

Case No: 91969
Document No: 1558315
Decision No 202/25/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 10 December 2025

concerning exemptions from the excise duty on waste incineration for
undertakings covered by the EU ETS

(Norway)

The EFTA Surveillance Authority ('ESA'),

Having regard to:

the Agreement on the European Economic Area ('the EEA Agreement'), in
particular to Articles 61 and 62,

Protocol 26 to the EEA Agreement,

the Agreement between the EFTA States on the Establishment of a Surveillance
Authority and a Court of Justice ('the Surveillance and Court Agreement'), in
particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3 SCA'), in particular
to Article 1(3) of Part I and Article 7(2) and 7(6) of Part II,

having called on interested parties to submit their comments ⁽¹⁾, and having regard
to their comments,

Whereas:

I. FACTS

1 Procedure

- (1) On 29 February 2024, the Norwegian authorities notified i) an exemption from the excise duty on waste incineration for undertakings subject to the EU Emissions Trading System ('Measure 1') and ii) an exemption from the CO₂ tax for liquefied petroleum gas ('LPG') and natural gas for the processing industry for undertakings subject to the EU Emissions Trading System ('Measure 2'), pursuant to Article 1(3) of Part I of Protocol 3 SCA ⁽²⁾.

⁽¹⁾ ESA [Decision No 039/24/COL](#), opening a formal investigation into the exemptions from excise duty on waste incineration and CO₂ tax on LPG and natural gas for undertakings covered by the ETS, OJ C/2024/3127, 8.5.2024 and EEA Supplement No. 38, 8.5.2024, p. 1.

⁽²⁾ Document Nos 1439561, 1439563 and 1439565.

- (2) By Decision No 039/24/COL of 27 March 2024 ('the Opening Decision') ⁽³⁾, ESA initiated the formal investigation procedure. On 30 April 2024 ⁽⁴⁾, the Norwegian authorities submitted their observations on the Opening Decision.
- (3) The Opening Decision was published in the Official Journal of the European Union and in the EEA Supplement to it ⁽⁵⁾. ESA received comments from interested parties regarding Measure 1 ⁽⁶⁾. On 14 June 2024 ⁽⁷⁾, ESA forwarded these to the Norwegian authorities. On 21 June 2024 ⁽⁸⁾, the Norwegian authorities submitted their observations on the comments from the interested parties.
- (4) On 18 February 2025 ⁽⁹⁾, ESA requested additional information from the Norwegian authorities. On 27 February 2025, a meeting was held between ESA and the Norwegian authorities. On 18 March 2025 ⁽¹⁰⁾, the Norwegian authorities replied to the information request of 18 February 2025. On 19 May 2025, another meeting was held between ESA and the Norwegian authorities, and on 28 May 2025 ⁽¹¹⁾, ESA sent follow-up questions to the Norwegian authorities. The Norwegian authorities submitted answers to ESA's questions on 1 July 2025 ⁽¹²⁾. Additional meetings between ESA and the Norwegian authorities were held on 25 August 2025 and 4 September 2025. By agreement between ESA and the Norwegian authorities and pursuant to Article 7(6) of Part II of Protocol 3 SCA, the time limit to adopt a decision following the formal investigation was extended to 31 December 2025. Further meetings between ESA and the Norwegian authorities were held on 10 October 2025, 14 November 2025 and 21 November 2025.
- (5) The present decision only concerns Measure 1. As regards Measure 2, described in paragraphs 7 to 11 of the Opening Decision, ESA maintains the formal investigation procedure open.

2 Description of the measure

2.1 Background

- (6) In its budget proposal for 2022, the Norwegian Government proposed to introduce an excise duty on waste incineration to reduce emissions of CO₂ by internalising the costs of the CO₂ emissions associated with this activity ⁽¹³⁾.

⁽³⁾ ESA [Decision No 039/24/COL](#), opening a formal investigation into the exemptions from excise duty on waste incineration and CO₂ tax on LPG and natural gas for undertakings covered by the ETS.

⁽⁴⁾ Document Nos 1453310, 1453306 1453308 and 1453304.

⁽⁵⁾ OJ C/2024/3127, 8.5.2024 and EEA Supplement No. 38, 8.5.2024, p. 1.

⁽⁶⁾ Document No 1509369.

⁽⁷⁾ Document No 1463157.

⁽⁸⁾ Document Nos 1465942 and 1465940.

⁽⁹⁾ Document No 1509413.

⁽¹⁰⁾ Document Nos 1525019 and 1525021.

⁽¹¹⁾ Document No 1539541.

⁽¹²⁾ Document Nos 1552680 and 1552681.

⁽¹³⁾ Prop. 1 LS (2021-2022), Skatter, avgifter og toll 2022, item 9.9.5.

- (7) The excise duty on waste incineration was introduced on 1 January 2022. The general tax rate on waste incineration is currently NOK 830 per tonne of CO₂ in 2025 ⁽¹⁴⁾ ⁽¹⁵⁾.
- (8) The Norwegian Climate Quota Act ('the Climate Quota Act') ⁽¹⁶⁾ was introduced to implement Norway's obligations pursuant to the EU Emissions Trading System Directive ('ETS Directive') ⁽¹⁷⁾. Within its scope of application, the Climate Quota Act imposes an obligation on undertakings to surrender emission allowances as specified in the act.
- (9) Emissions covered by the Climate Quota Act do not currently benefit from a total exemption from the excise duty on waste incineration but are levied a reduced rate, which was introduced under the General Block Exemption Regulation ('GBER') ⁽¹⁸⁾. However, to avoid that undertakings are both subject to the excise duty on waste incineration at a reduced rate, and the obligation to surrender emissions allowances pursuant to the Climate Quota Act, the Norwegian authorities intend to introduce Measure 1. If found to be in accordance with the EEA State aid rules by ESA, Measure 1 would completely exempt emissions that are covered by the Climate Quota Act from the excise duty on waste incineration ⁽¹⁹⁾.
- (10) In the view of the Norwegian authorities, Measure 1 does not qualify as State aid within the meaning of Article 61(1) of the EEA Agreement, as it is a non-selective measure. Nevertheless, the measure was notified for legal certainty.

