Thus, firms using the mineral products in the way described above are relieved of charges that would normally be borne from their budgets and gives the recipient firms an advantage over other firms. This advantage is granted through State resources as the State suffers a loss of State revenues. According to the information submitted by the Norwegian Government, tax expenditure due to the exemptions was estimated to amount to NOK 2 270 million. The recipient firms exercise an economic activity on markets on which there is or could be trade between the Contracting Parties or on which firms from other EEA countries might wish to establish themselves. The exemptions therefore distort or threaten to distort competition and could affect trade between the Contracting Parties.

Consequently, and based on the information submitted by the Norwegian Government, the Authority has doubts whether the exemptions from and the reduced rates of the CO_2 tax do not constitute aid, as the Norwegian Government claimed, within the meaning of Article 61(1) of the EEA Agreement.

SO_2 tax

The Norwegian Government argued that, as far as the tax on oil refineries represented a 'new' tax, it was selective as it only applied to oil refineries. In order to represent a 'new' tax the emission tax had to have a source, other than mineral oil and coal and coke, and thus a source not previously taxed (e.g. raw oil). As far as this was the case, the Norwegian Government was of the opinion that the abolition in 2002 of the selective tax measure could not be regarded as selective in the sense that it represents 'aid' within Article 61(1) of the EEA Agreement.

The Norwegian Government expressed the view that the abolition of the tax on coal and coke could fall outside the scope of Article 61(1) of the EEA Agreement.

The Norwegian Government argued that for a measure to be selective it had to be an exemption/reduction from a general tax scheme directed at a particular sector of the economy or a particular region. A tax system that taxed, e.g. some products or a certain conduct, as opposed to others, was not selective in nature. Hence, the abolishment of the SO_2 tax on the use of coal and coke could not, in the Norwegian Government's point of view, be considered as aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority has examined whether the decision to exclude coal and coke as well as emissions from oil refinery plants has the effect of favouring the production of certain goods or certain undertakings compared with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.

At the outset, the Authority notes that the abolishment of the SO_2 tax on coal and coke limits the scope of the SO_2 tax without, however, distinguishing between different categories of undertakings or sectors. The scope of the SO_2 tax is determined by excluding a specific product, namely the use of coal and coke. The abolishment of the SO_2 tax on coal and coke benefits, in principle, all undertakings in Norway using coal and coke. However, there are indications that the abolishment is targeted at specific sectors of the industry. Based on information at the Authority's disposal, it would seem that the extension of the scope in 1999, as well as the limitation of the scope in 2002, concerned around 30 enterprises in the following sectors: oil refineries, cement and leca production, carbide, aluminium and ferro-alloy industry ([1]). As regards the abolishment of the SO_2 tax for oil refineries, the Authority takes the view that this limitation of the scope of the SO_2 tax is sector-specific. In addition, the Authority observes that these industries are subject to the agreement of intent concluded between the Norwegian Government and PIL. Due to the link between the abolishment of the tax and the agreement, the abolishment of the SO_2 tax can be seen as being targeted at the industries covered by the agreement.

([1]) This information is taken from the Government paper on Green Taxes, St.prp. nr. 54 (1997-98), Chapter 6 point 6.2.5.

In view of the overall objective to reduce SO_2 emissions, it would seem reasonable for any tax system targeting SO_2 emissions to cover the major part of the emissions; on the other hand, a limitation of the scope of the tax system which would result in only a minor part of those emitting SO_2 being subject to the tax would at first glance not seem to be in line with the objectives as defined by the Norwegian Government.

In this respect, the Authority notes however that according to information available to the Authority, before the extension of the scope of the SO_2 tax, only around 20 % of all SO_2 emissions were subject to the tax ([1]). After the extension of the scope of the tax, around 80 % of SO_2 emissions were covered ([2]).

