

EFTA SURVEILLANCE AUTHORITY DECISION  
of 16 December 2009

on budget increases for the Norwegian Energy Fund and the tightening of the rules on  
eligibility for aid under its wind programme

(Norway)

THE EFTA SURVEILLANCE AUTHORITY<sup>1</sup>

HAVING REGARD to the Agreement on the European Economic Area,<sup>2</sup> in particular to  
Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a  
Surveillance Authority and a Court of Justice,<sup>3</sup> in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(3) of Part II of Protocol 3 to the  
Surveillance and Court Agreement,<sup>4</sup>

HAVING REGARD to the Authority's Guidelines on the application and interpretation of  
Articles 61 and 62 of the EEA Agreement,<sup>5</sup> and in particular the chapter on state aid for  
environmental protection<sup>6</sup> thereof,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing  
provisions referred to under Article 27 of Part II of Protocol 3,<sup>7</sup>

Whereas:

## I. FACTS

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<sup>1</sup> Hereinafter referred to as the Authority.

<sup>2</sup> Hereinafter referred to as the EEA Agreement.

<sup>3</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>4</sup> Hereinafter referred to as Protocol 3.

<sup>5</sup> Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994, p. 1 and EEA Supplement No 32, 3.9.1994, p. 1 as amended. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

<sup>6</sup> Adopted by Decision No 500/08/COL of 16 July 2008, not yet published in the OJ or the EEA Supplement.

<sup>7</sup> Decision 195/04/COL, 14.7.2004 published in OJ C 139, 25.5.2006, p. 57 and EEA Supplement No 26, 25.5.2006, p. 1 as amended by Decision 319/05/COL, 14.12.2005 published in OJ C 286, 23.11.2006, p. 9 and EEA Supplement No 57, 23.11.2006, p. 31. Hereinafter referred to as Decision No 195/04/COL.

## **1. Procedure**

By Decision No 125/06/COL of 3 May 2006,<sup>8</sup> the Authority approved the state aid scheme financed by the Norwegian Energy Fund.

By letter dated 10 July 2007 (Event No 428861), the Norwegian authorities notified certain changes to the scheme. By letter dated 17 August 2007 (Event No 433843), the Authority requested additional information. By letter dated 14 September 2007 (Event No 441456), the Norwegian authorities replied to the information request. By letter dated 14 November 2007 (Event No 450321), the Authority requested additional information. By letter dated 12 December 2007 (Event No 457262), the Norwegian authorities replied to the majority of the questions raised in the second information request. By letter dated 10 January 2008 (Event No 457794), the Authority informed Norwegian authorities that the notification was not complete due to the fact that the Norwegian authorities had not responded to all of the questions raised.

By letter dated 7 November 2008 (Event No 497794), the Norwegian authorities withdrew the notification of the aid scheme. However, in the same letter, the Norwegian authorities informed the Authority that a part of the notification concerning a budget increase of the Norwegian Energy Fund scheme was not subject to withdrawal.

The Authority and the Norwegian authorities subsequently exchanged information via email before the Authority by letter dated 18 February 2009 (Event No 508977), requested further information. By letter dated 23 March 2009 (Event No 513189), the Norwegian authorities replied to the information request.

By letter dated 20 March 2009 (Event No 513017), the Norwegian authorities submitted a simplified notification of an increase of the 2009 budget of the Norwegian Energy Fund and a tightening of the rules on eligibility for aid under its wind programme.

By letter dated 20 April 2009 (Event No 515538), the Authority requested further information pertaining to both the reply to the request for information of 23 March 2009 (Event No 513189) and the notification of 20 March 2009 (Event 513017). By letter dated 20 May 2009 (Event No 519221), the Norwegian authorities replied to the information request.

By letter dated 20 July 2009 (Event No 525127), the Authority requested further information. By letter dated 9 September 2009 (Event No 529851), the Norwegian authorities replied to the information request. The Authority and the Norwegian authorities discussed the notifications in a meeting in Oslo on 16 September 2009. The Authority subsequently received further information via email.

