RESPONSE TO NORWAY’S LETTER OF 19 JANUARY 2018 REGARDING UNLAWFUL STATE AID RESULTING FROM EXEMPTIONS TO THE CHOCOLATE AND NON-ALCOHOLIC DRINKS LEVIES

1 EXECUTIVE SUMMARY

On 1 January 2018 the Norwegian Parliament’s decision to increase the chocolate levy and the non-alcoholic drinks levy by 83% and 42.3% respectively took effect, significantly exacerbating the distortive impact of these measures that have been known for over a decade.

In order to prevent this aggravation of an ongoing distortion of competition, NHO Mat og Drikke submitted a complaint to the Authority on 13 December 2017 in which it called upon the Authority to open a formal investigation procedure and issue a suspension injunction given that the measures, after the increases, entail the granting of unlawful state aid to those comparable products that are not subject to the levy.

In response to the complaint, the Norwegian authorities submitted a letter to the Authority on 19 January 2018 arguing that the levies do not constitute aid because they are not selective. In essence, they claim that indirect taxes are to be assessed primarily under Article 14 of the EEA Agreement. Only in exceptional circumstances, where the boundaries of a fiscally motivated special levy or other means of indirect taxation are set in a clearly arbitrary manner and this leads to the favouring of comparable products, would Article 61 (1) of the EEA Agreement constrain the otherwise unfettered fiscal sovereignty of EEA (EFTA) Member States. In that regard, the Norwegian authorities urge the Authority to take a cautious approach to the notion of state aid as regards indirect taxes. The Norwegian authorities claim that NHO Mat og Drikke’s approach as presented in the complaint is unduly strict, and warn that deeming the disputed levies to be selective would be tantamount to making most special levies unlawful under the EEA Agreement’s state aid rules.

NHO Mat og Drikke does not consider that these arguments have merit.
Firstly, there is no doubt that EEA Member States' exercise of fiscal powers is subject to exactly the same constraints stemming from the EEA's provisions on state aid as any other public intervention in the economy are.

Secondly, according to fundamental principles of EEA state aid law, the effect of a measure, not its form or objective, determines whether it constitutes state aid. The correct test to establish a fiscal measure's selectivity consists therefore in establishing if the effect of that measure is that it favours comparable products. In that regard, it is immaterial if a fiscal measure favours comparable products by means of an explicit exemption, or by not subjecting comparable products to the same fiscal burden as those encompassed by it. In any event, the levies are selective under any plausible test, including under the "clearly arbitrary" and "standard derogation" tests argued by the Norwegian authorities.

Thirdly, the complaint and a subsequent decision by the Authority confirming that the measures entail state aid would merely concern the levies at hand, and not put the Norwegian regime of special levies as such into jeopardy. The chocolate and non-alcoholic drinks levies do not reflect the same level of legislative scrutiny as more recent levies implemented by the Norwegian authorities, and the Norwegian authorities seem to have consciously ignored the adverse impact on competition that these measures entail. Further, other EEA Member States have recognised that special levies of similar scope may raise state aid concerns, and appear to have notified their plans to implement them to the European Commission. In any event, the EEA Agreement leaves ample room for the EEA states to raise revenue in a myriad of different manners that are compatible with that agreement.

NHO Mat og Drikke welcomes that the Authority has prioritised the assessment of its complaint. Despite the measures having taken effect, it remains possible for the Authority to require Norway to suspend the measures, and thereby prevent a further aggravation of the situation. In any event, the Authority is obliged to open a formal investigation procedure. Aside from providing additional factual and legal elements that will assist the Authority in its assessment, this letter also calls upon the Authority to meet its legal obligation swiftly.

2 INTRODUCTION AND STRUCTURE OF THIS LETTER

2.1 Introduction

On 13 December 2017, NHO Mat og Drikke submitted a complaint ("the complaint") to the EFTA Surveillance Authority ("the Authority") concerning exemptions from the Chocolate and Sugar Goods Levy ("the chocolate levy") and the Non-Alcoholic Drinks Levy ("the non-alcoholic drinks levy"). In its complaint, NHO Mat og Drikke recalled that the Authority is obliged to open a formal investigation procedure when it has doubts or serious difficulties in establishing that the aid is compatible with the EEA Agreement.

Further, NHO Mat og Drikke showed in the complaint that both levies entail the granting of selective advantages in favour of comparable products exempted or omitted from the levies' scopes. NHO Mat og Drikke also pointed out that the increases by 83 % and 42.3 % respectively, which the Norwegian parliament decided on 12 December, constitute a substantial alteration of existing aid, resulting in the granting of new (and most likely incompatible) aid to those comparable products on which the levies are not raised. NHO Mat og Drikke provided further arguments as to the existence of new aid on 18 December 2017.

In response to the complaint, the Norwegian authorities submitted a letter on 19 January 2018 ("the response to the complaint" or "the letter"). In this letter, the Norwegian authorities focus exclusively on the question as to whether the levies in question are selective in the meaning of Article 61(1) EEA.
In NHO Mat og Drikke’s view, the arguments raised by the Norwegian authorities in support of their view that the levies are not selective do not hold. Conversely, NHO Mat og Drikke reiterates that the levies clearly are selective. In order to provide further support to this conclusion, the present letter will elaborate on relevant legal and factual elements. It will also address the main issues and arguments raised by the Norwegian authorities.

2.2 Norway’s point of view as expressed in the letter of 19 January 2018

As mentioned above, the Norwegian authorities focus in their response to the complaint exclusively on the issue as to whether the disputed exemptions from the levies in question entail state aid in the meaning of Article 61.

For the sake of convenience, the essence of their arguments is recalled in the following:

- The Norwegian authorities attempt to characterize this case as raising fundamental questions about the interaction between EEA Member States fiscal sovereignty and the EEA Agreement. In particular, they seem to suggest that concluding on the levies in question being selective would result in most (fiscally motivated) indirect taxes and in any event special levies or excise duties being incompatible with the EEA Agreement.

- In the Norwegian authorities view, indirect taxes should therefore be primarily assessed against Article 14 of the EEA Agreement, and only in exceptional cases could it be justified to also assess whether the boundaries of a given levy are designed in a clearly arbitrary way with the effect of favoring comparable products so that the selectivity criterion of Article 61 (1) EEA is met. In this regard, the Norwegian authorities appear to suggest that different thresholds or materially different tests exist depending on whether there is an explicit exemption from a levy, or whether it is the scope of a fiscal measure itself that could entail a selective advantage for those products or undertakings on which the tax is not imposed. In view of the fiscal sovereignty of EEA Member States, the Norwegian authorities argue, the latter situation calls for a cautious approach in the Article 61 (1) assessment.

2.3 Structure of this letter

The present letter is structured as follows:

In Section 3, NHO Mat og Drikke will set out what it considers to be the correct legal framework. NHO Mat og Drikke will demonstrate that the EEA Member States are bound in the exercise of their fiscal powers by several provisions of the EEA Agreement including Article 14 and Article 61 (1), which however establish different and as such unrelated tests. Further, NHO Mat og Drikke will recall that the notion of state aid pursuant to Article 61 (1) is an objective, effects based concept that does not allow for more or less strict tests or cautious approaches. Finally, NHO Mat og Drikke will show that the correct test to establish a fiscal measure’s selectivity consists of assessing the effect of that measure on comparable products in light of its intrinsic objective.

In Section 4, NHO Mat og Drikke will provide additional background information on other types of indirect taxation both in Norway and in other EEA Member States to illustrate that concluding on the disputed measures’ selectivity will not jeopardise Norway’s fiscal sovereignty, as alleged by the Norwegian authorities. Within the bounds of the EEA Agreement, a myriad of lawful possibilities exist to raise revenue.

In Section 5, NHO Mat og Drikke will establish that the chocolate and non-alcoholic drinks levy are selective regardless of the test chosen, be that the test that NHO Mat og Drikke deems to be correct, the test advocated by the Norwegian authorities, or even the “standard derogation” test for explicit exemptions that the Norwegian authorities have identified.
Section 6 contains some concluding remarks, and recalls the Authority's obligation to open the formal investigation if it encounters doubts or serious difficulties to establish a measure's compatibility with the EEA Agreement.

3 LEGAL FRAMEWORK

3.1 The relationship between the fiscal sovereignty of EEA Member States and the EEA Agreement

One of the key concerns raised by Norway is that deeming the exemptions to the chocolate and non-alcoholic drinks levies to constitute state aid would deprive EEA Member States of their fiscal sovereignty in determining the basis for taxation. The Norwegian authorities take the view that the fiscal sovereignty of EEA Member States is only constrained by Articles 14 and Article 61 EEA, the latter only in so far as "the detailed boundaries of a tax are set in a clearly arbitrary or based way so as to favour certain undertakings in a comparable situation having regard to the objective of the tax". Norway also raises concerns that any other interpretation would unduly limit its democratic prerogatives in fiscal matters, where it should retain "the final say".

NHO Mat og Drikke agrees with Norway in so far as the EEA Agreement obviously does not deprive EEA Member States of their fiscal sovereignty, as long as it is exercised within the constrains resulting from that agreement. NHO Mat og Drikke does not agree, however, that this case raises questions of principle regarding the scope of the EEA Agreement and its impact on Member States' ability to pursue the fiscal policy it chooses.

In NHO Mat og Drikke's view, the issues raised by the Norwegian authorities in their response to the complaint concern exclusively the correct interpretation of the notion of state aid pursuant to Article 61 (1) EEA. NHO Mat og Drikke will explain in some detail in this letter why it considers that the interpretation that the Norwegian authorities have taken in their letter is based on a flawed interpretation of established case-law pertaining to the constitutive criterion of selectivity. Further, NHO Mat og Drikke doubts that the correct interpretation would "imply that many – if not most – fiscally motivated taxes would be illegal under EEA law".

However, before focusing on the decisive issue – the selective nature of the chocolate and non-alcoholic drinks levy – NHO Mat og Drikke recalls certain fundamental legal principles that govern the relationship between the fiscal sovereignty of EEA Member States and the EEA Agreement.

The EFTA Court held in case E-6/98 that

"the Court notes first that, as a general rule, a tax system of an EEA/EFTA State is not covered by the EEA Agreement. In certain cases, however, such a system may have consequences that would bring it within the scope of application of Article 61(1) EEA. It is established case law of the ECJ that the fiscal nature of a measure does not shield it from the application of Article 92 EC (now after modification Article 87 TFEU))."1

Further, the EFTA Court confirmed in cases E-1/01 and E-6/07, as the Norwegian authorities correctly point out in their letter, that Article 14 bars EEA EFTA Member States from adopting discriminatory fiscal measures. Finally, the EFTA Court also held that indirect taxes can infringe other provisions of the EEA Agreement, including for example those pertaining to the free movement of services2 or the freedom of establishment.3

1 Case E-6/98, paragraph 34.
2 Case E-1/03, in particular paragraph 28.
3 Case E-7/14.
While NHO Mat og Drikke therefore does not dispute the existence of EEA EFTA States’ principal fiscal sovereignty, it notes that its exercise is subject to more and more comprehensive constraints stemming from the EEA than the Norwegian authorities concede in their letter. In any event, NHO Mat og Drikke will not assess in this letter if the levies in question may also infringe the EEA Agreement’s provision on the fundamental freedoms, and only addresses Article 14 in so far as is necessary to demonstrate that this provision has a different objective, rationale and test than Article 61 (1).

3.2 There is only a limited interplay between Articles 14 and 61 of the EEA Agreement

The Norwegian authorities correctly characterise in their letter the chocolate and non-alcoholic drinks levies as being indirect taxes. They also claim that the assessment of the compatibility of such fiscal measures with the EEA Agreement should be guided by asking two separate, albeit closely linked questions, regarding the applicable tax base and the more detailed boundaries of that tax. Further, they argue that the legislative choice to tax chocolate and sugar products and non-alcoholic beverages is, in principle, a decision to be taken solely by the EEA States, and should be exclusively assessed under Art 14, save in exceptional circumstances (i.e. where their boundaries are defined in a clearly arbitrary way), in which Article 61 (1) EEA could become of relevance.

