

Case No: 68562  
Event No: 551032  
Dec. No: 248/11/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 18 July 2011

on the Norwegian Energy Fund scheme

(Norway)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61(3)(c),

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(3) of Part I and Article 4(3) of Part II,

HAVING REGARD to the consolidated version of the Authority’s Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 (“the Implementing Provisions Decision”),<sup>1</sup>

Whereas:

### I. FACTS

#### 1. Procedure

- (1) The Norwegian authorities notified the Norwegian Energy Fund scheme (“the Energy Fund scheme”) pursuant to Article 1(3) of Part I of Protocol 3 by letter of 9 July 2010 (Events No 563725, 563728, 563729, 563730 and 563733).
- (2) By letter dated 3 September 2010 (Event No 567850), the Authority requested additional information. By letter dated 4 October 2010 (Event No 572020), the Norwegian authorities replied to the information request. By letter dated 27 October 2010 (Event No 573839), the Authority requested additional information. By letter dated 12 November 2010 (Event No 577478), the Norwegian authorities replied to the information request. The Norwegian authorities submitted further information in a telephone conference with the Authority on 1 December 2010 (Event No 579373), via email dated 9 December 2010 (Event No 580262), by letter dated 13 December

---

<sup>1</sup> Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>.

2010 (Event No 580592), and by emails dated 4 January 2011 (Event No 581976) and 13 January 2011 (Event No 583410).

- (3) By letter dated 18 January 2011 (Event No 583411), the Authority informed the Norwegian authorities that the notification was incomplete. By email dated 9 February 2011 (Event No 586519), the Norwegian authorities submitted more information. By email dated 15 February 2011 (Event No 587335), the Authority requested additional information. By email dated 25 February (Event No 588815), the Norwegian authorities submitted more information. The Authority met with the Norwegian authorities on 2 March 2011. By email dated 4 March 2011 (Event No 589443), the Authority requested additional information. By emails dated 4 March 2011 (Event No 589442) and 15 March 2011 (Event No 590501) the Norwegian authorities responded.
- (4) By letter dated 29 March 2011 (Event No 592647), the Norwegian authorities amended the notification. By email dated 7 April 2011 (Event No 593795), the Norwegian authorities submitted additional information. By letter dated 13 May 2011 (Event No 598089), the Authority requested additional information. By letter dated 3 June 2011 (Event No 599983), the Norwegian authorities responded. The Norwegian authorities submitted additional information via emails dated 22 June 2011 (Events No 601685, 601824, 601838 and 601839), 23 June 2011 (Events No 601845, 601848, 601849, 601854, 601929, 601933 and 601958) and 29 June 2011 (Event No 602719).

## **2. The pre-existing Energy Fund scheme**

- (5) The Energy Fund scheme was established on 1 January 2002. It represented a continuation of two pre-existing schemes operating under the competences of the Norwegian Water Resources and Energy Directorate.<sup>2</sup> The scheme was approved by the Authority in 2006 by Decision No 125/06/COL. Amendments to the scheme were approved by the Authority by Decisions No 536/09/COL<sup>3</sup> and 75/10/COL<sup>4</sup>. A one-year prolongation of the scheme was approved by the Authority by Decision No 486/10/COL.<sup>5</sup> This approval expires on 31 December 2011 and is not altered by the Decision in the case at hand.

## **3. Overview of the notified Energy Fund scheme**

### **3.1 The objective of the scheme**

- (6) The objective of the Energy Fund scheme is to promote an environmentally friendly change in the use and production of energy in Norway. The Norwegian Government has set an overall performance target of increasing the production of energy based on renewable energy sources and of reducing the energy consumption by 40 TWh in the period 2001-2020.

---

<sup>2</sup> See the Authority's Decision No 125/06/COL (OJ L 189, 17.7.2008, p. 36 and EEA Supplement No 43, 17.7.2008, p. 1) for more information.

<sup>3</sup> OJ C 174, 1.7.2010, p. 13 and EEA Supplement No 34, 1.7.2010, p. 12.

<sup>4</sup> OJ C 265, 30.9.2010, p. 8 and EEA Supplement No 53, 30.9.2010, p. 6.

<sup>5</sup> Not yet published in the OJ or the EEA Supplement. The decision is available on the Authority's website: <http://www.eftasurv.int/state-aid/state-aid-register/>.

- (7) The Norwegian authorities have notified the scheme on the basis of Article 61(3)(c) of the EEA Agreement and the Authority's Guidelines on state aid for environmental protection ("the EAG").<sup>6</sup>

### 3.2 The structure of the scheme

#### 3.2.1 The four programmes – the subject of the notification

- (8) The Energy Fund scheme consists of four separate programmes. These are: (i) the Renewable energy production programme, (ii) the Cogeneration and energy-efficient district heating and cooling programme, (iii) the Energy saving programme, and (iv) the New energy technology programme.
- (9) The (i) Renewable energy production programme covers investments in the production of biogas, local heating and electricity. The (ii) Cogeneration and energy-efficient district heating and cooling programme covers investments in cogeneration plants, district heating and cooling plants and district heating and cooling infrastructure. The following table gives an exhaustive overview over the renewable energy sources utilised and their corresponding energy result under those two programmes.<sup>7</sup>

Programme	Renewable energy source utilised	Output
Renewable energy production	Biomass and biogas	Biogas
	Solar, biomass and geothermal	Local heating
	Liquid biofuel, solar, wind, tide, wave and hydro	Electricity
Cogeneration and energy efficient district heating and cooling	Biomass, geothermal (in addition, non-renewable waste and heat will be used for district heating and cooling)	District heating, district cooling, and electricity (in cogeneration)

- (10) The (iii) Energy saving programme concerns energy saving measures as well as studies related to energy saving measures.
- (11) The (iv) New energy technology programme aims to support the market diffusion of new technologies within the field of renewable energy production and energy efficiency. Projects generating energy from all energy sources utilised under the other programmes can be supported. Energy saving projects can also be supported.

#### 3.2.2 The four programmes sub-divided into chapters

- (12) Each of the four programmes is sub-divided into chapters. The Norwegian authorities have informed the Authority that these chapters are designed to, and will, remain within the ambit of the notification as approved by the Authority. The Norwegian authorities have explained that the chapters under the four programmes need to be flexible in order to adapt to the developments in the market. When the Norwegian authorities consider it appropriate to develop new chapters under the

<sup>6</sup> Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

<sup>7</sup> Information provided by the Norwegian authorities by email dated 23.6.2011 (Event No 601845).

programmes, those chapters will be designed within the ambit of the programmes as approved by the Authority.<sup>8</sup>

### 3.3 Management of the scheme by Enova SF

- (13) The Energy Fund scheme is managed by Enova SF (“Enova”), a state enterprise<sup>9</sup> fully owned by the Norwegian State via the Ministry of Petroleum and Energy. Enova was established on 1 January 2002 with the purpose of managing the Energy Fund. Enova is financed by the Energy Fund, does not operate on any market and does not generate any income. Its principal task is to administer the Energy Fund, implement the support schemes and achieve the energy policy objectives set out by the Norwegian Parliament. These tasks are specified in an agreement between the Norwegian state (represented by the Ministry of Petroleum and Energy) and Enova (“the Enova Agreement”).<sup>10</sup>

### 3.4 National legal basis

- (14) The national legal basis for the Energy Fund scheme derives from the following sources of law:
- a) The Amendment to the Energy Act<sup>11</sup> of 5 April 2001 on the basis of a Proposition by the Ministry of Petroleum and Energy of 21 December 2000.<sup>12</sup>
  - b) The articles of association of the Energy Fund.<sup>13</sup>
  - c) The Enova Agreement.<sup>14</sup>
  - d) The annual Norwegian state budgets, which define the energy policy and the budget for the relevant year.
  - e) Norwegian Regulation No 1377 of 10 December 2001 on the levy on the electricity grid tariff (“the Energy Fund regulation”).<sup>15</sup>
  - f) The Proposition by the Ministry of Finance of 15 May 2007 (Evaluation of Enova and the Energy Fund).<sup>16</sup>
  - g) The Proposition by the Ministry of Environment of 22 June 2007 (on the Norwegian climate policy)<sup>17</sup> and the Agreement on climate policy of 17 January 2008 between the Norwegian Government<sup>18</sup> and several opposition parties<sup>19 20</sup>.

<sup>8</sup> The new chapters might have tighter constraints than those applicable to the programmes: a new chapter might have limitations with regards to the technologies supported, the business sector supported, or new and stricter limitations regarding the minimum energy yield or maximum aid intensity.

<sup>9</sup> In Norwegian: *Statsforetak*. Enova is organised in accordance with Act No 71 of 30 August 1991 on state enterprises.