## **2. Description of the proposed measures**

### **2.1. Title of the aid scheme**

The Norwegian Energy Fund.<sup>9</sup>

### **2.2. Objective of the aid scheme**

The Energy Fund is managed by Enova SF, which is an enterprise fully owned by the state via the Ministry of Petroleum and Energy. The objective of the scheme financed by the Energy Fund is to contribute to an environmentally friendly change in the use and

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<sup>8</sup> Published in OJ L 189, 17.7.2008, p. 36 and EEA Supplement No 43, 17.7.2008, p. 1. Hereinafter referred to as Decision No 125/06/COL.

<sup>9</sup> Hereinafter referred to as the Energy Fund.

production of energy. In order to achieve this, Enova SF grants aid to undertakings involved in projects which either:

- increase the supply of renewable heat,
- increase the supply of renewable electricity, or
- contribute to energy saving.<sup>10</sup>

### **2.3. Notified alteration to the aid scheme**

The current notifications deal with increases of the 2008 and 2009 budgets of the Energy Fund as well as a tightening of the rules on eligibility for aid under its wind programme as originally authorised by the Authority in Decision No 125/06/COL.

#### **2.3.1. The pre-existing financing of the Energy Fund**

The aid scheme financed by the Energy Fund, as authorised by the Authority, has been financed by revenue stemming from a charge levied on the consumers of electricity and allocations from the state budget, however, no budgetary allocations were made in the years 2006 and 2007.

#### **2.3.2. Increase of the 2008 budget**

For the year 2008 the charge on electricity generated NOK 723 million.<sup>11</sup>

The increase of the 2008 budget consisted of the two following budgetary allocations:

- an *ad hoc* state budget allocation of NOK 200 million, and
- an additional budgetary allocation of NOK 399 million stemming from a fund referred to as the *Grunnfond for fornybar energi og energieffektivisering*.<sup>12</sup>

The *Grunnfond* was established on 2 January 2007 with the specific aim of contributing to the financing of the Energy Fund. The fund represents a budgetary mechanism known as an “account loan” (in Norwegian: *kontolån*). It was established by way of a capital deposit of NOK 10 billion over the state budget into a state-managed account in the Norwegian central bank (*Norges Bank*). This deposit represents a form of fictitious intra-state loan from the Ministry of Petroleum and Energy to the Norwegian State, that generates a yearly interest fixed at 4.31 per cent per year for 10 years. The interest generated over one year is allocated to the Energy Fund at the start of the following year. The first allocation of interest represented interest generated during the course of 2007 and took place at the start of 2008. The transfer is, however, subject to a formal approval by the Norwegian Parliament (*Stortinget*) in the same manner as other budgetary allocations. Consequently, the Parliament has the power to reduce the amount of the allocation. As mentioned above, the allocation for 2008 amounted to NOK 399 million. The interest generated by the *Grunnfond* is intended to represent a permanent source of financing for the Energy Fund

<sup>10</sup> See Decision No 125/06/COL for more information.

<sup>11</sup> See table in section I, 2.3.4 of this Decision.

<sup>12</sup> Hereinafter referred to as the *Grunnfond*.

in the sense that the interest generated from the fund is intended to be allocated to the Energy Fund on an annual basis.<sup>13</sup>

The notified increases represents a combined increase of NOK 599 million, increasing the total 2008 budget of the Energy Fund to NOK 1 322 million.<sup>14</sup>

### 2.3.3. *Increase of the 2009 budget*

In the notification dated 20 March 2009, the Norwegian authorities notified a budgetary allocation of NOK 1 190 million to the 2009 budget for the Energy Fund representing an extraordinary budgetary allocation to limit the effect of economic downturn caused by the financial crisis. Furthermore, the Norwegian authorities allocated NOK 391 million of the interest on the *Grunnfond* and an additional *ad hoc* allocation of NOK 200 million over the state budget.

The total 2009 budget of the Energy Fund thus amounts to an estimated NOK 2 516 million.