NHO Mat og Drikke reiterates that its complaint is, at least at this stage, only directed towards the unlawfulness of the levies under Article 61 (1) EEA.

However, NHO Mat og Drikke does not consider it to be correct to establish a link between a potential infringement of Article 14 (or other fundamental freedom provisions in the EEA Agreement), and Article 61 (1) EEA, as these provisions have a different purpose and different test. Further, to NHO Mat og Drikke’s knowledge there is no basis to be found in relevant case law on state aid for the distinction between “tax base” and “boundaries of the tax base”, even though, in NHO Mat og Drikke’s view, the introduction of these concepts, if applied correctly, does not appear to make a substantive difference in terms of concluding whether a fiscal measure constitutes state aid.

Article 14 EEA prohibit in essence discrimination against products from other EEA Member States by means of domestic indirect taxation. Article 61 (1) EEA on the other hand prohibits the granting of selective advantages in whatever form, and protects first and foremost competition between different undertakings and sectors, including, importantly, between domestic producers to the extent that an effect on trade cannot be excluded.

To NHO Mat og Drikke’s knowledge, in most cases in which either an infringement of Art 14 EEA (or Article 110 TFEU, respectively) have been established there was no simultaneous infringement of Article 61, or vice versa. Therefore, NHO Mat og Drikke considers that section 4.2 of Norway’s response to the complaint is largely irrelevant for the purposes of assessing the complaint, and it will not comment further on it. Further, NHO Mat og Drikke is uncertain what consequences the alleged “interplay” between internal market and state aid rules has for the assessment of this case, and why Norway considers, as set out in section 4.3 of its letter, that NHO Mat og Drikke’s view is contrary to Article 14 EEA.

It should be noted however, that both set of provisions – the internal market provisions and those on state aid – share common or at least comparable traits. First, they are predominately directed against unfair treatment and discrimination (in one instance, they protect against discrimination of comparable products/undertakings or sectors, and in the other, against discrimination based on nationality). Second, and much more relevant for the purposes of this case, they are effect based rules. Article 14 and the other fundamental freedoms prohibit both direct and indirect discrimination, i.e. also against discrimination that results from the effect of a national measure. Similarly, as will be explained in the next

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4 Cf. case 166/98.
section, the notion of state aid is linked primarily to the *effect* of state interventions. Therefore, whether a given fiscal measures, including in particular its scope (or its boundaries) infringe one of the provisions of the EEA Agreement will primarily depend on its effect.

### 3.3 State aid rules are effect-based rules

One of the most fundamental principles in State aid law, recalled in virtually every judgement of the EEA Courts, is that in order to determine whether a measures constitutes state aid pursuant to Article 61 (1) EEA, regard should be had to the measure’s effect, and not to the cause, form or objective of that measure.

This principle is recalled for example in the Authority’s guidelines on the notion of State aid (hereinafter “NoA guidelines”), where the Authority explains that "only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention." They further explain, in a paragraph that the Norwegian authorities partly quote in their response to the complaint, that "Article 61(1) does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used".

This principle, that the assessment under Article 61(1) is effect-based, has also been endorsed and applied consistently by the EFTA Court, which for example held that

> "the Court notes at the outset that according to established case law it is the effect and not the form of an aid which is decisive when determining whether measures entail State aid";

> "[n]or does Article {107} distinguish between the measures of State intervention by reference to their causes and aims but rather defines them in relation to their effects".

NHO Mat og Drikke considers that it is crucial to bear this fundamental principle of EEA state aid law in mind when reading and interpreting relevant case law and practice pertaining to both EU and EFTA EEA Member States.

In their response to the complaint, when setting out their view on the relevant test to determine whether fiscal measures are selective, the Norwegian authorities appear to have placed great weight on a provision in NoA guidelines (which is recalled in some of the Commission’s recent decision pertaining to selective fiscal measures) on whether the boundaries of the reference system have been in "designed in a clearly arbitrary or biased way".

As NHO Mat and Drikke will show in this letter, the scope of the chocolate and non-alcoholic drinks levy has, in fact, been designed in a *clearly arbitrary* way. However, in NHO Mat og Drikke’s view, it would not be correct to attribute too great a significance to this wording in isolation.

First, as will be demonstrated below, this wording takes its origin in the Commission’s interpretation of the case law, and does not stem from case law itself. Second, given the effects-based nature of state aid rules, the decisive factor has to remain the effect of a given measure, and not its form, (legislative) aim or objective. Third, as will be recalled in the following section, state aid is an objective notion, and the arbitrariness- or inconsistency-test of the NoA guidelines, interpreted in the light of this overarching principle of state aid law, consequently excludes from the reach of state aid control only those fiscal aid measures that are designed in a clearly arbitrary way.

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5 Paragraph 67.
6 Paragraph 129.
7 Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and others*, (2005), paragraph 76.
8 Case E-6/98, paragraph 34.
measures that are designed in a sufficiently consistent way so as to treat in effect all undertaking in a comparable situation alike. A fiscal measure not achieving this equal treatment would conversely constitute state aid.

3.4 ‘‘State aid’’ is an objective concept

Another fundamental principle of state aid law worth recalling for the purposes of assessing the case at hand is that the notion of a ‘‘state aid’’ as defined in Article 61 (1) EEA is an objective, legal concept. The Authority explains in its NoA guidelines:

‘‘Given that the notion of State aid is an objective and legal concept defined directly by the EEA Agreement, these Guidelines clarify the Authority’s understanding of Article 61(1) of the EEA Agreement, as interpreted by the […] EEA Courts. […] The views set out in these Guidelines are without prejudice to the interpretation of the notion of State aid by the EEA Courts; the primary reference for interpreting the EEA Agreement is always the case-law of the EEA Courts.

It should be stressed that the Authority is bound by this objective notion.”

Two important conclusions can be drawn from this summary of established case law and principles of EEA law:

First, the Norwegian authorities argue on page 11 of their letter that the language of the NoA guidelines in paragraph 129 calls for a “cautious approach” in determining whether fiscal measures are state aid. NHO Mat og Drikke considers that it is not possible, legally, to adopt a “cautious approach” to the notion of aid, given that it is an effect-based, objective and legal concept. The question of whether a measure constitutes state aid is thus binary – either it is, or it is not. NHO Mat og Drikke will demonstrate in this letter that chocolate and non-alcoholic drinks levies unambiguously entail state aid.

Second, the Authority recalls the “interpretation-monopoly” of the EEA Courts when it comes to the provisions of the EEA Agreement, such as state aid in Article 61 (1), meaning that the foremost and supreme legal source for the interpretation and application of that concept remains the case law of the courts. NHO Mat og Drikke will thus in the remainder of this chapter on the legal framework in the particular focus on the relevant case law of the EEA Courts, which in NHO Mat og Drikke’s view has not been attributed sufficient space and significance in Norway’s response to the complaint.

3.5 The correct selectivity test: No relevant difference between an exemption and an omission from a logical system of reference

3.5.1 Introduction

Aside from seemingly introducing a novel and unsubstantiated interplay between Article 14 jurisprudence and that pertaining to Article 61 (1) EEA, the Norwegian authorities also appear to suggest that selectivity tests differing in substance and in terms of “effect-threshold” exist depending on whether the point of departure for the assessment is either

(i) the “reference system as defined by the EEA State concerned”; (i.e. the “standard” case against which explicit exemptions from a tax or a levy are assessed); or

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9 Paragraph 129 of the NoA guidelines opposes rules designed in a consistent manner with those that are arbitrarily designed. NHO Mat og Drikke will revert to this below in section 3.5.4. I should be noted however already at this point that arbitrary in the meaning of the NoA guidelines appears to mean inconsistent.
10 Paragraphs 3-4.
11 Cf. paragraph 129 of the NoA guidelines.
(ii) "a reference system 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"\(^{12}\) (the Ferring type of situation, where the assessment in a first step focuses on the (logical) scope of a tax or levy, and where the omission from such a levy is tantamount to a tax exemption).

NHO Mat og Drikke will demonstrate that the effects-based nature of state aid rules, the correct interpretation of the established case law of the EEA courts, the relevant paragraphs in the NoA Guidelines as well as the Authority’s and the Commission’s case practice unequivocally support the contrary conclusion, namely that the sole relevant test is whether a fiscal measure favours undertakings that are in a comparable situation with the regard to the underlying logic of the measure in question. In short, NHO Mat og Drikke will show that for the purposes of Article 61 (1), it does not make a substantial difference whether a EEA Member State devises a measure with a consistent, wide scope, and introduces derogations in favour of comparable undertakings thereto, or whether it designs an inconsistent or narrower measure which leaves out of its scope comparable undertakings or products.

In NHO Mat and Drikke’s view, and as explained in the complaint, the only relevant difference pertaining to the two tests is that for alternative (i) the point of departure is given, whereas alternative (ii) requires the establishment of a logical system of reference for the purposes of the selectivity assessment.

In that context, NHO Mat og Drikke adds that the selectivity assessment under alternative (ii) requires steps two and three of the “standard test” (i.e. is there are a derogation, and is it justified by the nature and logic of the system), even though steps 1 and 2 may in practice merge into one overall assessment. This follows clearly from the jurisprudence of the EEA Courts\(^{13}\) as well as the Commission case practice\(^{14}\).

As NHO Mat og Drikke does not perceive this to be controversial, it will not comment further on this point.

### 3.5.2 The Norwegian authorities’ view on the selectivity test to be applied

As mentioned in the foregoing, the Norwegian authorities attempt to establish in their letter that there is a substantive difference in the test depending on whether an advantage is conferred on a group of undertakings by means of an explicit exemption, or by means of an omission or an inconsistent or discriminatory scope of a tax or levy.

In doing so, the Norwegian authorities introduce novel concepts into state aid law. According to the letter it would be necessary to perform, in a selectivity assessments, a two-pronged test in which firstly the choice of tax the based is assessed (which is however, subject to Article 14 constraints, entirely up to EEA Member States) and secondly, the detailed boundaries of that tax base are assessed against a double-benchmark of arbitrary design and the consequence of that difference in treatment on comparable products.

This test, the Norwegian authorities argue, is not the “standard derogation test”, and it would be wrong to apply “the strict test advocated by the complainant”.

NHO Mat og Drikke fails to see the added value of that test, though it is concerned that it introduces an unnecessary and unsupported complexity in an otherwise comparatively straightforward assessment. In particular, the distinction tax base / boundaries of the tax would appear to blur the decisive aspect of “comparability” as established by case law. Under the correct test, however, as described by NHO Mat og Drikke in this letter, the measures are clearly selective.

In any event, NHO Mat og Drikke will also show that the levies even entail state aid under the test proposed by Norway in section 5.2.3, because they have a “clearly arbitrary” scope, and under the

\(^{12}\) Cf. for example paragraph 42 of the Commission’s decision in case SA.44351.

\(^{13}\) Cf. case C-487/06 P British aggregates, paragraph 88: “Consequently, the distinction made as between undertakings also cannot be justified by the nature or general scheme of the system of which it forms part”

\(^{14}\) Commission decisions in cases SA.41187 and SA.44351.
“standard” derogation test, because they have explicit exemption (section 5.2.4). This section however focuses on demonstrating that the allegedly “strict test” is also the correct test for alternative (ii), i.e. situations in which the selective advantages accrues from the non-imposition of a levy or tax on comparable products or undertakings as those subject to it.

3.5.3 Relevant jurisprudence on selective measures stemming from the scope of a tax / an omission from its scope

NHO Mat og Drikke recalls, by means of introduction, that the test advocated by Norway which would require a separate analysis of tax base and boundaries of that tax base finds little, if any, support in relevant case law.15

The letter comprises a quote on page 4 of the letter of “leading EU literature” dating from 2012, which reads:

“From this starting point we must also accept that the Member States are free to levy a tax which concerns only a certain group of enterprises, because the state is free to levy taxes on specific goods and services. A tax on beer producers in order to support wine producers is not prohibited; the same holds true for a tax on road hauliers which strengthens the competitiveness of rail freight undertakings. The Member State is free to change its “general tax scheme”. The mere fact that there is competition between taxed and non-taxed market participants does not stand in the way of the fiscal sovereignty of the Member States”.