<sup>10</sup> Revised Enova agreement of 18.6.2008 (*Avtale mellom Den norske stat ved Olje- og Energidepartementet og Enova SF om forvaltningen av midlene fra Energifondet i perioden 1.6.2008 til 31.12.2011*), available online:

<http://www.regjeringen.no/upload/OED/Avtale%20mellom%20OED%20og%20Enova%202008%20til%202011.pdf>. The Ministry and Enova are currently in the process of negotiating the terms for a new agreement. The negotiations are set to be concluded in 2011, the Norwegian authorities have informed the Authority that the main policy goals and Enova’s principal tasks will remain unchanged.

<sup>11</sup> The Energy Act No 50 of 29.6.1990. In Norwegian: *Energilova*.

<sup>12</sup> Ot.prp. nr. 35 (2000-2001).

<sup>13</sup> *Vedteker for energifondet*.

<sup>14</sup> Referenced above.

<sup>15</sup> *Forskrift om innbetaling av påslag på nettariffen til Energifondet*.

<sup>16</sup> St.prp. nr. 69 (2006-2007) Tilleggsbevilgninger og omprioriteringer i Statsbudsjettet 2007.

#### 4. The financing of the Energy Fund

- (15) As will be set out in detail below, the Energy Fund scheme is financed through a fund (“the Energy Fund”). This fund is financed by three separate means: (i) allocations under the state budget, (ii) allocations stemming from a parafiscal levy on the electricity grid tariffs and (iii) allocations of interest generated on the Energy Fund itself. In the following, these sources of financing are explained in greater detail.

##### 4.1.1 Allocations under the state budget

- (16) The Energy Fund is primarily financed through the state budget. For the budget years 2008 to 2010<sup>21</sup> the Energy Fund received an annual ordinary budgetary allocation of NOK 200 million in addition to budgetary allocations stemming from the revenue generated by a fund that has been set up in order to finance the Energy Fund, the so-called Base Fund for renewable energy and energy efficiency<sup>22</sup> (“the Base Fund”).
- (17) The Base Fund was established on 2 January 2007 with the specific aim of providing a stable source of financing for the Energy Fund.<sup>23</sup> It is managed<sup>24</sup> by the Ministry of Petroleum and Energy. The fund represents a budgetary mechanism known as an “account loan”,<sup>25</sup> it was established by way of a capital deposit of NOK 10 billion of state funds into an account in the Norwegian central bank.<sup>26</sup> The deposit generates a fixed annual interest that corresponds to the market rate for 10-year government bonds (securities). The transfer from the Base Fund to Enova’s Energy Fund is subject to the approval of the Norwegian Parliament<sup>27</sup> in the same manner as other budgetary allocations.
- (18) The interest rate for the NOK 10 billion deposited by the Norwegian authorities in 2007 is fixed at 4.31 percent per year for 10 years. In 2009 the Norwegian authorities deposited an additional NOK 10 billion into the Base Fund with a fixed rate of 3.65 percent per year for 10 years. The Norwegian authorities made a deposit of NOK 5 billion in 2010, the interest rate fixed at 4 per cent. The fund currently amounts to NOK 25 billion. NOK 996 million will be eligible for allocation to the Energy Fund for the 2011 budget year.

Year of allocation	Deposit (billion NOK)	Interest rate	Annual interest (million NOK)
--------------------	-----------------------	---------------	-------------------------------

<sup>17</sup> St.meld. nr. 34 (2006-2007) Norsk Klimapolitikk.

<sup>18</sup> The Labour Party (*Arbeiderpartiet*), the Socialist Left Party (*Sosialistisk Venstreparti*) and the Centre Party (*Senterpartiet*).

<sup>19</sup> The Conservative Party (*Høyre*), the Christian Democratic Party (*Kristelig Folkeparti*) and the Liberal Party (*Venstre*).

<sup>20</sup> Available online at: [http://www.regjeringen.no/Upload/MD/Vedlegg/Klima/avtale\\_klimameldingen.pdf](http://www.regjeringen.no/Upload/MD/Vedlegg/Klima/avtale_klimameldingen.pdf).

<sup>21</sup> The Energy Fund will not be allocated NOK 200 million in the form of an ordinary budgetary allocation for 2011.

<sup>22</sup> In norwegian: *Grunnfond for fornybar energi og energieffektivisering*.

<sup>23</sup> The Norwegian authorities have indicated that the Norwegian state plans to make further capital contributions to the Base Fund, thus increasing the amount of interest generated and consequently, the annual allocations to the Energy Fund.

<sup>24</sup> The Base Fund is not actively managed in the same way as the Energy Fund. It primarily serves one purpose, and that is to yield a return that can be transferred to the Energy Fund.

<sup>25</sup> In norwegian: *kontolån*.

<sup>26</sup> *Norges Bank*.

<sup>27</sup> *Stortinget*.

2007	10	4.31	431
2009	10	3.65	365
2010	5	4	200

#### 4.1.2 *The parafiscal charge on the electricity distribution tariff*

- (19) The Energy Fund is partly financed by the revenue generated by a parafiscal charge on the electricity grid tariff (“the parafiscal charge”). The legal basis for the parafiscal charge is provided for by the Energy Fund Regulation.
- (20) According to section 3 in conjunction with section 2a) of the Energy Fund Regulation, the companies which have been granted a trading license<sup>28</sup> according to section 4-1 of the Energy Act<sup>29</sup> shall, when it charges the end user for the withdrawal of electrical energy from the grid, add a NOK 0.01/kWh supplement (see also section 4-4 Energy Act). The licensee shall then pay a contribution to the Energy Fund of NOK 0.01/kWh multiplied by the amount of energy for which the end user is invoiced.
- (21) In the last years, electricity consumption in Norway has been relatively inelastic and the parafiscal charge has generated between NOK 700-800 million annually.

#### 4.1.3 *The interest generated on the Energy Fund*

- (22) Funds that are not committed to specific projects during one fiscal year remain within the Energy Fund. The resources of the Energy Fund is kept in an account in the Norwegian central bank. The account is owned by the Ministry of Petroleum and Energy. The account bears interest. The interest rate on the Energy Fund is connected to the interest rate on short term state bonds and is to be set twice a year for six months at a time. The accrued annual interest is transferred to the account at the end of each year, and are at Enova’s disposal the following year.

#### 4.1.4 *Overview of the financing of the Energy Fund 2011 in NOK millions<sup>30</sup>*

Income parafiscal levy	775
Allocation of interest generated by the Base Fund	976
Allocation of interest generated by the Energy Fund	114
Annual budget for the Energy Fund	1 865

#### 4.1.5 *Commitment authorization (“Tilsagnsfullmakt”)*

- (23) Enova is authorized to reserve the funds of the following year’s state budgets up to a limit of NOK 400 million per year. A decision by Enova about future funds represents a binding commitment in which Enova promises to grant the beneficiary the agreed amount of funds during the next budgetary years, given that the certain conditions have been fulfilled.

<sup>28</sup> Omsetningskonsesjon.

<sup>29</sup> Act No 50 of 29.6.1990 on the generation, conversion, transmission, trading, distribution and use of energy etc. (*Lov om produksjon, omforming, overføring, omsetning og fordeling av energi m.m.*).

<sup>30</sup> Based on information provided by the Norwegian authorities via email dated 23.6.2011 (Event No 601848).



## 5. Recipients

- (24) Undertakings as well as legal and private persons not considered as undertakings within the meaning of Article 61 of the EEA Agreement are eligible for support under the scheme.
- (25) The Energy Fund scheme is not sector specific, potential recipients in all sectors covered by the EEA Agreement may submit applications for aid under the Energy Fund scheme. However, certain chapters under the programmes may be directed towards specific industries.
- (26) The Norwegian authorities have informed the Authority that no aid will be granted to addressees of pending recovery orders nor to undertakings that are in financial difficulties at the time their application is submitted to Enova. Enova monitors pending recovery orders in close cooperation with the Ministry of Government Administration, Reform and Church Affairs.

## 6. Competition for aid

### 6.1 Application procedure

- (27) Enova grants aid through programme chapters that either are open for applications throughout the year, or through calls for applications within certain dates. The texts of the chapters are available on Enova's website. The programme chapters and calls for applications are also published in major national and regional newspapers.
- (28) All programme chapters use web based application forms. The electronic application forms, which have been developed for interactive processing, provide detailed instructions about application requirements. Applicants must use Enova's investment calculation tool,<sup>31</sup> which is used to determine the eligible costs of the projects.

### 6.2 Enova's assessment of the application for aid

#### 6.2.1 *The incentive effect, necessity and proportionality of the aid*

- (29) When assessing an application for aid, Enova firstly assesses whether the projects go beyond any existing or new European Union ("EU") standards or mandatory requirements. Only the projects that do, are eligible for aid. The reference cost is the cost of complying with EU, and in some cases, national, standards.<sup>32</sup>
- (30) If there are no relevant standards, and if the cost of investing in environmental protection is not easily identifiable, Enova will assess whether the applicant, in the absence of aid, would invest in a technically comparable solution that provides a lower degree of environmental benefit. Enova requires the undertaking to describe the credible counterfactual situation in the application for aid. Applicants that do not provide credible documentation on energy saving or production and incentive effect are ineligible for aid.
- (31) Enova utilises its experience and expertise in order to assess the counterfactual situation and the costs, savings and benefits. Where data on default costs, savings and benefits are available from a third party, Enova uses this information. When deemed necessary, third party assessments of the projects are acquired.

