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Norwegian Ministry of Petroleum and Energy
Postboks 8148 Dep
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Dear Sir/Madam,

Subject: Request for information concerning the award and renewal of hydropower authorisations in Norway

The Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) is in the process of examining the award and renewal of authorisations for the construction and operation of hydropower installations as well as the duration of such authorisations.

It is the Directorate’s understanding that the hydropower sector in Norway is regulated through a system of authorisations. These authorisations are prescribed by and granted in accordance with either the Norwegian Act on Water Resources (“the Water Resources Act”)¹ or the Act relating to Regulations of Watercourses (“the Watercourses Regulation Act”).² The type of authorisation required depends on the nature of the installation or its capacity.³ Authorisations may be granted if the benefits of the hydropower installation outweigh the harm or inconvenience to the public or private interests affected by the measure.⁴ Authorisations granted in accordance with the Watercourses Regulation Act may be granted for an indefinite or a limited period,⁵ and when it expires, the State has the right to take over the hydropower installation without compensation (a system of reversion).⁶ These authorisations may be revised after a specified time-period (30/50 years or less), or reassessed if requested by the owner of the installation.⁷ Authorisations granted in accordance with the Water Resources Act may be granted for an

¹ Lov 24. november 2000 nr. 82 om vassdrag og grunnvann (vannressursloven).

² Lov 14. desember 1917 nr. 17 om regulering og kraftutbygging i vassdrag (vassdragsreguleringsloven).

³ Section 19 of the Water Resources Act and Section 3 of the Watercourses Regulation Act. Certain installations do not require an authorisation, cf. Section 8 of the Water Resources Act.

⁴ Section 5 of the Watercourses Regulation Act and section 25 of the Water Resources Act

⁵ Section 6 of the Watercourses Regulation Act.

⁶ Section 28 of the Watercourses Regulation Act

⁷ Section 8 and Section 9 of the Watercourses Regulation Act

indefinite or a limited period.⁸ They may be reassessed in special cases, or revised if prescribed by the terms and conditions of the individual authorisation.⁹ Large hydropower installations need a second authorisation, prescribed by and granted in accordance with the Act on licences for the Rights to Waterfalls (“the Waterfall Rights Act”).¹⁰ Such authorisations may only be granted to public entities.¹¹

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”)¹² and Article 36 of the EEA Agreement.

Articles 9 to 13 of the Services Directive restrict EEA States’ right to make access to, or the exercise of, a service activity subject to an authorisation scheme. Article 4(6) of the Services Directive provides for a broad definition of authorisation schemes, including “*any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof.*” The concession system under Norwegian law appears to qualify as an authorisation scheme under that definition.

Article 12 of the Services Directive lays down specific requirements for situations under which the number of authorisations is limited because of the scarcity of available natural resources or technical capacity. Such situations necessitate additional safeguards to ensure, inter alia, open competition and transparency, cf. recital 62 in the preamble to the Services Directive. Authorisations for the construction and operation of hydropower installations typically fall within the scope of Article 12 of the Services Directive. Consequently, such authorisations schemes must fulfil the specific requirements laid down in that provision and as further detailed in the preamble.

Furthermore, Article 31 of the EEA Agreement provides that there shall be no restrictions on the freedom of establishment of nationals of one EEA State in the territory of another EEA State. This includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as the host State’s own nationals. It is settled case law that the rules on equal treatment in the EEA Agreement, including Article 31 EEA, prohibit both overt and covert discrimination based on nationality.¹³ In the context of an authorisation scheme in which the authorities of an EEA State award the pursuit of an economic activity to one or more economic operators in particular, this principle of non-discrimination implies an obligation of transparency.

⁸ Section 26(4) of the Water Resources Act.

⁹ Section 28 and Section 26(4) of the Water Resources Act.

¹⁰ Lov 14. desember 1917 nr. 16 om konsesjon for rettigheter til vannfall mv. (vannfallrettighetsloven).

¹¹ Section 2 and Section 5 of the Waterfall Rights Act.

¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), incorporated into the EEA Agreement at point 1 of Annex X by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009.

¹³ Case E-14/12 *ESA v Liechtenstein* [2013] EFTA Court Report 256, paragraph 28.

In order to allow the Authority to ascertain whether the relevant Norwegian legislation complies with EEA law, in particular Article 12 of the Services Directive and Article 31 of the EEA Agreement, the Norwegian Government is invited to provide the following information:

1. **Applicable legislation:** Can you confirm whether the Directorate's understanding of the Norwegian legislation applicable to the use of natural resources to generate hydropower, as set out above, is correct? Is there any further legislation regulating the hydropower sector? If so, please describe and outline any additional legislation regulating this sector.
2. **Award procedure:**
 - 2.1. Please describe the procedures used to award authorisations under the Water Resources Act and the Watercourses Regulation Act.
 - 2.2. Does the Norwegian Government consider these procedures to constitute authorisation schemes within the meaning of Article 4(6) of the Services Directive?
 - 2.3. Is it correct that authorisations in Norway are limited in number and that the authorisation procedures are therefore subject to the requirements of Article 12 of the Services Directive? If so, please explain in detail how the procedures fulfil the transparency requirements of EEA law, in particular as set out in Article 12 of the Services Directive and Article 31 of the EEA Agreement.
3. **Duration:** Please describe the procedure for determining the duration of an authorisation, explaining in particular how the principle of proportionality is taken into account when doing so, cf. recital 62 of the Services Directive, and how the possibility of granting indefinite authorisations fulfil the requirements laid down in Article 12(2) of the Services Directive.
4. **Renewal procedure:** Is there a right of renewal of an authorisation and/or a possibility to prolong an authorisation through a reassessment? If so, please describe the procedure applicable to the renewal/reassessment of an authorisation, including an explanation as to how this procedure fulfils the requirements set out in Article 12 of the Services Directive and Article 31 of the EEA Agreement.
5. **Transfer of rights:** Is it possible to transfer the awarded authorisation rights? If so, please describe the procedure applicable to such a transfer, including an explanation as to how this procedure fulfils the requirements set out in Article 12 of the Services Directive and Article 31 of the EEA Agreement.
6. **Rights of private parties:** Is it possible for private parties to obtain rights to harness hydropower on publicly owned ground? If so, please describe the rules and procedures applicable for obtaining such rights.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *3 June 2019*.

Yours faithfully,

Kristin Saether Bangsund
Deputy Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Kristin Saether Bangsund.