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Oslo, 10 December 2024
Our ref.: GMA/31161-515

In charge:
Gjermund Mathisen

NHO Mat og Drikke

Dear Madam/Sir,

2024/9015/NO – STAKEHOLDER CONTRIBUTION

On behalf of NHO Mat og Drikke (FoodDrinkNorway), please find below a stakeholder contribution to TRIS notification 2014/9015/NO (Norway) – Amendment to the Food Act and proposal for new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children.

FoodDrinkNorway is a sectoral federation in the Confederation of Norwegian Enterprise (NHO), and represents than 1 977 companies in Norway, in the food, drink and bio industry.

FoodDrinkNorway and its members are concerned that the measures notified by Norway through notification 2014/9015/NO will not be in compliance with secondary legislation incorporated into the EEA Agreement, and will constitute an unjustified restriction on the free movement of goods.

The legal assessment included below has also been shared, at an earlier date, with the EFTA Surveillance Authority (ESA).

Yours faithfully
KVALE ADVOKATFIRMA DA

Gjermund Mathisen
Partner | Advokat

EEA LAW ASSESSMENT – THE MINISTRY OF HEALTH'S CONSULTATION PAPER OF 22 AUGUST 2024 ON THE MARKETING OF CERTAIN FOODSTUFFS

Contents

1 INTRODUCTION AND CONCLUSIONS

FoodDrinkNorway has commissioned Kvale Law Firm, represented by Gjermund Mathisen, to assess the rules in the regulation proposed by the Ministry of Health in the consultation paper of 22 August 2024, against EEA law. In the consultation paper, the relationship to EEA law is discussed in section 6.6. The assessments below are based on the discussions there. For the most part, the assessments are also made in the same order: First, the relationship to secondary law is assessed and then the relationship to general EEA law, i.e. the provision of the main part of the EEA Agreement and general principles of EEA law. Finally, the obligation to notify ESA and the rules related to this are also assessed.

The assessments below show that EEA law has been inadequately analysed and partly misrepresented in the consultation paper. The analyses of EEA law in the consultation paper do not provide a sound basis for the proposed national regulation.

If such rules are to be adopted, it is necessary under EEA law to make several changes – some of them significant – compared with the proposal in the consultation paper. Particularly problematic is the large degree of discretion in the draft regulation. In our opinion, the proposed rules will violate the EEA law principle of legal certainty, which sets strict requirements for the design of such national legislation.

Nor does the Ministry take sufficient account of the fact that administrative fines engage Article 6 ECHR. Given this, and in the context of the broad and vague prohibition rules, an in-depth proportionality assessment be made. However, the consultation paper is flawed already in the basic assessment of what constitutes a restriction, and the assessments of suitability, consistency and necessity are deficient and erroneous.

In addition, the rules proposed in the consultation paper will be in partial conflict with several directives and regulations. A national regulation cannot be formulated in this way, and as a basis for any revised draft of new rules, the relationship to these directives and regulations must be further investigated – and taken into account in the proportionality assessment.

The draft regulations have been notified to ESA under the EEA Consultation Act regarding draft technical regulations. The fact that this has been done before the public consultation at the national level has been completed, is remarkable. It must be taken into account that the public consultation at the national level may lead to significant changes in the draft regulation, in which case the draft must be re-notified in a revised form. In our opinion, such changes must be made and a new notification must thus be submitted to ESA.

2 RELATIONSHIP TO SECONDARY LAW

2.1 Introduction

In section 6.6.2 of the consultation paper, the Ministry assesses the proposed new rules against relevant parts of secondary law – directives and regulations – that have been incorporated into the EEA Agreement. In the following, we make specific comments on directives or regulations where the Ministry's analysis in the consultation paper is misleading or where significant points have been omitted.

2.2 Audiovisual Media Services Directive (2010/13/EU as amended by Directive (EU) 2018/1808)

In section 6.6.2.2 of the consultation paper, the Ministry concludes that the Audiovisual Media Services Directive does not prevent the adoption of the proposed rules. Provided that the rules are in accordance with general EEA law – which, however, does not seem to be the case, cf. section 3 below – this is largely correct. That is to say, the rules may in that case be made applicable to providers of media services subject to *Norwegian* jurisdiction, cf. Article 4(1) of the Directive.