The abolishment leads to a situation where not all industries causing SO_2 emissions actually pay for such emissions in the form of an SO_2 tax. Therefore, taking account of the objectives pursued by the SO_2 tax, the Authority cannot exclude that the abolishment of the SO_2 tax leads to a different tax treatment between industries which are — from the environmental point of view — in a comparable situation.

Furthermore, without more detailed information on this point, the Authority cannot exclude that the abolishment of the tax on the use of coal and coke as fuel may benefit certain undertakings compared to undertakings in the process industry using mineral oil for fuel purposes. There may, therefore, be a distortion of competition within the various industry sectors depending on the degree they make use of taxed and non-taxed products ([3]).

In light of the above considerations and based on the information at its disposal, the Authority concluded that the abolishment of the SO_2 tax for coal and coke and on oil refineries confers a financial benefit to undertakings in certain sectors and is thus, in its effects, comparable to a tax exemption. The Norwegian Government has, in practice, waived their right to receive tax payments from firms in these sectors, thus conferring upon them an economic advantage.

Consequently, that advantage was conferred through the use of State resources. According to information at the Authority's disposal ([4]), based on the current rate of SO_2 tax of NOK 3,09 per kg, the duty would have provided annual tax revenues of approximately NOK 40 to 50 million. The figures presented by the Norwegian Government regarding tax expenditures due to the SO_2 tax exemptions indicate that, from 2001 to 2002, the expected losses in tax revenues were estimated to decrease by NOK 60 million.

The recipient firms exercise an economic activity on markets on which there is or could be trade between the Contracting Parties or on which firms from other EEA countries might wish to establish themselves. The exemptions therefore distort or threaten to distort competition and could affect trade between the Contracting Parties.

Consequently and based on the information at the Authority's disposal, the Authority takes the view that the abolishment of the SO_2 tax may be regarded as aid within the meaning of Article 61(1) of the EEA Agreement.

Qualification as 'new aid' as from 1 January 2002

By accepting the appropriate measures proposed by the Authority (see letter from the Norwegian Government dated 6 July 2001), the Norwegian Government was legally bound to bringing existing aid schemes in line with the requirements set out in the Environmental Guidelines before 1 January 2002 ([5]).

([1]) See Government paper on Green Taxes, St.prp. nr. 54 (1997-98), Chapter 6 point 6.2.5.
([2]) St. prp. nr. 1 (2001-2002) — FIN, point 3.11.
([3]) It would seem that at least insomuch as these products are used as heating fuels, they are substitutable; see Proposal for a Council Directive restructuring the Community framework for the taxation of energy products: 'It is clear that all these products, inasmuch as they are used as heating fuels, are directly or indirectly substitutable and therefore should all come with the same taxation framework.'
([4]) PIL News dated 18 December 2001, 'Norwegian Process Industry takes responsibility for reduced SO_2-emissions.'
([5]) It results from the case law of the European Court of Justice that appropriate measures, accepted by the States concerned, have a binding effect; see Judgment of the European Court of Justice of 24 March 1993, Case C-313/90, Comité International de la Rayonne et des Fibres Synthétiques and others v. Commission [1993] ECR p. I-1125.

The Authority would like to point out that, had the Norwegian Government not signified its agreement to the appropriate measures, the Authority would have been obliged to open the formal investigation procedure against all existing aid schemes in place in Norway should the Authority have had doubts as regards their compliance with the new Environmental Guidelines ([1]). To the extent certain measures had been found to be incompatible with the requirements laid down in the new Environmental Guidelines, the Authority would have asked the Norwegian Government to adopt the necessary measures to ensure compliance or otherwise abolish the aid measures in question. The fact that the Norwegian Government accepted the appropriate measures but did not adopt the necessary measures to comply with the obligations resulting therefrom cannot lead to a situation where the Norwegian Government escapes the legal consequences of its acceptance.