Aside from this leading EU literature being relatively outdated, this quote is in fact nothing but an incomplete and somewhat misrepresented reproduction of AG Tizzano’s opinion in Ferring, which assessed exactly the types of issues that the present case raises, namely the non-imposition of a tax on comparable undertakings, and which reads as follows:

“The difficulty and subtlety of the question arise from the fact that any new tax imposed on a given category of economic operators may be viewed in theory as an advantage conferred upon all operators who are not subject to that tax but are in more or less close competition with the first category. To give just a few examples, a tax that affects beer producers could be regarded as indirect aid to wine producers; a tax imposed on road hauliers could be seen as aid to rail freight undertakings; a tax on cinema operators could imply aid to theatres, and so on.”

Note that the authors of this leading EU literature on state aid have used the same examples as the AG, though contrary to the AG the authors conclude that “the mere fact that there is competition between taxed and non-taxed market participants does not stand in the way of the fiscal sovereignty of the Member States”. Note also that the examples given evidently refer to products that only have a remote, if any, competitive relationship.

What the Norwegian authorities have left out, however, is to go back to the AG’s opinion and reproduce the full quote, which shows that already more than 15 years ago, the EU Courts have recognised that the non-imposition of taxes can entail state aid. The AG continues in his opinion as follows:

“A broad interpretation of the concept of aid, one that encompasses the levying of a tax on third parties whose competitive relationship with the presumed beneficiaries of the aid is no more than tenuous, risks transgressing the letter and spirit of the law.[...]”

Yet, neither is it possible to consider satisfactory a solution which, by contrast, excluded a priori any possibility of identifying a selective advantage in the non-imposition of a new tax on certain

15 While Norway refers to “consistent case law” in third paragraph on page 4 of its letter, it does not provide any references thereto that would support the test it advocates.
economic operators. An interpretation of that sort would in fact provide Member States with a simple mechanism for circumventing Community rules on State aid by means of discriminatory taxation. An example would be the introduction of a tax levied on private air carriers but not on public ones, or a tax levied on automobile manufacturers in good economic condition, but not on those in difficulty. In such cases it would obviously be difficult to distinguish between non-imposition of the tax and tax exemption, since the effect produced would be absolutely identical, and it hardly need be recalled that the Court of Justice has consistently held that Article 92 defines measures of State intervention as State aid according to their effects.

My view, in short, is that it can neither be accepted nor excluded a priori that failure to levy a tax on certain parties is tantamount to conferring a selective advantage within the meaning of Article 92 of the Treaty. The solution must be sought on a case by case basis, with regard being had to the particular circumstances of the case and, above all, to the competitive relationship between the operators concerned, the reason for the tax and its effects.  

It only needs to be added that the EU Court of Justice agreed with the AG, and considered as selective the non-imposition of a tax on undertakings in a comparable situation.

As will be demonstrated here, the chocolate and non-alcoholic drinks levies entail exactly this type of different fiscal treatment for closely competing products which AG Tizzano considered to confer a selective advantage.

Furthermore, a number of judgements since the Ferring case have further clarified that there is in principle no difference between selectivity stemming from an explicit exemption or an omission from the scope of a measure.

Importantly, in more recent jurisprudence, the EU Courts have confirmed that the "regulatory technique" used to confer a selective advantage on undertakings, including the omission from or the inconsistent scope of a fiscal measure, is in essence irrelevant for the selectivity assessment.

The first case in a line of important judgements was British aggregates, which concerned an indirect tax, and in which the AG explained that

"If it is established that an advantage of that nature exists, even action in the form of refraining from imposing a new tax on certain economic operators may constitute aid within the meaning of Article 87(1) EC".  

And further:

"the analysis of the Court of First instance focuses on the formal aspects of the measure in question, such as the legislative technique used by the national authorities. In terms of the impact on competition, however, there is no great difference between, on the one hand, the imposition of a general tax with an exemption for certain beneficiaries and, on the other hand, the imposition of a tax on certain taxable persons to the exclusion of others who are in a comparable situation. Here, too, it seems to me that the judgment under appeal departs from an approach focused on an analysis of the effects of the measure."

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16 Opinion of AG Tizzano in Case C-53/00 Ferring, paragraphs 36-39. See also paragraph 20 of the judgement: "It would appear that not assessing wholesale distributors to the tax on direct sales - a tax which is designed to help finance the National Insurance Sickness Fund - equates to granting them a tax exemption."

17 Opinion of AG Mengozzi in C-487/06 P British aggregates, paragraph 82.

18 Opinion of AG Mengozzi in C-487/06 P0 British aggregates, paragraph 100.
The Court of justice endorsed the AG’s opinion:

“the unavoidable conclusion is that the Court of First Instance disregarded Article 87(1) EC, as interpreted by the Court of Justice, by holding, in paragraph 115 of the judgment under appeal, that Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they decide to subject to an environmental levy, with the result that the fact that such a levy does not apply to all similar activities which have a comparable impact on the environment does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage.”

In the same vein, AG Kokott explained in the case of the Sardinian stop-over tax that

“It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 87(1) EC.

In that connection, it is immaterial what legal mechanism is used. The tax benefit may be based on the fact that the legislature has expressly exempted some undertakings from the tax in question, to which they would otherwise be subject. Likewise the tax benefit may arise from the fact that a tax law is asymmetrically formulated in relation to its factual elements or its scope, so that some undertakings are caught as taxpayers while others are not.”

The Court of Justice endorsed the AG’s conclusion, the key reasons being that it considered all undertakings (also those to whom the tax did not apply) to have been in an objectively comparable situation.

Finally, the EU Court of Justice held in Commission v Gibraltar that

“However, contrary to the General Court’s reasoning and the proposition put forward by the Government of Gibraltar and the United Kingdom, that case-law does not make the classification of a tax system as ‘selective’ conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings.

Such an interpretation of the selectivity criterion would require, contrary to the case-law cited in paragraph 87 above, that in order for a tax system to be classifiable as ‘selective’ it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact.”

In none of these judgements there is a mentioning of a two-pronged "tax-base / boundaries test", or a requirement for a “clearly arbitrary and biased” reference system. What follows from this case law, is instead that the key criterion to establish whether a measure is (selective) state aid is the effect of a given measure i.e. to what extent it leads to a different treatment of comparable products/undertakings. It is similarly clear that an explicit derogation is equivalent, for the purposes of the selectivity assessment, to an exemption that has been established by means of a different legislative technique.

19 C-487/06 P British aggregates, paragraph 86.
20 Opinion of AG Kokott in C-169/08 Sardinian stopover tax, paragraphs 127-128.
On page 5 of its letter, Norway mentions a “warning” expressed by AG Kokott in the *Finanzamt Linz* case against an overly broad interpretation of the selectivity criterion. In NHO Mat og Drikke’s view, there is no risk whatsoever that concluding on the existence of selective advantages from the levies in question would somehow broaden the notion of selectivity, as this conclusion follows clearly from established case law.

On the other hand, awarding different fiscal treatment to goodwill acquired through the purchase of domestic as compared to foreign undertakings, the measure at stake in *Finanzamt Linz*, would arguably have done that. Contrary to the selective measures at hand, which *de iure* differentiate directly between comparable products, the case in *Finanzamt Linz* was about a type of indirect selectivity (would certain undertakings rather buy domestic than foreign firms?). AG Kokott’s warning was not endorsed by the Court, and also predates the CJEU’s judgement on *Spanish goodwill*, where it held that differentiated rules on goodwill were in fact selective:

“So far as concerns the condition relating to the selectivity of the advantage [...] it is clear from equally settled case-law of the Court that the assessment of that condition requires a determination whether, under a particular legal regime, a national measure is such as to favour ‘certain undertakings or the production of certain goods’ over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory. [...] It follows from all the foregoing that the appropriate criterion for establishing the selectivity of the measure at issue consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system”.

With reference to its previous judgement in *Commission v Gibraltar*, the Court held that

“ [...] since the condition relating to selectivity has a broader scope that extends to measures which, by their effects, favour certain undertakings [...] on account of the specific features characteristic of those undertakings. That measure accordingly operated de facto discrimination against undertakings that were in a comparable situation in the light of the objective pursued by that regime [...]”

The court then concluded that

“All that matters in that regard is the fact that the measure, irrespective of its form or the legislative means used, should have the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings, although all those undertakings are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned.

Further, according to the Court’s settled case-law, the fact that the number of undertakings able to claim entitlement under a national measure is very large, or that those undertakings belong to various economic sectors, is not sufficient to call into question the selective nature of that measure and, therefore, to rule out its classification as State aid”.

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22 Opinion of AG Kokott in case C-66/14, *Finanzamt Linz*.
23 Joined Cases C-20/15 P and C-21/15 P *Spanish goodwill*, paragraphs 54 and 60.
24 Joined Cases C-20/15 P and C-21/15 P *Spanish goodwill*, paragraphs 74.
25 Joined Cases C-20/15 P and C-21/15 P *Spanish goodwill*, paragraphs 79-80.
NHO Mat og Drikke can only conclude in the light of the foregoing overview of relevant jurisprudence that fiscal measures’ selectivity is only subject to one substantive test: Is there a difference in treatment of products or undertakings that are in a comparable factual and legal situation in the light of the objective pursued by the system? If there is, then the measure is – at least prima facie – selective.

NHO Mat og Drikke also considers it illustrative to apply the test proposed by the Norwegian authorities to the facts of the British aggregates case. Leaving outside from the scope of the levy in question certain types of aggregates may not be, in addition to having the consequence of treating comparable products differently, “clearly arbitrary”, or at least not more arbitrary than leaving outside certain sweet biscuits from a general sweets levy. Nonetheless, the Court of Justice considered that measure to be selective. NHO Mat og Drikke finds it highly doubtful that any EEA Court would come to a different conclusion as regards the levies in question.

3.5.4 The selectivity test under the relevant paragraphs in the NoA Guidelines

As mentioned in the foregoing, the NoA guidelines only contain the Commission’s (and the Authority’s) interpretation of the EEA Courts’ case law as it existed at that time. They are thus of lesser legal significance than the case law, and are not constantly updated. For instance, the important Spanish goodwill judgement was handed down after the Commission adopted the NoA Guidelines, and is hence not reflected.

This is not to say that NHO Mat og Drikke does not appreciate the NoA guidelines’ guidance value, but rather to say that the summaries of case law the NoA guidelines contain have to be understood and interpreted in light of the jurisprudence to which they refer. Further, subsequent case law has to be taken into account.

For the sake of convenience, NHO Mat og Drikke reproduces in the following the most relevant paragraphs of the NoA Guidelines for the assessment of material selectivity in fiscal measures:

“128. [...] the selectivity of the measures should normally be assessed by means of a three-step analysis. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is prima facie selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is prima facie selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system. If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) of the Treaty.

129. However, the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned. It must be emphasised that Article 107(1) of the Treaty does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used. This means that in certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system as defined by the Member State concerned. It is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.
130. Thus, in Joined Cases C-106/09 P and C-107/09 P concerning the Gibraltar tax reform, the Court of Justice found that the reference system as defined by the Member State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies. In this respect, the Court found that the fact that offshore companies were not taxed was not a random consequence of the regime, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies had no tax base.

NHO Mat og Drikke will not comment at this point on the "standard test" described in paragraph 128.

Given how much weight the Norwegian authorities have attributed to the term “clearly arbitrary” in their response, NHO Mat og Drikke will comment on how it considers that this term ought to be interpreted in a meaningful manner that is consistent with established case law.

First, a closer scrutiny of the relevant passages of the guidelines reveals that the term “arbitrary” in the NoA guidelines would seem to mean, in fact, inconsistent. Under the test in the paragraphs 129-130 in the guidelines it needs to be assessed whether the “boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way”. The word conversely suggests that this test or question is again a binary one: If the boundaries are construed consistently, they are not clearly arbitrary or biased. However, if the boundaries are construed inconsistently they are, conversely, either clearly arbitrary or biased.

