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EFTA SURVEILLANCE
AUTHORITY

The Ministry of Climate and Environment
Post-box 8013 Dep
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Norway

Dear Mrs Sæverud,

Subject: Inquiry by the Norwegian Government regarding the possibility of introducing a measure requiring that all biofuels sold in Norway have to be in conformity with the sustainability criteria in the Fuel Quality and the Renewable Energy Directives

1 Introduction

By letter dated 18 April 2017 (your ref.: 15/63), the Norwegian Government requested the EFTA Surveillance Authority (“the Authority”) to provide guidance on whether Norway could introduce a measure which would require all biofuels sold in Norway to be in conformity with the “sustainability criteria”.

It is worth recalling that, according to the institutional framework set up by both the EEA Agreement and the Agreement between the EEA EFTA States on the establishment of a Surveillance Authority and a Court of Justice (“SCA”), and to the functions attributed to the diverse bodies foreseen therein, the competence of the Authority is limited to monitoring the correct implementation and application of EEA law in the EEA EFTA States. Only the EFTA Court is entitled to interpret EEA law with regard to the EEA EFTA pillar¹. Against this background, the Internal Market Affairs Directorate of the Authority (“the Directorate”) notes that the drafting of a legal opinion on the interpretation of EEA rules on a measure which has not been adopted yet upon the request of an EEA EFTA State cannot be regarded as being covered by the Authority’s mandate.

The Directorate also notes that Directive 98/34/EC² sets forth procedures to be followed when EEA EFTA States intend to adopt regulations that may create technical barriers to trade.

¹ According to Article 108(2) of the EEA Agreement and Article 34 SCA, the EFTA Court has jurisdiction to rule on the interpretation of the EEA Agreement applicable in the EEA EFTA States.

² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, incorporated into the EEA Agreement by Joint Committee Decision No 146/99 which entered into force for the EEA EFTA States on 5 November 1999.

Having regard to the limitations and statements set out above, and in the spirit of loyal cooperation with the national administrations, the Directorate wishes to provide the Norwegian Government with some guidance, regarding the EEA legislation regulating the biofuels market and the case-law related to the balance between the free movement of goods and the protection of the environment.

2 EEA Secondary Legislation on Biofuels

2.1 The Fuel Quality and the Renewable Energy Directives

The EEA secondary legislation which will primarily regulate the Norwegian biofuels market is the “Fuel Quality Directive”³ and the “Renewable Energy Directive”⁴.

Biofuel is defined in Article 2(i) of the Renewable Energy Directive as liquid or gaseous fuel for transport produced from biomass. Biomass is defined in Article 2(e) of the Renewable Energy Directive as the biodegradable fraction of products, waste and residues from biological origin. In accordance with Article 2(9) of the Fuel Quality Directive, biofuel should have the same meaning as in the Renewable Energy Directive for the purpose of the Fuel Quality Directive.

The Renewable Energy Directive sets binding overall targets for renewable energy. According to Annex I of the Renewable Energy Directive, each Member State has a target to reach by 2020 a certain share of renewable energy in gross final consumption. Joint Committee Decision No 162/2011 incorporated the Renewable Energy Directive into the EEA Agreement. The overall target set in this Joint Committee Decision for Norway is 67.5% renewable energy by 2020. Furthermore, Article 3(4) of the Renewable Energy Directive sets out a mandatory target of 10% for renewable energy in all forms of transport by 2020.

The Fuel Quality Directive sets technical specifications for transport fuels and a target for the reduction of life greenhouse gas emissions. The target set is a 6% reduction of life greenhouse gas emissions from transport fuels by December 2020. Article 7(b) of the Fuel Quality Directive provides for sustainability criteria for biofuels and regulates that it is only biofuels which fulfil the sustainability criteria that can be included when calculating the reduction of greenhouse gas emissions in a Member State. Article 7(b) of the Fuel Quality Directive on sustainability criteria reflects Article 17 of the Renewable Energy Directive.

³ Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC as amended by Directive 2009/30/EC (“the Fuel Quality Directive”). This Directive was incorporated into the EEA Agreement by Joint Committee Decision No 270/2015 on 30 October 2015 and entered into force for the EEA EFTA States on 1 November 2015.

⁴ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (“the Renewable Energy Directive”) This Directive was incorporated into the EEA Agreement by Joint Committee Decision No 162/2011 on 19 December 2011 and entered into force for the EEA EFTA States on 20 December 2011.