2.2 Objective

- (11) The measure's objective is to avoid that activities associated with CO₂ emissions are subject to two sets of legislative requirements, which both aim to internalise the costs of the emissions. Measure 1 is designed to ensure that waste incineration is not subject to both an excise duty and the costs of emissions allowances resulting from the Climate Quota Act.

2.3 National legal basis and administration

- (12) The national legal basis for Measure 1 will be the decisions on excise duties and taxes that are adopted annually by the Norwegian Parliament through the State budget, and the applicable Norwegian regulations implementing these decisions.

⁽¹⁴⁾ Between January and July 2025, the tax rate was NOK 908. The current tax rate of NOK 830 per tonne of CO₂ is applicable from August 2025.

⁽¹⁵⁾ The current level of the excise duty is temporary, as the excise duty on waste incineration is phased in. Initially, the Norwegian authorities planned to raise the tax rate for waste incineration towards the general rate charged for similar emissions in 2026, see paragraph (37). However, due to concerns regarding the supply of power to the grid and due to the European Commission's ongoing assessment of whether the EU Emissions Trading System should be extended to waste incineration, the Norwegian authorities are considering whether to pause further increases of the tax level in 2026.

⁽¹⁶⁾ [LOV-2004-12-17-9](#).

⁽¹⁷⁾ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, pp. 32–46, act referred to at point 21 al of Annex XX to the EEA Agreement, as amended.

⁽¹⁸⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), referred to at point 1j of Annex XV to the EEA Agreement, as amended. Activities subject to the Climate Quota Act are currently levied a reduced rate of NOK 182 per tonne of CO₂, constituting 22 per cent of the general tax rate, see GBER 11/2024/ENV.

⁽¹⁹⁾ FOR-2024-12-13-3220, *Stortingsvedtak om avgift på avfallsforbrenning for 2025*, numeral II.

The measure will be administered by the Norwegian Ministry of Finance. The Norwegian tax system is however structured around an obligation of self-assessment. This duty entails that taxpayers are obliged to submit factually correct information to the tax authorities and to apply the relevant tax rules to calculate the tax.

2.4 Relevant environmental laws and policies

- (13) The European Union ('the EU') is committed to transforming Europe into a highly energy-efficient and carbon-neutral economy. To this end, the European Climate Law entered into force on 29 July 2021 ⁽²⁰⁾. It includes a legal objective for the EU to reach climate neutrality by 2050, and a target of at least a 55% reduction in the net greenhouse gas emissions compared to 1990 levels by 2030.
- (14) As reflected in EEA Joint Committee Decision No 269/2019 ⁽²¹⁾, Norway agreed in 2019 to new obligations under EEA law to achieve, by 2030, its target of at least a 40% reduction in greenhouse gas emissions compared with 1990 levels following from the Paris Agreement. Following that Joint Committee Decision, Norway is subject to the Effort Sharing Regulation ⁽²²⁾ ('the ESR') and the Regulation on Land Use, Land Use Change and Forestry ('the LULUCF') ⁽²³⁾, in addition to the EU Emissions Trading System ('the ETS'), which it has been part of since 2008. As part of its 'Fit for 55-package', the EU has revised these acts to reflect the increased target of at least a 55% reduction in the net greenhouse gas emissions compared to 1990 levels by 2030 ⁽²⁴⁾. The amendments to the ESR have however not yet been adapted and incorporated into the EEA Agreement, unlike the amendments to the ETS.

2.4.1 The EU Emissions Trading System

- (15) The ETS covers emissions from highly emitting industries and activities, such as energy production, the petroleum sector and aviation. The ETS is a so-called cap and trade instrument. It establishes a cap on the total emissions of certain greenhouse gases from the ETS sectors, and a system for issuing and surrendering tradable emissions allowances within this cap. The ETS was set up by the ETS

⁽²⁰⁾ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, pp. 1–17. The European Climate Law has been considered not to be relevant for incorporation into the EEA Agreement.

⁽²¹⁾ See the EEA Joint Committee Decision No 269/2019 of 25 October 2019 and the declarations made in conjunction with this decision, OJ L 11, 12.1.2023, pp. 38-45. See also the [press release of the European Commission of 25 October 2019](#).

⁽²²⁾ Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 ('Effort Sharing Regulation'), OJ L 156, 19.6.2018, pp. 26–42, act referred to at Article 3, point 8(a), second indent, of Protocol 31 to the EEA Agreement.

⁽²³⁾ Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, OJ L 156, 19.6.2018, pp. 1–25, act referred to at Article 3, point 8(a), first indent, of Protocol 31 to the EEA Agreement.

⁽²⁴⁾ An overview of the adoption of the Fit for 55-legislation is available [here](#).

Directive and put into effect in 2005. Norway has been part of the system since 2008 ⁽²⁵⁾.

- (16) The limit on the total number of allowances, in combination with the obligation to surrender allowances corresponding to the level of emissions, ensures that the ETS contributes to internalising the costs of emissions. Pursuant to the ETS, a number of allowances are allocated to undertakings free of charge.
- (17) Each year, undertakings must surrender allowances corresponding to their emissions covered by the ETS for the previous year. Fines are imposed if this obligation is not complied with. Undertakings that had lower emissions than the allowances they possess can keep surplus allowances. The cap within the ETS is reduced over time so that total emissions fall.
- (18) The ETS was amended by Directive (EU) 2023/959 ⁽²⁶⁾ to cover maritime transport from 1 January 2024.
- (19) In addition to the amendments made to the ETS, an additional emissions trading system was introduced to cover emissions from buildings, road transport and additional sectors which had previously not been covered by the ETS ('ETS 2'). The ETS and the ETS 2 constitute separate emissions trading systems in the sense that allowances are not transferable between them. Activities subject to a duty to surrender emissions allowances pursuant to ETS 2 are excluded from the scope of the notified measure ⁽²⁷⁾.
- (20) In 2023, the price of emission allowances under the ETS averaged approximately EUR 80 per tonne of CO₂ emissions. In February 2024, the price was approximately EUR 60 per tonne of CO₂ emissions and in October 2025, the price was approximately EUR 78 per tonne of CO₂ emissions.

