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EFTA SURVEILLANCE
AUTHORITY

Ministry of Petroleum and Energy
Einar Gerhardsens plass 1
0033 Oslo
Norway

Dear Sir/Madam,

Subject: Foreign Trade Licence (Section 4-2 of the Energy Act)

1 Introduction

In its letter dated 16 December 2009, the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("the Directorate") requested information from Norway on Section 4-2 of the Energy Act¹, which provides that "*no one but the State may export or import electrical energy without a licence*" ("the Foreign Trade Licence").

In its reply dated 3 February 2010, Norway relies on Ot.prp. nr. 56 (2000-2001) and indicates that the Foreign Trade Licence only applies to physical imports and exports of electricity. It does not apply to financial contracts. In other words, only operators and owners of cross-border interconnectors as well as power exchanges are obliged to acquire a Foreign Trade Licence. Thus currently, only Statnett (the owner or co-owner of all major interconnectors between Norway and other EEA States) and Nord Pool (the Nordic power exchange) hold Foreign Trade Licences.

Concerning the criteria for the granting of the licence, Norway also refers to Ot.prp. nr. 56 (2000-2001) and indicates that the purpose of the Foreign Trade Licence is to ensure efficient and secure export and import of electrical energy. The criteria for granting a Foreign Trade Licence are based on reasons of security of supply, environment and resource management.

Finally, Norway states that Section 4-2 is compatible with the EEA Agreement. The quantity of import and export of electrical energy to and from Norway is not restricted by the Foreign Trade Licence, but by the physical transmission capacity and limitations in the power grid.

The Directorate welcomes these clarifications on the scope of the Foreign Trade Licence and on the criteria for the granting of the Licence. But questions remain on the legality of such an authorisation scheme under EEA law.

¹ Lov 29 Juni 1990 nr. 50 : Lov om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (energiloven) (Act no 50 of 29 June 1990: Act relating to the generation, conversion, transmission, trading, distribution and use of energy, etc. (The Energy Act)).

2 Relevant national law

According to the understanding of the Directorate, the construction of an interconnection line between Norway and an EEA State first requires a Construction and Operating Licence under Section 3-1 of the Energy Act, as would the construction of any transmission line.

This Construction and Operating Licence is delivered by the national regulatory authority, the Water Resources and Energy Directorate (NVE). The criteria on the basis of which this Licence is granted do not appear to be explicitly provided for in Norwegian law. But in view of the requirements of Section 3-2 of *Regulation no 959 of 7 December 1990 concerning the generation, conversion, transmission, trading, distribution and use of energy etc.* ("the Energy Act Regulation"), which lists the content of the application which must be submitted to obtain such a Licence, and Section 3-5 of the Energy Act Regulation, which lists the conditions imposed on the licensee, one can suppose that the Licence is granted taking into account: the ability of the applicant to ensure operational reliability of the installations; the emergency preparedness in the planning, design and operation of the installation; the compatibility with the energy plan; and the environmental impact of the installations, including land-use planning concerns.

Once the Construction and Operating Licence has been granted, it is the understanding of the Directorate that the operator will be subject to the comprehensive regulatory framework which rules electricity transmission. He will be subject to the coordination of the system operator and the supervision of the national regulatory authority, NVE.

The development of a cross-border transmission line requires, moreover, a Foreign Trade Licence under Section 4-2 of the Energy Act, which is delivered by the Ministry of Petroleum and Energy. It would appear that no explicit and legally binding criteria for the delivery of this licence are provided for in Norwegian law or regulation. According to the information provided by Norway, the criteria for the award of the Foreign Trade Licence can be found in the preparatory work and are based on security of supply, environmental concerns and resource management.

It is the understanding of the Directorate that the operation of national transmission and distribution lines is subject to a different complementary licence, the Trading Licence under Section 4-1 of the Energy Act. Again, it is unclear on the basis of which criteria this licence is awarded. However, in view of the information required from the applicant under Section 4-3 of the Energy Act Regulation, it would seem the criteria relate to the financial soundness, corporate structure and ownership of the applicant.

3 Relevant EEA law

According to Article 11 of the EEA Agreement, quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties. Article 12 of the EEA Agreement prohibits quantitative restrictions on exports and all measures having equivalent effect.

As provided for in Article 13 of the EEA Agreement, the provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit

justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.

4 The Directorate's preliminary assessment

4.1 The restriction on free movement

According to established case-law of the Court of Justice, an obligation to obtain an import licence or permit for intra-EEA trade is a measure having equivalent effect to a quantitative restriction on imports, falling within the scope of Article 11 EEA. The EFTA Court and the Court of Justice have held that even when the licence is granted automatically and that it is thus a pure formality, such a scheme falls under Article 11 EEA². This applies equally to export licences. The latter constitute measures having equivalent effect to a quantitative restriction on exports, falling within the scope of Article 12 EEA, even when they are granted automatically and simply have as their only object to ascertain the intention of the exporters³.

A fortiori, a licensing obligation which applies to the construction of a cable to import and export electricity into and out of Norway constitutes a measure having equivalent effect to a quantitative restriction, falling within the scope of Articles 11 and 12 EEA.

