

Case No: 56682
Event No: 311156
Dec. No: 151/05/COL



EFTA SURVEILLANCE
AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION
of 22 June 2005

regarding a notification of an electricity tax exemption for energy intensive industries
participating in a programme for energy efficiency
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD TO the Agreement on the European Economic Area², in particular to
Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of
a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof and
Article 1 (2) in Part I of Protocol 3 thereof,

HAVING REGARD TO the Authority's Guidelines⁴ on the application and interpretation
of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 15 thereof,

Whereas:

I. FACTS

A. Procedure

By letter dated 17 November 2004 from the Norwegian Mission to the European Union, forwarding the letters from the Ministry of Modernisation and the Ministry of Finance, both dated 15 November 2004, the Norwegian authorities notified to the Authority operating aid in the form of temporary electricity tax exemption for energy intensive industries which participate in a programme for energy efficiency. The letters were received and registered by the Authority on 22 November 2004 (Case No 56682, Event No 300399).

The Authority requested further information in a letter dated 17 January 2005 (Event No 304785).

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the "EEA Agreement".

³ Hereinafter referred to as the "Surveillance and Court Agreement".

⁴ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement, adopted and issued by the Authority on 19 January 1994, published in OJ L 231, 3.9.1994 and EEA Supplement to the OJ No 32, 3.9.1994, last amended 17 June 2005.

By letter dated 21 February 2005 from the Norwegian Mission to the European Union, forwarding letters from the Ministry of Modernisation and the Ministry of Finance both dated 16 February, the Norwegian authorities replied to the above mentioned letter. The reply was registered by the Authority on 23 February 2005 (Event No 311114).

By letter dated 15 April 2005, the Authority demanded further clarification on some aspects of the aid scheme. By letter dated 30 May 2005, forwarding a letter from the Ministry of Modernisation dated 26 May 2005 and the Ministry of Finance dated 23 May 2005, the Norwegian authorities provided further information and amended the aid scheme and the notification in several respects. The letter was received and registered by the Authority on 31 May 2005 (Event No 321225).

B. Background

The notification foresees that energy intensive undertakings will be given a full exemption (i.e. a zero tax rate) from the electricity tax. The general electricity tax rate in Norway is NOK 0.0988/kWh in 2005 (0.0967/kWh in 2004). However, certain industries (in particular the manufacturing and mining sector) only pay a reduced tax rate of NOK 0.0045 per kWh (EUR 0.0005⁵). This reduced rate was authorised by the Authority in its decision of 30 June 2004⁶. Some of the companies paying a reduced rate should now, with the scheme notified to the Authority, be totally exempted from the electricity tax.

The zero tax rate as notified can only be obtained by undertakings which participate in an energy efficiency programme, based on an Agreement which is to be concluded between the undertaking applying for the tax exemption and the Norwegian State⁷. Energy intensive companies will be offered the possibility to participate in a five-year programme, which requires that certain energy efficiency obligations be fulfilled, and stipulates penalty arrangements in case the obligations are not fulfilled.

These commitments are considered to replace the steering effect of the electricity tax, and the companies are therefore granted a full exemption from the electricity tax on electricity used in the industrial production process during the programme period. Details are given below.

1. The objective of the support measure

The objective of the tax exemption in conjunction with the Agreement is to achieve a more efficient use of energy. The motivation for the programme is to establish a system for improving energy efficiency in companies characterised by high energy consumption and where the potential for savings is therefore significant, if the companies were given an incentive to take energy saving measures during a five-year period because they would receive a tax relief.

2. The national legal basis

⁵ The conversion is based on the conversion principles set out in Article 13 (1) of Directive 2003/96/EC, i.e. at a conversion rate on 1 October 2004 of NOK/Euro 8.34.

⁶ Decision 149/04/2004 regarding certain derogations from electricity tax. The reduced rate for certain industries is laid down in 3-12-4 of the Norwegian Regulation on Excise Duties.

⁷ "The Agreement concerning the promotion of efficient energy use in energy intensive industries", hereinafter referred to as "the Agreement".

