



Additional information concerning the tax on chocolate and sugar products

Letter | Date: 28/02/2020 | [Ministry of Finance](http://www.regjeringen.no/en/dep/fin/id216/) (<http://www.regjeringen.no/en/dep/fin/id216/>)

Recipient: EFTA Surveillance Authority

Our ref.: 17/5203

1. Introduction

Reference is made to the video conference between the EFTA Surveillance Authority (the Authority) and Norwegian Authorities 31 January 2020 concerning the excise duty on chocolate and sugar products, and the Authority's request for additional information sent later the same day.

This letter answers the request for additional information; see item 2 concerning products that shifted tax position in 1998 and item 3 concerning statistics of the changes.

1.1 Some general remarks

The letter is a supplement to the letters to the Authority dated 19 January 2018 and 13 December 2019, and the Ministry reiterates its fundamental view that the excise duty in question is compatible with state aid rules.

It is well argued in the letters that the excise duty on chocolate and sugar products does not constitute state aid. The Ministry argues that the selectivity test is not a competitive analysis of the substitutability of the products falling within or outside the scope of the tax, as the complainant seems to argue. The Ministry is instead of the view that a, from a state aid perspective, fiscal tax measure may legitimately be imposed if the scope of the tax is set out without discrimination and in a clearly non-arbitrary manner.

To support this argumentation, the Ministry would like to draw the Authority's attention to the opinion of Advocate General Kokott delivered on 13 June 2019, in the case C-75/18 Vodafone. It follows from point 162 of the opinion that, *"in essence the selectivity test is 'merely' a discrimination test"*. See also point 160.

The Ministry would also like to point out that the Authority bears the burden of proof for the unequal treatment, see point 161, and also T-865/16 paragraph 59 and T-636/16 paragraph 194-195.

The Ministry maintains that the excise duty in question does not constitute state aid according to art. (61) (1) of the EEA Agreement. If however, the Authority is of the opinion that the excise duty in question constitutes state aid, the Ministry maintains that the adjustments in 1998 and 2018 in the excise duty do not alter the aid into new aid. Hence, the excise duty does not constitute unlawful state aid.

2. Products that shifted tax position in 1998

For a general explanation on the adjustments made in the excise duty in 1998 see item 5 in the letter to the Authority 13 December 2019.

In its information request, the Authority asks for the Ministry's confirmation that the list set out therein is correct and exhaustive. The Ministry presents below an exhaustive and correct list. Hence, the list below indicates the products, which were subject to the excise duty pre-1998 and became excluded from the scope of the excise duty in 1998. Thus, the products in the list are delimited towards both products, which already were exempted from the excise duty pre-1998 and products which were still taxed post-1998.

The list sent by the Authority contained background information on some of the points. The Ministry has completed the background information. The purpose of the background information is to make it easier to understand the adjustments technically, but also to understand the law technic in the regulation post-1998. The regulation refers to CN codes, however, products listed under a taxable CN code can anyway be exempted if it is not shaped.

In the background information it is often firstly, explained the rules pre-1998, and secondly why the product law technically no longer is taxable. For the reason for the adjustments, see letter to the Authority 13 December 2019.

- Products containing cocoa with fat percentage above 26 % that were not shaped, such as cocoa butter and chocolate spreading.
 - Background: Pre-1998, they were generally taxed as cocoa products and could only be exempted if they had a fat percentage under 26 % according to Section 5 of the 1990 Chocolate- and sugar goods Regulation. These products now generally fall outside the scope of the excise duty, as they are not shaped. Besides, the CN codes for cocoa butter and chocolate spreading are not included in the new scope.
- Products containing cocoa in packaging less than 125 gram that were not shaped, and were not chocolate pudding powder, chocolate sauce and chocolate drinking powder.
 - Background: Pre-1998, they were generally taxed as cocoa products and could only be exempted if they weighed more than 125 gram according to Section 5 of the 1990 Chocolate- and sugar goods Regulation. However, the weight-criteria did not apply to chocolate pudding powder, chocolate sauce and chocolate drinking powder, thus these products were already exempted pre-1998. The products now fall outside the scope of the excise duty because they are not shaped.
- Cocoa powder products with additives that were not a household product according to section 5. No. 2 of the 1990 Chocolate- and sugar goods Regulation.

- Background: Pre-1998, cocoa powder could only be exempted the excise duty if it did not contain additives or if it was a household product, see section 5 no. 1 and no. 2 in conjunction.
The products now fall outside the scope of the excise duty because they are not shaped.
- Products containing cocoa listed under CN code 19.04 (ex. cornflakes and muesli), that were not a household product according to section 5. No. 2 of the 1990 Chocolate- and sugar goods Regulation.
 - Background: Pre-1998, they were generally taxed as cocoa products, but they were exempted if they met the conditions for being a household product set in section 5. No. 2 of the 1990 Chocolate- and sugar goods Regulation.
These products now fall outside the scope of the excise duty due to the CN code is not included in the scope.
- Chocolate in imported ice cream and bakery products.
 - See explanation in letter to the Authority 13 December 2019 item 5.3.4.
- Sugar products (including liquorice products, hereunder liquorice paste, liquorice squash and “hockey powder”) that were not shaped (masses), and were not sugar products in package above 5 kilos for the use in the production of non-taxed finished products in your own business.
 - Background: Pre-1998, they were generally taxed as sugar products and could only be exempted if they were in package above 5 kilos and were for the use in the production of non-taxed finished products in own business.
The products now fall outside the scope of the excise duty because they are not shaped.
- Candied fruit, which were not shaped candied lemon peel for the use in households and bakeries.
 - Background: Pre-1998, candied fruit were taxed, however candied lemon peel for the use in households and bakeries were generally not taxed, exempt when it was shaped.
These products now fall outside the scope of the excise duty as the CN code 20.06 is not included in the scope.

- Cocoa biscuits that were partly covered by a mass of chocolate (cocoa) or sugar and/or had an in-between layer of the aforementioned masses and the total weight of the mass was less than 50 pct. of the total weight of the biscuit.
 - Background: the rules for biscuits were simplified: cocoa biscuits were taxed post-1998 the same way as non-cocoa biscuits. The following biscuits are taxed both pre and post-1998: Biscuits fully covered (except from bottom) with the aforementioned masses and biscuits partly covered by the aforementioned masses and/or have an in-between layer of the aforementioned masses and the total weight of the mass is above 50 pct. of the total weight of the biscuit.
- Chocolate and sugar products under CN codes 17.04 and 18.06 shaped and in packaging above 2 kilos for the use in production of non-taxed finished products in your own business, that were not sugar products in package above 5 kilos.
 - Background: new general exemption for commodity goods was introduced. Pre-1998 sugar masses for the use in production was exempted in general when in package above 5 kilos, post-1998 all masses are in general exempted, thus the commodity-exemption only “needs” to apply to shaped goods. The weight threshold was amended to correspond with the relevant CN code.

As indicated in the list above most of the changes in the tax position of the products are due to the products not being shaped. The exemption for masses in general was made to clarify and simplify the existing exemptions for “almond and comparable masses”, for “household products” and for “cocoa powder”. The gap between the pre-1998 exemptions and the general exemption for masses is narrow. This is also indicated by the verbosity of the description of the product groups in the list. The background for the exemption is an intention to primarily tax typical chocolate products as finished goods, i.e. sweets intended for immediate consumption. See item 5.3.1 in letter to the Authority 13 December 2019.

See also item 5.3.2, 5.3.3 and 5.3.5 concerning the other “groups” of adjustments.