On the other hand, the rules cannot be applied to providers of media services subject to the jurisdiction of another EEA State unless the procedure set out in Article 4(2) to (5) of the Directive has been followed. That is to say, Norway must first raise the matter with the EEA state in question, and then follow up with a notification to ESA if the matter cannot be resolved bilaterally or through the contact committee established pursuant to Article 29.

Furthermore, it is only in specific cases of circumvention that the stricter national rules can be applied to media service providers under the jurisdiction of another EEA State, see in particular

points 10 i.f. and 11 of the preamble to Directive (EU) 2018/1808. In other words, the media service provider in question must have been established in the other EEA state in order to avoid the Norwegian advertising ban. For providers that are already established in other EEA states, this will naturally not be the case.

The practical result of the proposed regulation may thus be continued, or even increased, advertising by foreign media service providers, while advertising by Norwegian media service providers will be prohibited.

UPDATE: Having read the Ministry's Reply to written questions from the Commission, we now understand that the approach is not to target providers of video-sharing platforms or on-demand audiovisual services with e.g. administrative fines under the proposed regulation. Instead, fines are to be levied on the advertiser. By way of example, the Ministry explains that "if the supervisory authority finds that a producer of an unhealthy food product, covered by the draft regulation Annex I, has paid for advertising of this product directed at children to be communicated on a video-sharing platform, the authority would direct its orders to stop the marketing towards the producer" (bottom of page 2 to top of page 3 of the Ministry's Reply to the Commission). We note also the preceding sentence: "The supervisory authority can target producers, importers, distributors, retailers of unhealthy food and beverages in Norway and other actors involved in the marketing of such products directed at children, such as marketing agencies." Read in context, this raises new questions. What if the advertising is paid for by a company established elsewhere, for example in Estonia or another EEA State? And what if the advertising is not directed specifically at the Norwegian market, but for example at a wider European market? One could imagine advertising for soft drinks or cereal, distributed in social media, and forming part of a European marketing campaign, perhaps paid for by a company in Germany, or perhaps a company outside the EEA. This apparent inconsistency and lack of clarity will be a serious concern.

2.3 e-Commerce directive (2000/31/EC)

In section 6.6.2.3, the Ministry assesses the relationship with the e-Commerce Directive and concludes that this does not prevent the adoption of the rules proposed in the consultation paper.

However, the system under this Directive is largely the same as under the Audiovisual Media Services Directive (section 2.2 above). This means that Norway cannot, in principle, impose restrictions on information society services from other EEA states. This includes, as the Ministry itself points out, marketing over the internet or in social media. Norwegian authorities cannot prevent marketing from reaching Norwegian consumers from other EEA states – without following the procedure in Article 3(4) to (6) of the Directive. This means that the authorities can only attempt to intervene against individual information society services through dialogue with the country of origin and possibly through notification to ESA.

The practical result of the proposed regulation may thus be continued, or even increased, advertising over the internet and in social media from abroad, while such advertising from Norway will be prohibited.

UPDATE: Having read the Ministry's Reply to written questions from the Commission, we now understand that the approach is not to target providers of information society services with e.g. administrative fines under the proposed regulation. Instead, fines are to be levied on the advertiser. By way of example, the Ministry explains that "if the supervisory authority finds that a producer of an unhealthy food product, covered by the draft regulation Annex I, has paid for advertising of this product directed at children to be communicated on a video-sharing platform, the authority would direct its orders to stop the marketing towards the producer" (bottom of page 2 to top of page 3 of the Ministry's Reply to the Commission). We note also the preceding sentence: "The supervisory authority can target producers, importers, distributors, retailers of unhealthy food and beverages in Norway and other actors involved in the marketing of such products

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2.4 Food Information Regulation ((EU) No 1169/2011 with subsequent amendments)