---

<sup>31</sup> Available online at: <http://beregning.enova.no/applicant/newapplication.aspx>.

<sup>32</sup> Standards such as: building codes, Health, environment or safety requirements or emission requirements.

- (32) Eligible costs are calculated on the basis of extra investment costs related to energy saving or energy production compared to the established reference costs according to the relevant counterfactual situation net any operating benefits the first 3-5 years, depending on the project.
- (33) Enova undertakes a financial analysis (net present value calculation) of each project in order to ensure that they generate a normal return on capital. Projects with an estimated return on capital which equals or exceeds what is considered normal for the relevant projects and industry are ineligible for aid. Aid is only considered proportionate if the same result could not be achieved with less aid. In practice, Enova will evaluate the rate of return of each project and compare it to the rate generally applicable for the relevant activity.
- (34) The aid amounts are further limited by the application of the maximum aid intensities of the EAG.

#### *6.2.2 Competition and limited budgets*

- (35) Under the Renewable energy production programme, the Cogeneration and energy-efficient district heating programme and the Energy saving programme, Enova disburses aid to the projects which give the highest amount of KWh saved or produced per NOK of aid until the annual budget is fully allocated.<sup>33</sup>
- (36) For the New energy technology programme, the KWh/NOK of aid ratio is used in the assessment, however, more weight is given to the future production/efficiency potential than to the actual production/efficiency of the demonstration project.

### **7. The aid disbursements**

- (37) Only investment aid will be granted under the scheme. In other words, no operating aid will be granted. All aid is given in the form of direct grants, disbursed in tranches depending on the progress of the projects and the investment cost budget. The disbursements are made as reimbursements for incurred costs on the basis of progress reports submitted by the recipients wherein actual incurred costs are documented. 20% of the total award is withheld until Enova has approved a final report.
- (38) In the event a project exceeds its initial cost estimate (from the application for aid), Enova does not grant additional funding. On the other hand, where a project turns out to be less costly, the total grant is reduced in a pro rata calculation.

### **8. Cumulation and monitoring**

- (39) The aid granted under the Energy Fund scheme can be cumulated with aid from other local, regional, national or EU sources to cover the same eligible costs. Enova is responsible for ensuring that the total aid granted under the notified scheme and from other sources does not exceed the aid intensities set out in the EAG. Applicants are obliged to provide information on aid from other sources to the relevant project. All letters of allocation from Enova to the beneficiaries shall include a reference to the EAG and inform the recipients of their duty to provide information on other aid received.

---

<sup>33</sup> See email from the Norwegian authorities dated 22.6.2011 (Event No 601824).



- (40) Detailed records of each allocation letter, including information on the factual basis for granting the aid is kept by Enova in accordance with point 198 of the EAG.

## 9. Duration of the scheme

- (41) The duration of the Energy Fund scheme is from 18 July 2011 until 31 December 2016.

## II. ASSESSMENT

### 1. The presence of state aid

- (42) 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.”*

#### 1.1 Presence of state resources

- (43) In order to constitute aid within the meaning of Article 61 of the EEA Agreement, the measure must be granted by the State or through state resources. The Energy Fund scheme (which is the aid measure) supports various projects by disbursing direct grants which are financed by the state budget, the revenue of the parafiscal charge and the interest generated on the Energy Fund itself. The financing stemming from the state budget clearly represent state resources.
- (44) With regard to revenue from the parafiscal charge, state resources are involved where money is transferred by a fund which is established by the State, and the fund is fed by contributions imposed or managed by the State,<sup>34</sup> and its assets are permanently under the control of public authorities.<sup>35</sup>
- (45) The Energy Fund was established by the Norwegian State. The Energy Fund is administered by a public body, Enova, which is owned by the Norwegian State via the Ministry of Petroleum and Energy. The level of the levy is equally determined by the State. The proceeds of the levy are allocated directly to the Energy Fund from where Enova in turn, allocates them directly to the chosen projects. The Authority, therefore, considers that the Norwegian State exercises permanent control over the levy and that it qualifies as state resources within the meaning of Article 61(1) of the EEA Agreement.
- (46) Finally, the interest generated on the capital of the Energy Fund itself represents proceeds on state resources accrued to the Energy Fund whilst under the permanent control of public authorities. Consequently, the Authority finds that the interest represents state resources.

<sup>34</sup> See Case 173/73 *Italy v Commission*, [1974] ECR 709 paragraph 16 and Case 78/76 *Steinike* [1977] ECR 595 paragraphs 21-22. See also the Commission Decisions in cases C 7/2005 (Slovenia) and N 143/2009 (Cyprus).

<sup>35</sup> See Case C-206/06 *Essent Netwerk Noord BV* [2008] ECR I-5497 paragraph 70.

- (47) As the Energy Fund, thus, is entirely funded by state resources, all disbursements made under that scheme constitute state resources, too.

## 1.2 Favouring certain undertakings or the production of certain goods

- (48) In order to be characterised as state aid within the meaning of Article 61 of the EEA Agreement, the measure must favour certain undertakings or the production of certain goods.
- (49) The EEA law notion of “undertaking” encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.<sup>36</sup> Economic activity is characterised by the provision of goods and services on a market.<sup>37</sup> The producers of environmentally friendly energy<sup>38</sup> or district heating or cooling infrastructure engage in economic activities by selling their products or services on the market and must consequently be considered as “undertakings” within the meaning of Article 61 of the EEA Agreement. The energy saving programme favours entities active in any economic sector implementing various energy saving measures. In line with the above, grants to entities engaged in economic activities implementing energy saving measures<sup>39</sup> favours undertakings within the meaning of Article 61 of the EEA Agreement.<sup>40</sup>
- (50) Additionally, in order to constitute state aid within the meaning of Article 61 of the EEA Agreement a measure must favour “*certain undertakings or the production of certain goods*”. A selective economic advantage is considered to exist when it is found that a measure does not apply generally to all the undertakings in an EEA State.<sup>41</sup> The Energy Fund scheme involves disbursing economic advantages to certain undertakings engaging in environmentally friendly activities. Moreover, not all undertakings in Norway are eligible for grants under the programmes of the Energy Fund scheme, only undertakings successfully participating in the selection processes (tenders or open calls for applications) receive support, hence the grants must be considered as selective within the meaning of Article 61 of the EEA Agreement.

## 1.3 Distortion of competition and effect on trade between Contracting Parties

- (51) To constitute aid within the meaning of Article 61(1) of the EEA Agreement, a measure must distort or threaten to distort competition and affect trade between the Contracting Parties. The Authority is not required to establish that an aid measure

<sup>36</sup> See Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] ECR p. 62, paragraph 78, and Joined Cases E-4/10, E-6/10 and E7/10 *Principality of Liechtenstein, Reassur Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority* (not yet reported), paragraph 53.

<sup>37</sup> Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein, Reassur Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority* (not yet reported), paragraph 54, Joined Cases C-180-184/98 *Pavlov* [2000] p. I-6451, paragraph 75 and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22.

<sup>38</sup> *I.e.* companies producing biogas, electricity, local heating and district heating or cooling.

<sup>39</sup> *I.e.* studies or energy saving measures.

<sup>40</sup> Enova also grants support to entities that do not engage in economic activities, such as private households. In so far as they do not confer an advantage on an undertaking, disbursements of state resources to a private household does not constitute state aid within the meaning of Article 61 of the EEA Agreement. The Norwegian authorities have explained that Enova does not distinguish between undertakings and non-undertakings when administering the various programmes. Consequently, the rules laid down in this Decision are applicable for all recipients under the programmes approved by this Decision regardless of the status of the recipient.

<sup>41</sup> Case C-256/97 *Déménagements-Manutention Transport SA* [1999] ECR I-3913, paragraph 27.

actually has an appreciable effect on trade between Contracting Parties or that competition is actually being distorted, but only to examine whether such aid is *liable* to do so.<sup>42</sup>

- (52) In the present case, funding provided for under the measure will strengthen the competitive situation of undertakings so supported within the energy and electricity markets in the European Economic Area, where they actually or potentially compete with other undertakings. Accordingly, the aid measure is liable to distort competition.
- (53) Equally, the aid measure is liable to affect trade. The support to undertakings active in the energy sector threaten to distort competition and affect trade between the Contracting Parties. The Energy Fund scheme supports projects involving energy production, energy saving, cogeneration, district heating and cooling (plants and infrastructure) and new energy technologies. The support enables the benefitting undertakings to lower the cost of implementing environmentally friendly energy measures. Support will be granted to undertakings engaged in intra-EEA trade. These advantages will be liable to distort competition and affect trade between Contracting Parties.