2.2 Article 5 of the Fuel Quality Directive

2.2.1 Article 5 of the Fuel Quality Directive

The Norwegian Government states in its letter dated 18 April 2017 that the extension of the sustainability criteria to all biofuels could be in contradiction of Article 5 of the Fuel Quality Directive.

Article 5 of the Fuel Quality Directive states the following:

“No Member State may prohibit, restrict or prevent the placing on the market of fuels, which comply with the requirements of this Directive.”

In the ruling *Gyorgy Balazs*⁵, the Court of Justice of the European Union (“CJEU”) expressed that it is clear that the Fuel Quality Directive deals with specifications on health and environmental grounds for the fuels concerned.

Moreover, according to its judgment *BPU and Others*⁶, the CJEU stated that Article 5 of the Fuel Quality Directive needs to be read in relation with the former Biofuel Directive⁷ and the Renewable Energy Directive setting targets for Member States. Consequently, the CJEU concluded that Article 5 of the Fuel Quality Directive, read in conjunction with the Biofuel Directive, did not preclude a Member State from requiring petroleum companies to place on its market a compulsory percentage of sustainable biofuels for transport purposes with a view to achieve the national indicative targets of the Biofuel Directive. Such conclusions, said the CJEU, apply all the more when Article 5 is read in conjunction with the provisions of the Renewable Energy Directive, which sets mandatory energy targets in transport. As the Court further stated, Article 5 does not as such set limitations for a Member State to introduce mandatory percentages of sustainable biofuel if assessed in conjunction with the targets set in the Renewable Energy Directive.

2.2.2 Exhaustive Harmonisation of the Sustainability Criteria

As far as the Directorate understands with the limited documentation provided, the proposed measure would not modify the sustainability criteria, however, it is a measure which makes the sustainability criteria compulsory for all biofuels.

Nevertheless, due to the limited documentation provided to the Directorate for the measure in question, the Directorate points to a recent judgement of the CJEU, *E.ON Biofor Sverige AB and Statens Energimyndighet*⁸, in order for the Norwegian Government to take note of recent case-law regarding the regulation of the biofuel market. The CJEU pronounced in this judgment that the sustainability criteria laid down in Article 17 of the Renewable Energy Directive are fully harmonised.

⁵ Judgement of 20 November 2015, *Gyorgy Balazs*, C-251/14, EU:C:2015:687.

⁶ Judgement of 31 January 2013, *BPU and Others*, C-26/11, EU:C:2013:44.

⁷ Directive 2003/30 of 8 May 2003 on the promotion of the use of biofuel or other renewable in the transport sector. This Directive was not incorporated into the EEA Agreement.

⁸ Judgement of 22 June 2017, *E.ON Biofor Sverige AB and Statens Energimyndighet*, C-549/15, EU; C:2017:490.

Moreover, the Court emphasised that Article 17 seeks first to ensure a high level of protection of the environment as referred to in Article 114(3) TFEU (former Article 95(3)), when deciding that biofuels may be taken into account by Member States for the three environmental purposes set out in Article 17(1) of the Renewable Energy Directive, provided that they fulfil the sustainability criteria in that Article.

Article 17(1) reads as follows:

“Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community, energy from biofuels and bioliquids shall be taken into account for the purposes referred to in points (a), (b) and (c) only if they fulfil the sustainability criteria set out in paragraphs 2 to 6:

- (a) measuring compliance with the requirements of this Directive concerning national targets;*
- (b) measuring compliance with renewable energy obligations;*
- (c) eligibility for financial support for the consumption of biofuels and bioliquids.”*

In addition, Article 17 of the Renewable Energy Directive seeks, as it is apparent in particular from recital 94 of the Renewable Energy Directive, to facilitate trade in sustainable biofuels between Member States. The Court states that that facilitation lies primarily in the fact that when biofuels, including those coming from other Member States, satisfy the sustainability criteria set out in Article 17 of the Renewable Energy Directive, Article 17(8) prohibits the Member States from refusing to take those sustainability biofuels into account for the three purposes set out in Article 17(1) on other sustainability grounds.

Although Article 17 of the Renewable Energy Directive facilitates trade in sustainable biofuels, the Court concluded that the aim of Article 17 is not to regulate imports of sustainable biofuels between Member States nor particularly to require them to unconditionally authorise such imports. The Court emphasised that the aim of the Article is merely by their harmonisation to regulate the conditions relating to sustainability, which must be fulfilled by biofuels, in order for them to be taken into account by a Member State for the three specific purposes set out in Article 17(1) of the Renewable Energy Directive.