The interpretation that measures which are inconsistently demarcated with regard to their scope give rise to selective advantages also finds support in case law. In this respect, reference is made case C-487/06 P British aggregates, paragraph 88, where the Court discusses the “potential inconsistencies in the definition of the scope of the AGI”.

Second, it would also appear incorrect to attribute too much importance to the fact that both the Court and the Commission have used the concept of a measure being “specifically designed”, as opposed to it being “a random consequence”. As was demonstrated above, the objective or intent of a measure is not relevant for the determination if a given measure constitutes state aid. When EU institutions have mentioned the “specific design” so as to favour undertakings, this should therefore not be interpreted as establishing the need for an intended selectivity in the sense of wanting to provide certain undertakings with an advantage. It suffices that this is a predictable consequence of the inconsistent demarcation of the tax.

Finally, what the Norwegian have described as “second aspect” under this test is in fact the decisive question. Does the inconsistency lead to a favouring of certain undertakings in a comparable situation? If it does, then the measure is selective.

In any event, the literal meaning of single terms should not be overestimated in the interpretation of EU/EEA documents by the EEA Courts. One academic on EU legal theory concludes that the Court “does not put a great deal of weight on the literal meaning of the words. Policy considerations play a particularly important role and sometimes prevail over the literal meaning even when it is clear. [...] the Court adopts

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26 NoA Guidelines, paragraphs 128-130.
27 The Collins dictionary (See https://www.collinsdictionary.com/dictionary/english/arbitrary) explains “arbitrary” by “if you describe an action, rule, or decision as arbitrary, you think that it is not based on any principle, plan, or system. It often seems unfair because of this.” The same dictionary suggests that “random” and “inconsistent” are synonyms of arbitrary. Similarly, the Oxford dictionary (https://en.oxforddictionaries.com/definition/arbitrary) defines “arbitrary” as “based on random choice or personal whim, rather than any reason or system.
the meaning which, in its view, best accords with the purpose of the provision and the policy objectives pursued by the Court."

In NHO Mat og Drikke’s view, this description of the correct methodology to interpret provisions of EU/EEA legal documents support the conclusion that the foremost consideration to determine a measure’s selectivity remains its effect.

Therefore, NHO Mat og Drikke does not consider that the wording of NoA guidelines supports Norway’s conclusion of the existence of a more lenient test for measures that could be selective because they do not impose a tax or levy on products that are comparable to those subject to that tax or levy. In particular read and interpreted in the light of the EEA Courts’ jurisprudence, these guidelines do not suggest that there is a particularly high threshold to conclude on such measures being selective.

Norway argues it in its letter on page 12 that “any possible inconsistency within the two excise duties assessed here [...] must be seen as a random consequence of the regime” (and would thereby not be selective).

As explained above, NHO Mat og Drikke does not consider the randomness of the consequences to be decisive. In state aid law, the effect, the consequences of a measure determine whether a measure constitutes state aid. Moreover, NHO Mat og Drikke does not agree that the consequence of the non-taxation of many comparable products in the present case is random. The Norwegian legislator has been aware of the distortive effects of the levies for a long time, and has chosen not only to maintain this distortive regime, but in addition amplify its effects through drastic increases in the levies. The characterisation of that consequence as random is in NHO Mat og Drikke’s view difficult to follow.

3.5.5 The Authority’s and the Commission’s case practice

The Norwegian authorities also claim that the alleged scarcity of case practice from the Commission (and the Authority) pertaining to potential state aid inherent in indirect tax regimes illustrates a reluctance on the side of these bodies to deal with such cases, and those that were “struck down” were deliberately designed to favour certain undertakings at the expense of others. As already explained in the foregoing section, the intent underlying a fiscal measure is irrelevant for its state aid nature. In addition, indirect taxes are, to a large extent, harmonised at EU level, which entails a significantly reduced possibility for state aid cases (cf. section 4.2 below). Finally, any potential reluctance to open such cases is legally irrelevant.

The Norwegian authorities also emphasise that the Commission had not (yet) taken a final decision in the Finnish and Danish cases to which the complaint referred. This, in NHO Mat og Drikke’s view, does not make the legal approach expressed in or entailed in these decisions or statements less illustrative. Moreover, NHO Mat og Drikke notes that Norway has not explained to what extent the boundaries of the scope of the levies in these cases were more “arbitrary” or inconsistent as those for the chocolate and non-alcoholic drinks levies. Finally, the fact that prima facie similar levies exist in other EEA Member States does not have any relevance either for the assessment in this case either. Those could equally entail (unlawful) state aid, or they could be designed in a sufficiently consistent manner treating comparable products alike for that not to be the case. NHO Mat og Drikke cannot assess this. It could also simply be the case that other Member States have breached the stand-still obligation. That there is a high likelihood of such measures entailing state aid is however apparent from the fact that at least two EU Member States have apparently notified prima facie similar levies, see section 4.3 below.

Conversely, it is illustrative that there are to NHO Mat og Drikke’s knowledge no similar cases in which either the Authority or the Commission have taken the view that the non-imposition of taxes on comparable products does not entail state aid.

Further, and with regard to the negative decisions on the Polish retail turnover tax and the Hungarian tobacco tax, it is not evident how progressive tax rates are more arbitrary or inconsistent than the levies at hand.

Finally, it would appear that also the Authority has endorsed the EEA Courts’ conclusion, as it is obliged to do, that there is no difference between selectivity by (explicit) exemption or by (tacit) omission.

In decision 342/09/COL, the Authority prohibited a measure that in effect would have extended the Norwegian CO₂ tax to gas and LPG for the purposes of heating buildings. In many ways, this is an illustrative case for the assessment at hand.

This decision shows in particular that the regulatory technique to achieve a certain objective though a fiscal measure is irrelevant. In that case, the Norwegian authorities decided to extend, in principle, the CO₂ tax to gas and LPG, but introduced an exemption for all purposes other than the heating of gas and buildings. In fact, through the “exemption”, 94% of all gas used in Norway would not have been subject to the tax. Accordingly, the Norwegian authorities argued that “they consider the notified measure not to be an exemption from a CO₂ tax on gas for certain sectors, but rather the introduction of a limited tax on the use of gas for the heating of buildings, i.e. the tax (on heating buildings) is a burden for those upon whom the tax is levied rather than an exemption and advantage for the many who consume gas in a way which is not subject to the tax.”

The Authority did not consider this to be of relevance. It referred to the decisiveness of the effect of a measure in State aid law, as confirmed by the EFTA Court, and the British Aggregates judgement. It noted that

“The Court [...] confirmed that in assessing the applicability of Article 87(1) of the EC Treaty, no account can be taken of the purpose or objective of a particular measure, and the only test when assessing selectivity is the extent to which the measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. In his opinion on the case, Advocate General Mengozzi also questioned the focus the Court of First Instance had had on the formal aspect of the measure in question, stating that: ‘In terms of the impact on competition ... there is no great difference between, on the one hand, the imposition of a general tax with an exemption for certain beneficiaries, and, on the other hand, the imposition of a tax on certain taxable persons to the exclusion of others who are in a comparable position.’

Accordingly, the Authority concluded that the measure was selective. In view of the wording of its decision, it is highly unlikely that the Authority would have come to the opposite conclusion if the Norwegian authorities had formulated the measure not as an explicit exemption, but as a very narrowly defined tax, that would have omitted all other uses of gas than heating from its scope.

Similarly, in decision 150/15/COL, the Authority concluded that VAT zero-rating electric vehicles constitutes state aid. While the Authority dealt in that case with an explicit exemption, it is nonetheless illustrative that the question of whether electric and fuel-driven vehicles were sufficiently comparable for the exemption to be selective was not even assessed. In NHO Mat og Drikke’s view, certain types of biscuits or non-alcoholic drinks are evidently more comparable than vehicles consuming different fuels, based on different technology and different characteristics in terms of running costs, range and use.

Finally, NHO Mat og Drikke recalls that the Authority and the Norwegian authorities concurred in concluding that a VAT exemption for goods of a lesser value than NOK 350 was prima facie selective in decision 155/16/COL. In that decision, the Authority placed particular weight on the indirect effect of the

29 See decision 342/09/COL, section 1.2.
30 See decision 342/09/COL, section 1.2.
measures on dealers and producers of these product categories abroad as compared with companies established in and operating out of Norway.3

In view of the foregoing, NHO Mat og Drikke considers that the case practice of the Commission and of the Authority is not only consistent with the relevant case law, but emphasises above all the decisiveness of the effect of a measure for the selectivity assessment, and the irrelevance of the regulatory technique used. A particular regulatory technique, namely the use of the HS to delineate the scope of a fiscal measure, is further addressed in the next section.

3.5.6 The use of the HS to establish the scope of a fiscal measure

In section 6.2 of its response to the complaint, Norway provides some additional information on the Harmonised Commodity Description and Coding System ("HS"). NHO Mat og Drikke sees no reason, at this stage, to comment on or dispute the factual elements concerning the origins or use of the HS.

NHO Mat og Drikke considers that the use of the HS to define the scope of a levy cannot predetermine whether that levy is selective. If it can be ascertained, through the use of the HS, that a levy treats all comparable products alike, that levy will not be selective. On the other hand, the widespread use of the HS, including in EU regulation and the EEA Agreement, does by no means entail that through the HS the selectivity of a measure is excluded, as the Norwegian authorities seem to imply.

In short, the use of the HS to establish the scope of a levy or tax is one of many plausible regulatory techniques that public authorities can avail themselves of. As demonstrated above, which regulatory technique is chosen is irrelevant for the assessment of whether a measure constitutes state aid.

NHO Mat og Drikke maintains, however, that establishing the scope of a levy by enumerating a large number of tariff headings and codes appears to entail a significant risk that state would be granted, as even the accidental omission of a sufficiently comparable product would likely entail state aid. This is not, however, what has happened in the case at hand. In the case at hand, the Norwegian authorities have deliberately subjected groups of products to the levies and at the very least accepted that this entails an advantage for comparable products not subject to the levies.

Furthermore, as regards the chocolate levy, the scope has not only been defined through HS headings and codes. In fact, explicit exemptions have been introduced to exempt from the scope of the levy certain products that fall under a certain HS code (for example a large number of biscuits are exempted from the levy in that way).

Finally, NHO Mat og Drikke does not see the relevance of the examples pertaining to the use of possible VAT exemptions provided by the Norwegian authorities in section 8 of their letter. The potential selectivity of such measures has to NHO Mat og Drikke’s knowledge never been assessed. This could be due to the fact that making use of the possibility to provide exemptions in accordance with the VAT directive may not be imputable to that Member State, and therefore not constitute state aid. In any event, the mere existence of other potentially selective fiscal schemes that have not been assessed by the Commission or the Authority cannot, in any way, affect the question of whether aid is present in another scheme.

3.5.7 The relevance of the objective of a fiscal measure for the selectivity assessment

In their response to the complaint, the Norwegian authorities suggest in several instances that the fiscal purpose of the chocolate and non-alcoholic drink levies distinguishes them from precedents, including in

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31 See paragraph 91. The fact that the Authority deemed this to be a prima facie selective measure that was justified by the objective of lightening the customs and tax checks to be conducted by the competent authorities is not decisive in this regard.

32 Cf. Commission decision in case SA.33206, and case C-460/07 Puffer.
particular the Danish fat tax. The Norwegian authorities seem to imply that for purely or predominately fiscally motivated measures, a less strict or different selectivity test applies than for measures that pursue objectives pertaining to for example public health or the environment.

NHO Mat og Drikke considers that this – at least implied – point of view calls for a number of clarifications as regards the significance of a fiscal measure’s objective in the selectivity assessment.

As described in some detail in the complaint letter, under step 2 of the selectivity test for fiscal measures, it has to be established if there is a derogation from the system of reference. This implies assessing whether “the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in the light of the intrinsic objective of the system of reference.”