As the tax relief for energy intensive industries is dependent on the achievement of certain environmental objectives, several legal bases have to be mentioned.

As to the electricity tax and the exemption therefrom, the Act on Excise Duties⁸ gives the legal basis for the Regulation on Excise Duties⁹, which in Section 3-12-1 establishes a common duty to pay electricity tax.

Section 3-12-11 of that Regulation establishes a full exemption from the electricity tax for those energy intensive undertakings in the paper and pulp industry which participate in an authorised energy efficiency programme¹⁰. The excise duty rates are decided upon annually by the Parliament¹¹.

The energy efficiency programme is governed by an Agreement, which limits the tax exemption to energy intensive companies (section 4 of the Agreement). The main text of the Agreement between Norway and the aid recipient is drafted in a manner to cover all energy intensive industries. However, the actual tax decision for 2005 limits the tax exemption to the paper and pulp industry¹².

3. Number of recipients

The number of beneficiaries is expected to be 30 undertakings in the paper and pulp industry. Another 28 energy intensive undertakings are potentially estimated to enter the programme in the future.

4. Budget

The Norwegian authorities have calculated (based on 30 undertakings in the paper and pulp industry, which are currently paying a reduced electricity tax rate of 0.0045/kW) an annual aid amount in the form of foregone tax revenue of NOK 25 million (approximately Euro 3 million). For the notified ten-year period this amounts to NOK 250 million (approximately Euro 30 million).

No calculations have yet been made for the entry of other energy intensive companies into the programme. However, it is estimated that if all energy intensive industries were to benefit from the exemption, this would constitute NOK 38 million per year in total (of which some NOK 25 million stemming from the paper and pulp industry).

5. Duration

The programme covers the period from 1 July 2004 until 30 June 2014. While the programme enters into force only on 1 July 2005, undertakings in the paper and pulp industry might apply for a retroactive tax reduction. For that reason the Norwegian authorities describe the duration of the programme to be for 10 years.

⁸ Act of 19 May 1933 No. 11.

⁹ Regulation of 11 December 2001 No. 1451.

¹⁰ The exemption was included through Regulation of 25 June 2004 No. 1040.

¹¹ For 2004 the Parliamentary decision of 26 November 2003 with changes of 18 June 2004, for 2005 the Parliamentary decision of 25 November 2004.

¹² Details relevant to the paper and pulp industry are dealt with in an appendix to the Agreement. On the extension possibility in order to cover also other energy intensive companies outside the paper and pulp industry, see also below point I 8 of this Decision.

6. Cumulation with other support measures

The Norwegian Government states that the support cannot be cumulated with aid received from other local, regional, national or European Community schemes covering the same eligible costs¹³.

7. Detailed description of the Agreement between the Norwegian State and the individual company

The Agreement is based on an energy efficiency programme similar to that developed for Swedish energy intensive industries¹⁴. To avoid extensive administration by repayment of tax, the scheme foresees that the approved undertakings concerned are not liable for tax when purchasing electricity and no subsequent repayment will take place.

The preamble of the Agreement links the tax exemption and the achievement of energy efficiency goals as outlined in the Agreement by section 1, which reads:

“the purpose of the Agreement is to promote efficient energy use and the Agreement sets out provisions that provide energy-intensive companies to participate in a five year programme for energy efficiency in exchange of exemption from tax in accordance with Regulation on excise duties of 11 December 2001, no 1451, Section 3-12-11. See that Regulation also for inter alia payment of the electricity tax (Section 2-1(5)) and default interests (Section 6-4) in cases of non-compliance.”

The Agreement will be administered by the Norwegian Water Resources and Energy Directorate as the state’s representative in the Agreement (hereinafter “NVE”). NVE is subordinated to the Ministry of Petroleum and Energy. Participation in the Agreement is achieved by application from the undertaking concerned to NVE, which will assess whether the application requirements are satisfied, and monitor fulfilment of the Agreement.