3 Application of the EEA Agreement

If the Norwegian Government concludes upon thorough documentation and the referred case-law above, that applicable EEA secondary legislation would not prevent the Norwegian Government to introduce the measure in question, the Norwegian Government needs also to make an assessment whether the measure would infringe the basic provisions of the EEA Agreement.

The Directorate recalls in this respect that Directive 98/34/EC⁹ sets forth procedures to be followed when EEA EFTA States intend to adopt regulations that may create technical barriers to trade.

The EEA Agreement has dedicated a chapter to the protection of the environment¹⁰. It is even stated in Article 75 of the EEA Agreement that the EEA EFTA States have the discretion to introduce more stringent protective measures than Annex XX¹¹ provides for. However, it is to be noted that Article 75 of the EEA Agreement grants this discretion only on the condition that such measures are compatible with the provisions of the EEA Agreement.

The introduction of the measure in question falls to be assessed under Article 11 of the EEA Agreement, insofar as it appears to be capable of hindering, directly or indirectly, actually or potentially, intra-EEA trade of biofuels¹².

According to settled case-law, national measures that are capable of hindering intra-EEA trade may *inter alia* be justified by measures aimed at protecting the health and life of humans, animals and plants, which are among the public grounds listed in Article 13 EEA, and with reference to overriding public interest requirements relating to the protection of the environment¹³.

It is for each EEA EFTA State to decide on the level of environmental protection in order to safeguard the health and life of humans, animals and plants. However, they may only do so within the limits set by the EEA Agreement, and in compliance with the principle of proportionality.

In accordance with the proportionality principle, the measure in question must be suitable, necessary and proportionate to the aim pursued¹⁴. In particular, it must be established that the aim cannot be as effectively achieved by measures that are less restrictive of intra-EEA trade¹⁵.

In the cases referred to above¹⁶, the CJEU has undertaken an assessment whether the measure in question was proportionate with a view to reach the binding targets in the Fuel Quality and the Renewable Energy Directives.

⁹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, incorporated into the EEA Agreement by Joint Committee Decision 146/99 which entered into force for the EEA EFTA Member States on 5 November 1999.

¹⁰ Chapter 3 of the EEA Agreement, Articles 73 to 75.

¹¹ Annex XX is the Annex where secondary environmental legislation is incorporated.

¹² See, in particular, judgment of 11 July 1974, *Dassonville*, C-8/74, EU:C:1974:82, paragraph 5; judgement of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 66; judgement of 11 September 2014, *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192, paragraph 77.

¹³ Judgement of 20 September 1988, *Commission v Denmark*, C-302/86, EU:C:1988:421; judgement of 11 December 2008, *Commission v Austria*, C-524/07, EU:C:2008:717.

¹⁴ Judgement of 4 June 2009, *Mickelsson and Roos*, C-142/05, EU:C:2009:336, paragraphs 31 and 32.

¹⁵ Judgement of 25 February 2005, *Pedice AS v Sosial- og helsedirektoratet*, E-4/04, [2005] EFTA Ct. Rep. 1, paragraphs 55 and 5; judgement of 12 September 2011, *Philip Morris Norway AS v Staten v/Helse-og Omsorgsdepartementet*, E-16/10, [2011] EFTA Ct. Rep. p. 330, paragraphs 83 to 85.

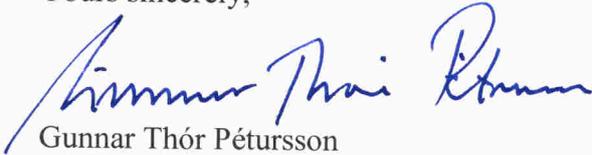
¹⁶ Judgement of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037; judgement of 11 September 2014, *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192; judgement of 31 January 2013, *BPU and Others*, C-26/11, EU:C:2013:44 C-26/11.

The Directorate underlines that when invoking exemptions based on Article 13 of the EEA Agreement and the mandatory requirements, the burden of proof rests with the EEA EFTA State that invoke them¹⁷.

4 Final remarks

The Directorate hopes that the description of the secondary legislation and case-law set out above will provide useful input for the Norwegian Government when carrying out its legal assessment of the issues raised in its letter of 18 April 2017. The Directorate is also willing to meet with the Government for a further discussion, for example in relation to the forthcoming package meetings in Oslo towards the end of October 2017.

Yours sincerely,



Gunnar Thór Pétursson
Director
Internal Market Affairs Directorate

¹⁷Judgement of 23 September 2003, *Commission v Denmark*, C 192/01, ECR I-9724, paragraph 46; judgement of 24 April 2008, *Commission v Grand Duchy of Luxemburg*, C-286/07, ECR I-0063, paragraph 37.