The Ministry's assessment seems to be that manufacturers or importers should solve the challenges of complying with specific Norwegian requirements for packaging by, for example, applying stickers. Under section 6.6.2.5, on page 63 of the consultation paper, the Ministry refers to how wine importers "solved clarifying requirements for the labelling of goods from Israeli settlements after the CJEU's decision in C-363/18". The parallel to this judgment from the CJEU is misguided. The case before the CJEU concerned non-compliance with the labelling requirements set out in *the Regulation*. The labelling on some wines had to be further detailed in order to *comply with EU/EEA law*. On the other hand, if manufacturers or importers have to apply stickers over parts of the packaging to comply with *national* requirements, this constitutes a restriction. In other words, the national rules then prevent or restrict the free movement of goods that are in line with the Regulation – in violation of its Article 38(2).

As the Ministry itself points out on page 64 of the consultation paper, with reference to Case E-2/12 *HOB-vín*, it is correct that national exclusion of a product as a result of the design of the packaging constitutes a barrier to trade. Similarly, it is also an obstacle to trade if manufacturers or importers, for example, have to apply stickers to the packaging in order to sell the product in Norway. In contrast to Article 18(2) of the previous Directive (2000/13), Article 38(2) of the Regulation does not allow for such barriers to trade to be justified. On this point, the parallel drawn in the consultation paper to the EFTA Court's case thus fails.

The Ministry's analysis of the relationship to the Food Information Regulation is thus inaccurate and the conclusion misleading. In our opinion, it is necessary to conduct a renewed analysis on this point and to revise the draft national regulation accordingly.

2.5 Regulation (EU) No 609/2013

Regulation (EU) No 609/2013, which among other things applies to infant formula, means that Norwegian authorities cannot " restrict … the placing on the market of food which complies with this Regulation, for reasons related to its … presentation or labelling", cf. Article 4(3).

Depending on the circumstances, the rules proposed in the consultation paper, and in particular Section 4, fourth paragraph, may come into conflict with the requirements of the Regulation.

The regulation has incorporated into Norwegian law by Section 1, first paragraph, of Regulation 10 January 2014 No 21 on foodstuffs for special groups.

As the Ministry correctly points out, the rules that implement the Regulation (EU) No 609/2013 will take precedence in the event that they conflict with the regulation proposed in the consultation paper. However, it is not appropriate regulatory technique to issue a regulation that in some respects does not apply according to its content. Such a design may furthermore entail a breach of the duty of loyalty under Article 3 of the EEA Agreement, cf. e.g. ESA's Reasoned Opinion of 9 June 2021 in Case No 84329 concerning sickness benefits in cash, in particular paragraphs 11, 33–37 and 99–113.

At the very least, it should be made clear in the regulation itself that it applies subject to another set of rules (*in casu* Regulation (EU) 609/2013), and information should be provided in the regulation about the application of this other set of rules. But even that is not an ideal form of regulation. Ideally, a new regulation should be drafted in such a way that it does not pretend to provide rules that in some respects nonetheless do not apply.

In our opinion, the draft regulation needs to be reworked on this point.

3 THE PROPOSAL ASSESSED AGAINST GENERAL EEA LAW

3.1 Introduction

In sections 6.6.3 and 6.6.4 of the consultation paper, the Ministry assesses the proposed new rules in relation to general EEA law, i.e. the fundamental rules in the main part of the EEA Agreement on the free movement of goods and services.[1] The assessments follow a traditional pattern, but are nevertheless skewed and erroneous or inadequate on several points. Already in the initial assessment of whether the proposed rules constitute a restriction on free movement, in section 6.6.3 of the consultation paper, the Ministry gets it wrong, followed by several problematic assessments in section 6.6.4.

3.2 The Ministry errs on several points when assessing the existence of a restriction

In section 6.6.3 of the consultation paper, the Ministry assumes, *first*, that the proposed restrictions on the marketing of legal foodstuffs will constitute a restriction under Articles 11 and 36 of the EEA Agreement. We agree with this.