With the acceptance of the appropriate measures, the Norwegian Government assumed obligations which imply that any aid scheme which is not in accordance with the requirements set out in the new Environmental Guidelines would have to be abolished as from 1 January 2002. With the acceptance, the Norwegian Government assumed obligations it cannot unilaterally deviate from.

The Authority takes note of the request from the part of the Norwegian Government to allow it additional time for complying with the requirements laid down in the Environmental Guidelines in light of the findings of the working group which was asked to deliver a preliminary report by 1 July 2002.

The Authority observes that it has not been formally informed about the conclusions of the preliminary report, nor has the Norwegian Government indicated which measures it might intend to take in accordance with the findings of that report. The Authority notes that more than 14 months after the entry into force of the new Environmental Guidelines, there are still no concrete proposals from the Norwegian Government of how existing aid schemes will be amended so as to be in accordance with the requirements set out in the new Environmental Guidelines. Without such concrete proposals or commitments, it is impossible for the Authority to ascertain that existing aid schemes would in fact be in line with the new Environmental Guidelines, albeit at a later date than initially foreseen.

The Norwegian Government has not submitted information which would have demonstrated that the adoption of appropriate measures necessary to comply with the requirements laid down in the new Environmental Guidelines would take more time than foreseen under the appropriate measures. In addition, the Norwegian Government has not claimed that it would not be possible to adopt measures which would allow the elimination of possible incompatible aid with retroactive effect, i.e. as from 1 January 2002.

In light of the foregoing considerations, the Authority takes the view that the Norwegian Government has not submitted arguments justifying an extension of the time limit for compliance.

The Authority, therefore, takes the initial view that any aid scheme applicable after 1 January 2002, and which is found to be incompatible with the requirements laid down in the new Environmental Guidelines, is to be regarded as 'new aid' ([2]).

The Authority reminds the Norwegian Government that, in accordance with point 6.2.3 of Chapter 6 of the Authority's State Aid Guidelines, unlawful aid may be recovered from the recipients should the Authority find the compensation scheme to be incompatible with the EEA Agreement.

Compatibility of aid measures

Assessment of the aid measure under Article 61 (3)(c) of the EEA Agreement in combination with Chapter 15 of the Authority's State Aid Guidelines on Aid for Environmental Protection

Pursuant to point 42 of the Environmental Guidelines, '[w]hen adopting taxes that are to be levied on certain activities for reasons of environmental protection, EFTA States may deem it necessary to make provisions for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness.'

([1]) See point 7.4.3(2) of Chapter 7 in combination with Chapter 5 of the Authority's State Aid Guidelines, in particular point 5.2(1) thereof.

([2]) See Judgment of the European Court of Justice of 24 March 1993, Case C-313/90, CIRFS v. Commission [1993] ECR I-1125, paragraph 35; see also EC Commission's decision to open the formal investigation procedure in the State aid case No C 37/2000 (ex NN 60/2000, ex E 19/94, ex E 13/91 and N 204/86) regarding the financial and tax aid scheme for the free zone of Madeira (Portugal), published in OJ 2000 C 301/4, and EC Commission's decision to adopt appropriate measures in the State aid case No E 10/2000 regarding the 'Gewährträgerhaftung und Anstaltslast' in Germany, letter to Germany dated 27 March 2002.

According to the guidelines, such exemptions constitute operating aid but that '…the adverse effects of such aid can be offset by the positive effect of adopting taxes. Accordingly, if such exemptions are necessary to ensure the adoption or continued application of taxes applicable to all products, the Authority takes the view that they are acceptable, subject to certain conditions and for a limited period of time. This period may last for 10 years if the conditions are met…'

Pursuant to point 43 of the Environmental Guidelines, '[i]f the tax does not correspond to a tax which is to be levied within the European Community as the result of a Community decision, the firms affected may have some difficulty in adapting rapidly to the new tax burden. In such circumstances there may be justification for a temporary exemption enabling certain firms to adapt to the new situation.'