#### 1.4 Conclusion

- (54) In light of the above, the Authority considers the Energy Fund scheme to constitute an aid measure in the form of a scheme to disburse state aid within the meaning of Article 61 of the EEA Agreement.

## 2. Procedural requirements

- (55) Pursuant to Article 1(3) of Part I of Protocol 3 “*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*”.

### 2.1 Standstill obligation and the notification of the Energy Fund scheme

- (56) By submitting the notification of the Energy Fund scheme by letter dated 9 July 2010 (Events No 563725, 563728, 563729, 563730 and 563733), and not disbursing any aid prior to the Authority’s approval thereof, the Norwegian authorities have complied with their notification and standstill requirements. The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

### 2.2 Standstill obligation applicable to measures subject to a detailed assessment

- (57) In addition, the Authority notes that, regarding measures subject to a detailed assessment pursuant to point 160 of the EAG,<sup>43</sup> the Norwegian authorities have confirmed that such aid will not be granted without the Authority’s prior authorisation.
- (58) The obligation to notify will apply to all measures supported under the Energy Fund scheme regardless of whether the compatibility of the relevant part of the scheme has been assessed on the basis of the EAG. In other words, aid granted under the

<sup>42</sup> Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finn fjord and Others v EFTA Surveillance Authority*, 2005 ECR p. 117, paragraph 93.

<sup>43</sup> See recital 7 *supra*.

New energy technology programme and aid granted to district heating or cooling infrastructure must also be notified to the Authority whenever the aid meets the requirements of point 160 of the EAG.<sup>44</sup>

### 3. Compatibility of the aid

- (59) In the following, the Authority will assess the compatibility of the Energy Fund scheme with Article 61(3)(c) of the EEA Agreement.
- (60) In doing so, the Authority will apply its EAG. At the outset, the Authority notes that the Norwegian authorities have confirmed that they will apply all relevant definitions as laid down in point 70 of the EAG.

### 4. The Renewable energy production programme

#### 4.1 Eligible projects

- (61) According to the Norwegian authorities, aid under the Renewable energy production programme will be granted in accordance with section 3.1.6 of the EAG.
- (62) The objective of the Renewable energy production programme is to create individual incentives to increase the share of renewable sources of energy in total energy production. Projects involving investments in renewable energy installations both for internal use and external sale are eligible for support under the programme.
- (63) Enova will grant aid for the promotion of energy from renewable sources within the meaning of point 70(9) of the EAG which reads as follows:

*“energy from renewable energy sources” means energy produced by plants using only renewable energy sources, as well as the share in terms of calorific value of energy produced from renewable energy sources in hybrid plants which also use conventional energy sources. It includes renewable electricity used for filling storage systems, but excludes electricity produced as a result of storage systems;”*

- (64) Only projects involving the production of renewable energy as defined by point 70(9) of the EAG will be supported under the scheme. Energy production from the following renewable energy sources<sup>45</sup> are supported under the Renewable energy production programme: wind, solar, geothermal, wave, tidal, hydropower, biomass and biogases.
- (65) Support under the Renewable energy production programme will be granted to projects that involve: (i) production of sustainable biofuels<sup>46</sup> in the form of biogas (liquid or gaseous fuel derived from biomass or biogas), (ii) local heating systems/plants<sup>47</sup> (as opposed to district heating which will be supported under the

<sup>44</sup> See information provided by the Norwegian authorities via email on 29.6.2011 (Event No 602719).

<sup>45</sup> Within the meaning of point 70(5) of the EAG.

<sup>46</sup> Within the meaning of point 101 of the EAG in conjunction with point 70(7) and (8).

<sup>47</sup> The term local heating systems/plant means small and minor heating plants which supply one or a few individual buildings (offices, shops and/or apartment buildings) with heat, mostly through waterborne heating systems, see email from the Norwegian authorities dated 22.6.2011 (Event No 601685).

Cogeneration and energy-efficient district heating and cooling programme),<sup>48</sup> and (iii) electricity production.<sup>49</sup>

- (66) With regard to the support for biofuel production, the Authority notes that the scheme will exclusively support the production of “sustainable biofuels” within the meaning of the EAG. This includes production of biofuels within the meaning of paragraph 70(7) of the EAG, which includes liquid<sup>50</sup> or gaseous fuel derived from biomass. There are no restrictions on the utilisation of the energy under the Energy Fund scheme. The biogas can be utilised in any energy application where it will replace fossil gas. The biogas can be used for heating, production of electricity, industrial processes or transportation.

#### 4.2 Eligible costs

- (67) Enova calculates the investment aid for energy production measures according to point 105 and 106 of the EAG in conjunction with points 81, 82 and 83.
- (68) The investment costs of the projects will be strictly confined to the extra investment cost necessary to meet the environmental objectives. Eligible costs are limited to the extra investment costs borne by the beneficiary compared with a conventional power plant or heating system with the same capacity in terms of the effective production of energy (point 105 of the EAG). The Norwegian authorities have provided the Authority with examples of the various forms of reference investments. The Norwegian authorities have explained that for investments in biogas production, investments in direct electric heaters will normally represent the conventional alternative.<sup>51</sup> This is usually also the case for investments in local heating. For local heating, with regard to older buildings, the installation of an oil boiler can also represent a reference investment. For investments in electricity production, gas fired plants will normally represent the conventional alternative.<sup>52</sup>
- (69) As required by point 106 of the EAG, the eligible costs will be calculated net of any operating benefits and operating costs related to the extra investment for renewable sources of energy and arising during the first five years of the life of the investment as set out in points 81-83 of the EAG.

#### 4.3 Conclusion

- (70) Based on the above assessment, and the fact that the Renewable energy production programme respects the other requirements as detailed in this Decision, the Authority concludes that the aid complies with the EAG.

---

<sup>48</sup> Projects involving energy recovery of which the waste heat is exclusively or mainly used for electricity production, and only a minor part is used for heat in district heating installations will be supported under the Renewable energy production programme.

<sup>49</sup> From liquid biofuel, solar, wind, tide, wave or hydro, see email from the Norwegian authorities dated 23.6.2011 (Event No 601845).

<sup>50</sup> See the Commission Decision in case N 59/2008 (Finland) *Tax exemption for bio fuels used for heating and stationary motors*.

<sup>51</sup> See email from the Norwegian authorities dated 23.6.2011 (Event No 601933).

<sup>52</sup> See email from the Norwegian authorities dated 23.6.2011 (Event No 601845).



## 5. The Cogeneration and energy-efficient district heating and cooling programme

### 5.1 The legal bases for the assessment of the programme

- (71) The Norwegian authorities have informed the Authority that the Cogeneration and energy-efficient district heating and cooling programme firstly, involves granting aid for investments in cogeneration installations in accordance with section 3.1.7 of the EAG and secondly, aid for district heating installations in accordance with section 3.1.8 of the EAG.
- (72) Thirdly, Enova will grant aid to district cooling plants operated on biomass or geothermal energy. The EAG does not contain provisions on aid for district cooling. However, the Authority views positively the useful application of biomass and geothermal energy. Similar to the use of those energy sources for heating purposes, the use of biomass and geothermal energy for district cooling purposes makes environmentally friendly cooling available to end consumers, which would otherwise *i.a.* use conventional electricity to run individual air conditioning units. Since the sources of energy (*i.e.* biomass and geothermal energy), the techniques (*i.e.* transporting heat or cool through pipelines to the consumer), and the environmental benefits (*i.e.* primary energy savings) are comparable, it is justified to assess the use of industrial waste heat for district cooling purposes in analogy to section 3.1.8 of the EAG.<sup>53</sup> In the following, for the sake of simplicity, no further reference is made to the analogous application of the EAG to district cooling plants.
- (73) Fourthly and finally, the Norwegian authorities will support district heating and cooling infrastructure under the Energy Fund scheme. As explained in the following, the compatibility of aid to district heating and cooling infrastructure is assessed directly under Article 61(3)(c) of the EEA.

### 5.2 The objectives of the programme

- (74) The Norwegian authorities have explained that the objective of the Cogeneration and energy-efficient district heating and cooling programme is to create individual incentives to meet environmental targets. Cogeneration of heat and electricity is considered the most efficient way of producing heat and electricity simultaneously, as less energy is wasted in production. With regards to district heating installations and infrastructure, the Norwegian authorities have made reference to point 51 of the EAG, where it is stated that district heating may be more energy-efficient than individual heating and may provide a significant improvement in urban air quality. Finally, the Norwegian authorities have explained that the primary objective of granting aid to district cooling installations and infrastructure is to protect the environment by reducing the use of primary conventional forms of cooling such as *i.a.* air conditioners using electricity.

### 5.3 General criteria for eligibility under the programme

- (75) All undertakings investing in the supported activities may apply for aid under the programme. The installation or infrastructure must be built in Norway in order to be eligible for aid.

---

<sup>53</sup> In case N 485/2008 (Austria) *Aid Scheme for District Heating and Cooling Infrastructure and Cooling Installations*, paragraphs 18-19, the Commission accepted a similar analogous application of the EAG with regard to district cooling.