However, the Ministry's assertion that there are "no discriminatory effects of the proposal" is inaccurate. The proposed restrictions on marketing must be judged as an *indirectly* discriminatory restriction. The point is illustrated by the CJEU's judgment in Case C-405/98 *Gourmet*. The case concerned a Swedish ban on alcohol advertising, and the Court noted in paragraph 21:

> *Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.*

The same will apply to a number of the products included in the proposed Annex I to the regulation, including some chocolate, spreads, desserts, ice cream, soft drinks and juices, etc.

The Ministry must conduct an EEA law analysis that is not based on the erroneous assumption made in the consultation paper. The proportionality assessment must take into account the discriminatory effects. For example, it is misleading when the Ministry, on p. 68, assumes that the freedom of movement of goods will not be restricted to a great extent because there is no "ban on products". For an actor from another EEA state, for example an ice cream producer, who is considering entering the Norwegian market, market access may in reality be dependent on marketing.

[1] The consultation paper refers to Articles 8, 11 and 36 of the EEA Agreement.

Second, restrictions on the placement of certain foodstuffs in connection with the sale of toys etc. are addressed separately in the consultation document, at the end of section 6.6.3. The Ministry briefly concludes that these are "considered to be sales arrangements that do not constitute a barrier to trade". The conclusion is questionable, especially in light of the EFTA Court's case law. The Ministry itself refers to Case E-16/10 *Philip Morris*, but overlooks the significance of the judgment on this point. The case concerned the Norwegian display ban on tobacco products. In paragraphs 38–51, the Court assesses whether the display ban can be regarded as a sales arrangement that is not a barrier to trade, but concludes that the display ban may have an indirectly discriminatory effect. The same follows from subsequent case law, see Case E-19/11 *Vín Trío*, paragraphs 58–62.

3.3 No real assessment of whether the goal is pursued in a consistent and systematic manner

Whether the proposed rules pursue the objective in a consistent and systematic manner is mentioned as a question in the consultation paper's suitability assessment, on page 67. However, the Ministry does not carry out any actual assessment of this question of consistency in the legislation as a whole.

The EEA law requirement is that Norwegian legislation as a whole must be free of inconsistencies that prevent the objective from being achieved.[2] Furthermore, it must be assessed whether the state adopts, promotes or tolerates other measures that run counter to the objective that the proposed rules are intended to achieve.

The relationship to EEA law is inadequately analysed and assessed on this point.

An important additional element is that the Ministry also fails to consider whether the proposed rules can be considered to pursue the objective in a consistent and systematic manner at all when the rules do not prevent advertising sent from other EEA states over the internet or in social media (see section 2.3 above) or, for example, in television broadcasts from other EEA States (see section 2.2 above). In particular, the relationship with advertising in social media is important in practice and as a matter of principle, as many young people are heavy consumers of social media. Many are exposed to advertising through social media to a greater extent than through other channels, and much of the content may come from other EEA states.

It is a significant deficiency in the analysis that this has not been assessed in more detail.

3.4 The rules are inconsistent in practice – especially as to sponsorship

The rules covered by the consultation paper also do not appear to be consistent as the proposal is formulated. For example, the rule proposed in Section 6, litra a, would have inconsistent, arbitrary or discriminatory effects. Section 6 makes certain exceptions to the marketing prohibition, and according to litra a, sponsorship shall be permitted, provided that the sponsorship "only involves the use of the sponsor's company name and logo". In practice, however, some manufacturers have a company name and logo that are very closely associated with well-known products (e.g. Dr Oetker and their frozen pizza products), while others do not (e.g. Orkla and Grandiosa pizza).

This is one point (among several) where designing a good rule is difficult. Be that as it may, the rule as it is proposed now, is problematic. More specifically, the proposal is problematic in two respects: Depending on what the Norwegian authorities' chosen level of protection may be – which remains unclear in the consultation paper – this rule may undermine the consistency of the proposal. And as drafted, the rule may violate EEA law requirements on equal treatment or non-discrimination.

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[2] Cf. Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett*, 4th ed. 2022, p. 142.