NHO Mat og Drikke submits two observations in regard of step 2 of the selectivity test.

First, in cases where derogation stems from the scope of the measure in question, as was the case for example in British aggregates, the Gibraltar case or the chocolate and non-alcoholic drinks levies, steps 1 and 2 of the assessment are merged into one. A measure is accordingly prima facie selective if it treats differently certain undertakings or products compared others which are in a similar factual and legal situation in the light of the measure’s intrinsic objective.

Second, as underlined in the preceding paragraph, comparability is to be assessed against a measure’s intrinsic objective. The NoA guidelines and established case law clarify that external policy objectives cannot remove the selective character of a derogation from the system of reference. As explained in the complaint, for certain special levies, for instance those with health related objective, this implies that a difference in treatment that is intrinsic to that measure’s objective is not a derogation. A levy on alcoholic drinks intended to deter people from consuming alcohol would thus not derogate in favour of non-alcoholic but otherwise comparable drinks. On the other hand, for purely fiscally motivated measures, it is much harder to conceive what characteristics of products that could (otherwise) be regarded as substitutes by consumers could justify a difference in treatment without being “comparable” in the sense of the selectivity test.

In short, fiscally motivated tax or levies are prima facie selective if they entail a difference of treatment between comparable products. The objective of raising revenue – which is evidently legitimate – is of little relevance for the comparability assessment.

Finally, under step 3 of the selectivity test for fiscal measures, it has to be assessed whether the measures is justified by the nature or general scheme of the system of reference.

In this regard, NHO Mat og Drikke notes that the Norwegian authorities have not provided any justification. According to established case law, it is for the EEA Member State that introduces a prima facie selective measure to justify it with a view to its nature.

In any event, none of the potential justification grounds listed in the NoA guidelines seem applicable. Those are the following:
- the need to fight fraud or tax evasion;
- the need to take into account specific accounting requirements;

Cf. for example page 5 and 9 of the letter.
NoA guidelines, paragraph 135.
NoA guidelines, paragraph 135; cf. also C-6/12 Oy, paragraph 27 et seq. See also Commission decisions in cases SA.41187 and SA.44351.
Cf. for example C-88/03, Portugal v Commission; joined Cases C-106/09 P and C-107/09 Commission v Gibraltar and United Kingdom, paragraph 146.
administrative manageability, the principle of tax neutrality;
- the progressive nature of income tax and its redistributive purpose;
- the need to avoid double taxation.37

While that list is not exhaustive, it would seem highly unlikely that the alleged difficulties in designing a consistent tax could serve as a justification pursuant to step 3 of this test. It should also be observed that any justifiable derogation would have to be proportionate.

3.5.8 Conclusion: The correct legal framework to determine whether a fiscal measure is selective

In this section, NHO Mat and Drikke has demonstrated that the correct test to assess a fiscal measure’s potential selectivity consists in establishing whether it favours undertakings as compared to those that are in a comparable situation with the regard to the underlying logic of the measure in question. It is clear from the case law of EEA Courts and the case practice of the enforcement organs that there is no material difference depending on whether a EEA Member State devises a measure with a consistent, wide scope, and introduces derogations in favour of comparable undertakings thereto, or whether it designs an inconsistent, narrower measure, which leaves out of its scope comparable undertakings or products.

Thus, independently of the regulatory technique used, it has to be established if a fiscal measure entails derogations from the logical system of reference, and whether these derogations are justified. A 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. Whether the point of departure is a reference system as defined by the Member State, or a reference system devised to establish whether a fiscal measure is selective, does not make and cannot make a difference in substance, given the overarching principle of the notion of state aid being an effect-based concept.

NHO Mat and Drikke will show that the chocolate and non-alcoholic drinks levies entail selective advantage under this correct test in section 5.2.2.

The Norwegian authorities have attempted to show that in case where a Member State chooses, instead of an explicit exemption, simply not to impose a tax or levy on a group of comparable products, a different, more lenient selectivity test applies. That test should only be met where the boundaries of a levy have been in defined in a clearly arbitrary manner, meaning that mere inconsistencies in the boundaries and random effects should not make a measure selective.

NHO Mat og Drikke considers, as explained above, that this approach lacks support in the established case law of the EEA Courts. While it is no evident in how far that test diverges from the correct test as described above, NHO Mat og Drikke perceives this as unnecessarily complicating the assessment of fiscal measures under state aid rules.

In any event, NHO Mat og Drikke will also show that the chocolate and non-alcoholic drinks levies entail selective advantage under the test as proposed by the Norwegian authorities in section 5.2.3.

Finally, the Norwegian authorities have explained that the “standard test”, in which the point of departure is a reference system as established by the Member State, is not applicable here. NHO Mat og Drikke will however demonstrate in section 5.2.4 that even under this test, the levies in question confer a selective advantage on explicitly exempted products.

37 Cf. NoA guidelines paragraph 138 et seq.
Before reverting to the levies under assessment, NHO Mat og Drikke will provide the Authority with some additional information about excise duties in general, and prima facie similar levies as those under assessment in other EEA Member States in the following section, including so as to illustrate that concluding on the selectivity of the levies in question does not jeopardise Norway’s fiscal sovereignty.

4 THE COMPLAINT DOES NOT ENCROACH ON THE NORWEGIAN AUTHORITY’S FISCAL SOVEREIGNTY – COMPARISON WITH OTHER MEASURES IN NORWAY AND IN THE EEA

4.1 All state measures must be assessed on their merits

As discussed in the introduction to section 3 above, the Norwegian authorities have urged the Authority to take a “cautious approach” with regard to this case, as there would allegedly otherwise be a risk to undermine EEA (EFTA) Member States’ fiscal sovereignty in general. The Norwegian authorities claim that concluding on the selectivity of the chocolate and non-alcoholic drinks levies would “imply that most fiscal taxes would be prohibited as illegal state aid”. They also attempt to use the relatively small number of state aid cases concerning indirect taxes as well as the fact that superficially similar levies exist elsewhere in the EEA as argument for the non-selectivity of the measures in question.

As will be further exemplified in the following, the implication that the present complaint is unduly encroaching on the Norwegian authorities’ fiscal sovereignty lacks a factual and legal basis. While the starting point is that the EEA Agreement does not harmonise the Contracting Parties’ fiscal policies, this fiscal sovereignty must – in the same way as in other areas – be exercised within the bounds of the relevant provisions in the EEA Agreement.

In the following, NHO Mat og Drikke will firstly demonstrate that there is an increasing awareness, triggered through recent jurisprudence and case practice, that indirect taxes can entail elements of state aid, and that the claim that such taxes should be subject to more deferential scrutiny than other instruments of taxation is without merit. In line with this, there are numerous examples in recent case practice of indirect taxation measures giving rise to state aid. At the same time, it is more likely that state aid from indirect taxation measures arise in the EFTA EEA States than in EU Member States, as EU tax law is largely harmonized in this area.

Secondly, NHO Mat og Drikke will point out that from the information available, it appears that other national authorities are in fact well aware that similar levies as those subject to the present complaint may in fact amount to state aid. As already mentioned, the number of cases as well as the existence of levies with certain similarities does in any event not amount to a basis for a legal argument that the measure must be deemed to be free of aid. All measures must be assessed on their merits, and the fact that national measures may have been implemented in other countries does not alter the state aid nature of a given other measure.

Lastly, NHO Mat og Drikke will highlight that the measures addressed in the complaint can be distinguished from other excise duties also on the basis of their origin and rationale. The chocolate and non-alcoholic drinks levies do not reflect the level of analysis one has come to expect from the Norwegian authorities when considering alternative tools for taxation. Unlike modern special levies, the concerned levies do not reflect an appreciation of whether they fulfil the purpose of generating state revenue without unduly distorting competition through favouring certain undertakings. The crux of the case is simply that the Norwegian authorities have opted to uphold and substantially increase the rate of levies which are by modern standards clearly inappropriate and arbitrary, instead of generating the tax revenue from other means. As underlined in section 3 above, the present complaint is not as the Norwegian authorities suggest an attack on Norwegian special levies as such, but a legitimate legal step against two particular levies which have become new aid through a significant increase in the aid amounts that exempted products receive resulting from a drastic rises of their rates.
4.2  Indirect taxes and excise duties in the EEA

The Norwegian authorities point out that in the EU, VAT legislation is largely harmonised. This is correct, and the harmonisation of indirect taxes in the EU (in particular based on Article 113 TFEU) also includes other indirect taxes, and in particular excise duties on alcohol, tobacco and energy. 38

Whether making use of exemptions provided for in indirect taxes harmonised at EU level could constitute state aid, is far from certain, and in fact would appear to be rather unlikely in view of existing jurisprudence and practice 39. Conversely, it is uncontroversial that lower rates or exemptions from the Norwegian VAT can constitute state aid.

For instance, in its decision 150/15/COL, referred to in section 3 above, the Authority assessed whether a VAT zero rating for electric vehicles entails state aid. The Authority concluded that this was the case, and rejected an argument similar to the one raised by the Norwegian authorities in their response to the complaint, namely that given that taxation falls outside the EEA Agreement, Norway’s should be allowed the fiscal choice not to impose VAT on certain types of products without this being state aid.:

"State aid rules are different from fiscal rules and the fact that Norway could be allowed to establish a zero rate VAT for electric cars without breaching internal market rules (as the VAT Directive is not applicable in Norway) does not imply that the VAT system can be used in contravention of the State aid rules. VAT exemptions or zero rates can still entail State aid and therefore their compatibility with the State aid rules still has to be assessed." 40

In the same vein, a zero VAT rating for electronic news services in the media was readily identified as state aid in the Authority’s Decision No 23/16/COL.

As mentioned in section 3, the Authority has furthermore held that a value threshold for the imposition of VAT on imported goods of lower value, gave rise to state aid as it favoured certain groups of undertakings. In its decision 155/16/COL, the Authority made a concrete and fact based selectivity analysis. As regards the indirect beneficiaries, the Authority noted, inter alia, that:

"The complainant has provided data which suggests that consumers are sensitive to the benefit provided by the import duties exemption when purchasing goods. Such a consumer preference materialises in an indirect advantage for dealers and producers of these product categories abroad that companies established in and operating out of Norway do not enjoy." 41

At no stage did the Authority indicate that a more deferential (or cautious) approach was warranted for analysing the advantages flowing from indirect taxation measures. Rather, the Authority’s approach was an effect based one, in line with the leading precedents in EEA law.

It should also be recalled that the Authority has identified preferential treatment in the field of special levies as aid measures. This was the case in for example the Authority’s decision 370/04 COL, concerning a preferential treatment of the wood industry with regard to the CO2 levy.

Recent case practice from the Authority thus give ample illustration of the fact that indirect tax measures are, contrary to what is alluded to by the Norwegian authorities, regarded as state aid measures when they result in the favouring of certain undertakings. The Authority’s approach has thus, and again contrary to what is asked by the Norwegian authorities, not been one of caution, but one where the measure is analysed on the basis of its effects.

38 See, for an overview, https://ec.europa.eu/taxation_customs/business_en
39 Cf. Commission decision in case SA.33206, and case C-460/07 Puffer.
40 Paragraph 102.
41 Paragraph 81.
It is further of interest to note that the fact that the most significant and widespread indirect taxes are harmonised in the EU may entail that there are relatively few other, non-harmonised excise duties of significance that could potentially give rise to state aid issues. For instance, Germany appears to only have two non-harmonised excise duties in place, for coffee and nuclear fuel, whereas the UK seems to only charge a climate change levy and duties on certain fuels in addition to harmonised excised duties.

NHO Mat og Drikke does not consider it necessary to deepen the analysis of other EEA Member States’ approach to excise duties. However, in NHO Mat og Drikke’s view, the above illustrates that the significance of the case at hand should not be exaggerated in terms of potential effects on Member States’ possibilities to raise indirect taxes. Further, it partly explains why indirect taxation has not regularly been in the focus of state aid enforcement.