## 5.4 Cogeneration

### 5.4.1 Eligible projects

- (76) Only “high-efficiency cogeneration” projects within the meaning of point 70(11) of the EAG<sup>54</sup> are eligible for aid.
- (77) Additionally, the cogeneration project must fulfil the criteria laid down in point 112 of the EAG.<sup>55</sup>

### 5.4.2 Eligible costs

- (78) The eligible costs for cogeneration installations will be calculated in accordance with points 117-118 of the EAG<sup>56</sup> in conjunction with points 81-83, *i.e.* the eligible costs will be limited to the extra investment cost necessary to realise an investment in a high-efficiency cogeneration plant as compared to the reference investment. The reference investment for the extra cost method will be based on the cost of a gas fired plant or an oil boiler with the same production capacity.<sup>57</sup> The eligible costs will be calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment.

## 5.5 Energy-efficient district heating and cooling plants

### 5.5.1 Eligible projects

- (79) Aid will be granted to district heating plants only producing district heat, as well as district heating plants that, in addition to heat, produce minor amounts of electricity. The Authority notes that the wording of the EAG indicates that the latter form of projects can be supported under chapter 3.1.8 on aid for energy-efficient district heating, as point 120(a) explicitly references cogeneration, which, according to the definition of point 70(10) is “*the simultaneous generation in one process of thermal energy and electrical (...) energy*”.
- (80) The Norwegian authorities have confirmed that only “energy-efficient district heating” projects within the meaning of point 70(13) of the EAG<sup>58</sup> are eligible for aid.
- (81) The Norwegian authorities have furthermore confirmed that the compliance with the criteria of point 120 of the EAG is ensured. This entails that in order to be eligible for aid, the combined operation of the generation of heat (as well as the electricity in

<sup>54</sup> Cogeneration meeting the criteria of Annex III to Directive 2004/8/EC and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC of 21.12.2006.

<sup>55</sup> See emails from the Norwegian authorities dated 22.6.2011 (Event No 601839) and 23.6.2011 (Event No 601849).

Point 112 of the EAG reads as follows:

“*Environmental investment and operating aid for cogeneration will be considered compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement, provided that the cogeneration unit satisfies the definition of high-efficiency cogeneration set out in point 70(11), and provided that for investment aid:*

*(a) a new cogeneration unit will overall make primary energy savings compared to separate production as defined by Directive 2004/8/EC, 50 and Decision 2007/74/EC;*

*(b) improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit will result in primary energy savings compared to the original situation.”*

<sup>56</sup> See email from the Norwegian authorities dated 22.6.2011 (Event No 601839).

<sup>57</sup> See email from the Norwegian authorities dated 23.6.2011 (Event No 601929).

<sup>58</sup> District heating which, with regard to generation, either complies with the criteria for high-efficiency cogeneration or, in the case of heat-only boilers, meets the reference values for separate heat production laid down in Decision 2007/74/EC.

the case of cogeneration) and the distribution of heat must result in primary energy savings (in accordance with point 120(a) of the EAG), alternatively, the investment must be meant for the use and distribution of waste heat for district heating purposes (in accordance with point 120(b) of the EAG).

- (82) District cooling plants must also lead to primary energy savings on the part of the end consumers, the programme thus ensures that aid will only be granted to projects that lead to energy savings comparable to those envisaged under point 120 of the EAG.

#### 5.5.2 Eligible costs

- (83) The eligible costs for energy-efficient district heating installations will be calculated in accordance with points 124-125 of the EAG in conjunction with points 81-83. This entails that the eligible costs will be limited to the extra investment cost necessary to realise an investment in an energy-efficient district heating or cooling plant as compared to the reference investment. The reference investment for district heating plants will be based on the cost of installing electric heating with the same production capacity for all the end users in the area of coverage. The reference investment for district cooling plants will be based on the cost of installing air conditioners, or other relevant conventional cooling equipment running on electricity, for all end users in the area.<sup>59</sup> The eligible costs will be calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment.

### 5.6 District heating and cooling infrastructure

- (84) Support for district heating and cooling infrastructure does not fall within the scope of the EAG. Point 67 of the EAG states that

*“to the extent that the provisions relating to energy saving set out in section 3.1.5 are not applicable, these Guidelines do not apply to state aid to investments in infrastructure related to district heating, which will be assessed under Article 61(3)(c) of the EEA Agreement.”*

- (85) This is confirmed by footnote 52 of the EAG which reiterates that the financing of district heating infrastructure has to be assessed directly under Article 61(3)(c) of the EEA Agreement.<sup>60</sup>
- (86) On this basis, the Authority will assess the aid to district heating and cooling infrastructure directly on the basis of Article 61(3)(c) of the EEA Agreement.
- (87) For aid to be compatible with that provision, it must, be necessary and in a proportionate manner pursue an objective of common interest. In that regard, the Authority considers it appropriate to assess the following questions:
- a. Is the aid measure aimed at a well-defined objective of common interest?
  - b. Is the aid well designed to deliver the objective of common interest? In particular:

<sup>59</sup> See email from the Norwegian authorities dated 23.6.2011 (Event No 601958).

<sup>60</sup> In its decision in case N 485/2008, the European Commission applied the state aid provision in, then Article 87(3) of the EC Treaty (now Article 107(3)(c) TFEU), and not, the EAG, in order to assess aid for district heating and cooling infrastructure.

- i. Is the aid measure an appropriate instrument, *i.e.* are there other, better-placed instruments?
  - ii. Is there an incentive effect, *i.e.* does the aid change the behaviour of undertakings?
  - iii. Is the aid proportionate, *i.e.* could the same change in behaviour be obtained with less aid?
- c. Are any distortions of competition and effects on trade limited, so that the overall balance is positive?<sup>61</sup>
- (88) Firstly, with regard to whether (a) the aid measure is aimed at a well-defined objective of common interest: the Authority notes that the aid to district heating and cooling infrastructure aims at making conditions favourable for the use of district heating and cooling. The supported projects are expected to lead to primary energy savings on the part of the end consumer which, in turn, should reduce Norway's CO<sub>2</sub> emissions, thus contributing to environmental protection. It can thus be established that the aid is aimed at a well-defined objective of common interest.
- (89) Secondly, with regard to whether (b) the aid is well designed to deliver the objective of common interest, and to the question of whether (b) (i) aid is an appropriate instrument, the Norwegian authorities have explained that there are currently no better placed instruments to achieve the objective and that the market does not provide sufficient incentives for companies to invest in district heating and cooling infrastructure. Restrictive regulatory requirements or standards, will likely not be effective for purposes of furthering the investment in district heating and cooling infrastructure. Taking this into account, the Authority concludes that aid represents an appropriate instrument.
- (90) With regard to whether (b) (ii) the aid provides an incentive effect, the Norwegian authorities have explained that the costs of the equipment and of connecting the end consumers to the district heating system is prohibitively high (in 2009, the average cost of 1 meter of infrastructure was NOK 5 500<sup>62</sup>). According to information provided by the Norwegian authorities, little district heating infrastructure in Norway (at least outside densely populated areas such as Oslo) has been built without aid.<sup>63</sup> On this basis the Norwegian authorities argue that aid is necessary to provide an incentive for companies to invest in district heating infrastructure. Aid will not be granted to projects where the heat generating process fulfils the relevant EU standards. There are currently no negotiations at EU level about mandatory standards. The costs of building district cooling infrastructure are comparable to those of district heating infrastructure. Therefore, the same arguments about costs related to district heating infrastructure can be made for district cooling infrastructure. On the basis of the above, the Authority concludes that the aid to district heating and cooling infrastructure has an incentive effect.

<sup>61</sup> See Commission Decision in case N 485/2008 (Austria) at paragraph 28. See also the Authority's Decision No 329/09/COL, Chapter II.3.2.2.

<sup>62</sup> The cost is based on an assessment of the applications received in Enova. The costs depend on the dimensions of the pipes. Infrastructure dimensions are typical in the range of DN 100 – DN 150 (DN = *Deutsche Normale* a pipe measuring standard). According to the report "*Kostnader for fjernvarmeutbygging*" (published in December 2010) the costs of infrastructure in Norwegian cities are 6100 NOK/m (DN 100), 7 300 NOK/m (DN 125), and 7 900 NOK/m (DN 150), information provided by the Norwegian authorities via email on 23.6.2011 (Event No 601854).

<sup>63</sup> Information provided by the Norwegian authorities via email on 23.6.2011 (Event No 601854).

