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Date

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## **Information concerning hydropower authorisations in Norway and the application of the Services Directive 2006/123/EC**

Dear Sir/Madam

The Norwegian Ministry of Petroleum and Energy (the Ministry) refers to the letter from the EFTA Surveillance authority (the Authority) dated 30 April 2019 regarding information on the award, renewal and duration of authorisations for the construction and operation of hydropower installations in Norway.

### **1. Introduction**

To answer the questions from the Authority, the Ministry finds it necessary to explain the Norwegian system for public ownership to the hydropower resources and the control with constructing and operating hydropower installations. This entails a description of the relevant property rights that must be acquired in order to utilise the water resources and the different concessions (licenses) for installations and measures affecting waterfalls or river systems.

The questions from the Authority also necessitates an assessment of whether the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the Services Directive) is applicable. The Ministry do not consider this Directive to be applicable to the concessions for hydropower in Norway. Furthermore, it is the Ministry's view that the concession system does not contravene Article 31 of the EEA Agreement.

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In point 2 the Norwegian concession system is described. In point 3 the Ministry will comment on the applicability of Services Directive. The questions from the Authority in the letter dated 30 April 2019 are commented in point 4.

## **2. The Norwegian concession system for acquisition, construction and operation of hydropower installations**

In order to exploit hydropower resources and produce hydropower, the power producer has to acquire the necessary property rights for the waterfalls and with the appurtenant rights ("fallrettigheter").

The Norwegian legislation related to waterfall rights pursues an objective of establishing public ownership over waterfall rights. According to Act No. 16 of 14 December 1917 relating to acquisition of waterfalls<sup>1</sup> (Waterfall Rights Act) a concession for the acquisition of waterfall rights can only be issued to public bodies, i.e. state-owned enterprises, municipalities and county authorities. Concessions may also be issued to undertakings where such bodies hold at least two-thirds of the capital and the votes in the company in accordance with the relevant provisions of the Act.<sup>2</sup> The Waterfall Rights Act apply to acquisition of waterfall rights above a prescribed threshold in the Act.

For a description of the historical background and legal framework up to 2007, we also refer to the judgement by the EFTA Court in Case E-2/06 regarding concessions for acquisition of hydropower resources in Norway. As regards the legal character of a waterfall right ("fallrettighet"), see in particular the following description in point 16 of the judgement:

*"Under Norwegian law, river systems have from the very beginning been subject to private ownership. This principle is now laid down in the first paragraph of Section 13 of Act No 82 of 24 November 2000 Relating to River Systems and Groundwater (lov 24. november 2000 nr. 82 om vassdrag og grunnvann (vannressursloven)) where it is stated: "A river system belongs to the owner of the land it covers, unless otherwise dictated by special legal status." The private ownership rights are, however, limited by public law which inter alia subjects the exploitation and acquisition of waterfalls to concession requirements."*

In its judgement in case E-2/06, the EFTA Court acknowledged that Norway may legitimately pursue the objective of establishing a system of public ownership to hydropower resources and related installations, provided that the objective is pursued in a non-discriminatory and proportionate manner (para. 72).

Following the judgement by the EFTA Court, the Act of 1917 was amended in 2008 (and 2009) to bring the legislation in accordance with the judgement and the EEA Agreement, in

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<sup>1</sup> Lov 14. desember 1917 nr 16 om konsesjon for rettigheter til vannfall mv. (vannfallrettighetsloven)

<sup>2</sup> Section 3 and Section 5

particular the rules of establishment and capital. The amendments in 2008 and the conformity with the EEA Agreement are described in Ot.prp. nr. 61 (2007-2008).

Furthermore, it is noted that the Authority subsequently assessed the amendments and, by decision 29 September 2010, closed its own-initiative case against Norway commenced following the EFTA Court's judgement in case E-2/06.