3.5 Insufficiently substantiated suitability and necessity assessments

According to settled case law, the state must document that measures that constitute restrictions are suitable and necessary to achieve the objective. The state bears *the burden of proof*, both the objective burden of proof, *the risk of doubt*, and the subjective burden of proof, *the obligation to provide evidence*. As an example, reference can be made to the EFTA Court's judgement in Case E-8/20 *N*, which concerned the NAV scandal. In paragraph 95, the EFTA Court summarises the case law as follows: [3]

> *It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. It must also be pointed out that reasons invoked by an EEA State as justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments ...*

The consultation paper does not meet this burden of proof. In section 6.6.4, at the bottom of page 66, the Ministry seems to want to lower the standard: "In the detailed assessment, account must be taken of the fact that the isolated effect of various measures in the dietary area is difficult to measure, and that any effect will often occur over a period of time." And the proportionality of *the display ban* is not assessed at all in the consultation paper, see section 3.2 above.

Following on from that, the Ministry assumes that *the marketing ban* is suitable for achieving the objective. In support of this, the consultation paper points to case E-16/11 *Philip Morris*, which concerned *a display ban* on tobacco products such as *cigarettes and snuff*. The Ministry "holds that there is reason to believe that the assessment of restrictions on the marketing of unhealthy foods aimed at children must be assessed in much the same way as similar measures in the tobacco sector". However, it is not obvious that a ban on marketing aimed at children and young people of e.g. juice and iced tea can be equated with a ban on the in-store display of cigarettes and snuff. The Ministry's assumption on this point is not further detailed, and the consultation paper is insufficiently substantiated in this regard.

This in turn affects the assessment of the measures' necessity, which assumes that the measures are suitable.

Similar to the consistency assessment (see section 3.3 above), it is an important additional point also here that the suitability of the rules appears questionable when they do not prevent advertising in social media or over the internet, or in TV broadcasts, from other EEA states. The Ministry has not considered this in the consultation paper, even though it may be of decisive importance for whether the conform to EEA law requirements. In our opinion, these are significant deficiencies that in themselves require a renewed assessment before formulating such marketing prohibitions as proposed by the Ministry.

3.6 The Ministry takes the wrong starting point for the necessity assessment

As a starting point for the assessment of necessity, the consultation paper refers, on p. 66, to case E-4/04 *Pedicel*, paragraph 56, *in the Norwegian language version*, which states that "målsettingen ikke like *effektivt* må kunne oppnås ved tiltak som i mindre grad hindrer handelen innen EØS" (emphasis added). This is an unfortunate translation of the original English language version which requires that "the ... objective may not be as *effectively* achieved by measures which are less restrictive of intra-EEA trade" (emphasis added). The English expression does not correspond to the common Norwegian understanding of the word *effektivt*, which would rather translate into

[3] See also paragraphs 93, 103-104, 119 and 125 of the judgement.

"efficiently". A key point here is that the state must choose less trade-restrictive measures, even if these are more resource-intensive and in that sense less efficient, provided that they are actually effective. Neither is it decisive that the chosen measure provides an effect beyond the objective. It is only required that the alternative measure will have the effect of achieving the objective.[4]

The Ministry's point of departure also means that it is not clear what the level of protection is, which is the yardstick for the necessity assessment, cf. page 68 of the consultation paper. This in turn creates uncertainty as to whether the Ministry's necessity assessment can stand.

In the consultation paper (p. 69), the Ministry emphasises that the proposal, as part of an overall package of measures, has a greater effect than the sum of each individual measure. However, it is not clear whether this only ensures the achievement of the goal, or whether the state goes further than the goal. This also remains unclear because the other parts of "such an overall package" are rather loosely specified: "Measures such as communication to the population, taxes, product labelling, etc."

In our opinion, the necessity assessment must be carried out anew, with the right assumptions.

3.7 The relationship with the self-regulation scheme MFU (*Matbransjens Faglige Utvalg*) is incorrectly assessed

A flawed premise for the analysis is also assumed when the Ministry considers the marketing ban (again, the exhibition ban is not considered) to be less restrictive because "the industry has already introduced such a ban through the self-regulation scheme MFU", see page 68 of the consultation paper. As the Ministry itself points out, at the very least this does not apply to the parts of the proposed regulation that go further than the MFU scheme, or have a broader scope.