In the following, the guidelines lay down the specific requirements which must be fulfilled in order to benefit from the 10-year exemption (see point 46 of the Environmental Guidelines). The requirements depend also on whether or not the tax in question concerns a tax which corresponds to a harmonised tax at Community level.

The Authority points out that exemptions may, in principle, only be approved under the Environmental Guidelines with respect to 'new environmental taxes'. This means, on the one hand, that the tax in question must be an 'environmental tax' as defined in point 7 of the guidelines. This implies that the EFTA State concerned has to demonstrate the estimated environmental effect of the levy. In addition, the exemptions in question must be granted with respect to a newly introduced tax. For 'existing taxes' the EFTA State concerned would have to demonstrate that the conditions enumerated under point 46.2 or point 47 of the Environmental Guidelines are fulfilled.

In general, and in cases where no corresponding harmonised Community tax exists, a 10-year exemption may be justified where exemptions from the tax are conditional upon the conclusion of agreements in which beneficiary firms give undertakings to achieve environmental protection objectives or where the exemptions are subject to conditions that have the same effects (see point 46.1(a)). Point 46.1(a) lays down further criteria which have to be met in order for the agreement/commitment to be regarded as justified. It is for the Authority to assess the substance of the agreements. EFTA States must ensure strict monitoring of the commitments entered into by the firms or associations of firms. The agreements concluded between an EFTA State and the firms concerned must stipulate the penalty arrangements applicable if the commitments are not met.

In the absence of such agreements and undertakings, derogations from the tax in question may be granted if the eligible firms pay a significant proportion of the national tax (see point 46.1(b) second alternative). On the other hand, where the reduction concerns a tax corresponding to a harmonised Community tax, the guidelines require that the amount effectively paid by the eligible undertakings must remain higher than the Community minimum in order to provide an incentive to improve environmental protection (see point 46.1(b) first alternative).

Finally, the EFTA State concerned would have to show that the tax measure in question makes a significant contribution to protecting the environment and that the exemptions do not, by their very nature, undermine the general objectives pursued (see point 45 of the Guidelines).

Electricity tax

At the outset, the Authority takes note of the fact that, according to the Norwegian Government, a working group has been set up in order to examine the consequences of the new Environmental Guidelines for the electricity tax in Norway. This working group was asked to deliver a preliminary report by 1 July 2002. Any measures addressed by the working group would be assessed by the Norwegian Government in the context of the State Budget for 2003. No further information or justification was provided by the Norwegian Government as regards exemptions from the electricity tax and their compatibility under the Environmental Guidelines.

The Authority notes that there is currently no harmonised electricity tax at Community level. However, several EC Member States have introduced taxes on the consumption of electricity. These taxes show big differences in the applicable rates and the tax structure, including exemptions and refund mechanisms. These differences make it difficult to compare the electricity tax systems in other EC Member States to that in place in Norway. The Authority takes note of the information submitted by the Norwegian Government regarding the estimated increase in costs resulting from a withdrawal of the tax exemptions. These figures may indicate that, at least for some industries, there is a necessity to offset costs due to the electricity tax. Against this background, exemptions under the Norwegian electricity tax system for certain industries might be regarded as justified in order to offset losses of competitiveness.

However, in order to strike a balance between environmental concerns and concerns regarding the maintenance of competitive conditions for certain industries, the exemptions in question have to satisfy the requirements laid down in the new Environmental Guidelines.

Based on the scarce information provided by the Norwegian Government as regards the justification of the sectoral derogations from the electricity tax under the new Environmental Guidelines the Authority makes the following observations:

First of all, the Authority notes that the electricity tax was introduced in 1971 and is therefore to be regarded as an 'existing tax'. Based on the information submitted by the Norwegian Government, it would seem that various tax exemptions were adopted after the tax was introduced. The Norwegian Government has not provided an explanation as to how the exemption possibility in point 46.1 of the Environmental Guidelines could apply to exemptions from existing tax measures. In particular, the Authority notes that in 1993, 1994 and 1997, when additional exemptions were introduced, the tax rate had not been increased significantly. As regards exemptions granted in, and possibly before, 1993 the Authority has no information.