4.3 Other EEA Member States appear to have notified “their” sugar taxes, and are well aware of the state aid implications

In their letter, the Norwegian authorities also seem to imply that the existence of state aid in the chocolate and non-alcoholic drinks levies would be at odds with the fact that EU Member States such as Hungary, Finland or France have certain soft drink levies in place. NHO Mat og Drikke has, as mentioned above, no information about these measures. However, NHO Mat og Drikke underlines that all state measures must be assessed on their merits, and that the information from the Norwegian authorities does not establish that the concerned levies are identical to the Norwegian levies.

Of greater significance, in NHO Mat og Drikke’s view, is the fact that in recent times at least two governments of EU Member States have recognised that the non-imposition of taxes on certain non-alcoholic drinks when other (sweet) drinks are taxed raises state aid issues.

First, the Republic of Ireland will apparently introduce a tax on certain sugar-sweetened drinks. However, it will reportedly only do so after having obtained state aid approval from the Commission. Previously, in 2016, an advisory body to the Irish government, the “tax strategy group”, which is chaired by the Irish Department of Finance, issued a report that also addressed the state aid implications of such a tax. It concluded:

“The proposed tax on sugar-sweetened drinks would operate like an excise, however excises on sugar-sweetened drinks are not currently regulated by the European Union. Accordingly, in the absence of harmonisation, Member States are free to introduce internal taxes subject to compliance with the EU Treaties and acquis. […] In addition, the prohibition of aids granted by States outlined in Articles 107 and 109 TFEU also applies to any new tax applied. The European Commission, through the Directorate-General for Competition, has increasingly used its powers under Article 108 TFEU to decide that Member States should abolish or modify certain taxes. When designing a new excise, attention must be given to state aid issues […]These rules are engaged where products are substitutes for one another, and one substitutable product is given preferential treatment by the state over another through a measure such as tax on competitors etc. The issue of whether milk-based sugar-sweetened drinks, and fruit drinks with natural sugar, are substitutes for water based sugar-sweetened drinks may engage state aid issues, should the former categories be excluded from the scope of the tax.”

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42 http://worldcustomsjournal.org/Archives/Volume206%2C%20Number20%20(Sep%202012)/03%20Schroer-Schallenberg.pdf, page 12.
Accordingly, Ireland will apparently seek the Commission’s approval: “Our sugar tax will commence [...] subject to State Aid approval”.

Second, and according to the information on the website of the WHO, Estonia has introduced a tax on soft drinks:

“From 1 January 2018, the legislation will introduce a tax on non-alcoholic beverages (carbonated and noncarbonated drinks, 100% juice drinks and sweetened milk drinks).”

However, certain exemptions thereto appear to be subject to the Commission’s approval:

“For 100% juice drinks and sweetened milk drinks, Estonia will ask permission to give them state aid from the European Commission. With this permission, these products will be freed from the tax.”

NHO Mat og Drikke does not have further information about the details of these measures, and cannot ascertain if Ireland and Estonia have notified them. Nor does NHO Mat og Drikke know what the Commission’s view on those measures is. However, the foregoing examples show that other governments in the EEA have accepted the fact that the non-imposition of special levies on prima facie comparable products requires notification under state aid rules.

4.4 The concerned measures are different from other excise duties and levies, and the complaint does not address Norwegian special levies as such

As mentioned above, the Norwegian authorities seek to present the case at hand as one challenging state sovereignty in the area of taxation. To this end, the Norwegian authorities remark that most fiscal measures would be prohibited as state aid if analysed against similar tests as the one advocated in the complaint. This is however not correct.

The starting point here is the recognition of tax neutrality in modern Norwegian tax law. There has been a gradual shift where the legislator has to an increasing extent recognized that advantages flowing from tax provisions are liable to distort competition to the detriment of the long term welfare of consumers. This recognition is reflected in several tax reforms, and is based on the same development in the field of economics that has lead to a significant body of law safeguarding competition in markets, including also state aid law.

In line with this, the Norwegian legislators generally seek to carefully balance a given levy’s objective and effects before implementing it. Thus, modern special levies generally have a clear objective, and reflect an analysis of how the concerned levy will work. This is illustrated by the fact that the current Regulation on Special Levies includes a number of dedicated levies designed to support environmental considerations. For example, the regulation includes a CO₂ levy on mineral products (chapter 3-10) and road use levies on petrol and diesel (chapter 3-9 and 3-11). Naturally, the Norwegian authorities also assessed how the levies work in practice. For instance, the levy on the final treatment of waste has recently been repealed (§ 3-13-1). On the other hand, the advice of the Norwegian Public review in the 2007, that the chocolate levy should be abolished including due to its distortive effects, was not implemented (cf. section 2.2.3 of the complaint).

The measures that are subject to the complaint do however not reflect a careful analysis of the effects of the levies. These measures were originally imposed as taxation on luxury goods in the 1920s, and the Norwegian authorities have gradually widened their scope, and repeatedly chosen to uphold them despite the knowledge that they may not respect the principle of tax neutrality. Further, it has long been established that levies significantly distort competition by arbitrarily favouring certain products in a comparable situation as products subject to levy. These effects are however not attributable to the pursuit of any objective intrinsic to levies as they are fiscal in nature.

As NHO Mat og Drikke sees it, the Norwegian authorities’ approach in the present case is reminiscent of that adopted during the Authority’s first investigation into the differentiated regional security contributions. In that investigation, the Norwegian authorities went to great lengths in arguing that regionally differentiated tax measures are not selective, despite these measures clearly having the effect of conferring advantages on the basis of properties which are specific to certain undertakings. In the present case, the Norwegian authorities are effectively arguing that, despite the concerned levies likewise distributing economic advantages selectively to undertakings trading in certain products, these advantages should somehow escape scrutiny under state aid law. What the Norwegian authorities are essentially trying to safeguard, therefore, is the right to enact poorly designed special levies without having to respect the constraints arising from state aid law. This would, however, be tantamount to renouncing on the protection Article 61(1) EEA affords competition free of undue state intervention.

5 THE CHOCOLATE AND NON-ALCOHOLIC DRINKS LEVIES ENTAILS THE GRANTING OF A SELECTIVE ADVANTAGE TO PRODUCTS THAT ARE EXEMPTED FROM ITS SCOPE

5.1 Additional facts about the levies in question

NHO Mat og Drikke welcomes that the Norwegian authorities have clarified in their letter a number of factual aspects pertaining to the levies in question relevant for the state aid assessment of the chocolate levy and the non-alcoholic drinks levy. NHO Mat og Drikke will summarise these facts in the first part of this section, before proceeding to the selectivity analysis of the measures.

At the outset, NHO Mat og Drikke considers it to be noteworthy that the Norwegian authorities have confirmed that the levies pursue a fiscal objective. Further, the letter contains information on the levies’ scope which confirms NHO Mat og Drikke’s stance that the levies in effect constitute a preferential tax treatment of certain products which are in factually and legally comparable situation to those encompassed by the levies.

5.1.1 The chocolate levy

According to the information provided in sections 6.1 – 6.3 of the letter, the overall objective of the chocolate levy is to tax the consumption of finished products that can be characterised as sweets normally bought in a shop or kiosk and capable of being eaten immediately.

While according to the Norwegian authorities products such as cakes, ice cream biscuits do not meet this definition, chocolate (products) and certain biscuits are nonetheless comprised by the levy. The amount of sugar or sweetener in the product appears to play no role for their classification as taxable, whereas the fillings and coatings with sugar or chocolate, above a 50 % percentage (respectively with regard to weight and surface area covered), are considered as decisive. (cf. also the overview of the scope of the levy in section 2.2 of the complaint). This entails for example, that a fully coated chocolate biscuit in which chocolate only amounts to 10 % of its weight is covered by the levy, but a sweet chocolate biscuit that is not fully coated in chocolate would escape taxation as long as the chocolate content remains under 50 %.
The Norwegian authorities also explain in their letter which HS codes or headings are used to define the levies’ scope, and which exemptions have been made under certain HS codes.

NHO Mat og Drikke will assess in section 5.2.2.1 if a fiscally motivated consistent levy on sweets normally bought in a shop or kiosk and capable of being eaten immediately could be deemed not to be selective. While this was dealt with in more detail in the complaint, NHO Mat og Drikke provides in the following a number of additional comments pertaining to excluded / omitted products that would appear to be sweets normally bought in a shop or kiosk and capable of being eaten immediately.

- NHO Mat og Drikke notes that the Norwegian authorities have not commented in detail on the examples provided in Annex I to the complaint. In NHO Mat og Drikke’s view, all the sweet snacks mentioned in this document appear to be sweets normally bought in a shop or kiosk and capable of being eaten immediately at least to the same extent as those included in the levy.
- Specifically during the Christmas season, gingerbread would also seem to fall into this category, at least to the same extent as biscuits with for example chocolate filling.
- Pastries and certain bakery wares are arguably also sweets normally bought in a shop or kiosk and capable of being eaten immediately at least to the same extent as biscuits with for example chocolate filling, yet they are not included in the scope of the levy.

In terms of regulatory technique, NHO Mat og Drikke notes that the scope of the levy has not been altered in great detail over the years, even though today’s levy is based mostly an exhaustive list of HS codes and headings, whereas until 1998 a more descriptive approach was chosen, including also more explicit exceptions (see section 2.2. of the complaint letter). To NHO Mat og Drikke this adds further support to the view that the regulatory technique chosen has to be considered as irrelevant for the purposes of determining the effect of a measure, and thereby its nature as state aid. All that matters is if the scope of the tax encompasses all products that are in a comparable factual and legal situation with regard to the underlying logic of measure in question.

Further, NHO Mat og Drikke also notes that the current levy still entails some explicit exemptions to its scope. In section 3-17-1 of the Regulation on special levies, reproduced and translated on page 5 of the complaint letter, it is provided that biscuits are in principle within the scope of the levy, but only if they meet certain conditions (see also page 16 of the Norwegian’s authorities’ letter). This is an explicit exemption in favour of those biscuits not meeting the requirements. In terms of regulatory technique, this is very similar to the prohibited extension of the CO₂ levy for the use of a gas for heating buildings mentioned above.

5.1.2 The non-alcoholic drinks levy

According to the information provided in section 7.1 and section 7.2 of the letter, the overall objective of the non-alcoholic drinks levy is to tax the consumption of non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added.

In contrast to the chocolate levy, it appears that the scope of this levy has been defined without the use of HS-codes.

It would also appear that liquid beverages as defined by the Norwegian authorities encompass products that can be consumed right away, but also concentrate (syrup) to which water has to be added before consumption.

NHO Mat og Drikke will assess in section 5.2.2.3 if a fiscally motivated consistent levy on non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added could be deemed not to be selective.
While this was dealt with in more detail in the complaint, NHO Mat og Drikke considers it merited to provide a number of additional comments in the following pertaining to excluded / omitted products that would appear (akin) to non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added.

- In section 7.2 of the letter the Norwegian authorities clarify that the objective of the levy is to tax beverages for immediate consumption. At the same time, they explain that the taxed concentrate has to be mixed with water prior to consumption. However, according to the Norwegian authorities, it is not possible to tax powder products (to which water also has to be added to make them drinkable), because that would include in the scope of the tax powders for soup. The Norwegian authorities have not explained why it was not possible to simply state in the regulation for the levy that only powders to make sweet beverages are encompassed by the tax.

- No explanation has been offered as to why products containing “natural” sugar such as juices, juices from concentrate and squash (which again, is hardly drinkable without adding water prior to consumption) are not taxed, even though they would appear to be extremely similar in terms of content and consumer preference.

- It is also stated that sweetened milk products are exempt from the scope of the levy in order to provide children with an incentive to drink flavoured milk. It is altogether unclear to NHO Mat og Drikke why flavoured milk should be treated differently than other flavoured/sweetened drinks from a fiscal point of view.

In terms of regulatory technique, NHO Mat og Drikke notes that the scope of the levy is defined through a combination of general rules, quasi-exhaustive lists of ingredients, and explicit exemptions. Again, this shows that regulatory technique chosen (which differs from the chocolate levy, for example), has to be considered as irrelevant for the purposes of determining the effect of a measure, and thereby its nature as state aid. All that matters is if the scope of the tax encompasses all products that are in a comparable factual and legal situation with regard to the underlying logic of measure in question.