- (91) With regard to the question of whether (b) (iii) the aid is proportionate, the Authority notes that the aid recipients are chosen according to a non-discriminatory, transparent and open process. Additionally, aid will only be granted in cases where the investment costs have been calculated in accordance with the extra cost method, by deducting the cost of a credible reference investment from the cost of the aided infrastructure investment and deducting operating benefits and adding operating costs for the first five years in analogy to points 124-125 of the EAG.<sup>64</sup> The reference investment for the extra cost method will be based on the cost of installing electric heating or conventional cooling equipment with the same production capacity for all the end users in the area. In light of this, the Authority concludes that the scheme ensures that the aid is proportionate.
- (92) Thirdly, with regard to (c) possible distortions of competition and effects on trade, it should be noted that aid will only be granted to district heating or cooling infrastructure that connects end users with an environmentally friendly heating or cooling installation. Consequently, the aid scheme ensures that the aid will not be used to finance conventional district heating or cooling. In particular, the aid scheme ensures that the aid is proportionate and that the aid is limited to the minimum amount necessary. In particular, the aid will be calculated net of the investment cost of a credible reference investment and net of operating benefits during the first five years. It can therefore be concluded that any possible distortion of competition or effect on trade will be limited. At the same time the Norwegian authorities ensure the positive environmental effects of the aid. As described above, only district heating or cooling infrastructure that connects environmentally friendly forms of heating or cooling is eligible for aid under the scheme. Furthermore, applicants have to demonstrate that the project results in primary energy savings on the part of the end users. It can therefore be concluded that the programme will ensure a positive environmental impact which outweighs the (limited) distortions of competition.

## 5.7 Conclusion

- (93) Based on the above assessment, and the fact that the Cogeneration and energy-efficient district heating and cooling programme respect the other requirements as detailed in this Decision, the Authority concludes that the support for cogeneration and district heating and cooling installations is compatible with the EAG and that the programme's support for district heating and cooling infrastructure is compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c).

## 6. The Energy saving programme

### 6.1 Eligible projects

- (94) The Norwegian authorities have informed the Authority that aid under the energy saving programme will be granted in accordance with sections 3.1.4 (aid for environmental studies) and 3.1.5 (aid for energy saving) of the EAG. The energy saving programme involves granting aid to undertakings investing in both energy saving measures, and environmental studies directly linked to investments for the purpose of achieving energy saving.
- (95) The objective of the energy saving programme is to create individual incentives to attain environmental targets for investments in energy saving and for the reduction of greenhouse gas emissions in line with point 47 of the EAG.

---

<sup>64</sup> Reference is made to the Commission Decision in case N 485/2008 (Austria) at paragraph 33, where the extra cost method was applied for the calculation of the extra cost of district heating infrastructure.

- (96) Enova will only grant state aid where the investments resulting in energy savings are not compulsory pursuant to applicable EU standards, national regulations and where such investment are not profitable in that the market mechanism do not incentivise the eligible investments, in line with point 47 of the EAG.
- (97) The programme is not sector specific, undertakings active in all sectors covered by the EEA Agreement are in principle eligible for support under the programme. Only energy saving projects related to buildings or industries located in Norway are eligible for aid.
- (98) According to point 70(2) of the EAG
- ”energy-saving measure” means any action which enables undertakings to reduce the amount of energy used in particular in their production cycle;”*
- (99) Under certain circumstances, the process of energy recovery can be regarded as a form of energy saving measure, even when the recovered energy is utilised by a third party (*i.e.* where the energy saved does not enable the supported undertaking to reduce the amount of energy used in its production cycle).<sup>65</sup> On this basis, Enova will support certain energy recovery measures as energy saving. Projects where waste heat is exclusively, or mainly, used for district heating installations will not be covered by the Energy saving programme.<sup>66</sup> The same applies where heat is exclusively or mainly used for electricity production.<sup>67</sup>

## 6.2 Eligible costs

### 6.2.1 Energy saving projects

- (100) The eligible costs of energy saving projects will be calculated in accordance with point 98 of the EAG in conjunction with points 81, 83 and 84.
- (101) Where aid is granted to achieve energy savings beyond the level required by relevant EU standards, the eligible extra costs will be determined in accordance with point 98(b) of the EAG in conjunction with point 84.
- (102) If no EU standard exists, the eligible costs will consist of the investment costs necessary to achieve a higher level of environmental protection which the undertaking would achieve in the absence of any environmental aid (in accordance with point 84 of the EAG).
- (103) Eligible costs will be calculated net of any operating benefits and operating costs arising during either (i) the first three years of the life of the investment in case of SMEs, or (ii) the first four years in the case of large undertakings that are not part of the EU CO<sub>2</sub> Emission Trading System or, (iii) the first five years in the case of large undertakings that are part of said emission trading system (in accordance with point 98(c) of the EAG).

<sup>65</sup> See the Authority’s Decision No 39/11/COL *Aid to Finnffjord AS for an energy recovery system* at chapter II.3.1 and the Commission Decision in case N 485/2008 (*Austria Aid Scheme for District Heating and Cooling Infrastructure and Cooling Installations*) at paragraphs 16-17.

<sup>66</sup> Such projects may be supported under the Cogeneration and energy-efficient district heating and cooling programme.

<sup>67</sup> Such projects may be supported under the Renewable energy production programme.



### *6.2.2 Environmental studies related to energy saving*

- (104) In accordance with point 92 of the EAG, the eligible costs for environmental studies related to energy savings is limited to the costs of the study.

### **6.3 Conclusion**

- (105) Based on the above assessment, and the fact that the Energy saving programme respects the other requirements as detailed in this Decision, the Authority concludes that the aid complies with the EAG.

## **7. The New energy technology programme**

### **7.1 The objective of the scheme**

- (106) In order to support the market diffusion of new technologies within the field of renewable energy production and energy efficiency, the New energy technology programme will support demonstration projects involving new energy technologies. In doing so, the programme seeks to address market barriers such as the lack of available investment capital and lack of user acceptance due to the risk associated with innovative products and services.
- (107) The programme aims to incentivise investors and build user-acceptance in the market. The aid reduces the financial barrier for investing in demonstration projects. The long-term goal is to contribute to environmental protection by the diffusion of the new and more efficient energy technologies.
- (108) The programme supports technology qualification, no aid is granted to R&D&I projects. In practice, it is required that the technology must be developed prior to applying for investment aid from Enova. A complete technical description of the new technology must be submitted with the application for aid. The technical risk connected to the new technology cannot be undefined. Uncertainties related to defining the technical risk of the project can be mitigated by a third party evaluation of the technology. Projects eligible under the scheme will typically involve technologies where a well-functioning solution has been established through research and development. However, a number of risks or uncertainties related to operability, regularity, quality, maintenance cost etc. still remain. By the qualification of the technology through a demonstration project, these risks are systematically documented.

### **7.2 Eligible projects**

- (109) The programme is technology-neutral. Projects generating energy from all sources utilised under the other programmes of the Energy Fund scheme can be supported. Energy saving projects can also be supported.
- (110) Demonstration projects have to fulfil a number of other criteria in order to be eligible for aid under the New energy technology programme. These are presented in the following.

#### *7.2.1 Limited market dissemination and no prior full-scale testing*

- (111) In order to ensure that the relevant technology represents a form of new technology with a limited market dissemination, the programme will only support new technologies with a limited dissemination and for which no functioning market exists. Aid will not be granted to technologies that have already been introduced to the market. The Norwegian authorities have explained that they consider that a



market does not exist where there are not more than 2-3 known adoptions of the relevant technology in the market. Aid is only granted to projects that have not already been tested in full-scale.

### *7.2.2 End-user participation*

- (112) It is required that an end-user is involved in the demonstration project. The end-user will normally be a buyer of the technology that intends to put it to commercial use in the future.

### *7.2.3 Full-scale versions under typical operating conditions*

- (113) The demonstration project has to involve full-scale versions of the new technologies, no aid is granted for the demonstration of scaled-down models or limited component testing. The full-scale testing does not have to include more than one unit of the new technology.
- (114) The technology must be tested under typical industrial-like operating conditions, *i.e.* in environments similar to those where the technology is intended to be used. Projects must go beyond laboratory testing, or testing in other forms of controlled environments. The demonstration phase environment does not have to be identical to the environment of the area of intended use of the technology. As an example, the Norwegian authorities have explained that a wind turbine intended for off-shore use may be tested onshore when the goal is to test the turbine and not a floating device or sea-bed fundamentals (enabling the turbine to function off-shore).

### *7.2.4 Two years operational period*

- (115) The demonstration project must have a minimum operational period of 2 years.

### *7.2.5 Measurable energy result and positive cash flow*

- (116) Only projects that generate a measurable energy result in the form of energy production or energy efficiency are eligible for aid. Projects that are not estimated to generate a positive cash flow during the operational phase are not eligible for aid under the New energy technology programme. In practice, this entails that the estimated value of the energy produced or saved must cover the estimated operating costs of the demonstration project.

## **7.3 Eligible costs**

- (117) Under the New energy technology programme, the eligible cost of the projects are calculated in accordance with the extra cost method of the EAG.
- (118) The types of projects supported on the basis of the three other programmes of the Energy Fund scheme can be supported under the New technology programme, as long as they involve a form of new technology and comply with the criteria set out above. The method for calculation of eligible cost depends on the type of project, and corresponds to the method that will be applied to support for similar but non-innovative measures supported under the three other programmes of the scheme.