To qualify as a participant in the programme the undertaking must classify as an energy-intensive company. A company is considered energy-intensive (section 4 of the Agreement) if:

1. the purchasing costs for energy products and electricity amount to at least 3 per cent of the company’s production value in the baseline year, or
2. energy, CO₂ and sulphur dioxide taxes on the energy products and electricity used by the company in the baseline year amount to at least 0.5 % of the company’s added value in the same period.

The baseline year is the reference year for determining the company’s purchasing costs and payment of taxes and is defined in section 4 of the Agreement as either the calendar

¹³ This was in particular emphasised with regard to the Energy Fund system, which is equally notified to the Authority and which also covers the support for energy saving measures.

¹⁴ The Swedish model was approved by the European Commission in Decision N253/2004.

year preceding the application for approval or another calendar year that reflects the company's industrial activity satisfactorily. The latter condition is decided by NVE¹⁵.

The main obligations for the beneficiaries under the Agreement will be:

7.1 Implementation of a standardised energy management system (section 5-6 of the Agreement)

The company will be obliged to use a standardised energy management system which is certified by an accredited certification body.

The energy management system shall require that the company establish a relevant energy policy for itself, which also contains an obligation for ongoing efficiency improvements. The energy savings shall at least correspond to what would have been achieved if the electricity tax had been paid. The company shall continually analyse and monitor its energy use and identify the energy efficiency measures which can be carried out for improvement. Energy goals and action plans shall be established based on the company's energy policy. The company shall also take on the responsibility to train its staff to secure the functioning of the energy management system, and construct an organisational function that makes available the resources needed for management of the system (section 6 of the Agreement).

Individual energy efficiency targets will be fixed for each company in consultation with NVE and a certification body. The targets have to be quantifiable and of a fixed duration. After two years from start-up of the programme an accredited certifying body will certify that the system meets the requirements in section 6 of the Agreement, which includes an analysis of the company's individual targets.

Norway states that the estimated price elasticity for electricity in the paper and pulp industry is -0.14. Applying this elasticity, the Norwegian authorities have estimated that the effect of maintaining the current tax rate of NOK 0.0045/kWh would reduce the electricity consumption of this industry by 0.3% (about 0.02 TWh per year). A higher price elasticity as estimated by Norway Statistics¹⁶ would imply a reduction of 1.9%. However, participation in the scheme is expected to lead to a similar or even greater reduction, i.e. 2%, or about 0.13 TWh. This corresponds to the energy saving potential forecast under the Finnish and Swedish energy efficiency schemes¹⁷.

7.2 Description of energy use (section 7 of the Agreement)

In addition to the energy management system, the company must describe the energy use in the production process and its auxiliary systems. The company shall assess the alteration of energy use in the short and long term and identify energy-efficient measures that will be implemented in the manufacturing process.

The action plan described above should include measures with a pay-off time of three years.

¹⁵ In an appendix to the Agreement, an example for such a situation is given: It might be that a company has experienced a not insignificant production interruption or has made extensive investments, from which the VAT is going to be deducted

¹⁶ Norway Statistics has done a small sample which showed variations in elasticity of -0.02 to -0.86.

¹⁷ See European Commission decision N 253/2004.

7.3 *Implementation of the identified energy-efficient measures in the production process (section 11 to 14 of the Agreement)*

After two years in the programme period, the company shall be certified by an external certification body. The company must submit a report to NVE, which includes the certification documents. The report shall document that the requirements of the Agreement have been met so far (this covers the requirements for an energy management system under Article 6 of the Agreement and a survey of the obligations resulting from Article 7 of the Agreement, see above).

It should also be documented how the company plans to increase the energy efficiency equivalent to what would have been achieved by energy taxation at a level of EUR 0.5 per MWh, which is the minimum of the Energy Tax Directive. The company is required to submit a list of energy efficiency measures to this end. NVE assesses whether the report can be approved.

If the report is not submitted, or does not fulfil the requirements of the Agreement, NVE will disqualify the company concerned. This will also lead to liability for the exempted electricity tax within the programme period plus default interests¹⁸.