Norway, in its letter dated 3 February 2010, states that the quantity of import and export of electrical energy to and from Norway is not restricted by the Foreign Trade Licence, but by the physical transmission capacity and limitation in the power grid.

The Directorate agrees that the good functioning of the internal market in electricity and the quantity of electricity flowing across the EEA is dependent on numerous factors, among which is the capacity of the national transmission systems and the manner in which capacity is managed inside the national systems and at their borders.

However, it remains that interconnection is a necessary if insufficient condition for the free movement of electricity. Without sufficient interconnection capacity between national transmissions systems, the internal market in electricity is bound to remain fragmented and the free movement of electricity across the EEA restricted. By subjecting the construction of interconnection capacity (*i.e.* import and export capacity) between Norway and the rest of the EEA to a licence, Section 4-2 of the Energy Act is liable to restrict intra-EEA trade in electricity and thus constitutes a measure having equivalent effect to a quantitative restriction.

² Case E-1/94 *Restamark*, paragraphs 49 and 50. See also Case 51-54/71 *International Fruit Company v Produktschap voor Groenten en Fruit* [1971] ECR 1107, paragraph 9.

³ Case 68/76 *Commission v France* [1977] ECR 515, paragraphs 14-16.

4.2 The justification of the measure

The licensing obligation is not contrary to the EEA Agreement, provided that it pursues one of the objectives of public interest listed in Article 13 EEA or one of the mandatory requirements recognised by the Court of Justice and the EFTA Court, that it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it.

Security of supply and environmental concerns could constitute acceptable grounds for a justification of the measures.

It is more difficult to understand what Norway classifies under the term “resource management”. Depending on its content, such a vague and general notion could constitute acceptable grounds for a justification of the measures, but also be a purely economic aim which is not recognised as worthy of protection in the context of the fundamental freedoms⁴.

In any event, the exceptions to the fundamental principle of the free movement of goods and freedom to provide services must be construed strictly⁵. The EEA State concerned must demonstrate that the measure at issue is appropriate to the aim pursued⁶ and that it does not go beyond what is necessary to achieve that aim⁷.

In its case *Canal Satélite Digital*⁸, the Court of Justice set out four considerations must be taken into account when determining compliance with the principle of proportionality of a national provision which requires prior administrative authorisation before imported goods or services may be marketed on the territory of an EEA State:

- (1) For a prior administrative authorisation scheme to be justified even though it derogates from the fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;
- (2) A measure introduced by an EEA State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another EEA State;
- (3) A prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;
- (4) A prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

⁴ See, for example, Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 34.

⁵ Case C-205/89 *Commission v Greece* [1991] ECR I-1361, paragraph 9.

⁶ Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.

⁷ Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 76; Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 22.

⁸ Case C-390/99 *Canal Satélite Digital v Administración General Del Estado* [2002] ECR I-607, paragraph 43.

The Foreign Trade Licence would appear to raise concerns on the first three points, which will be examined in turn.

4.2.1 *Transparency of the criteria*

It is settled case-law that a system of prior administrative authorisation cannot legitimise discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EEA law, particularly those relating to the fundamental freedoms. Therefore, as indicated above, if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily⁹.

This obligation of transparency also stems from the principle of legal certainty. The Court of Justice has consistently ruled that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts¹⁰.

In view of the information provided by Norway, the criteria for the award of the Foreign Trade Licence have been laid down neither in the Energy Act nor in the regulations taken for its application. Norway indicates that those criteria are to be found in the preparatory work to the Energy Act.

However, firstly, these preparatory legislative documents would not appear to afford sufficient legal certainty or transparency to fulfil the requirements of the Court of Justice. This is particularly the case concerning the transparency requirement. According to the information provided by Norway, the relevant criteria may only be found in the preparatory work for an amendment to the Energy Act which only marginally modified Section 4-2 and post-dates the adoption of the provision in its current form by more than a decade¹¹.

Secondly, even if one were to accept that criteria simply set out in preparatory work would afford sufficient legal certainty, the wording used concerning the Foreign Trade Licences is vague and unspecific. It is simply indicated, in Point 3.4.7.2 of Ot .prp. nr. 56 (2000-2001), that the licensing scheme has the purpose of ensuring "*as much as possible an efficient and secure power transmission between Norway and third countries, in a manner which protects common public interests such as security of supply, the environment and*

⁹ See, Case C-390/99 *Canal Satélite Digital v Administración General Del Estado* [2002] ECR I-607, paragraph 35 and case-law cited therein.

¹⁰ See Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7; Case C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18; Case C-236/95 *Commission v Greece* [1996] ECR I-4459, paragraph 13; Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraph 50, Case C-54/99 *Association Église de Scientologie de Paris* [2000] ECR I-1335, paragraph 22, Case C-478/01 *Commission v Luxembourg* [2003] I-2351, paragraph 20, Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 74-75, and Case C-370/05 *Festersen*, [2007] ECR I-1129, paragraph 43.

¹¹ According to Chapter VIII of Ot.prp.nr.43 (1989-1990), Section 4-2 of the Energy Act corresponds, in substance, to Section 23a of the Industrial Concession Act no 16 of 16 December 1917. So the Foreign Trade Licence even pre-dates the adoption of the Energy Act in 1990.

