SCHJØDT

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LEGAL ASSESMENT OF THE REVISED NATIONAL ALLOCATION PLAN

We have been requested to assess certain elements of the revised Norwegian NAP that may raise concerns under EEA law, as they may be incompatible with criterion 5 in Annex III to in Directive 2003/87as adopted and modified by the EEA Joint Committee ("the Directive'). The proposal for a revised NAP is currently on hearing and will be notified to the Authority's Services according to the procedure set out in Directive 2003/87 before obtaining final approval by Parliament. The deadline for the hearing is set to 7 November 2008 and the Norwegian Government has opted for a "fast track procedure."[1]

In its Decision of 16 July 2008 the EFTA Surveillance Authority objected to the discrimination between existing operators implicitly contained in the original Norwegian NAP.

The new proposal of the Norwegian authorities seeks to address that problem. The key elements of this proposal may be briefly summarised as follows:

- "Existing operators" are defined as operators having received their permit before notification of the NAP to the Authority in March 2008.
- Existing operators for which historical data from the period 1998-2001 are available, will receive their quota on the basis of those historical data.
- Existing operators without historical data from the period 1998-2001 but with historical data from the period 2002-2007 will receive their quota on the basis of those latter data.
- Existing operators without any historical data will receive their quota on the basis of calculations or norms (referred to as 'normtildeling' in the revised proposal).

It is clear that overall equal treatment must be ensured among the different categories of existing operators. Within the three categories, the existing operators without historical data appear vulnerable as the allocation will be based on less verifiable data than for the two other categories.

Prima facie the system seems unproblematic as Member States must be able to find practical solutions during the introduction of a NAP. It follows from the Commission decision making practice and general principles of EEA law that administrative criteria must be clear and

[1] The Ministry's reasoning for the short public consultation period is that the government has decided to "address the issues raised by ESA. The hearing letter contains suggestions for necessary changes to the applicable law and regulations in order for ESA to approve the Norwegian plan for quota allocation, allow quotas to be issued and link the Norwegian and European quota systems. In order to execute this process as quickly as possible, there is some urgency in passing the required changes to acts of Parliament and regulations. The deadline for any responses to the hearing letter is therefore set at three weeks."

transparent in order to avoid arbitrary conduct from the public authorities called to apply them.[2] This argument may also be found in the Authority's Decision in Case No: 62345 – *Norwegian NAP*, where the Authority states that the allocation methodology *"shall not favour certain undertakings or activities, unless it is justified by the environmental logic of the system itself or such rules are necessary for consistency with duly justified environmental policies'.*[3]

Thus, in the present case the Authority must assess whether the criteria ensure the equal treatment of the third category of existing operators compared with the two other categories, and whether this equality of treatment is ensured in a transparent and clear manner. We have grave concerns as to whether parts of the Norwegian proposal comply with these criteria.

A study of the proposal as a whole do demonstrate that gas power plants are treated differently from other forms of existing industries both *de jure* and *de facto.* There is no valid environmental justification for this differential treatment and the proposed 'emission-benchmarks' ('normtildeling') do lead to an arbitrary result when the quotas are allocated.

The criteria for the allocation do base the allocation of an individual quota on the result of the allocation percentage and the detailed norms. The allocation percentage for the third category equals the allocation percentage applicable to the two other categories for which historical data are available and appears to be unproblematic with regard to the criteria of equal treatment.

The detailed norms for allocation are production, capacity utilisation and production time.

Concerning production norms and capacity utilisation, we refrain from further comment at this stage. However, concerning *production time* the Norwegian authorities have taken the view that less than 8 760 hours (365 days x 24 hrs = 100%) of production time do reflect that the undertakings concerned will have production interruptions, for technical or economic reasons.

The proposal go on to state that as a main rule, production time will be set at 7 500 hours, i.e. a capacity utilization of about 85.6 %. No particular justification is made for this statement. Furthermore, from this "main rule" the Norwegian government then introduces an exception which allows the Karstø plant only 2 500 hours as the basis for calculation of quota allowances. As this reduction to approximately 33 % of normal estimated time is indeed quite drastic, one would expect the Norwegian authorities to have extensive and particularly well researched reasons for introducing such a reduction with regards to an existing operation, with no reference production due to the fact that operations have recently commenced.

The reasons stated by the government are in brief as follows: Initially the authorities refer to the fact that the plant has only been in full production for a limited period since its operational start in the autumn of 2007. The authorities then argue that this *probably* reflects the fact that electricity prices were low and gas prices were high in the south of Norway, and that the future production will depend on the future commercial decisions of the plant management. On the basis of these predictions the authorities then 'conclude' that the plant will likely be inactive for long periods during the next years and that consequently the production time may be set at 2500 hours, or approximately 100 days per year.

This reasoning is clearly insufficient and does not ensure equal treatment of existing operators. Furthermore, the government's line of reasoning is in conflict with the owners' statements made in the investment decision.

Before we turn to Statkraft's investment decision, it is appropriate to note that the historic data are not representative within the meaning of the Directive, as they are extremely limited. On the contrary, the historic market conditions have been less than representative due to, *inter alia*, the fact that exports to Denmark have been impossible. This is partly due to *force majeure* and therefore not representative for normal trading conditions in that part of the EEA.