## **7.4 The legal basis for the assessment of the programme**

### *7.4.1 The legal basis referred to by the Norwegian authorities*

- (119) The Norwegian authorities argue that the New energy technology programme is compatible with the functioning of the EEA Agreement directly on the basis of its Article 61(3)(c) and hold that the programme is not covered by the Authority's

Guidelines for Aid for research and development and innovation (“the RDI”)<sup>68</sup> nor the EAG.

#### 7.4.2 Non-applicability of the RDI

- (120) The Authority concurs with the Norwegian authorities that the New energy technology programme falls outside the RDI.
- (121) The RDI apply to state aid for research, development and innovation in the environmental field,<sup>69</sup> provided that the other criteria for applicability as stated in the guidelines are met.
- (122) Under chapters 5.2-5.8 of the RDI a number of activities that potentially qualify for funding are listed.<sup>70</sup> On the basis of the description of the New energy technology programme and its criteria above, the Authority concludes, at the outset, that the programme is not covered by those chapters.
- (123) Having excluded the applicability of those chapters, the question remains whether the activities supported under the notified programme falls under aid for R&D projects within the meaning of chapter 5.1 of the RDI.
- (124) While the RDI defines in point 50 (e)-(g), the research categories of fundamental research, industrial research and experimental development as falling within the guidelines, in point 72 reference is furthermore made to the Frascati Manual<sup>71</sup> when classifying activities allegedly falling under the said categories.
- (125) The New energy technology programme only supports projects involving a direct practical application of new technology as opposed to “experimental or theoretical work” which characterise fundamental research,<sup>72</sup> and the purpose of the supported projects is to qualify technology and not “the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services” which characterise industrial research.<sup>73</sup>
- (126) On this basis, the Authority has assessed whether the activities supported under the programme can constitute a form of “experimental development” within the meaning of the RDI.
- (127) Point 50(g) on experimental research reads as follows:

*“experimental development” means the acquiring, combining, shaping and using of existing scientific, technological, business and other relevant knowledge and skills for the purpose of producing plans and arrangements or designs for new, altered or improved products, processes or services. These may also include, for example, other activities aiming at the conceptual definition, planning and documentation of*

<sup>68</sup> Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

<sup>69</sup> Point 46 of the RDI. See also made to point 63 of the EAG.

<sup>70</sup> 5.2 Aid for technical feasibility studies, 5.3 Aid for industrial property rights costs for SMEs, 5.4 Aid for young innovative enterprises, 5.5 Aid for process and organisational innovation in services, 5.6 Aid for innovation advisory services and for innovation support services, 5.7 Aid for the loan of highly qualified personnel, and 5.8 Aid for innovation clusters.

<sup>71</sup> Organisation for Economic Co-Operation and Development, 2002.

<sup>72</sup> In accordance with point 50(e) of the RDI.

<sup>73</sup> In accordance with point 50(f) of the RDI.

*new products, processes and services. The activities may comprise producing drafts, drawings, plans and other documentation, provided that they are not intended for commercial use.*

*The development of commercially usable prototypes and pilot projects is also included where the prototype is necessarily the final commercial product and where it is too expensive to produce for it to be used only for demonstration and validation purposes. In case of a subsequent commercial use of demonstration or pilot projects, any revenue generated from such use must be deducted from the eligible costs.*

*The experimental production and testing of products, processes and services are also eligible, provided that these cannot be used or transformed to be used in industrial applications or commercially.*

*Experimental development does not include the routine or periodic changes made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements;”*

(128) Point 111 of the Frascati Manual reads as follows:

*“Chapter 4 defines experimental development as “systematic work, drawing on knowledge gained from research and practical experience, which is directed to producing new materials, products or devices; to installing new processes, systems and services; or to improving substantially those already produced or installed.” It is difficult to define precisely the cut-off point between experimental development and pre-production development, such as producing user demonstration models and testing, and production that is applicable to all industrial situations. It would be necessary to establish a series of conventions or criteria by type of industry. The basic rule originally laid down by the US National Science Foundation (NSF) provides a practical basis for the exercise of judgement in difficult cases. Slightly expanded, it states:*

*“If the primary objective is to make further technical improvements on the product or process, then the work comes within the definition of R&D. If, on the other hand, the product, process or approach is substantially set and the primary objective is to develop markets, to do pre-production planning or to get a production or control system working smoothly, the work is no longer R&D.””*

(129) The objective of the New energy technology programme, as elaborated on above, is to support new technologies at the point of market diffusion. The purpose of the programme is to enable undertakings to demonstrate to the end users, the benefit of the innovative new technology. The objective is not to operate demonstration projects to make further technical improvements of the technology.

(130) On this basis, and in light of the description of the objective and criteria of the programme above, the Authority concludes that the New technology programme as notified cannot be considered as a programme supporting experimental development.

(131) Accordingly, the Authority concludes that the New energy technology programme falls outside the RDI.

### 7.4.3 Non-applicability of the EAG

- (132) The Authority also concurs with the Norwegian authorities that the New energy technology programme falls outside the EAG.
- (133) As described above, under the New energy technology programme, the Norwegian authorities, in principle, intend to grant aid to all the various activities covered by the three other programmes of the Energy Fund scheme. On this basis, it could be argued that the assessment of the compatibility of the New energy technology programme should be based on the same legal framework.
- (134) However, many of the projects that will be supported under the New energy technology programme, will not, due to their inherent characteristics as demonstration projects, follow the economic logic inherent in the EAG, which dictates that state aid can be granted in order to render certain environmentally friendly projects profitable.<sup>74</sup>
- (135) The European Commission (“the Commission”) recently assessed the compatibility of investment aid for *Alpha Ventus*, a wind park off the German coast. In that case, the investors were willing to invest in the said wind park even without expecting a normal return on the investment. Although in *Alpha Ventus*, the wind park produced electricity, generation of electricity was not the main objective of the project. The primary objective was the demonstration of a technology untested in deep waters.<sup>75</sup>
- (136) In that case, the Commission concluded that there is a gap in its state aid guidelines, more specifically between its RDI and EAG under which non-R&D&I projects that do not comply with the economic logic of the EAG have to be assessed.<sup>76</sup> The Commission therefore assessed the compatibility of the aid on the basis of Article 107(3)(c) TFEU, which corresponds to Article 61(3)(c) of the EEA Agreement.
- (137) In accordance with the above, the Authority concurs with the Norwegian authorities that the compatibility of the New energy technology programme must be assessed directly under Article 61(3)(c) of the EEA Agreement.

### 7.5 Assessment of the New energy technology programme on the basis of Article 61(3)(c) of the EEA Agreement

- (138) In the following, the Authority assesses the compatibility of the New energy technology programme directly on the basis of Article 61(3)(c) of the EEA Agreement.
- (139) As noted above (see recital (87) *supra*), in connection with the assessment of the compatibility of aid to district heating and cooling infrastructure, for aid to be compatible on this legal basis, it must firstly, pursue an objective of common interest. Secondly, it must be well designed to deliver that objective and in that context: be an appropriate instrument, have an incentive effect and be proportionate. Finally, the distortions on competition and effect on trade of the aid must be limited so that the overall balance is positive.

<sup>74</sup> Reference is made to the Commission Decision in case N 521/2008 (Germany) *Aid to Offshore Wind Park Borkum, Alpha Ventus*, paragraph 78.

<sup>75</sup> *Ibid.* paragraph 77.

<sup>76</sup> *Ibid.* paragraph 82.

- (140) With regard to whether the aid measure is aimed at a well-defined objective of common interest, the Authority notes that the primary objective of the aid is to introduce new energy technologies to the market. The substantial environmental benefit pursued is the future large scale deployment of new and more effective energy production and saving technologies. The programme attempts to realise and execute the market diffusion of such technologies and to address a market failure in the sense that the long term positive externalities such as knowledge spill-overs stemming from the testing and deployment of new technologies are not sufficiently taken into account when profit seeking undertakings make investment decisions. Due to the perceived unattractive rates of return from a commercial perspective, the number of investments in this field risk being sub-optimal from a community perspective. On this basis, the Authority concludes that aid for the execution of new energy technology demonstration projects is aimed at a well-defined objective of common interest.
- (141) With regard to whether aid is well designed to deliver the objective of common interest and whether it is an appropriate instrument, the Norwegian authorities maintain that there are no other, less distortive instruments to achieve the same results, and state that the goals of the programme could not be attained through legislation. The Norwegian legislation does not require energy producers or other undertakings to construct plants using new innovative technologies instead of conventional production facilities or state of the art technologies. Provided that they respect applicable standards (*i.a.* with regard to pollution or building codes), conventional production facilities or buildings using conventional technologies known to the market may be authorised and built. Taking this into account, the Authority concludes that the aid represents an appropriate instrument.
- (142) With regard to the incentive effect, the Authority notes that the general method for selecting eligible projects also is applied under the New energy technology programme. In short this entails that projects that have started prior to the submission of the aid application to Enova will not be eligible for support under the Energy Fund scheme. Additionally, the incentive effect of the aid will be ensured by way of applying the procedure described in chapter II.9 of this Decision for the relevant projects. Applicants will be required to provide information about what actions they would have taken without the aid. This alternative counterfactual action will often be a similar investment without the same environmental benefits. For new technology projects in the building sector, the credible counterfactual investment would be to build in accordance with existing standards.<sup>77</sup> In some cases, aid applicants may not have considered an alternative investment. For many investors, the key element for a demonstration project is to reduce the perceived risk of investing in the innovation on a larger scale, and to increase the user acceptance of a new alternative technology or solution. A demonstration project is a risk mitigation measure related to future investment decisions. Alternative investments may be further research, technology monitoring or to wait until others have made the investment necessary to demonstrate the technology. Hence, a “no investment” counterfactual may be the realistic counterfactual alternative for some investors.<sup>78</sup> Under the Energy Fund scheme, where the incentive effect of the aid is based on a

---

<sup>77</sup> For example, if the project objective is to demonstrate a new technology for a building façade, the credible counterfactual would be to build a façade in line with existing standards.