Further, NHO Mat og Drikke notes that the non-alcoholic drinks levy also entails some explicit exemptions to its scope. In section 3-4-1 of the Regulation on special levies, reproduced and translated on page 12-13 of the complaint letter, it is provided that juices and lemonades are exempt, as well as non-alcoholic beverages that can be sold as ice-cream. In addition, as stated above, there is in practice an exemption for sweetened flavoured milk. Powder for mixing beverages is omitted.

5.2 Under any plausible test, the levies confer a selective advantage

5.2.1 The notion of an additional margin appreciation for certain tax measures is unfounded

In this section, NHO Mat og Drikke will demonstrate that both levies entail selective advantages in favour of comparable products that are not taxed under any plausible test, including the test proposed by the Norwegian authorities.

At the outset, NHO Mat og Drikke recalls that the Norwegian authorities appear to suggest that a certain degree of discrimination, certain inconsistencies, and delimitation issues cannot be avoided when imposing special levies or excise duties. The inevitability of this should in the Norwegian authorities not mean that such measures are selective.

As explained above, NHO Mat og Drikke does not share this view, and considers it unfounded in case law. There is no merit for a claim that national authorities are somehow provided with an additional margin of appreciation as regards the definition of the scope of a fiscal measure as compared to explicit exemptions.

Furthermore, the Norwegian authorities have been aware of these issues for over a decade. The abolition in particular of the chocolate levy has been suggested several times, in particular due to the competitive
distortions it creates. Alternative, less or non-distortive measures, such as a general sugar tax, have also been contemplated. However, each year it has been decided to keep these distortive levies in place, and recently, to dramatically increase their rates.

In view of the foregoing, NHO Mat og Drikke considers it highly implausible that consistent, non-selective levies targeting broadly the types of products that the Norwegian authorities wish to subject to these levies (non-alcoholic drinks and sweet snacks for immediate consumption) cannot be designed.

However, even if that was not the case, this cannot entail a justification for the granting of state aid. There are a myriad of manners of manners in which a state can raise revenue, including through indirect taxes. The vast majority of them do not entail the slightest risk of raising state aid issues, and the political desire to tax a certain group of products cannot set aside the obligation that EEA Member States are subject to under the EEA Agreement. More specifically, there is no legal basis for a “necessary” breach of Article 61 (1) of the EEA Agreement based on an EEA Member States choice to opt for a type of certain fiscal measure.

NHO Mat og Drikke will in the following sections revert back to assessing concretely if the chocolate and non-alcoholic drinks entail selective advantages in favour of comparable products, which are exempted or omitted from these levies. In doing so, NHO Mat og Drikke will firstly perform an assessment under the test it considers to be the correct one, followed secondly by the test proposed by the Norwegian authorities and finally and thirdly, under the “standard” selectivity test as provided for example in the NoA guidelines.

5.2.2 The correct test: The levies result in favouring comparable products

5.2.2.1 The test

As mentioned above, NHO Mat and Drikke considers that the correct test to assess a fiscal measure’s potential selectivity consists in establishing whether it favours undertakings as compared to those that are in a comparable situation with the regard to the underlying logic of the measure in question.

In the performance of this test, particular regard should be had to the effect of the measure, whereas the intention and form of the measure are not of relevance. Therefore, it is, in NHO Mat og Drikke’s view, not significant if the potential selectivity is intended, if it stems from an explicit exemption of an otherwise consistent scope or from an omission, or simply from the inconsistent scope of a measure.

Applying this correct test to the fact of the case at hand requires the assessment of two separate albeit related issues, namely

- whether non-selective measure can in principle be designed that tax exclusively
  - sweets normally bought in a shop or kiosk and capable of being eaten immediately; and
  - non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added;
- assuming that this is the case, whether the levies and their scope as formulated by the Norwegian authorities concretely entail the conferral of a selective advantage on comparable products.

In the following, NHO Mat og Drikke will first assess these two issues with respect to the chocolate, and then with regard to the non-alcoholic drinks levy.
5.2.2.1 Taxing only sweets normally bought in a shop or kiosk and capable of being eaten immediately for fiscal grounds is as such selective

While it is as such a complex exercise to define which products are “sweets”, the issue to be assessed firstly is whether a tax on sweets would ensure that all comparable products are subject to the same burden.

In NHO Mat og Drikke’s view, this is doubtful. Fiscally motivated taxes and levies are often justified with regard to the taxpayer’s ability to pay. This would also appear to have been the original rationale of the chocolate levy, which was conceived as a luxury tax, aimed at raising revenue from consumers that could afford to buy a non-essential (sweet) treats. Against this background, it appears to be questionable whether the singling out of certain treats from a wider category of non-essential (sweet) snacks or confectionary overall could be deemed non-selective. If the State’s objective is to raise revenue from the consumption of luxury or comfort products, i.e. food of relatively low nutritional value which consumers buy predominately for indulgence purposes rather than for nutrition, the existence of such a distinction would seem to be arbitrary. From this fiscal point of view, all these products would appear to be in a comparable situation with regard to underlying logic of the measure in question.

This would imply that the correct reference system should in reality encompass at the very least all types of sweet snacks. The derogation in favour of the products not encompassed by the levy such as numerous types of biscuits, gingerbread, (certain types of) bakery wares, cakes (in particular those strongly resembling candy such a merengue or baked marzipan figures) etc. would not be consistent with the fiscal logic of the measure, which would thus be prima facie selective. NHO Mat og Drikke cannot conceive of a plausible justification either.

For the above reasons, NHO Mat og Drikke considers that even a perfectly consistent levy on all sweets normally bought in a shop or kiosk and capable of being eaten immediately may well be selective. However, given that the chocolate levy in any event does not treat all comparable sweets alike, NHO Mat og Drikke will not comment on this issue further at this point of the procedure.

5.2.2.2 In any event, the chocolate levy does not tax all sweets normally bought in a shop or kiosk and capable of being eaten immediately, includes products that are not sweets, and is therefore selective

The Norwegian authorities have explained that levy is meant to tax sweets – products that one would naturally subsume under the Norwegian term godteri. In that respect, NHO Mat og Drikke respectfully submits that there is firstly no common understanding of the definition or the boundaries of the term “godteri”, and that the levy secondly is also imposed on many products that may be sweet snacks, but do not belong to the category godteri.

According to the Norwegian version of Wikipedia, godteri comprises the following types of articles “sukkertøy, drops og pastiller, knekk, tyggegummi, vingummi, marsipan, nougat, lakris, gelegodteri og andre sukkervarer”. Chocolate and biscuits are hence not encompassed by a “natural understanding” of godteri. NHO Mat og Drikke notes that the Norwegian authorities have in their letter also at times referred to an intention to impose a tax on sugar and chocolate goods, which appears to suggest that the scope of the levy is in reality godteri as well as chocolate and certain chocolate/sugary biscuits. However, even then there are products encompassed by the tax that do not fit under a natural understanding of this term. The nuts bar mentioned in Annex I to the complaint, or the bars depicted further below in this section, do not fit under any of the above terms.

48 Cf. Commission decisions in cases SA.41187 and SA.44351.
49 Cf. for example the broader definition of confectionary under https://en.wikipedia.org/wiki/Confectionery.
According to the Norwegian authorities, “biscuits represent an interesting example of the scope of the excise duty”. Allegedly, only those that fall inside the “natural scope for a tax on sweets” are subject to the levy. In NHO Mat og Drikke’s view, there is a much greater resemblance and hence “comparability” between all kinds of sweet biscuits to each other than to godteri. What the Norwegian authorities refer to as an interesting example, is in NHO Mat og Drikke’s view an excellent illustration of the inconsistent, and in fact clearly arbitrary scope of the levy.

While NHO Mat og Drikke does by no means intend to suggest that market definitions from competition law should form the sole basis for the Authority’s assessment as to which products are comparable for a selectivity analysis, the following quote pertaining to a market definition in a merger decision of the Commission is nonetheless illustrative:

\[\text{Biscuits are baked products including flour, fats, sugar, milk, eggs and baking powder. Flavouring ingredients might be added such as coffee, chocolate, vanilla, etc. Biscuits are produced in a number of forms and may be sweet or savoury. They are consumed primarily as a shared snack or indulgence during family moments (with tea or coffee or as part of breakfast) when they are shared. They are sold in packs rather than for single serving.}\]

\[\text{In past decisions, the Commission considered that from a demand-side perspective there is a distinction between sweet biscuits, which are generally consumed between meals and savoury biscuits, which are often consumed in the evening as a snack or with a topping such as cheese or meat.}^{51}\]

There is no mentioning of a possible distinction between (certain) chocolate-containing biscuits and other sweet biscuits. Thus, also for a selectivity or comparability assessment under state aid rules, it cannot be ignored that a distinction between different types of sweet biscuits (or even gingerbread), entails a highly problematic differentiation in terms of fiscal treatment.

NHO Mat og Drikke will further illustrate the arbitrariness of the chocolate levy by means of the following example.

For a random sample of popular biscuits sold in Norway selected by Bra Mat og Drikke\(^{52}\), NHO Mat og Drikke checked which of these biscuits are subject to the levy. Only those marked by a black-and-white star in the below picture are taxed.

\(^{51}\) See COMP/M.5644 - KRAFT FOODS / CADBURY, paragraph 28-29.
Further examples illustrating the arbitrariness, and in any event the selectivity of the levy’s scope as regards biscuits are shown in the following table:

<table>
<thead>
<tr>
<th>Exempt from the levy</th>
<th>Subject to the levy</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image1" alt="Cookie" /></td>
<td><img src="image2" alt="Cookie" /></td>
</tr>
<tr>
<td><img src="image3" alt="Cookie" /></td>
<td><img src="image4" alt="Cookie" /></td>
</tr>
</tbody>
</table>

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As becomes apparent from this illustration, it is impossible to consider the taxed products as different in any way relevant for consumers. Compared with these products, similar non-taxed products therefore clearly enjoy an advantage.

Similarly, there appears to be a certain arbitrariness attached to the fact that any trace of chocolate would make a nuts bar subject to the levy, whereas up to 49% of the weight of a biscuit or a cereal bar can be chocolate without that product being taxed.

As regards snack bars, more generally, NHO Mat og Drikke provides the following additional examples of the levy’s arbitrary and in any event selective scope.
The legal effect of including products such as for example certain biscuits or certain snack bars within the scope of the chocolate levy is that it substantially widens the logical reference system that forms the basis for the selectivity assessment. Such a reference system should, as explained above, encompass all comparable products. Sweet biscuits not subject to the levy, for instance, undoubtedly obtain a selective advantage, as they are evidently in a comparable factual and legal situation, in particular from a fiscal logic point of view.

NHO Mat og Drikke considers it superfluous to repeat that such derogations from the logical system of reference cannot, in all likelihood, be justified.

In view of the inconsistent enumeration of a variety of different categories of sweet products that form the scope of the chocolate levy, it is in NHO Mat og Drikke’s view rather complex to establish for the purposes of a selectivity “a reference system 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”. As mentioned in the complaint, it is also not required, at this stage of the procedure, to establish a definite scope of a logical reference system against which to assess an exhaustive list of derogations. However, in NHO Mat og Drikke’s preliminary view, this reference system should at the very least comprise all sweet biscuits, as well as all products containing chocolate for immediate consumption.
The precise logical scope of the reference system for the chocolate levy could only be established in the course of an in-depth investigation. In any event, the foregoing and most likely not exhaustive enumeration of inconsistencies inherent in the chocolate levy demonstrates that the chocolate levy does not treat all comparable products alike, given in particular its underlying logic of simply raising revenue. As a result, it entails the granting of selective advantages to comparable products that are not subject to it.