However, the parts of the proposed regulation that are similarly regulated through the MFU scheme must also be assessed as the restriction they constitute. And the yardstick for how restrictive a measure is cannot be a company that has already chosen, voluntarily, to restrict the type of marketing or product display at issue, but rather a hypothetical operator from another EEA State that is considering entering the Norwegian market. In the future, such an operator may encounter strict Norwegian laws and regulations that may differ significantly from those that apply in other EU/EEA countries where the operator is established and operates.

This is the yardstick that must be applied in the EEA law analysis.

Nor does the assessment of necessity in the consultation paper take into account the fact that breaches of the proposed rules may be subject to administrative fines engaging Article 6 ECHR.[5] The fines make the proposed rules particularly invasive. This is particularly true when it is precisely the opportunity to use impose such fines that is the reason for the introduction of the rules, or at least is part of the reason why the Ministry no longer considers the MFU scheme to be adequate.[6]

3.8 The wide-ranging and discretionary nature of the rules contravenes the principle of legal certainty

Particularly problematic in the draft regulation is the broad and vague wording of the prohibition rule, especially when combined with an extensive degree of discretion in the enforcement by the supervisory authority, the Directorate of Health (*Helsedirektoratet*).

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4 Cf. Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett*, 4th ed. 2022, p. 144 et seq.

5 See also section 3.9 below.

6 See further details in the consultation paper on page 68.

Section 4, third paragraph, of the draft stipulates that the decisive factor in determining whether marketing is prohibited shall be "an overall assessment, which may take into account" a *non-exhaustive* list of more or less vague factors, such as colours, effects and other things that "may appeal to children". According to Section 5, products covered by Annex I must not be placed "in a setting with other products and services that appeal to children". The exceptions in section 6 are also partly vague and unclear. For example, "sober" product information shall be permitted in "marketing" (cf. the definition in Section 3, litra b).

Supervision of the rules will be assigned to the Directorate of Health, cf. Section 7. The discretion contained in the provisions will be exercised by the Directorate. And, on that basis, the Directorate will be authorised to make decisions in cases of alleged unlawful marketing or unlawful product placement, and to impose periodic penalty payments and administrative fines.

The aforementioned rules are so vague and discretionary that, in our judgement, they will violate EEA law requirements of legal certainty. The rules will also be incompatible with the fundamental freedoms, even if the rules were to be considered both suitable and necessary to achieve the objective. Indeed, this follows from the EEA law principle of legal certainty, which requires that national rules must be clear, precise and predictable.[7] For example, it would appear to be contrary to the EEA Agreement if the decisive factor in determining whether something is prohibited under Section 4, third paragraph, is to be an "overall assessment" made at the discretion of the Directorate of Health, and where the Directorate may take account of a non-exhaustive list of vaguely specified conditions.

For the national legislator, the EEA law requirements that national rules such as this must be clear, precise and predictable may be demanding to fulfil in practice. But these difficulties are no justification. Such rules must be designed in a way that fulfils the requirements if the rules are to stand up. Broad, vague, unclear and non-exhaustive provisions as a basis for public law prohibitions are particularly problematic in an EEA law context.

3.9 Administrative fines engage Article 6 ECHR

In the consultation paper, the Ministry emphasises that administrative fines are *administrative*. Nonetheless, such fines engage Article 6 ECHR. This has several implications. First, the procedural guarantees in Article 6 of the ECHR apply, which under the Human Rights Act have been incorporated into Norwegian law, taking precedence over other Norwegian legislation.

Second, under EEA law, the restriction on freedom of movement must be considered particularly invasive when a penalty is attached to a breach of the rules in question. The Ministry does not seem to have taken this into account in the consultation paper. The Ministry's case must be better clarified on this point as well.