*resource management*¹². Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations. The criteria are not sufficiently certain and operable.

In view of the information provided by Norway, the Directorate must reach the conclusion that the administrative authorities have in this sphere a particularly broad discretion which would represent a barrier to the free movement of goods and freedom to provide services. The rules concerned would therefore seem to go beyond what is necessary to attain the objectives relied on by Norway. For that reason, the provisions of Section 4-2 of the Energy Act would have to be construed as violating Article 11 and 12 of the EEA Agreement.

But the measure would also appear to be disproportionate because it would seem to duplicate other procedures and/or it would appear that it could be replaced by subsequent controls.

4.2.2 *Duplication of procedures*

A measure introduced by an EEA State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another EEA State.

In the present case, Norway indicates that the Foreign Trade Licence serves the purpose of safeguarding security of supply, the environment and resource management.

However, it would seem that environmental concerns are directly already taken into account through the Construction and Operating Licence delivered under Section 3-1 of the Energy Act.

The same would appear to be the case concerning resource management and security of supply. The latter issues would appear to be included in energy planning¹³ which, in turn, appears to be taken into account when awarding Construction and operating licences. These matters would also appear to be regulated through the authorisation procedures for generation capacity. This would include, in particular, the legal framework for hydropower developments¹⁴.

The Foreign Trade Licence would thus seem to partially or fully duplicate controls which have already been carried out in the context of other procedures.

4.2.3 *Subsequent controls*

Moreover, a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.

¹² "Departementet vil videre bemerke at konsesjonsordningen legger til rette for å sikre en mest mulig effektiv og sikker kraftutveksling mellom Norge og utlandet på en måte som ivaretar allmenne samfunnsinteresser som forsynings sikkerhet, miljø og ressursforvaltning."

¹³ Section 7-1 of the Energy Act, Section 7-1 of the Energy Act Regulation and Regulation no 1607 of 16 December 2002 on energy studies.

¹⁴ In particular: the Protection Plan for Watercourses, the Master Plan for Water Resources, the Industrial Licensing Act, the Watercourse Regulation Act and the Water Resources Act, etc.

It is the understanding of the Directorate that in the Norwegian regulatory framework for electricity, security of supply concerns are mainly a task of the system operator, to be fulfilled to the greatest possible extent with instruments based on market principles¹⁵, with the possibility to resort to various safeguard mechanisms in emergency situations¹⁶.

It is difficult to see why those subsequent procedures, which, for the main part, are based on non-discriminatory market-based mechanisms, cannot achieve the aim of an efficient and secure power transmission between Norway and third countries, safeguarding common public interests such as security of supply, the environment and resource management.

So for that reason as well, it would therefore appear that the restriction to free movement entailed by this Licence goes beyond what is necessary in order to attain the objectives put forward by Norway.

This would seem to be confirmed by the procedures applicable to domestic transmission lines.

4.2.4 *Domestic transmission lines*

On the basis of the information available to the Directorate, it would appear that only transmission lines between Norway and other parts of the internal market are subject to a specific authorisation scheme aiming at safeguarding security of supply, the environment and resource management (beyond the Construction and Operating Licence). In particular, transmission lines between different zones within Norway are not subject to a comparable authorisation scheme.

Indeed, it is the understanding of the Directorate that the latter are only subject to the Trading Licence under Section 4-1 of the Energy Act, which would seem to be awarded on criteria relating to the financial soundness, corporate structure and ownership of the applicant¹⁷.

It is difficult to see why imported or exported electricity, or cross-border transmission lines, would be of such a different nature from domestic electricity, or internal transmission lines, as to justify a different administrative regime. These lines pose similar problems as regards security of supply, environmental protection or resource management.

The fact that the ex-ante and ex-post procedures would seem to be sufficient to guarantee security of supply, environmental protection and resource management as concerns domestic lines, would tend to indicate that the Foreign Trade Licence is not necessary to achieve the stated objectives as concerns cross-border lines.

In view of the above, the Directorate questions whether Section 4-2 of the Energy Act could go beyond what is necessary to attain the objectives relied on by Norway, and therefore breach Articles 11 and 12 of the EEA Agreement.

¹⁵ See Regulation no 448 of 7 May 2002 relating to the system responsibility in the power system.

¹⁶ See, for example, Section 6-2 and Chapter 8 of the Energy Act Regulations and the relevant provisions of Regulation no 448 of 7 May 2002 relating to the system responsibility in the power system.

¹⁷ As indicated above, it is unclear on the basis of which criteria this licence is awarded. But the criteria have been deduced from the information required from the applicant under Section 4-3 of the Energy Act Regulation.

5 Conclusion

Accordingly, as its information presently stands, the Directorate questions whether, by maintaining in force Section 4-2 of the Energy Act, Norway has failed to fulfil its obligation arising from Article 11, and 12 of the EEA Agreement.

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter.

This answer is to be provided by *6 December 2010*. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in this matter in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,



Hallgrímur Ásgeirsson

Director

Internal Market Affairs Directorate