5.2.2.3 Taxing only non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added is a such selective

Similar to the considerations set out above pertaining to the chocolate levy, it would prima facie appear to be difficult to justify a differentiation between non-alcoholic, liquid beverages depending on whether sugar has been added or whether sugar is contained in the ingredients to a non-alcoholic beverage. From a fiscal, including ability to pay point of view, the distinction between fruit juices and other sweet beverages would therefore seem to be selective. All these products would appear to be in a comparable situation with regard to underlying logic of the measure in question, which is to raise revenue. As mentioned above, the Estonian authorities appear to have arrived at the same conclusion.

NHO Mat og Drikke furthermore queries whether, from a fiscal point of view, the presence of sugar or artificial sweeteners in a non-alcoholic drink should be decisive at all for a comparability analysis under Article 61 (1) EEA.

As mentioned above, NHO Mat og Drikke does not suggest that market definitions from competition law should be the sole basis for the Authority’s assessment as to which products are comparable for a selectivity analysis. Nonetheless, NHO Mat og Drikke considers it illustrative that the established case practice of the Commission to non-alcoholic beverages (NABs) does not even mention the presence or absence of sugar, whereas the presence of carbon acid guides the overall segmentation into markets for carbonated and non-carbonated drinks.

While the sweetness of a product may be inherent in some of the contemplated market segmentations, the Commission did apparently not even investigate whether there was a difference between juices to which sugar or artificial sweeteners have been added, and those without added sugar or sweeteners: “With respect to NFC [not-from-concentrate] and FC juices [from-concentrate], most retailers indicated that these are considered potential alternatives by end-consumers since many of them do not distinguish between the two categories.”

Distinctions between concentrates, squash and juices depending on the presence of additional sweeteners would therefore appear to be secondary from a consumer’s point of view, which in turn also makes a fiscal distinction doubtful from a comparability perspective.

The following example illustrates this point further:

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See case M.5633, paragraph 10.

See case M.6924, paragraph 22.
Both products appear to be very similar and would almost certainly be seen as substitutes from a consumer's perspective. However, only the *Olden* eple drink is subject to the non-alcoholic drinks levy, because it contains a small amount of fructose.

In NHO Mat og Drikke's view, a fiscally motivated levy that inevitably distinguishes between such similar, comparable products has to be considered as being selective. Even the exclusion of bottled water appears not to be, from a purely fiscal point of view, evidently non-selective.

This conclusion finds further support in the examples provided in Annex A to this letter. On the first page of this complaint, a planogram of a fridge in a typical convenience store is depicted. The placement of the various drinks shows how closely certain taxed and not-taxed beverages resemble and compete with each other. The remainder of this annex also illustrates the arbitrariness of distinguishing between flavoured sweetened and flavoured non-sweetened drinks on one hand, and the differentiation between sweetened drinks to which sugar or other sweeteners have been added as compared to those where the sweetness stems from for example juice that is added to water.

Finally, NHO Mat og Drikke also queries whether the freezing of an otherwise taxed drink, and its subsequent sale as ice cream should logically entail that it is not encompassed by the levy.

In any event, the foregoing suggests that even a perfectly consistent tax on non-alcoholic liquid beverages to which sugar or sweeteners have been added would entail a derogation in favour of products such as juices, concentrates and possibly flavoured drinks or even bottled water. These derogations would not appear to be consistent with the fiscal logic of the measure, and would thus be prima facie selective. NHO Mat og Drikke cannot conceive of a plausible justification either.

In any event, given that the non-alcoholic drinks levy does not treat all comparable sweetened drinks alike, NHO Mat og Drikke will not comment on this issue further at this point of the procedure.

5.2.2.4 In any event, the non-alcoholic drinks levy does not tax (equally) all non-alcoholic, liquid beverages to which sugar or artificial sweeteners have been added and/or includes products that do not meet this definition, and is therefore selective.

The Norwegian authorities have explained that levy is meant to tax liquid beverages for immediate, instant drinking.

 Nonetheless, a number of products that cannot be drunk immediately, namely concentrates and syrups to which sugar/sweeteners have been added are encompassed by the levy, whereas powders (independently from their sugar/sweeteners content) are not encompassed. NHO Mat og Drikke does not see a relevant difference in terms of drinks preparation if water has to be added to thick syrup or to a
powder. Both products can, in fact, not be immediately consumed, but have to be prepared in a similar manner by the consumer prior to consumption.

Similar to the effect observed for the chocolate levy, the result of including products such as for example certain syrups or concentrates in the scope of the non-alcoholic drinks levy is that it substantially widens the logical reference system that forms the basis for the selectivity assessment. Such a reference system should, as explained above, encompass all comparable products. Powders to prepare drinks that contain sugar or artificial sweeteners therefore undoubtedly obtain a selective advantage, as they are evidently in a comparable factual and legal situation, in particular from a fiscal logic point of view.

NHO Mat og Drikke reiterates that such derogations from the logical system of reference cannot, in all likelihood, be justified.

There are a number of additional instances that in NHO Mat og Drikke’s view illustrate the scope of the non-alcoholic drinks levy entails the granting of selective advantages in favour of comparable products. However, as those types of products also benefit from an explicit exemption, which according to the Norwegian authorities requires the application of a different, stricter “standard” test than implicit exemptions, NHO Mat og Drikke will address those in section 5.2.4.2 below.

5.2.3 Even under the strict test of the Norwegian government, the levies entail a clearly arbitrary selective advantage for exempted products

As mentioned above, the Norwegian authorities appear to suggest that the scope of, or omissions to special levies or other instruments of indirect taxation could only be selective if their boundaries have been established in a clearly arbitrary manner. It seems that the Norwegian authorities interpret the term “clearly arbitrary” as meaning that random consequences that lead to a fiscal differentiation of comparable products should not be deemed to be selective.

NHO Mat og Drikke disagrees with this approach. However, NHO Mat og Drikke notes that even under this test, the levies in question entail selective advantages, because the differences in treatment are not a “random consequence”. In fact, particularly the chocolate levy has been the subject of much debate and research, and its problematic consequences are well-established, as described for example in section 2.2.3 of the complaint.

In any event, the selectivity inherent in these levies result inevitably from their inconsistent design, from the conscious choice of raising revenue by imposing the levies on certain products while not imposing it on other comparable products, and being aware of the distortive consequences this design has. This cannot be regarded as a random consequence.

Further, in NHO Mat og Drikke’s view, this is exactly what the Norwegian authorities have described, in abstract, as a clearly arbitrary measure. The only attempt of a justification being put forward is that there is no better – less arbitrary – way to raise revenue from non-alcoholic drinks and sweet snacks. NHO Mat og Drikke does not consider that to be plausible, and reiterates that even if that was the case, it could not remove from the ambit of Article 61(1) EEA the levies in question.

5.2.4 In any event, the levies contain explicit – and thereby selective – exemptions

5.2.4.1 Introduction

In their letter, the Norwegian authorities have distinguished between a “standard” three-step selectivity assessment for explicit exemptions and a special, less strict test for fiscal measures with a clearly arbitrary
scope. As explained throughout this document, NHO Mat og Drikke disagrees with this formalistic approach.

However, NHO Mat og Drikke recalls that both levies also have explicit exemptions, which the Authority would have to assess for selectivity in the event that it would conclude that the omissions, or respectively the inconsistent scope of the levies do not entail selective advantages.

5.2.4.2 The chocolate levy contains explicit selective exemptions

As mentioned above, the regulation on special levies contains also explicit exemptions in favour of certain sweet biscuits. NHO Mat og Drikke refers to its above considerations as to the comparability of different types of sweet biscuits.

In this section, NHO Mat og Drikke simply adds that sweet biscuits not encompassed by the levy has not been omitted, but deliberately exempted.

In this respect, NHO Mat og Drikke recalls that sweet biscuits falling under the HS codes 19.05.3100 and 19.05.3200 are in principle subject to the levy, but only if they are "fully draped (or with the exception of the bottom) with chocolate-(cocoa) and/or sugar filled masses, or partly draped and/or has middle layers(s) of chocolate-(cocoa) and/or sugar filled masses where the weight of the said masses amounts to more than 50 percent of the weight of the biscuit".

In the absence of this exemption, all sweet biscuits would be subject to the levy.

Applying the "standard" selectivity test, this entails that the reference system would be the levy without this exemption. The exemption constitutes the derogation. As mentioned above, NHO Mat og Drikke cannot conceive how the fiscal logic of taxing sweets, chocolate and sugar goods could plausibly entail that this derogation would not lead to a conclusion of the exemption in favour of sweet biscuits being prima facie selective, and furthermore not being justified.

5.2.4.3 The non-alcoholic drinks levy contains explicit selective exemptions

As mentioned above, the regulation on special levies in its provision pertaining to the non-alcoholic drinks levy contains some explicit, verbatim exemptions.

First, it is provided that juices and lemonades are exempt. Second, non-alcoholic beverages that can be sold as ice-cream are removed from the scope of the levy. Third, there is an explicit exemption for sweetened flavoured milk.

The Norwegian authorities have not provided particularly detailed explanations as to why these exemptions should not be considered selective, other than stating that they are logical, induce children to drink sweetened milk and are of relatively minor economic importance.

In NHO Mat og Drikke's view, the selectivity assessment for these exemptions is rather straightforward. Even if it was accepted to raise revenue by means of taxing non-alcoholic beverages to which sugar or artificial sweetener has been added, it is evident that:

- Exempting juices and lemonades reflect an external policy objective, namely that such beverages are allegedly healthier than typical beverages with added sugar or sweeteners. However, as the tax is a fiscal one, the differences in treatment are not explicable with reference to the underlying objective of the tax. The exemptions are thus selective.
- The non-imposition of the tax on certain sweetened milk products to increase their consumption by children is again founded in an external policy objective, for which there is no place within a
fiscal measure. As a result, this exemption is not pursing the objective of the tax, and is therefore selective.

As regards the exemption for non-alcoholic beverages that can be sold as ice-cream and the exemption pertaining to juices and lemonades, NHO Mat og Drikke refers to its considerations under section 5.2.2.3 above. Whether or not these explicit exemptions are selective depends on whether the Authority agrees with NHO Mat og Drikke that the singling out of certain non-alcoholic beverages is a such selective.

6 CONCLUSION

In view of the forgoing, NHO Mat og Drikke considers that the chocolate and non-alcoholic drinks levies entail selective advantages and therefore state aid in the meaning of Article 61 (1) EEA.

In any event, as explained in section 7.1 of the complaint, NHO Mat og Drikke recalls that the Authority is under a legal obligation to open a formal investigation because the levies – and their recent increases – objectively raise serious difficulties as regards their compatibility with the EEA Agreement.

Finally, NHO Mat og Drikke notes that with every passing months in which the levies are enforced, the manifest distortions they create – as for example illustrated by section 9 of the Norwegian authorities letter on their effects on prices – continue to favour certain products at the expense of other, comparable products. In addition, the amounts of aid that the Authority may eventually recover from the measures’ beneficiaries continue to grow, which results in intolerable legal uncertainty for the measures’ beneficiaries and their competitors.

NHO Mat og Drikke welcomes that the Authority has prioritised the assessment of its complaint. Despite of the measures having taken effect, it remains possible for the Authority to require Norway to suspend the measures, and thereby prevent a further aggravation of the situation. Should it decide not do so, NHO Mat og Drikke would urge the Authority to act swiftly and open a formal investigation procedure as soon as possible.

NHO Mat og Drikke remains at the Authority’s disposal to assists its investigation in any way that the Authority deems useful.

Yours sincerely,

Kluge Advokatfirma AS

Bjørnar Alterskjær
Jon Ramstad
Clemens Kerle
Planogram in a typical convenience store

- Water with flavour with no tax – Not sweetened
- Water with flavour With tax Sweetened
- Soft drinks With tax Sweetened
Water with Flavour – sweetened with juice
No tax

Water with Flavour – sweetened
Tax
Water with Flavour – no sweetener
No tax

Water with Flavour – sweetened
Tax
Water with Flavour – no sweetener
No tax

Water with Flavour – sweetened Tax
Water with Flavour – no sweetener
No tax

Water with Flavour – sweetened
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Water with Flavour – sweetened
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