In addition, the Norwegian Government has submitted only general statements regarding the objectives of the electricity tax. It has, however, not provided information required in accordance with point 7 of the Environmental Guidelines, showing that the electricity tax has positive environmental effects.

Contrary to the conditions stipulated in point 46.1 of the Environmental Guidelines, the exemption is neither conditional on the conclusion of environmental agreements, nor do firms eligible for an exemption pay a significant proportion of the national tax (since they are totally exempted). In this respect, the Authority points out that the figures presented by the Norwegian Government regarding the estimated increase in costs due to the abolishment of the existing exemptions from the electricity tax cannot in themselves justify the exemptions. These figures need to be assessed in more detail in the context of determining what could be the regarded as a 'significant proportion' of the national tax, which would have to be paid by the companies concerned in order to benefit from the derogation possibility in point 46.1(b) of the Environmental Guidelines.

Contrary to the requirements laid down in point 45 of the Environmental Guidelines, the Norwegian Government has not shown that the exemptions do not undermine the general objectives of the electricity tax. With approximately 70 % of consumption of electricity by the industry in Norway being exempted, the Authority is not convinced that the objective of the tax, i.e. the reduction of electricity consumption, has been achieved despite the broad exemption possibilities.

Finally, the Norwegian Government has neither shown that the derogations are temporary, nor have they given any commitment as regards the limitation of the aid measures in time.

As regards the regional derogations from the electricity tax, the Norwegian Government pointed out the special need for use of electricity in the eligible areas. It pointed out that harsh weather conditions and the long distances in this particular area would make the external conditions hard for business activities, and the exemption might, therefore, be justified as regional development aid. Furthermore, the exemption covered every industry, and no single company is discriminated by this exemption.

Even though the Authority explicitly requested the Norwegian authorities to provide a proper justification of the measures in question, the Authority notes that no such justification has been provided (the Norwegian Government merely stated that it is for the working group to consider alternative tax structures that are expected to be in line with the new Environmental Guidelines). In the absence of a justification, the Authority has doubts that the regional derogations could be regarded as compatible with the EEA State aid rules.

In light of the foregoing considerations, the Authority has doubts that the exemptions from the electricity tax are compatible with the functioning of the EEA Agreement.

CO_2 tax

The Authority notes that there is currently no harmonised CO_2 tax at Community level. To the Authority's knowledge, several EC Member States have introduced CO_2 taxes (in particular in Denmark, Sweden, Finland and the Netherlands) [1]. The tax rates and the structure, including tax base, applicable exemptions and refund schemes show, however, big differences. These differences make it difficult to compare the CO_2 tax systems in other EC Member States to that in place in Norway. The Authority takes note of the information submitted by the Norwegian Government regarding costs of the CO_2 tax for certain industries. These figures might indicate that, at least for certain sectors of industry, there is a necessity to offset costs due to the CO_2 tax. Against this background, exemptions under the Norwegian CO_2 tax system for certain industries might be regarded as justified in order to offset losses of competitiveness.

However, in order to strike a balance between environmental concerns and concerns regarding the maintenance of competitive conditions for certain industries, the exemptions in question have to satisfy the requirements laid down in the new Environmental Guidelines.

Contrary to the conditions stipulated in point 46.1 of the Environmental Guidelines, the exemptions from the CO_2 tax are neither conditional on the conclusion of environmental agreements, nor do firms eligible for an exemption/refund seem to pay a significant proportion of the national tax (since they are totally exempted; where the tax is refunded, the Authority would need information about the level of compensation in order to assess whether the companies concerned still pay a significant proportion of the tax).