2.4.2 The Effort Sharing Regulation

- (21) According to Article 2(1) of the ESR, the regulation applies to greenhouse gas emissions from energy, industrial processes and product use, agriculture and waste management, excluding greenhouse gas emissions from activities covered by Annex I of the ETS Directive. Emissions subject to the ETS are therefore excluded from the scope of the ESR, with the notable exception of maritime transport and activities listed in Annex I only for the purposes of monitoring, reporting and verification ⁽²⁸⁾.

⁽²⁵⁾ Decision of the EEA Joint Committee No 146/2007 of 26 October 2007 amending Annex XX (Environment) to the EEA Agreement, OJ L 100, 10.4.2008, pp. 92–98.

⁽²⁶⁾ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, pp. 134–202, act referred to at point 21a) of Annex XX to the EEA Agreement.

⁽²⁷⁾ The notification, first paragraph.

⁽²⁸⁾ Regulation 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, amended Article 2(1) of the ESR, specifying that maritime transport remains subject to the ESR despite its inclusion into the ETS following an ETS revision in 2023 (see paragraph (18)). Regulation (EU) 2023/857, amending the ESR, is not yet incorporated into the EEA Agreement.

- (22) The ESR sets a national target for the reduction of greenhouse gas emissions for each State. It is up to the national authorities in the respective States to implement policy instruments to comply with their national targets.
- (23) When incorporating the ESR into the EEA Agreement, the EEA Joint Committee set a national emission reduction target for 2030 for Norway under the regulation.

2.4.3 *The application of the ETS to waste incineration in Norway*

- (24) The Norwegian authorities have explained that the inclusion of a plant or installation in the ETS depends on how the activity in question is classified in the Norwegian Trading Regulation ⁽²⁹⁾, which together with the Climate Quota Act incorporates the ETS into Norwegian law. Most waste incineration included in the ETS falls within the category of ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW’ ⁽³⁰⁾. However, an exception applies for the incineration of hazardous or municipal waste which, according to the Norwegian authorities, has been understood and applied in line with the distinction between waste incineration plants and co-incineration plants ⁽³¹⁾.
- (25) The Norwegian authorities explain that in accordance with their national procedure, waste incineration plants are exempted from the ETS, while co-incineration plants fall within the scope of the ETS ⁽³²⁾. ESA notes that the Borgarting Court of Appeal made a request for an advisory opinion from the EFTA Court in Case E-2/25 ⁽³³⁾ concerning the interpretation of the scope of the exemption for the incineration of hazardous and municipal waste under the first activity listed in Annex I to the ETS Directive. In that case, the EFTA Court found that a classification building on a distinction between incinerators and co-incinerators is not in line with the ETS Directive. ESA assumes that going forward, the Norwegian authorities will apply the delineation between ETS and non-ETS emissions in line with the ETS Directive and relevant case law, including the judgment of the EFTA Court in Case E-2/25. However, ESA considers that future changes in practice following from the judgment and ongoing national procedures are not relevant to the State aid assessment in the present decision: Changes in practice may lead to a change in classification for specific plants/units, but do not affect the underlying distinction between emitters that are subject to the ETS and those that are not.
- (26) Additionally, a number of industrial production plants use waste as one of several fuels to meet their energy needs. These plants may also be covered by the ETS.
- (27) The Norwegian authorities have explained that Measure 1 will be applied to plants/units that are subject to the ETS, which will be exempted from the excise duty on waste incineration by the effect of Measure 1. By contrast, Measure 1 will

⁽²⁹⁾ [FOR-2004-12-23-1851](#).

⁽³⁰⁾ *Ibid*, section 1-3.

⁽³¹⁾ The Norwegian authorities have explained that they classify as waste incineration plants such plants that mainly burn municipal and/or hazardous waste. Meanwhile, the Norwegian authorities classify as waste co-incineration plants such plants that also burn waste but have as their main purpose not the disposal of waste, but rather the production of energy or other products, using waste as an input factor.

⁽³²⁾ See document Nos 1525019 and 1525021, referred to in footnote 10.

⁽³³⁾ Judgment of the EFTA Court of 11 November 2025, Case E-2/25, *Sarpsborg Avfallsenergi AS and Others v Staten ved Klima- og miljødepartementet*.

not apply to plants/units that are not subject to the ETS. These plants/units will thus be levied the excise duty.

2.5 Arguments presented by the Norwegian authorities in the notification

- (28) In the view of the Norwegian authorities, Measure 1 does not constitute State aid, as it is not selective.
- (29) The Norwegian authorities have argued that the aim of the excise duty on waste incineration is to introduce a price on CO₂ emissions where such a price is not levied through other alternative instruments. Furthermore, the Norwegian authorities have emphasised that climate taxes are Norway's preferred instrument to reduce emissions covered by the ESR. In the view of the Norwegian authorities, the reference system against which to assess the selectivity of Measure 1 under the EEA State aid rules is therefore the excise duty on waste incineration that falls outside the scope of the ETS but is causing emissions covered by the ESR. Furthermore, the Norwegian authorities assert that Measure 1 is not *prima facie* selective as undertakings subject to the exemptions introduced through Measure 1 are in a different legal and factual situation than undertakings which are not exempted, by virtue of being subject to the ETS.
- (30) In the event that ESA finds the measures to be *prima facie* selective, the Norwegian authorities assert that the derogation from the reference system would nevertheless be justified by the logic of the system. In this regard, the Norwegian authorities have underlined that the excise duty on waste incineration shares the same aim of reducing CO₂ emissions as the ETS by imposing a price on such emissions. Without Measure 1, the concerned emissions would effectively be levied a carbon price twice. As the excise duty on waste incineration has as its objective to provide cost-efficient reductions in ESR emissions, preventing a double pricing of emissions must, according to the Norwegian authorities, be considered a logical consequence of the system.