In addition to the acquisition of property rights for the use of waterfalls, a hydropower producer needs a concession to construct and operate the hydropower installations. The relevant acts are the following:

The Act No. 82 of 24 November 2000 relating to river systems and groundwater<sup>3</sup> (the Water Resources Act) constitutes the general legal framework for the use and management including all measures with effects in river systems. In addition to hydropower plants generating less than 40 GWh per year, the Water Resources Act applies to all measures taking place in the Norwegian river systems such as the abstraction of water for fish farms and the extraction of deposits (sand, gravel, etc.).

If the measure involves regulation of the flow in a river or transfer of water within or between river systems for use in power generation, a concession is required in accordance with the Act No. 17 of 14 December 1917 relating to regulation of watercourses<sup>4</sup> (the Watercourse Regulation Act). The Act also applies to run-of-river hydropower plants generating more than 40 GWh per year.

Concessions granted to hydropower projects include various conditions to ensure compensation for damage or to mitigate damage. The concession system shall also ensure that all the different interests related to a hydropower project are heard and considered, and that projects are subject to government control and conditions that safeguard different interests. This includes environmental impact assessments, consultations with stakeholders etc. The concessions also include provisions on the highest and lowest permitted water levels in the reservoirs, rules for reservoir and river flow levels etc. and conditions on concession fees and funds for compensation.

### **3. Applicability of the Services Directive**

The questions from the Authority appear to be based on a premise that production of hydropower is a service pursuant to the Services Directive. It is the Ministry's understanding that the production of electricity based on hydropower resources does not constitute a service within the meaning of Article 4 (1) of the Services Directive and Article 37 of the EEA Agreement. This was also the assessment laid down in the preparatory works for the Act

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<sup>3</sup> Lov 24. november 2000 nr. 82 om vassdrag og grunnvann (vannressursloven)

<sup>4</sup> Lov 14. desember 1917 nr. 17 om regulering og kraftutbygging i vassdrag (vassdragsreguleringsloven)

incorporating the Services Directive into Norwegian legislation, the Service Act<sup>5</sup> ("tjenesteloven").<sup>6</sup>

On page 2 in the Authority's letter, it is stated that

*"Pursuant to EEA law, the construction and operation of hydropower installations to generate electricity typically constitutes a service provided against remuneration within the meaning of Article 4(1) of Directive 2006/123/EC on services in the internal market ("the Services Directive") and Article 36 of the EEA Agreement."*

According to Art 4(1) of the Services Directive, the definition of a "service" reads as follows:

*'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty; (Article 37 in the EEA Agreement).*

According to article 37 first and second sub-paragraph of the EEA Agreement, services shall be considered to be

*'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*'Services' shall in particular include:*

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions.*

The Act No. 50 of 29 June 1990 relating to the generation, conversion, transmission, trading, distribution and use of energy etc.<sup>7</sup> (the Energy Act) requires anyone who builds, owns or operates an installation for the production, transformation, transmission and distribution of electrical energy to hold a concession. This supplements the concessions regarding the acquisition of waterfall rights and the utilisation of the water resources as explained above. For a description of the concession system for installing new capacity under the Energy Act, the Ministry refer to its letter to the Authority dated 21 November 2011 concerning the Authority's Conformity assessment of the transposition of the Second Electricity Directive.

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<sup>5</sup> Lov 19. juni 2003 nr. 103 om tjenestevirksomhet

<sup>6</sup> Ot.prp.nr. 70 (2008-2009) page 36

<sup>7</sup> Lov 29. juni 1990 nr. 50 om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m.

The generated electricity in a hydropower plant is sold on the market, either through the power exchange ("Nord Pool") or through power sales agreements. The Norwegian power market was deregulated with the adoption of the Energy Act in 1991, and is part of a Nordic/North-European power market. Sales of electricity are fully exposed to competition. This means that the hydropower producer, when obtaining the licenses and making an investment, takes the full risk of investment costs, electricity prices etc.