As regards the environmental effects of the CO_2 tax, the Authority regrets that no information was submitted in accordance with point 7 of the Environmental Guidelines, which would have shown the effects of the CO_2 tax on reduction of CO_2 emissions.

Contrary to the requirements laid down in point 45 of the Environmental Guidelines, the Norwegian Government has not shown that the exemptions do not undermine the general objectives of the CO_2 tax. In this respect, the Authority takes note of the information submitted by the Norwegian Government regarding CO_2 emissions caused by certain industries. From this information it would appear that the CO_2 emissions caused by industries exempted from the CO_2 tax account for approximately 66 % of overall CO_2 emissions. Against this background, the Authority has doubts whether the requirement in point 45 of the Environmental Guidelines is fulfilled.

Contrary to what is required under point 43 of the Environmental Guidelines, the Norwegian Government has neither shown that the derogations are temporary nor have they given any commitment as regards the limitation of the aid measures in time.

As regards the application of a reduced rate for the paper and pulp industry, the Norwegian Government has claimed that the reduced rate to be paid by this industry would exceed the corresponding EC tax, which is EUR 18 per 1 000 litres (NOK 0,14 per litre). Therefore, the Norwegian Government regarded the reduced tax to be in line with section 46.1(b) alternative 1.

[1] See overview of environmental taxes in the EU, in Report to DG Environment, Update of Database of Environmental Taxes and Charges, Stefan Speck and Paul Ekins, July 2000; see also EC database on environmental taxes:http://europa.eu.int/comm/environment/enveco/env_database/database.htm.

As the Authority has stated above, there is currently no harmonised CO_2 tax at Community level. Therefore, it would not seem that point 46.1(b) first alternative of the Environmental Guidelines is applicable. In addition, the Authority notes that no further information was submitted which would have shown that this rate provided firms in the paper and pulp industry with an incentive to improve environmental protection.

As regards the possibility for a temporary exemption under point 46.1(b) second alternative of the Environmental Guidelines, the Authority notes that the reduced tax rate amounts to 50 % of the normal CO_2 tax rate. The Authority does not exclude that this percentage could be regarded as a 'significant proportion' of the national tax. However, and as already pointed out in the previous paragraph, without information on the effects of this reduced rate on the behaviour of the industry concerned and in particular whether this rate still serves as an incentive to improve environmental protection, the Authority cannot conclude that the requirements in the guidelines are fulfilled.

Finally, the Authority observes that the CO_2 tax on mineral oil introduced in 1991 constitutes an 'existing tax'. The Authority notes that, according to the information submitted by the Norwegian Government, the reduced rate for the paper and pulp industry was only later introduced, i.e. in 1993. Against this background, the Authority has doubts whether the conditions laid down in point 46.2 of the Environmental Guidelines are satisfied, since the derogation from the generally applicable rate would seem not to have been decided on when the tax was adopted. In addition, the Authority notes that the Norwegian Government has not submitted information enabling the Authority to assess whether an exemption under point 46.1. of the Environmental Guidelines was justified under these circumstances.

In light of the above considerations, and should the further investigation confirm that the measures in question constitute aid within the meaning of Article 61(1) of the EEA Agreement, the Authority has doubts that the requirements laid down in the Environmental Guidelines are fulfilled with respect to the derogations from the CO_2 tax.

SO_2 tax

The Authority notes at the outset that there is currently no harmonised SO_2 tax at Community level. To the Authority's knowledge, several EC Member States have introduced SO_2 taxes (in particular Finland, Sweden and Denmark) [1]. The tax rates and the structure, including exemptions and refund schemes show, however, big differences. These differences make it difficult to compare the SO_2 tax systems in other EC Member States to that in place in Norway. The Authority takes note of the information submitted by the Norwegian Government regarding costs of the SO_2 tax for certain industries. These figures might indicate that, at least for certain sectors of industry, there is a necessity to offset costs due to the SO_2 tax. Against this background, exemptions under the Norwegian SO_2 tax system for certain industries might be regarded as justified in order to offset losses of competitiveness.