3 Grounds for initiating the formal investigation

- (31) In the Opening Decision, ESA's preliminary view was that Measure 1 may constitute State aid as defined in Article 61(1) of the EEA Agreement, as the measure may grant a selective advantage to the recipients.
- (32) Based on a preliminary assessment, ESA identified the reference system of Measure 1 as the excise duty on waste incineration. Furthermore, it was ESA's understanding that the objective intrinsic to the reference system is to internalise the price on all CO₂ emissions from waste incineration at a level at least equivalent to the excise duty.
- (33) ESA had doubts as to whether undertakings could be deemed to be in a different factual or legal situation in light of the objective intrinsic to the reference system, based simply on whether their emissions are covered by the ESR or the ETS. Lastly, ESA raised doubts as to whether Measure 1 was justified by the intrinsic logic of the system with regard to its objective of avoiding double regulation.
- (34) ESA also raised doubts as to the compatibility of Measure 1 with the functioning of the EEA Agreement.

4 Comments by the Norwegian authorities

- (35) In their comments to the Opening Decision and their responses to ESA's requests for information, the Norwegian authorities emphasised that the excise duty is imposed to put a price on emissions from waste incineration not previously priced.
- (36) The Norwegian authorities emphasised that Norway's two main instruments for reducing CO₂ emissions nationally are participation in the ETS and multi-sectoral climate taxes ⁽³⁴⁾: Such instruments cover approximately 85 per cent of emissions in Norway ⁽³⁵⁾.
- (37) Both these instruments aim to price emissions at a uniform price *within each system*, thus leading to emission cuts at the lowest cost for society as a whole. While the ETS is a market-based instrument where prices are set in accordance with market mechanisms, the Norwegian authorities aim at setting the different multi-sectoral climate taxes on emissions at a normal level of approximately NOK 1 405 per tonne of CO₂ equivalents for 2025 ⁽³⁶⁾.
- (38) The Norwegian authorities noted that in the Opening Decision, ESA preliminarily identified the reference system as a tax on all CO₂ emissions from waste incineration at the level at least equivalent to the excise duty. The Norwegian authorities argue that despite the fact that both the ETS and multi-sectoral climate taxes aim to internalise the price of CO₂ emissions, the prices for emissions inside and outside the ESR should not necessarily be the same. The Norwegian authorities base this policy on the fact that there are close links between Norwegian non-ETS emissions and Norway's climate obligations under both the Paris Agreement and the ESR. The price level set by the different multi-sectoral climate taxes is set to ensure that Norway will fulfil its obligations under the ESR, while no such obligation is placed on Norway under the ETS. The economic implications the Norwegian authorities draw from these obligations are that the price on emissions outside the ETS should be different from the price under the ETS.
- (39) Furthermore, according to the Norwegian authorities, cuts achieved by Norway in its emissions subject to the ETS will not count towards achieving Norway's goals under the Paris Agreement. The Norwegian authorities explained that this is due to the fact that reductions in emissions stemming from the ETS will likely be allocated between the EEA States, independent of which territory the reductions actually took place in ⁽³⁷⁾. The Norwegian authorities also stressed that given the cap on emissions in the ETS, additional emission cuts following from a tax on emissions subject to the ETS have only a limited impact on global emission reductions, as the same amount of CO₂ equivalents can be emitted by undertakings elsewhere in the

⁽³⁴⁾ Prop 1 LS (2024-2025), *Skatter, avgifter og toll*, Section 10.9 p. 214 ff.

⁽³⁵⁾ The Norwegian climate taxes include the CO₂ tax on mineral products, the excise duty on waste incineration, a tax on sulfur hexafluoride (SF₆), a tax on hydrofluorocarbons and fluorocarbons (HFC/PFC) and a tax on CO₂ emissions in the petroleum industry.

⁽³⁶⁾ See footnote 34. As explained in paragraph (7) and footnote 15, the level of the excise duty on waste incineration is currently lower, at NOK 830 per tonne of CO₂.

⁽³⁷⁾ The Norwegian authorities informed that they are still in dialogue with the EU as regards how the responsibility for emissions in the ETS will be split for the present trading period within the framework of the Paris Agreement. The assumptions by the Norwegian authorities regarding allocations of emissions are therefore made based on the division of responsibilities for emissions in previous trading periods.

ETS. It is the total cap on emissions in the ETS that determines the total amount of emissions.

- (40) Conversely, the level of the climate taxes levied in non-ETS sectors is generally set by the Norwegian authorities to ensure that Norway will reach its greenhouse gas emission reductions pursuant to its obligations under the ESR and the Paris Agreement.
- (41) The Norwegian authorities have further explained that when levied at a uniform level, climate taxes are a cost-efficient way to cut emissions subject to the ESR and thus fulfil their obligation under the ESR and the Paris Agreement. Climate taxes provide a price for ESR emissions, which incentivises the reduction of emissions but leaves it up to companies and households to decide which emission cuts are most affordable and easiest to implement.
- (42) Lastly, the Norwegian authorities pointed out that undertakings subject to the ETS and the Climate Quota Act have conferred upon them a number of legal obligations. Such obligations include the obligation to measure, report and verify greenhouse gas emissions, as well as surrendering emissions allowances. Furthermore, the Norwegian authorities argue that independent of the initial method of acquisition, such allowances represent an alternative cost in the financial statements/balance sheets of companies and provide an incentive for companies to cut emissions.