A report is also required by the end of the five-year period. If the final report is not submitted or is too incomplete, NVE will decide that the company has not fully implemented the energy efficiency measures in accordance with the programme. If NVE decides that the final report cannot be approved, it will withdraw the previously accorded approval. The company is then liable – from the time the approval entered into force – for the electricity tax including default interests. The approval shall also be withdrawn if the company is no longer energy intensive.

7.4 *Retroactivity and its effect*

Participants under the Agreement have the right to apply for a second and final period of five years¹⁹.

Under the Agreement, the paper and pulp industry is given the possibility to benefit from a retroactive tax exemption when applying for the participation in the programme within three months from the entering into force of the programme (1 July 2005). If the application is approved by NVE, the programme will be considered – for these companies - as running from 1 July 2004. This means that the first programme period will expire 31 June 2009, and the company will have one year less – counted from 1 July 2005 - to achieve the results required under the programme.

The reason for this is that originally the programme should have already entered into force on 1 July 2004 and that the paper and pulp industry, which was informed about the programme in the Revised National Budget for 2004 in advance of the planned implementation in July 2004, had already started preparations for the entry into force and continuously followed the ongoing work. While, during the first two years of the

¹⁸ Set at three percentage points above the rate according to *Lov om renter ved forsinket betaling m.m.*, which is currently at 8.75 %.

¹⁹ This can be done before the initial period of five years has elapsed. The approval will take effect from the end of the first period and will therefore create an overlap in time.

Agreement, no concrete energy efficiency goals must be reached²⁰, companies are obliged to carry out an analysis, identify potential measures, including the installation of energy management systems and certifications according to the relevant standards. According to information provided to the Authority, the companies in question have already started the certification process.

8. Comments by the Norwegian authorities

The Norwegian authorities do not dispute that the measure constitutes a form of State aid. However, they consider the support to be in compliance with Article 61 (3) (c) of the EEA Agreement in conjunction with the Environmental Guidelines. In this context the Norwegian authorities also refer to the Energy Tax Directive 2003/96/EC²¹.

The Norwegian authorities state that while, for the time being, the Parliament has decided on a zero tax rate only for the paper and pulp industry, other energy intensive industries may be later allowed to join the programme. As for the paper and pulp industry, a zero tax rate for the other companies is conditional on the participation in the programme. The Norwegian authorities asked the Authority to authorise the scheme for all energy-intensive industries, i.e. beyond the paper and pulp industry, as has been done by the European Commission in a similar notification of a Swedish energy efficiency programme.

As accepted by the Norwegian authorities, the zero tax rate for energy intensive industries (i.e. beyond the paper and pulp industry) may only cover undertakings which are submitted to the reduced rate according to section 3-12-4 of the Regulation on Excise duties (namely the manufacturing and the mining sector, social works as far as the electricity is used by enterprises that exercise industrial production in the same manner as the manufacturing and mining industries, and the industry which supplies steam and hot water).

II. APPRECIATION

A. Notification requirement

According to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, EFTA States have an obligation to inform the Authority, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The EFTA State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

All necessary powers have been conferred to the Ministry of Finance as concerns the exemption for the paper and pulp industry. The Agreement is, however, effectuated on 1 July 2005, after the Authority has given its approval. As concerns the exemption for other energy intensive industries, no powers have yet been conferred.

²⁰ At the stage of the interim report, see section 11 of the Agreement, the company must use a standardised energy management system, submit a certification document, implement and submit a survey on the use of energy within the company and state measures to change the use of energy. A list of energy efficiency measures which are expected to lead to increased efficiency equivalent to what would have been achieved with the payment of the tax must also be drawn up.

²¹ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283 of 31.10.2003, p. 51.

Against this background, the Authority considers that the Norwegian authorities have complied with the stand-still period of the Surveillance and Court Agreement.

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

The Authority will assess below whether the tax exemption for energy intensive industries (including paper and pulp and other industries) constitutes State aid within the meaning of Article 61 (1) of the EEA Agreement.

Article 61(1) of the EEA Agreement reads:

“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.”