The second and the third Electricity Directive provide common rules relating to the organisation and functioning of the electricity sector, including requirements on access to the market, the granting of authorisations for the construction of new generating capacity, and the operation of systems. Furthermore, the Renewable Energy Directive (2009/28/EC) establishes a common framework for the promotion of energy from renewable sources and is also part of the EEA Agreement.

The Ministry does not consider the construction and operation of hydropower producing installations in Norway as a service in accordance with the Services Directive. The legislation on hydropower authorisations relates to the utilisation of natural resources. The economic activity conducted by a hydropower producer involves the production of electricity to be sold on the power market subject to competition.

In this regard, the Ministry also refers to established EU case law pursuant to which electricity constitutes a good/commodity within the meaning of Article 28 TFEU. Reference is made *inter alia* to case C-393/92 *Almelo*, para. 28 and C-206/06 *Essent Netwerk Noord*, para. 43. Article 28 TFEU corresponds to Article 8 in the EEA Agreement. Furthermore, it follows from case 18/84 *Commission vs. France* (printing work) that production that leads directly to the manufacture of a physical article, is not a service.

It should be recalled that, pursuant to the definition in Article 37 of the EEA Agreement, a service is only at hand provided that the activity is not governed by other provisions relating to freedom of movement of goods, capital and persons.

The Ministry re-iterates that the Norwegian hydropower production is based on the utilisation of property rights in accordance with private law, subject to decisions ("concessions") according to administrative law. The Ministry fails to see any element of services that should render the Services Directive applicable for the utilisation of hydropower resources in hydropower plants. This was also emphasised by the Norwegian Government pursuant to the incorporation of the Services Directive into the EEA Agreement. The Ministry refer to the following statement (in Norwegian) in the proposition to the Parliament of the Norwegian Service Act, which implemented the Services Directive in Norway:

*"Det er i rettspraksis slått fast at elektrisk energi er en vare i EØS-rettslig forstand, jf. sak C-393/92 Almelo. Videre er produksjon av varer ikke en tjenesteytelse, jf. sak 18/84 Kommisjonen mot Frankrike. Produksjon av elektrisk energi faller derfor ikke inn under tjenestedirektivet. Det samme antas å gjelde for produksjon av fjernvarme. Direktiv 2003/54/EF om felles regler for det indre marked for elektrisitet (eldirektiv II) artikkel 6*

*regulerer krav som stilles til konsesjonsordninger for produksjon av elektrisitet. Utvinning av naturressurser er heller ikke en tjenesteytelse. (Ot.prp. nr. 70 (2008-2009) Page 36)"*

On the contrary, and by comparison, the organisation and operation of marketplaces for trade in electrical energy pursuant to the Energy Act Section 4-5 has been considered a service in accordance with the Services Directive.

#### **4. Comments to the Authority's questions**

In its letter dated 30 April 2019, the Authority has posed several questions to the Ministry, which are commented in more detail below.

As regards **question 1**, the Authority has asked for a confirmation of its understanding of the applicable legislation. We refer to our comments in point 2 above.

As regards **question 2.1**, the Ministry also refers to the description in point 2 above.

As regards **question 2.2**, the Ministry refers to point 3 above. In the opinion of the Ministry, a service is not at hand in this case. Thus, nor can any of the concession regimes in the Water Resources Act or the Watercourses Regulation Act fall under Article 4 (6) of the Services Directive.

As regards **question 2.3**, the Ministry would point out that concessions according to the Water Resources Act and/or the Watercourse Regulation Act are not limited in number. A hydropower producer having obtained the necessary property rights to the land and water resources to be utilised, need to apply for a concession for the construction and use of the hydropower installations. As explained in Point 2 above, the Norwegian legislation related to waterfall rights pursues an objective of establishing public ownership over waterfall rights ("fallrettighet").

The Authority asks about the conformity of that system with Article 12 of the Services Directive. The Ministry cannot see that Article 12 is of any interest here. Firstly, as explained above (point 3), there is no service at hand so that the Services Directive does not seem relevant.