5 Comments from interested parties

- (43) Norsk Industri, the Federation of Norwegian industries ('Norsk Industri'), has submitted comments regarding Measure 1. In its comments, Norsk Industri emphasises that co-incinerators are subject to two sets of measures that price CO₂. In its view, an exemption from the excise duty for waste incineration for industrial co-incineration facilities subject to the ETS does not constitute State aid, especially in the light of recent jurisprudence from the EU Courts emphasising the fiscal autonomy of Member States.
- (44) Norsk Industri believes that an accurate description of the reference system would be the tax as defined by the Norwegian authorities: The excise duty, including the potential exemption represented by Measure 1, specifies that the incineration of municipal waste is subject to the excise duty while activities subject to the ETS are not. As the non-taxation of waste incineration activities covered by the ETS is part of the reference system, there would be no need to assess if the exemption is a derogation.
- (45) Secondly, Norsk Industri argues that both the ETS and Measure 1 have the shared objective of incentivising changes in behaviour leading to a reduction of emissions. The Norwegian authorities' policy choice of designing the excise duty in a complementary manner to the ETS, so as not to use overlapping instruments to reach the goal of emission reductions, is an expression of the Norwegian authorities' fiscal autonomy and should be respected. In addition, undertakings subject to the ETS already pay a price for their emissions, which makes them demonstrably not comparable to those that are not subject to the ETS.
- (46) Lastly, as the intrinsic objective of the excise duty is to provide one, but not more, incentives to reduce emissions, Measure 1 is justified by the nature or general scheme of the excise duty.

II. ASSESSMENT

6 Presence of State aid

- (47) Article 61(1) of the EEA Agreement reads as follows: “Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”
- (48) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

6.1 Presence of State resources and imputability

- (49) Imputability of a measure to the State and the granting of an advantage through State resources are two separate and cumulative conditions for the existence of State aid, which are, however, often assessed together as they both relate to the public origin of the measure in question ⁽³⁸⁾.
- (50) Regarding imputability, the measure is by definition imputable to the State if the advantage is granted by a public authority, even if the latter enjoys legal autonomy from other public authorities ⁽³⁹⁾.
- (51) As to the requirement that State resources be involved, those include all resources of the public sector ⁽⁴⁰⁾.
- (52) Measure 1 satisfies these conditions. It is imputable to the State since its legal basis consists in decisions adopted by the Norwegian Parliament and Norwegian regulations implementing these decisions (see paragraph (12)). Furthermore, Measure 1 involves State resources as it comprises an exemption from the excise duty on waste incineration that will result in a loss of State revenue compared with the situation where no such exemption had been established.

6.2 Confer an advantage on an undertaking

- (53) The measure must confer on undertakings an advantage that relieves them of charges that are normally borne from their budget. An advantage within the meaning of Article 61(1) of the EEA Agreement is any economic benefit which an undertaking could not have obtained under normal market conditions ⁽⁴¹⁾.
- (54) By providing for an exemption from the excise duty that would otherwise be due for waste incinerators subject to the ETS, Measure 1 also constitutes a relief from

⁽³⁸⁾ ESA's Guidelines on the notion of State aid as referred to in Article 61(1) of the EEA Agreement ('NoA') (OJ L 342, 21.12.2017, p. 35 and EEA Supplement No 82, 21.12.2017, p. 1), paragraph 38.

⁽³⁹⁾ NoA, paragraph 39.

⁽⁴⁰⁾ NoA, paragraph 48 and the case law cited.

⁽⁴¹⁾ NoA, paragraph 66 and the case law cited.

economic burdens which the beneficiaries would have to bear if not for the measure.

6.3 Effect on trade and distortion of competition

- (55) The measure must be liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.
- (56) ESA's understanding is that the treatment of waste is subject to competition and trade within the EEA. The Norwegian authorities have furthermore not submitted information indicating that the beneficiaries are only active on markets where there is no or limited competition and trade between the Contracting Parties to the EEA Agreement. Based on this, ESA takes the view that Measure 1 is liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

6.4 Selectivity

- (57) A State measure is selective if it favours certain undertakings or the production of certain goods 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 ⁽⁴²⁾. Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 61(1) of the EEA Agreement ⁽⁴³⁾.
- (58) The objective pursued by a State measure or the technique used by the State to implement it is not sufficient to exclude the measure from being classified as State aid. Article 61(1) of the EEA Agreement does not distinguish between the causes or objectives of State measures but defines them in relation to their effects ⁽⁴⁴⁾.
- (59) The selectivity of tax measures is normally assessed by means of a three-step analysis. First, a system of reference is identified. Second, it must be determined whether a given measure constitutes a derogation from that reference system, insofar as it differentiates between economic operators who, in the light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If this question is answered in the affirmative, the measure is *prima facie* selective. It must then be assessed whether the measure is justified by the nature or general scheme of the system ⁽⁴⁵⁾. If a *prima facie* selective measure is justified by the nature or general scheme of the system, it will not be considered to be selective and will thus fall outside the scope of Article 61(1) of the EEA Agreement.
- (60) A measure is also selective if the reference framework itself, as it follows from the national law, has been configured according to manifestly discriminatory parameters intended to circumvent State aid law ⁽⁴⁶⁾.

⁽⁴²⁾ Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, EU:C:2001:598, paragraph 41.

⁽⁴³⁾ NoA, paragraph 118.

⁽⁴⁴⁾ Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraphs 81-89.

⁽⁴⁵⁾ NoA, paragraph 128.

⁽⁴⁶⁾ Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 100-108.

6.4.1 The reference system

- (61) In order to assess the selectivity of a measure under the three-step analysis, it is necessary to first establish the reference system. The reference system amounts to the benchmark against which the selectivity of a measure is assessed ⁽⁴⁷⁾.
- (62) The reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective ⁽⁴⁸⁾. In the case of taxes, the reference system is the normal taxation ⁽⁴⁹⁾, based on such elements as the tax base, the taxable persons, the taxable event and the tax rates ⁽⁵⁰⁾. The determination of the reference framework must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of the EEA EFTA State, following an exchange of arguments with said State ⁽⁵¹⁾.
- (63) Where the tax measure in question is inseparable from the general tax system of the EEA EFTA State concerned, reference must be made to that system. On the other hand, where it appears that such measure is clearly severable from that general system, it cannot be ruled out that the reference framework to be taken into account may be more limited than the general system concerned, or even that it may equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify a consistent body of rules external to that measure ⁽⁵²⁾ ⁽⁵³⁾.
- (64) It is the EEA EFTA State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard to its fiscal autonomy and EEA law, the characteristics constituting the tax, which in principle define the reference system. That applies in particular to the determination of the choice of the tax rate, the tax base, the taxable event and any exemptions that may apply ⁽⁵⁴⁾. The tax rate and the group of taxable persons form part of the fundamental characteristics of the legal regime ⁽⁵⁵⁾. The determination of the characteristics constituting the tax includes the basis of assessment, but also any exemptions to which the tax is subject ⁽⁵⁶⁾. It falls within the competence of the EEA EFTA State to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors.