Regarding the investment decision, it is not in dispute that this decision was made on the basis of a full – or close to full – utilisation of the production capacity for the plant's entire life span and we

[2] Reference is made to case C-390/99, *Canal Satellite.*
[3] Decision on page 3 last paragraph under heading 1.1.

refer to the business plan and the proposal to Statkraft's board of directors prior to the investment in Naturkraft:

- Grunnlasten tar utgangspunkt i at verket årlig kjører i 8000 timer med kapasitet på 407 MW for hele verket, noe som vil utgjøre ca 3,3 TWh/år.[4]
- Utslipp av CO2 fra gasskraftverket er totalt beregnet til 30 285 000 tonn over levetiden, eller 1,2 mill. tonn årlig.[5]

Furthermore, it is noteworthy that the Ministry's decision for quota allocation in 2007 was as follows:

> *'Departementet har kommet til at grunnlaget for tildeling av kvoter til Naturkraft AS skal være kapasiteten på anlegget som forutsatt i gjeldende konsesjon fra 2000 (...) På bakgrunn av data i søknaden og tilleggsinformasjonen er kvotegrunnlaget for Naturkraft etter dette bestemt å til å være:*
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> *2007: 606 204 tonn CO2'*[6]

Although this was an allocation made before the entry into force of the Directive under the EEA Agreement, it illustrates that the present proposal appears to be based on a quite different assumption when Article 11(2) is applied. It does seem odd that the scheme of the Directive should lead to a result that differs significantly from previous allocations for Naturkraft, when this is not the case for the vast majority of other undertakings covered by the revised scheme. The difference in treatment should then have been objectively justified.[7] As this is not the case that fact alone present sufficient grounds to conclude that the present NAP is not in conformity with the Directive. The benchmarking of existing undertakings with non-representative levels of emissions within the meaning of the Directive and the NAP regarding 'probable levels of emissions due to theoretic utilisation of production capacity' (as under Section 8(4) d) of the proposal) has to follow a transparent, non-discriminatory and objectively justified procedure.

In relation to the proposed 2 500 hrs norm, we particularly note that the norm *de facto* only covers one undertaking operating in Norway (Naturkraft). The proposed rule in Section 8(4) d) provides that the norm is 2500 hrs for 'other power plants' that are not high efficiency plants. In comparison – for electricity production, lime production and heat production – the proposed common norm is 7500 hrs of operation.[8] The proposal's wording is directly selective and favours highly efficient heat power plants ('høyeffektive varmekraftverk'). These plants seem to be treated on the basis of the general "7500 hrs rule" as defined in the proposal. The result is an undue and discriminatory advantage granted certain installations as well as the introduction of a selective scheme in violation of Article 61 EEA.

Regarding norms and the allocation to existing undertakings, the revised government proposal under heading 5 concerning 'substantial capacity increases' states that, in cases where no representative data are available after the changes to the production capacity took place;

> *'(...) vil virksomheten få normtildelt kvoter på grunnlag av den oppdaterte kapasiteten i anlegget. Med representative historiske utslipp menes utslipp i minst ett helt kalenderår før tildelingsplanen ble notifisert til ESA 28. mars 2008'.*[9]

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[4] Under heading 6.5 "Drift" ("Operation"). Our translation: The basic load is calculated from a premise that the plant will operate for 8000 hours per year at a capacity of 407MW for the entire plant, for a grand total of approximately 3,3TWH per year.

[5] Under heading 6.5.3. Our translation: CO2 emissions from the power plant is calculated to 30.285.000 tonnes during the entire lifespan of the plant, or 1,2 million tonnes per year.

6 The Ministry has fond that the basis for allocation of quotas to Naturkraft AS shall be the capacity of the plant as estimated in the existing concession from 2000 (...) Based on the data in the application and the additional information, the quota basis for Naturkraft is decided as: 2007: 606 204 tonnes of CO2

[7] See Case T-374, *Germany v. Commission* at para. 153.

[8] Section 8(4) litras b) and c)of the proposal.

[9] (...) the plant will be issued with quotas based on emission benchmarks calculated from the upgraded capacity of the plant. Representative historical emissions are defined as emissions for an entire calendar year before the allocation plan were notified to ESA on March 28. 2008.

As already stated above, there are no representative historic emission data from Naturkraft and the existing capacity should, in order to create a consistent non-discriminatory system for existing undertakings, be treated in the same manner as the more comparable situation for substantial capacity increases as the situation is parallel given the fact that no representative data are available for either situation.

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Given these conclusions, the Norwegian authorities should be invited to show that normal production time for other existing operators of gas power plants equals approximately 33 % of production time, when lime production etc. is treated more favourably. As previously shown, there is no valid environmental reasoning brought forward by the Norwegian government, nor is there any other valid justification for the differential treatment of Naturkraft's activities compared to other industries. Section 8(4) d) of the proposal is therefore a violation of Annex III point 5 of the Directive and Article 61 EEA.

On the basis of the above, we find it likely that ESA rejects the aspects of the plan that are not coherent with Annex III to the Directive, specifically Section 8 (4) d) of the proposed act.

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ADVOKATFIRMAET SCHJØDT DA

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