However, in order to strike a balance between environmental concerns and concerns regarding the maintenance of competitive conditions for certain industries, the exemptions in question have to satisfy the requirements laid down in the new Environmental Guidelines.

According to the Norwegian Government (see letter dated 31 January 2002), the exemptions from taxes, such as no tax on use of coal and coke and on the refineries, were in line with the Environmental Guidelines.

The Norwegian Government claimed that the abolishment of the tax was conditional on the conclusion of the agreement and that the abolishment of the tax could be seen as temporary. In this respect, it referred to a declaration in the State Budget for 2002 (St.prp. nr. 1 (2001-2002)): 'As part of the Agreement with PIL, the reduced tax on coal and coke and on oil refineries shall be abolished for the period up to 2010.' The Norwegian Government further informed the Authority that it had also been indicated in the context of the State Budget 2002 that it was the Norwegian Government's intention to phase out the existing tax exemption within 2010.

[1] See overview of environmental taxes in the EU, in Report to DG Environment, Update of Database of Environmental Taxes and Charges, Stefan Speck and Paul Ekins, July 2000; see also EC database on environmental taxes: http://europa.eu.int/comm/environment/enveco/env_database/database.htm.

The Authority points out that, even though the Norwegian Government stated that its intention was to phase out the existing 'tax exemption' within 2010, the Authority notes that no formal commitment, which would have limited the duration of the tax exemption to a maximum of ten years in a legally binding way, has been given by the Norwegian Government. Therefore, the Authority does not consider the aid to be of only temporary nature, as required under point 43 of the Environmental Guidelines.

Furthermore, the Authority notes that the SO_2 tax is not a 'new tax' within the meaning of point 46.1 of the Environmental Guidelines. According to point 46.2 of the Environmental Guidelines, the provisions in point 46.1 may be applied to existing taxes if certain conditions are fulfilled. In this respect, the Authority notes that the Norwegian Government has not provided a justification for why the exemption possibility in point 46.1 of the Environmental Guidelines is applicable in the present case.

More importantly, the Authority has doubts whether the conclusion of an agreement of intent between the Federation of Norwegian Process Industries (PIL) and the Ministry of Environment, as well as the adoption of possible future permission limits/permits by the Norwegian Pollution Control Authority fulfil the requirements set out under point 46.1 of the Environmental Guidelines.

As the Authority has already pointed out in its letter dated 28 February 2002, the agreement of intent is not legally binding upon the parties. Furthermore, the abolishment of the SO_2 tax would not seem to be conditional upon the implementation of the measures envisaged under the agreement of intent. The statement in the State Budget for 2002 can hardly be seen as sufficient. In this respect, the Authority notes, in particular, that there are no sanctions in case the commitments given by the undertakings benefiting from the tax exemption are not fulfilled. Finally, it is not clear to the Authority whether the obligation to reduce SO_2 emissions will result from the agreement or emission permits to be issued by the Norwegian Pollution Control Authority.

In order to benefit from a ten-year exemption, the Environmental Guidelines require that commitments given under agreements or other provisions having the same effects will result in reductions in emissions on the part of the firms benefiting from the exemption which go beyond normal business. The environmental effects of the agreements, or other provisions having the same effect, must be at least as good as the environmental effect of the taxes they replace.

The Norwegian Government informed the Authority, by letter dated 15 May 2002, that SO_2 emissions from the process industry were already subject to legally binding regulations through emission permits in accordance with the provisions of the Pollution Control Act. These regulations had already led to SO_2 emission reductions at costs higher than NOK 3/kg SO_2. From 1990 to 2000, emissions from industrial processes were reduced by 13 500 tonnes, to 17 100 tonnes in 2000. Only 800 tonnes of this reduction took place from 1998 to 2000, when the SO_2 tax was in force [1].