⁽⁴⁷⁾ NoA, paragraph 132.

⁽⁴⁸⁾ NoA, paragraph 133.

⁽⁴⁹⁾ Judgment of the Court of Justice of 6 September 2006, *Portugal v Commission*, C-88/03, EU:C:2006:511, paragraph 56.

⁽⁵⁰⁾ NoA, paragraph 134.

⁽⁵¹⁾ Judgment of the Court of Justice of 5 December 2023, *Luxembourg v Commission*, Joined Cases C-451/21 P and C-454/21 P, paragraph 111.

⁽⁵²⁾ Judgment of the Court of Justice of 6 October 2021, *Banco Santander and others v Commission*, Joined Cases C-53/19 P and C-65/19 P, EU:C:2021:795, paragraph 63.

⁽⁵³⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraph 47.

⁽⁵⁴⁾ Judgment of the Court of Justice of 14 December 2023, *Commission v Amazon.com and Others*, C-457/21 P, EU:C:2023:985, paragraph 39; judgment of the Court of Justice of 5 December 2023, *Luxembourg v Commission*, Joined Cases C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 118 and judgment of the General Court of the European Union, *Svenska Bankföreningen and Länsförsäkringar Bank v Commission*. T-112/22, EU:T:2024:250, paragraph 50.

⁽⁵⁵⁾ Judgment of the General Court of the European Union, *Svenska Bankföreningen and Länsförsäkringar Bank v Commission*. T-112/22, EU:T:2024:250, paragraph 50

⁽⁵⁶⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraph 49.

- (65) A general and abstract exemption to which a direct tax is subject is normally not classified as State aid. As a general rule, in so far as the exemption is presumed to be inherent in the normal tax regime, it cannot confer a selective advantage ⁽⁵⁷⁾. The EEA EFTA States, through their fiscal autonomy, have the possibility of making use of tax classifications, and in particular of tax exemptions, which they consider the most suitable for achieving the objectives of general interest they pursue, whether or not those objectives are tax related ⁽⁵⁸⁾. Through direct taxations, the EEA EFTA States may legitimately pursue objectives which are not purely budgetary, and which taken together constitute the objective of the reference framework.
- (66) When determining the reference framework for the purpose of Article 61(1) of the EEA Agreement in relation to tax measures, ESA is in principle required to accept the interpretation of the relevant provisions of national law given by the EEA EFTA State concerned in the exchange of arguments with ESA, provided that the interpretation is compatible with the wording of the national law ⁽⁵⁹⁾.
- (67) In the present case, the Norwegian authorities consider that the reference system is an excise duty on waste incineration for all emissions falling outside the scope of the ETS, but subject to Norway's obligations under the ESR. This can also be understood as the reference system being the excise duty in itself, where the exemption for emissions subject to the ETS is an integrated part of that reference system. According to the Norwegian authorities, the scope of the excise duty is thus only comprised of emissions from waste incineration subject to the ESR.
- (68) The excise duty on waste incineration is set out in the Norwegian State budget ⁽⁶⁰⁾, ⁽⁶¹⁾. The taxable event is the delivery of waste for incineration in an incineration plant, where such incineration leads to the emission of fossil CO₂ to the air by incineration of that waste ⁽⁶²⁾. The subjects of the excise duty are waste incinerators ⁽⁶³⁾. The tax base for the excise duty is the number of tonnes of fossil CO₂ released through the waste incineration process ⁽⁶⁴⁾ ⁽⁶⁵⁾.
- (69) ESA notes that the excise duty on waste incineration as such is not part of a wider tax system but is a self-standing tax. Although the tax is levied on emissions of CO₂ to the air, this is only for emissions following the specific pollutive action of burning waste. Furthermore, the excise duty is independent and distinct from other excise duties and climate taxes applied in Norway: It has its own tax base, tax rates and

⁽⁵⁷⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraph 50.

⁽⁵⁸⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraph 51.

⁽⁵⁹⁾ Judgment of the Court of Justice of 5 December 2023, *Luxembourg v Commission*, Joined Cases C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 120.

⁽⁶⁰⁾ Prop. 1 LS (2024-2025) *Skatter og avgifter 2025*, section 22-18.

⁽⁶¹⁾ FOR-2024-12-13-3220, *Storingsvedtak om avgift på avfallsforbrenning for 2025*.

⁽⁶²⁾ Regulation of 11 December 2001 No.1451 on excise duties, FOR-2001-12-11-1451, section 3-13-1 and 3-13-2.

⁽⁶³⁾ *Ibid*, Section 3-13-2.

⁽⁶⁴⁾ *Ibid*, Section 3-13-4.

⁽⁶⁵⁾ Although the tax is levied based on the emission of CO₂, this is an approximation based on the amount of waste in tonnes with a given emissions factor.

taxable events and group of taxable persons distinct from other climate taxes ⁽⁶⁶⁾ ⁽⁶⁷⁾.