The introduction of an electricity tax is not as such caught by Article 61(1) of the EEA Agreement, insofar as it is a general measure which applies to all sectors of industry. However, exceptions to a general tax 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. It is against this background that the tax exemption is assessed.

1. State resources

The tax exemption represents a loss of state revenues for the Norwegian State and is thus financed from state resources.

2. Economic advantage

The exemption from the electricity tax represents an advantage for the companies concerned compared to other companies, which will have a higher tax burden and hence higher operating expenses.

3. Selectivity

The tax exemption is also selective, as only energy intensive industries can participate in the programme and be entitled to the tax exemption, in contrast to non-energy intensive undertakings and also in contrast to energy intensive companies which so far do not pay a reduced rate and would not be allowed to join the programme.

4. Distortion of competition and effect on trade

The financial assistance provided to the selected beneficiaries will strengthen their position, and may in turn affect the market situation and the position of the competitors. Many of the beneficiaries are active on markets for which there is trade between the Contracting Parties. The measure therefore distorts or threatens to distort competition and affects trade between the Contracting Parties of the EEA Agreement.

Consequently, the electricity tax exemption for energy intensive industries constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

C. Compatibility assessment

The aid may still be considered compatible with the functioning of the EEA Agreement. The Authority has analysed, in this respect, the measures under Article 61(3)(c) of the EEA Agreement and the Environmental Guidelines. Article 61(3)(c) reads as follows:

“The following may be considered to be compatible with the functioning of the EEA Agreement: (...) 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 contrary to the common interest (...)”.

1. The Environmental Guidelines

According to Section D.3.2 of the Environmental Guidelines, EFTA States might deem it necessary to make provisions for temporary exemptions from environmental taxes notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. However, as emphasised in point 42 of the Environmental Guidelines, these exemptions constitute operating aid, for which the Guidelines establish certain requirements.

Point 46.1 of the Environmental Guidelines states that a derogation from a new tax introduced by the EFTA State can be justified under certain conditions (see below) for an exemption period of up to ten years. However, the electricity tax and derogations therefrom were already introduced by Norway in July 2004 and authorised by the Authority in its decision of 30 June 2004 (149/04/COL). The Authority therefore considers the tax to be an ‘existing tax’.

According to point 46.2 of the Environmental Guidelines the provisions stipulated in point 46.1 Environmental Guidelines may also be applied to existing taxes if the tax has a positive impact in terms of environmental protection and if the derogation has been decided upon at the adoption of the tax. Here, the tax aims to steer energy saving and the increased use of energy efficiency measures and thus has a positive impact for environmental protection. The derogation for that part of the industry concerned was decided in principle when the tax was adopted²².

²² At the time of the adoption of the electricity tax in July 2004 it was decided that the manufacturing and the mining sector as well as certain social works activities and the sector which supplies steam and hot water, to which these companies belong – see point 8 of this Decision - would only pay a reduced tax rate according to 3-12-4 of the regulation on excise duties. The payment of this rate, which corresponded to the Community minimum, is now replaced with the participation in the programme, leading to at least the same energy savings. It should further be noted that already under the former electricity tax from 1971, these companies were exempted. See in this respect the Commission’s argument in Case N 253/2004. At the time of the introduction of the new electricity tax, the Norwegian Government had informed the Authority by letters dated 14 April 2004 (Event No 278143) and 1 June 2004 (Event No 282553), i.e. before the new electricity tax entered into force, about its intention to continue the exemption for energy intensive processes, in particular for the paper and pulp industry, also under the new tax regime and that an energy efficiency programme would shortly be notified to the Authority in this respect.

The conditions stipulated under point 46.1 of the Environmental Guidelines

Point 46.1 of the Guidelines allows for a non degressive tax exemption for ten years, if the exemption is either conditional on the conclusion of an agreement between the aid recipient(s) and the EFTA State concerned or if the aid recipient pays either an amount which corresponds to the European Community minimum or a significant proportion in case of a national tax which does not correspond to a harmonised tax. In the case of a zero tax rate as in the present rate, only the first exemption could possibility apply.