### 2.3.4. *Overview of the financing of the Energy Fund from 2006 to 2009 in million NOK*

	2006	2007	2008	2009
Income parafiscal levy	735	734	723	735 <sup>15</sup>
<u>Budgetary allocations:</u>				
- Allocation of interest generated by the <i>Grunnfond</i>			399	391
- <i>Ad hoc</i> budgetary allocation			200	200
- Budgetary allocation to limit the effect of the financial crisis				1 190
Annual budget for the Energy Fund	735	734	1 322	2 516

### 2.3.5. *Tightening of the rules on eligibility for aid under the wind programme*

The Norwegian authorities intend to tighten the criteria for applying for investment support for wind power. This is accomplished by tightening the rules for calculation of income for the projects applying for support. According to section I.9.1 paragraph 2 and 3 of Decision No 125/06/COL, the income calculation is based on the expected energy production from the wind farm multiplied by the market price of electricity, taken from the relevant Nordpool prices. For the future, the Norwegian authorities will require that each application for aid under the programme is accompanied by a legally binding power purchase agreement with a power trader company. This power purchase agreement will serve as a basis for a more accurate prognosis of the expected income of the project.

The Norwegian authorities explain that the requirement of a power purchase agreement entered into with a power trader company will make the calculated aid level more accurate in proportion to the projects' expected cash flow, decrease the possibility of overcompensating the projects and increase the possibility of awarding aid that triggers investment.

<sup>13</sup> The Norwegian authorities have indicated that the Norwegian state will make further capital contributions to the *Grunnfond*, thus increasing the amount of interest generated and consequently, the annual allocations to the Energy Fund.

<sup>14</sup> See table in section I, 2.3.4 of this Decision.

<sup>15</sup> Estimate from the Norwegian authorities as noted in the letter dated 20.3.2009 (Event No 513017), p. 3.

#### **2.4. National legal basis for the aid measure**

The national legal basis for the budget increase of 2008 is the adopted Norwegian National budget for 2008 based on a proposition by the Ministry of Petroleum and Energy of 14 September 2007 St.prp. nr. 1 (2007-2008).

The legal basis for the increases of the 2009 budget of the Energy Fund and the tightening of one of the criteria to grant aid under its wind programme is the adopted Norwegian National budget for 2009 based on a proposition by the Ministry of Petroleum and Energy of St.prp. nr. 37 (2008-2009) on the fiscal measures to limit the economic downturn.

## **II. ASSESSMENT**

### **1. The presence of state aid**

Article 61(1) of the EEA Agreement reads as follows:

*“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”*

In Decision No 125/06/COL, the Authority established that the state resources allocated to undertakings under the scheme financed by the Energy Fund constituted state aid within the meaning of Article 61(1) of the EEA Agreement.

In the view of the Authority, the notified changes as described in section I.2.3 do not alter the assessment made in Decision No 125/06/COL. The allocations represent state resources granted to certain undertakings that threaten to distort competition and affect intra-EEA trade.<sup>16</sup>

### **2. Procedural requirements**

#### **2.1. Notification requirement and standstill obligation**

The Authority notes that the notified changes represent new aid, and should consequently have been notified to the Authority in accordance with Article 1(3) of Part I of Protocol 3, which reads as follows:

*“the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”.*

The Norwegian authorities put the first budget increase into effect at the beginning of 2008 and the second at the beginning of 2009, before the Authority had taken a final decision thereon. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

#### **2.2. The simplified notification procedure**

The Norwegian authorities intended to notify the increase of the 2009 budget of the Energy Fund and the tightening of the rules on eligibility for aid under its wind programme pursuant to the simplified notification procedure of Article 4 of Decision No 195/04/COL.

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<sup>16</sup> See section II.1 of Decision No 125/06/COL.

Due to the pending notification concerning the establishment of a *Grunnfond* and its impact on the new notified measure, the Authority decided to combine the two notifications in one single procedure, and on the basis of this, decided that the notifications were not eligible for the simplified notification procedure.

In any event, the Authority notes that the Norwegian authorities had not complied with the reporting obligation pursuant to Article 5(b) of Decision No 125/06/COL in conjunction with Article 5(2) of Decision No 195/04/COL. For that reason alone, the notified budget increase was not eligible for the simplified procedure, pursuant to Article 4(3) of Decision No 195/04/COL.