- (70) In the Opening Decision, ESA questioned the reference system as defined by the Norwegian authorities as the aim of the excise duty appeared to be to put a price on all CO₂ emissions, at a uniform level so as to ensure an overall minimum cost of emissions of CO₂ for all waste incineration. During the formal investigation, the Norwegian authorities have further clarified that although the purpose of the excise duty is to internalise the price of emitting CO₂ so that all emissions are covered by a cost of emitting, the objective pursued is not to apply *one uniform* price level to all emissions, whether such emissions are subject to the ETS or the ESR. This is mainly due to policy considerations by the Norwegian authorities. The considerations are two-fold (see also paragraph (39) above). Firstly, the Norwegian authorities consider that any further reductions in the ETS sectors in the Norwegian territory will likely not contribute towards the fulfilment of Norway's international obligations to reduce CO₂ emissions as reductions stemming from the ETS will be allocated between the EEA States party to the ETS. Secondly, the Norwegian authorities consider that a tax on top of the ETS would distort the incentive structure of the ETS and lead to less cost-efficient emission reductions within both instruments.
- (71) The structure of special-purpose levies, such as climate taxes imposed to discourage activities that have an adverse effect on the environment, will normally integrate the policy objective pursued by the excise duty ⁽⁶⁸⁾. The Norwegian authorities have explained that the excise duty has been introduced to ensure that waste incineration that is not subject to a price through the ETS is levied such a price on CO₂ emissions ⁽⁶⁹⁾.
- (72) The excise duty in question was introduced to help fulfil the Norwegian authorities' obligations to cut emissions in the waste incineration sector subject to the ESR and the Norwegian authorities' obligations under the Paris Agreement. As noted in paragraph (21) and as explained by the Norwegian authorities (see paragraph (39)), reductions in emissions subject to the ETS do not count towards the Norwegian State's reduction obligations under the ESR. As relevant plants/units are already subject to a price internalisation instrument through the ETS, such emissions are left out of the scope of the tax through Measure 1. As set out in paragraph (27) above, the excise duty covers the remaining waste incineration plants/units which prior to the introduction of the excise duty were levied no price on their CO₂-emitting activities.
- (73) ESA recognises that the normal tax system as set out by the Norwegian authorities is compatible with the wording of the national law ⁽⁷⁰⁾ ⁽⁷¹⁾: The excise duty, with the

⁽⁶⁶⁾ Although the Norwegian authorities have an overarching policy objective of pricing emissions subject to the ESR at the same level, this is subject to specific considerations for each climate tax and functions as a guiding principle across different taxes.

⁽⁶⁷⁾ See judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraphs 47 and 70.

⁽⁶⁸⁾ NoA, paragraph 136.

⁽⁶⁹⁾ Measure 1 was adopted as a part of the excise duty introduced in 2022 (see paragraph (7)) but will not be put into effect before approval by ESA.

⁽⁷⁰⁾ See judgment of the Court of Justice of 5 December 2023, *Luxembourg v Commission*, Joined Cases C-451/21 P and C-454/21 P, paragraph 120.

⁽⁷¹⁾ FOR-2024-12-13-3220, section 1 and letter II.

inclusion of Measure 1, constitutes a tax on emissions from waste incineration that are not subject to a carbon cost through the ETS/Climate Quota Act.

- (74) The exemption from the excise duty on waste incineration is granted for any emissions from the incineration of waste that is subject to a duty to surrender emissions allowances as specified in the Climate Quota Act. Accordingly, the wording of the national law defines the circle of beneficiaries of the exemption in an abstract and general manner ⁽⁷²⁾. Any emissions from the incineration of waste subject to the ETS benefit from the exemption under Measure 1.
- (75) ESA further recognises that the policy considerations, as stated by the Norwegian authorities, fall within the fiscal autonomy of an EEA State, which is free to introduce general exemptions or variation mechanisms ⁽⁷³⁾ ⁽⁷⁴⁾ that it considers suitable for achieving the environmental object pursued by the tax in question.
- (76) Furthermore, the conditions established by Measure 1 do not appear to be, in law or in fact, connected with one or more specific characteristics of the single category of undertakings capable of benefiting from it ⁽⁷⁵⁾. The relevant characteristics for exempting certain emissions from the excise duty do not appear to be inextricably linked to the nature of the undertakings generating the emissions or the nature of their activities.
- (77) Rather, the differentiation between undertakings whose emissions benefit from Measure 1 follows the delineation as set out in the ETS and the Climate Quota Act, and emanates from that regulatory system. The relevant characteristic deciding whether an emission may benefit from the exemption contained in Measure 1 is therefore whether the emissions are already subject to a price internalisation mechanism under another, complementary regulatory instrument for pricing emissions, namely the ETS. The delineation thus follows the delineation as made by the ETS, which sets out which emissions are subject to the regulatory framework of the ETS, and which emissions are the responsibility of the EEA States to reduce in line with their national targets.
- (78) Furthermore, the ETS covers a number of sectors and installations exceeding a certain size, as well as certain types of production processes that take place in different sectors. The exemption in Measure 1 will therefore apply to undertakings subject to an obligation to surrender emission allowances under the ETS, which may include undertakings that have as their main activity to incinerate waste and undertakings in other sectors that may use waste as one of several fuels to meet their energy needs while producing products which fall within other sectors in the economy ⁽⁷⁶⁾.
- (79) Based on these considerations, ESA agrees with the Norwegian authorities' contention that the reference system is the excise duty on waste incineration, with

⁽⁷²⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraphs 42 and 50.

⁽⁷³⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraphs 51 and 58.

⁽⁷⁴⁾ Judgment of the General Court of the European Union, *Svenska Bankföreningen and Länsförsäkringar Bank v Commission*. T-112/22, EU:T:2024:250, paragraphs 89 and 91.

⁽⁷⁵⁾ See judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraphs 54-55.

⁽⁷⁶⁾ See document Nos 1525019 and 1525021, referred to in footnote 10, pages 3-4.

the inclusion of Measure 1 as an inherent part of the reference system. Thus, ESA concludes that the reference system is correctly defined as the excise duty on waste incineration for all emissions falling outside the scope of the ETS, but subject to Norway's obligations under the ESR.