Secondly, there is no limitation of authorisations within the meaning of Article 12 in this case. Article 12 applies to a situation "where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity". This seems, typically, to indicate the situation where the state possesses certain scarce resources, which it allows to be exploited by economic operators. See for instance the facts in Joined Cases C-458/14 and C-67/15 *Promoimpresa*. However, that is not the case here. Norway pursues a system whereby the acquisition of waterfall rights, as a matter of principle,

is limited to public entities. As a principle, the resources are not made available for private operators and Article 12 of the Services Directive does not apply.

With regard to Article 31 EEA, the Ministry refers to the assessments regarding conformity with the EEA Agreement and the objective of establishing public ownership to waterfall rights as set out in Ot.prp.nr. 61 (2007-2008) and subsequently assessed by the Authority. The Ministry cannot see that the concessions under the Water Resources Act and the Watercourse Regulation Act raises any new questions under Article 31 EEA.

In response to **question 3**, the Ministry would point out that the concessions granted are based on unlimited duration.<sup>8</sup> A small number of concessions, however, is made time-limited and with terms of reversion to the state, in the few cases left where a private operator has acquired the property rights before the legal amendments in 2008.

In light of the above, the Ministry is of the opinion that this does not raise any question under Article 12 of the Services Directive.

As for **question 4**, that question only seems relevant for the small number of cases where the authorisations have been made time-limited. Such authorisations are not subject to prolongation due to the terms of reversion to the state. All authorisations independent of any time-limitation can be brought up for revision after 30 years concerning specific terms and conditions mainly for environmental reasons.

With reference to the response above, the Ministry is of the opinion that this does not raise any questions under Article 12 of the Services Directive. Nor can the Ministry see how this would violate Article 31 EEA.

As regards **question 5**, the Ministry reiterates that the concessions under the Watercourse Regulation Act and the Water Resources Act are intertwined with the ownership rights (see also question 3). It follows from the Water Regulation Act that concessions can only be transferred as part of a transfer of rights under the Waterfalls Rights Act.<sup>9</sup> With reference to this and the answer to question 2.3 above, the Ministry does not consider Article 12 in the Services Directive applicable in such a situation.

As for **question 6**, the Ministry refers to the letter from the Authority dated 19 October 2010 and the Authority's decision of 29 September 2010 to close its own-initiative case against Norway on page 2, which to the Ministry's view provides an apt explanation of the Act of 1917 that is still adequate. With the amendments in 2008, the possibility for acquiring *user rights* and *long-term disposal rights* on waterfalls and installations was abolished. This kind of private ownership to the power station and the installations, based on waterfall rights typically

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<sup>8</sup> Section 6 in the Watercourse Regulation Act and Section 26 in the Water Resource Act provide for the possibility to set a time-limit.

<sup>9</sup> Section 27 in the Watercourse Regulation Act

rented from a public owner, was not considered in line with the principle of public ownership as it was strengthened by the legal amendments in 2008.

In order to avoid difficulties with the transfer of existing rights, as pointed out by the Authority in its letter, the current holders of user rights concessions has an opportunity to continue to rent the waterfalls limited to a period of 30 years at the time upon approval by the King's Council as a transitional arrangement to the current legal system. It safeguards existing rights and does not allow the allocation of new user rights concessions.

The Ministry is for this reason of the opinion that the Norwegian water resources legislation does not provide for private parties to obtain rights to harness hydropower on publicly owned ground.

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In conclusion, the Ministry does not consider the Services Directive applicable to the concessions for hydropower production in Norway. Nor can the Ministry see that the hydropower concessions raises questions under Article 31 EEA.

The legislation in question relates to the utilisation of natural resources. As regards the principle of public ownership and concessions for the acquisition of ownership rights, the Norwegian legal framework was thoroughly assessed by the Authority following the EFTA Court's judgement in case E-2/06.

The Ministry will provide further information to the Authority, if necessary.

Yours sincerely

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Director General

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Deputy Director General

*This document is signed electronically and has therefore no handwritten signature*