### 3. Compatibility of the aid

In Decision No 125/06/COL, the Authority assessed the scheme financed by the Energy Fund in light of Article 61(3)(c) of the EEA Agreement and in light of the chapter of the Authority's Guidelines on environmental aid applicable at the time.<sup>17</sup> The scheme supported several initiatives for the promotion of energy production from renewable sources and other related measures. The Authority considered some support measures under this scheme to be compatible with the rules of the EEA Agreement subject to certain conditions,<sup>18</sup> and proposed appropriate measures in order to bring the scheme, as such, in line with the then applicable guidelines on environmental aid. The Norwegian authorities took the appropriate measures in order to bring the scheme in line with the then applicable guidelines on environmental protection.<sup>19</sup> The Authority issued a new chapter on state aid for environmental protection by Decision No 500/08/COL of 16 July 2008.

The Authority considers that the notified increases of the budgets, both individually and collectively, represent substantial increases. The substantially enlarged budget enables Enova to support more aid recipients under the scheme. However, the aid intensity remains unchanged and Norwegian authorities have confirmed that appropriate measures have been taken to ensure that the scheme is in line with the new environmental guidelines.<sup>20</sup> The circle of eligible aid recipients remains the same except for under the wind programme, where more restrictive criteria will apply. The change of the criteria for eligibility for aid under the wind programme represents a more restrictive criteria to ensure that the goals set out in the environmental guidelines are attained.

On the basis of the above, the budget increases and the tightening of the rules on eligibility for aid under its wind programme do not, in and of themselves, alter the assessment made in Decision No 125/06/COL as regards the classification of the scheme as state aid compatible with the functioning of the EEA Agreement.

### 4. Conclusion

On the basis of the foregoing assessment, the Authority does not raise objections to the notified budget increase for the Energy Fund corresponding to an increase of allocations amounting to NOK 599 million for 2008 and NOK 1 781 million for 2009 over the Norwegian state budget.

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<sup>17</sup> These Guidelines represented chapter 15 of the Authority's State Aid Guidelines, published in OJ L 21, 24.1.2002, p. 32 and EEA Supplement No 6, 24.1.2002, p. 63.

<sup>18</sup> Article 4 of Decision No 125/06/COL.

<sup>19</sup> See series of letters from the Norwegian authorities dated 4.7.2006 to 8.11.2006 registered in case no 57473.

<sup>20</sup> See letter from the Norwegian authorities dated 9.9.2009 (Event No 529851) and email from Norwegian authorities dated 8.11.2009 (Event No 536428).



The Authority regrets, however, that the Norwegian authorities did not respect their obligations pursuant to Article 1(3) of Part I of Protocol 3.

Furthermore, the Authority does not raise objections to the notified tightening of the rules on eligibility for aid under the wind programme financed by the Energy Fund.

The Norwegian authorities are reminded about the general obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Article 5(a) of Decision No 125/06/COL to provide annual reports on the implementation of the scheme.

Furthermore, the Norwegian authorities are reminded about the specific reporting obligations resulting firstly, from Article 5(b) of Decision No 125/06/COL, and secondly, from paragraph 193 in conjunction with paragraph 200(iii) of the Guidelines on state aid for environmental protection.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority. This includes increases of more than 20% of the original budget of the scheme financed by the Energy Fund pursuant to Article 1(3) of Part I of Protocol 3 in conjunction with Article 4 of Decision No 195/04/COL.

HAS ADOPTED THIS DECISION:

*Article 1*

The EFTA Surveillance Authority has decided not to raise objections to the notified budget increases and the notified tightening of the rules on eligibility for aid under the wind programme for the Norwegian Energy Fund.

*Article 2*

The implementation of the measure is accordingly authorised.

*Article 3*

This Decision is addressed to the Kingdom of Norway.

*Article 4*

Only the English version is authentic.

Done at Brussels, 16 December 2009.

*For the EFTA Surveillance Authority*

Per Sanderud  
*President*

Kristján Andri Stefánsson  
*College Member*