- (80) Upon further examination through the formal investigation and exchanges of arguments with the Norwegian authorities concerning the relevant national rules on the excise duty and its objectives, and in light of the EU Courts' emphasis on the fiscal autonomy of the EEA States, ESA considers the doubts raised in particular in paragraphs 44-46 of the Opening Decision to have been alleviated.
- (81) ESA considers that the situation described in the case law referred to in paragraph 45 of the Opening Decision concerns an exemption to a tax that is not comparable to that in the case at hand, as that exemption was not general and abstract, but was rather granted to specified industries. Furthermore, as opposed to the case law referred to in paragraph 45 of the Opening Decision, the reference system as set out by the Norwegian authorities is compatible with the wording of the national law and does not run counter to the structure of the tax (see paragraph (73) above).
- (82) In addition, in light of the development in case law related to the assessment of selectivity since the decision referred to in paragraph 44 of the Opening Decision, ESA considers the arguments raised in relation to that decision to be formalistic and no longer representative of the criteria that form the selectivity assessment as set out by the EU Courts.
- (83) Lastly, ESA does not have at its disposal any information suggesting that the reference system has been configured according to manifestly discriminatory parameters intended to circumvent EEA law on State aid ⁽⁷⁷⁾ ⁽⁷⁸⁾.
- (84) In conclusion, Measure 1 must be considered an inherent feature of the reference system and does not give rise to a selective advantage.

6.4.2 Derogation from the reference system

- (85) Following the conclusion in paragraph (84) above, ESA considers that the measure is not selective. However, even if Measure 1 were considered not to be part of the reference system, so that the reference system is a general tax on emissions from waste incineration (not including the exemption represented by Measure 1), ESA does not consider the measure to be *prima facie* selective, for the reasons set out below.
- (86) In the second step of the three-step analysis of tax measures (see paragraph (59) above), it must be assessed whether Measure 1 differentiates between undertakings in derogation from the reference system. To determine this, it is necessary to establish whether the measure is liable to favour certain undertakings, or the production of certain goods, compared with other undertakings which are in

⁽⁷⁷⁾ See judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 100-108, referred to in footnote 46.

⁽⁷⁸⁾ Judgment of the Court of Justice of 29 April 2025, *Prezydent Miasta Mielca*, C-453/23, EU:C:2025:285, paragraphs 53 and 73.

a similar factual and legal situation in the light of the intrinsic objective of the reference system ⁽⁷⁹⁾.

- (87) In its notification, the Norwegian authorities explained that the objective of the excise duty on waste incineration is to ensure that a price is levied on emissions from the activity of incinerating waste where such a price is not levied through alternative instruments ⁽⁸⁰⁾ ⁽⁸¹⁾. This has also been reiterated by the Norwegian authorities throughout the formal investigation.
- (88) In paragraph 50 of the Opening Decision, ESA noted that it appeared that the objective was also to internalise the price of emissions at a level equalling at least that of the level set by the excise duty. However, after further assessment of the national legal basis and objectives of the excise duty in an exchange of arguments with the Norwegian authorities, ESA recognises that the objective is in fact to price emissions that are not already levied a price by the use of other instruments, see paragraphs (70)-(72).
- (89) The excise duty on waste incineration is designed in a complementary manner to the ETS, so as to ensure that emissions from waste incineration that are not levied a price through the ETS are levied a price through an alternative instrument in the form of an excise duty on each unit emitted ⁽⁸²⁾. The logic is applied in a consistent manner as documented by Norwegian authorities ⁽⁸³⁾: Any emissions from waste incineration activities subject to the ESR that emit CO₂ to the atmosphere ⁽⁸⁴⁾ are faced with a carbon cost through the tax ⁽⁸⁵⁾. Likewise, undertakings responsible for any emissions subject to the ETS must surrender emission allowances for such emissions. Although the level of the tax may differ from the price of emissions allowances (which by their nature are variable throughout the relevant trading periods and the cap set), both instruments, through their different technical and practical set-up, lead to a carbon cost per unit of emitted CO₂. This incentivises emission cuts where such cuts are cheaper than the cost of carbon in the relevant system.
- (90) ESA therefore considers that, in light of the objective of the reference system to tax the emissions that are not subject to another instrument for price internalisation, the exemption in Measure 1 concerns emissions that are not in the same legal and factual situation as the emissions subject to the excise duty on waste incineration. This is because the former emissions are already subject to a price internalisation mechanism, namely the ETS, whereas the latter emissions are not subject to such a mechanism.
- (91) After having further investigated the excise duty and Measure 1, ESA also finds that the facts of the case and the application of the exemption in the present case are not comparable to those assessed in the decisional practice referred to in paragraph 53 of the Opening Decision. This is *inter alia* due to the measure in the

⁽⁷⁹⁾ NoA, paragraph 135.

⁽⁸⁰⁾ See the notification, pages 2, 5-6 and 10.

⁽⁸¹⁾ See also the Opening Decision, paragraphs 25-30 and 43.

⁽⁸²⁾ Emissions subject to the LULUCF are not included.

⁽⁸³⁾ See document Nos 1525019 and 1525021, referred to in footnote 10, pages 6-9.

⁽⁸⁴⁾ Where the CO₂ is not captured and stored.

⁽⁸⁵⁾ With the exception of hazardous waste, which is not suited to treatment with regular consumer waste due to risk of serious contamination or danger to people, animals and the environment.

present case being of general application and the reference systems and objectives of the reference systems differing in these cases.

- (92) In conclusion, even if, contrary to ESA's assessment, Measure 1 is not considered to be an inherent part of the reference system, so that the reference system constitutes a general tax on waste incineration, ESA considers that the measure is, in any event, not *prima facie* selective. This constitutes an additional ground based on which Measure 1 does not give rise to a selective advantage.

7 Conclusion

- (93) On the basis of the foregoing assessment, ESA considers that since the exemption from the excise duty on waste incineration for undertakings covered by the ETS does not meet the criterion of selectivity, it does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

Has adopted this decision:

Article 1

Measure 1, which consists in an exemption from the excise duty on waste incineration for undertakings subject to the EU Emissions Trading System, does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. The formal investigation for Measure 1 is hereby closed.

Article 2

This decision is addressed to the Kingdom of Norway.

Article 3

Only the English language version of this decision is authentic.

Done in Brussels,

For the EFTA Surveillance Authority,

Arne Røksund
President
Responsible College Member

Stefan Barriga
College Member

Árni Páll Árnason
College Member

Melpo-Menie Joséphidès
Countersigning as Director,
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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.