It therefore needs to be examined whether the Norwegian energy efficiency programme fulfils the criteria of 46.1 of the Guidelines. In this regard, the EFTA State and the aid recipients must not only enter into agreements under which the recipient firms undertake to achieve environmental protection objectives during the period for which the exemption applies. The EFTA States must also ensure strict monitoring of the commitments entered into by the firms and the agreements must stipulate penalty arrangements. In this regard, the Authority makes the following observations:

- In order to profit from the zero tax rate, the recipient must apply for admission to the energy efficiency programme and conclude an individual agreement with NVE as a State representative. According to section 3-12-11 of the Regulation on excise duties, only energy intensive undertakings in the paper and pulp industry which participate in the approved energy efficiency programme can benefit from the tax exemption. The Norwegian authorities have clarified that also for other energy intensive undertakings, which might join the programme at a later date, the zero tax rate would be conditional on its participation in the programme.
- By participating in the programme, the company undertakes to implement a standardised energy management system, which is certified by an accredited body. The energy management system involves mapping and analysing energy usage and implementing measures that result in an ongoing efficiency of the use of electricity.
- The company has to fulfil an individual target, which is quantifiable and of fixed duration. The targets and the achievement thereof will be assessed and approved by NVE.
- The conditions of the participation in the programme lead to an effect which is similar to that which the tax would have had on the companies. The total target of 2% reduction in energy consumption is, according to the calculations of the Norwegian authorities, higher than what would have been achieved if the beneficiaries had been obliged to pay the tax corresponding to the Community minimum resulting from Directive 2003/96/EC.
- The Guidelines stipulate that the EFTA State concerned must ensure strict monitoring of the commitments entered into. The undertaking's participation is conditional upon an application by the undertaking and an approval of NVE. NVE will, in general, supervise adherence to the Agreement.
- The undertaking concerned must submit a report on the implementation of the energy management systems two years after the Agreement has entered into force. The undertaking must equally produce a final report after five years when the first period of the Agreement expires. NVE will assess both reports. In case it finds the

report or the results unsatisfying, it will withdraw the former approval of participation.

- If the conditions of the Agreement have not been fulfilled, the company incurs liability for electricity tax throughout the duration of the programme. This involves repayment of the electricity tax, with default interests according to section 6-4 of the Regulation on excise duties. The interest rate is set at three percentage points above the rate set pursuant to the Act relating to Interest on Overdue Payments²³, which is currently set at 8.75%. The higher interests have a penalising effect.

For undertakings belonging to the paper and pulp industry, the Norwegian energy efficiency programme provides for a retroactive tax exemption from 1 July 2004, if the companies apply within three months from when the programme comes into effect (1 July 2005). The reason for this is that the system was supposed to enter into force already in 2004. The beneficiaries from the paper and pulp industry have continuously followed the development of the programme and were aware of the rules which they had to fulfil. As stated by that industry, many of the undertakings have already started work on energy efficiency (in particular on the certification process).

As stated by the Norwegian authorities, those undertakings must fulfil the same conditions as other undertakings to which the retroactivity does not apply (either because they do not apply within the period of three months from 1 July 2005 or because they are not active in the paper and pulp industry). However, they will have to achieve the goals within a de facto shorter period of four years, as the five-year period for those undertakings will be calculated from 1 July 2004 and thus end for them in 1 July 2009. If an undertaking does not manage to achieve the energy targets within that shorter period of four years, it will be submitted to the full electricity tax of five years with default interest.

The elapsed time before 1 July 2005 does not appear too long for the companies to achieve the energy targets within the remaining four years of the five year period. In this respect, it should be noted that the companies enter their programme only a year later and still during the first two years for which no concrete energy efficiency targets are stipulated to be met. As can be seen from section 11 on the Regulation on excise duties, the interim report after two years only obliges the companies to have inter alia a standardised and certified management system in place and a list of energy efficiency measures²⁴. In any event the company will be obliged to pay the electricity tax for the full five-year period with default interests, if at the end of that period the company has not fulfilled its commitments²⁵.