The Authority observes, however, that, at present, no concrete commitments as regards such reductions have been given by the sector benefiting from the exemption from the SO_2 tax, nor has the Authority more detailed information on the content of the future emission permits.

The information submitted by the Norwegian Government with respect to reductions of SO_2 emission due to the previous tax regime might indicate that the efforts to be undertaken by the industry concerned until 2010 go beyond what has been achieved so far in terms of SO_2 emissions with the tax in place. However, given the lack of more detailed and verifiable information, the Authority is not able to ascertain that the company's efforts under the agreement of intent or in the context of future binding emission limits set by the Norwegian Pollution Control Authority are in proportion to the tax exemption.

[1] The Norwegian Government informed the Authority that emission data for 2001 was not yet available.

In addition, the Authority observes that it is not clear from the information that has been submitted by the Norwegian Government whether emission permits issued in the past as well as possible future emission limits exceed binding Community standards within the meaning of the Environmental Guidelines. Point 7 of the Environmental Guidelines defines 'Community standard' as being the standard mandatory within the European Community setting the levels to be attained in environmental terms and the obligation to use the best available techniques (BAT) which do not entail excessive costs ([1]). In this respect, the Authority notes that no information was submitted which would have allowed the Authority to examine whether and to what extent such possible future limits for SO_2 emissions would exceed harmonised standards, such as the limits laid down in the EEC Directive on air quality standards for sulphur dioxide ([2]) and whether such future limits would exceed the requirements following the Directive on air pollution from industrial plants ([3]) and the 'IPPC' Directive ([4]).

In light of the above considerations, and should the further investigation confirm that the measures in question constitute aid within the meaning of Article 61(1) of the EEA Agreement, the Authority has doubts that the requirements laid down in the Environmental Guidelines are fulfilled with respect to the partial abolition of the SO_2 tax.

Final remarks and conclusions

Based on the information submitted by the Norwegian Government, the Authority cannot exclude that the exemptions from the electricity tax, derogations from the CO_2 tax as well as the abolition of the SO_2 tax constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that these measures can be regarded as complying with Article 61(3)(c) of the EEA Agreement, in combination with the requirements laid down in the new Environmental Guidelines. Consequently, the Authority has doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance with point 5.2 of Chapter 5 of the Authority's State Aid Guidelines, the Authority is obliged to open the procedure provided for in Article 1(2) of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement,

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement against:

   — the sectoral and regional exemptions from the tax on electricity consumption;

   — the exemptions from the CO_2 tax for coal and coke used as raw materials or as reducing agents in industrial processes as well as for coal and coke used for energy purposes in the production of cement and leca and the reduced CO_2 tax rate for the paper and pulp industry; and

   — the abolition of the SO_2 tax for coal and coke as well as for the oil refinery industry.

2. The Norwegian Government is invited, pursuant to point 5.3.1(1) of Chapter 5 of the Authority's State Aid Guidelines, to submit its comments on the opening of the formal investigation procedure within two months from the notification of this Decision.

([1]) In footnote 5 to the Environmental Guidelines, it is clarified that such standards become EEA standards when they are incorporated into the EEA Agreement. In footnote 6 to the Environmental Guidelines, reference is made to the relevant EC Directives as incorporated into the EEA Agreement.
([2]) Council Directive 80/779/EEC, incorporated into the EEA Agreement, point 14 of Annex XX to the EEA Agreement.
([3]) Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, incorporated into the EEA Agreement in point 16 of Annex XX to the EEA Agreement.
([4]) Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, incorporated into the EEA Agreement in point 2g of Annex XX to the EEA Agreement.

3. The Norwegian Government is requested to submit all information enabling the Authority to examine the compatibility of the tax measures in question with the EEA Agreement within two months from the notification of this Decision.

Done at Brussels, 26 July 2002.

For the EFTA Surveillance Authority

Einar M. BULL

The President