We would add that the Ministry also provides an inadequate account of the significance of administrative fines in section 8.4.1 of the consultation paper, e.g. on page 84: "The Ministry expects that the use of administrative fines will have a preventive effect and thus save resources for the supervisory authority." Such an assessment seems to presuppose that the case handling will not be very resource-intensive, and that the supervisory authority will not make mistakes. The same seems to be the Ministry's assumption on p. 85: "The introduction of administrative fines will only have consequences for actors who violate the relevant provisions." This overlooks the fact that if administrative fines are to have a preventive effect, as the Ministry assumes, it will have consequences in the industry in the form of increased resource utilisation and overcautiousness. On the whole, the Ministry's assumptions here seem unrealistic.

[7] See Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett*, 4th ed. 2022, pp. 154-155.

4 DUTY TO NOTIFY ESA UNDER THE EEA CONSULTATION ACT (DRAFT TECHNICAL REGULATIONS) – AND STANDSTILL OBLIGATION

4.1 Introduction

In section 6.6.1 of the consultation document, on page 58, the Ministry notes that "requirements for EEA notification of the proposed regulatory rules" will be dealt with in separate processes.

The Ministry is correct in stating that "EEA notification" requirements apply here, i.e. such rules must be notified to ESA before they can be adopted. Furthermore, a standstill obligation applies, i.e. the proposed rules may not be adopted until after the expiry of a specific deadline.

More detailed requirements for "EEA notification" follow from the EEA Consultation Act, transposing the EEA law rules on draft technical regulations in Norwegian law.

4.2 Obligation to notify under the EEA Consultation Act – and requirement for new notification in case of amendments

The obligation to notify ESA follows from Section 4 of the Act, on the obligation to notify "technical rules" in conjunction with Section 3 on what constitutes "technical rules" within the meaning of the Act. The notification must be submitted to ESA through the Ministry of Trade, Industry and Fisheries. Once the proposed rules have been notified, ESA sends them for consultation to the European Commission and all EEA states (EU states as well as EFTA states). In addition, the revised EFTA Convention of 21 June 2001 and Switzerland's bilateral agreements with the EU ensure that Switzerland can also participate in the consultation.

The definition of "technical rules" in Section 3 of the Act is broad and includes the proposed rules on marketing bans. Further requirements for the content of the notification follow from section 5 of the Act. The notification must include the proposed technical rules (i.e. the draft regulation) in Norwegian and English, and the notification must justify why the rules are considered necessary.

The Ministry notified the proposed rules to ESA on 2 October 2024.[8] However according to Section 4, second paragraph of the Act, a new notification must be submitted "if changes are made that significantly ... change the scope ... or introduce new ... requirements". As shown above, in our opinion, it is necessary to make changes to the draft regulations, and in our opinion the required changes are of such significance that it will be necessary to re-notify the amended rules.

4.3 Standstill obligation

According to Section 6 of the Act, there is a standstill obligation. This means that proposals for new technical rules cannot be adopted until three months after ESA has received the notification. For the notification that has already been submitted (cf. the previous point), the standstill obligation runs until 3 January 2025.[9] A new notification, which will probably be necessary, will start a new standstill period.

The exceptions to the standstill obligation in Sections 7 and 8 of the Act do not apply.

4.4 Legal effects – the rules become inapplicable in case of breach of obligations under the EEA Consultation Act

Pursuant to Section 9 of the EEA Consultation Act, the adopted rules become inapplicable if the notification obligation or standstill obligation is breached. This also applies to breaches of the

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8 The notification is available on ESA's website: Draft Technical Regulation - Amendment to the Food Act and proposal for new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children. | ESA (eftasurv.int).

9 See Draft Technical Notifications | ESA (eftasurv.int).

obligation to re-notify amended rules, and the obligation to respect the new standstill period that follows such notification. In order to ensure that the amended rules will actually be applicable, the Ministry must therefore re-notify.

4.5 Relationship to the Norwegian *utredningsinstruksen* (administrative rules on public consultation, etc.) – requirement for new consultation in the event of changes

If the EEA consultation, for example as a result of comments from ESA, leads to significant changes in the proposed provisions, a new public consultation must be conducted in Norway. This follows from section 3-3, fifth paragraph, of *utredningsinstruksen*.