2. The Energy Tax Directive

The Authority also takes note of Council Directive 2003/96/EC, which stipulates, for the European Community, the conditions under which a total tax exemption for energy products can be authorised. While not being incorporated into the EEA Agreement, the Authority notes that the harmonised Community tax level is of relevance for the

²³ *Lov 17. desember 1976 nr. 100 om renter ved forsinket betaling m.m.*

²⁴ As stated by the Norwegian authorities, the 2-year interim stage is rather a checkpoint. While it is possible at this stage for the NVE to withdraw the approval with the consequence of tax repayment and interests, it is mainly after the end of the complete five-year period that it will be judged whether or not the company has fulfilled its commitments.

²⁵ See Article 14 of the Agreement and letter by the Norwegian authorities dated 17 November 2004, section 12 ‘other information – repayment and sanctions’ and letter by the Norwegian authorities dated 30.05.2005, point 2 – the 5 year period under the agreement.”

compatibility assessment of tax exemptions under the Authority's Environmental Guidelines. Point 44(b) of the Environmental Guidelines states that a tax exemption below the Community's minimum rate will be accepted as compatible only in so far as this would have been authorised within the European Community under the Energy Tax Directive. Against this background, the Authority therefore has analysed under which conditions a zero rate for the energy intensive industries would have been allowed under Directive 2003/96/EC.

2.1 *Energy intensive business*

The Norwegian criteria correspond to the definition of energy intensive users in Article 17(1) (a) of the Energy Tax Directive.

2.2 *Agreement on energy efficiency*

Article 17 (4) of the Directive provides for a certain qualitative standard of the agreements which the recipients would conclude with the State in that the agreements must lead to the achievement of environmental objectives or increased energy efficiency which is broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed. This is then also a requirement under the Environmental Guidelines point 44(b).

The current total energy consumption in the paper and pulp industry is approximately 15.5 TWh per year. Of this, approximately 6.5 TWh (42%) consists of electricity consumption²⁶. According to the Norwegian authorities, an electricity tax of NOK 0.0045 per kWh for the industry, which corresponds to the standard Community minimum rates, will reduce the use of electricity by 0.02 TWh, which equals 0.3% of the consumption. The Norwegian authorities draw parallels to a similar Finnish scheme on energy efficiency. According to the estimations under this scheme, participation in an energy efficiency programme would lead to energy savings equalling 2% compared to not participating. This would represent approximately 0.13 TWh for the paper and pulp industry, which means that it would have a larger impact than the payment of the electricity tax itself²⁷. Efficiency targets will be fixed for the firms individually as they differ in nature. On this basis it can be presupposed that the Agreement will lead to increased energy efficiency broadly equivalent to what would have been achieved by applying the minimum Community tax rates²⁸.

D. Conclusions

The Authority concludes that the notified operating aid in the form of electricity tax exemption for energy intensive industries constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The Authority however takes the view that the tax exemption in favour of energy intensive industries is compatible with the functioning of the EEA Agreement, in particular Article 61(3)(c) thereof, in combination with the Environmental Guidelines until 31 June 2014.

²⁶ Other energy intensive industries which may to sign the Agreement have an energy consumption of 6.8 TWh, of which 3.2 TWh is electricity consumption.

²⁷ If based on a higher elasticity, leading to a reduction of 1.9% (see above point I 7.1 of this Decision), the participation in the programme would still have an effect similar to the tax.

²⁸ See in this respect also the similar calculations for the Swedish energy efficiency programme, Commission Decision N 253/2004.

The Norwegian authorities are reminded that they must provide the Authority annually with a report on the implementation of the aid and that any changes in the modalities of the scheme have to be notified.

HAS ADOPTED THIS DECISION:

1. The Authority decides not to raise objections to the notified electricity tax exemption for energy intensive industries participating in a programme for energy efficiency.
2. This Decision is addressed to the Kingdom of Norway.
3. This Decision is authentic in the English language.

Done at Brussels, 22 June 2005.

For the EFTA Surveillance Authority

Einar M. Bull
Acting President

Bernd Hammermann
College Member