<sup>78</sup> The Commission has assessed the incentive effect of aid to innovative projects on the basis of a “no investment” counterfactual, see the Decision in Case N 521/2008 (Germany) *Aid to Offshore Wind Park Borkum, Alpha Ventus*, paragraphs 106-127.



“no investment” counterfactual, Enova will assess the following elements in order to determine whether the aid has an incentive effect: (i) whether any relevant EU or national standards will be introduced in the foreseeable future, (ii) whether the investment in the relevant project represents normal market behaviour, (iii) the level of risk connected to the project and whether the investment, without the aid, would generate an appropriate profit, (iv) the project’s level of the increased environmental protection, and (v) the extent of the production advantages obtained by the aid recipient. If, on the basis of this assessment, Enova finds that the applicant would have invested without aid, Enova does not grant aid. If Enova finds that the applicant would have invested with less aid, Enova does not grant the requested amount of aid. On the basis of the above, the Authority concludes that the New energy technology programme ensures the incentive effect of the aid.

- (143) With regard to whether the aid is proportionate, the Authority notes that the general method of the Energy Fund scheme for selecting eligible projects also is applied under the New energy technology programme. Thus, the extra cost method is applied to ensure that only the environmental part of the investment is eligible for aid and the maximum aid intensities of the EAG is applied. Additionally, the costs of each project is assessed in a net present value calculation to ensure that the aid amount is limited to the amount necessary to trigger the project. When assessing new technology projects with a shorter lifespan than the lifetime of the equipment, Enova either bases the net present value calculation on the hypothetical full lifetime of the equipment (*i.e.* 10-20 years, depending on the equipment). Alternatively, it deducts the remaining value of the equipment in the calculations. Furthermore, due to the limited budgets, the projects compete for aid and only the best and most cost effective projects receive support. On this basis, the Authority concludes that the aid is proportionate.
- (144) With regard to any distortions of competition and effects on trade, the Authority notes that the undertakings receiving aid will improve their position in the market. However, the technology will then be made available to other actors. In that context, the Authority notes that undertakings receiving aid under the New energy technology programme, although not required to reveal business secrets and the content of any intellectual property rights, are required to make the results of the project publicly available. The demonstration projects supported will normally be carried out by the technology provider and an end-user (according to the criteria of eligibility for aid, the end-user participation is mandatory). The technology provider will normally use the project as a reference project when introducing the technology to the market, and by doing so, the project results will be disseminated. On this basis the Authority concludes that any distortions of competition and effects on trade of the New energy technology programme are limited. At the same time the Norwegian authorities ensure the positive environmental effects of the aid. As described above, the substantial environmental benefit pursued is the future large scale deployment of new and more effective energy production and saving technologies. Due to the perceived unattractive rates of return from a commercial perspective, the number of investments in this field risk being sub-optimal from a community perspective. On this basis, the Authority concludes that the aid will ensure a positive environmental impact which outweighs the (limited) distortions of competition.

## 7.6 Conclusion

- (145) Based on the above assessment, and the fact that the New energy technology programme respects the other requirements as detailed in this Decision, the



Authority concludes that the aid is compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c).

## 8. Aid intensities

- (146) The Norwegian authorities have provided the Authority with information about the maximum aid intensities under the Energy Fund scheme. The maximum aid intensity is fixed at a certain percentage of a projects' eligible cost as described above.<sup>79</sup>
- (147) Small and medium sized enterprises ("SMEs"), as defined by point 70(16) of the EAG,<sup>80</sup> are eligible for a bonus in the form of a higher aid intensity. In order to obtain the bonus, Enova requires the SMEs to document their status.
- (148) No aid will be granted in accordance with the procedure described as a "genuinely competitive bidding process" in points 97, 104, 116 and 123 of the EAG.
- (149) The following table gives an overview over the maximum aid intensities applicable under the Energy Fund scheme.

<b>Supported activity</b>	<b>Small enterprise</b>	<b>Medium-sized enterprise</b>	<b>Large enterprise</b>
Renewable energy production	80%	70%	60%
Cogeneration	80%	70%	60%
Energy-efficient district heating and cooling	70%	60%	50%
District heating and cooling infrastructure	70%	60%	50%
Energy saving	80%	70%	60%
Environmental studies directly linked to investments for the purpose of achieving energy saving	70%	60%	50%
New energy technology	70%	60%	50%

- (150) Based on the above, the Authority concludes that the Energy Fund Scheme respects the relevant aid intensities of the EAG. Furthermore, the intensities for aid district heating and cooling infrastructure as well as new technologies ensure that that the New energy technology programme and the relevant part of the Cogeneration and energy-efficient district heating and cooling programme are compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c).

## 9. The incentive effect of the aid

- (151) The Authority considers that aid does not present an incentive effect for the beneficiary in all cases in which the project has already started prior to the aid application by the beneficiary to the national authorities (point 143 of the EAG).

<sup>79</sup> The maximum aid intensity for environmental studies directly linked to investments for the purpose of achieving energy saving is fixed at a certain percentage of the cost of the study.

<sup>80</sup> Point 70(16) of the EAG simply refer to the definition of SMEs to be found in Regulation (EC) No 70/2001 or any regulation replacing it. Regulation No 70/2001 has been replaced by Regulation No 800/2008 (OJ L 214, 9.8.2008, p.3), incorporated in to the EEA Agreement in Annex 15.

The Norwegian authorities have confirmed that projects that have started prior to the submission of the application for the aid are ineligible for aid under the Energy Fund scheme.

- (152) For all categories of aid granted to SMEs,<sup>81</sup> the Authority will presume that the requirement of incentive effect will automatically be met if the aided project has not started before the aid application.
- (153) For all other subsidised projects, the incentive effect has to be demonstrated according to point 146 of the EAG, which reads as follows:

*“To demonstrate the incentive effect, the EFTA State concerned must prove that without the aid, that is to say, in the counterfactual situation, the more environmentally friendly alternative would not have been retained. For this purpose, the EFTA State concerned must provide information demonstrating:*

- (a) that the counterfactual situation is credible;*
- (b) that the eligible cost have been calculated in accordance with the methodology set out in points 81, 82 and 83, and*
- (c) that the investment would not be sufficiently profitable without aid, due account being taken of the benefits associated with the investment without aid, including the value of tradable permits which may become available to the undertaking concerned following the environmentally friendly investment.”*

- (154) When examining such projects, Enova will firstly assess whether they go beyond any existing or new EU standards or mandatory requirements. Only projects that do, are eligible for aid. The reference cost is the cost of complying with EU, and in some cases, national standards.<sup>82</sup>
- (155) If there are no relevant standards, and if the cost of investing in environmental protection is not easily identifiable, Enova will assess whether the applicant, in the absence of aid, would invest in a technically comparable solution that provides a lower degree of environmental benefit. Enova requires the undertaking to describe the credible counterfactual situation in the application for aid. Applicants that do not provide credible documentation on energy saving or production and incentive effect are ineligible for aid.
- (156) Enova will utilise its experience and expertise in order to assess the counterfactual situation and the costs, savings and benefits. Where third party data on default costs, savings and benefits will be available, Enova will use that information. When deemed necessary, third party assessments of the projects are acquired.
- (157) Enova will carry out a financial analysis of each project in order to ensure that they generate a normal return on capital. Projects with an estimated return on capital which equals or exceeds what is considered normal for the relevant projects and industry are ineligible for aid.

---

<sup>81</sup> Except in cases where the aid must be assessed in accordance with the detailed assessment in Chapter 5 of the EAG (point 144 of the EAG).

<sup>82</sup> Standards such as: building codes, Health, environment or safety requirements or emission requirements.

- (158) On the basis of the above, the Authority concludes that the Energy Fund scheme, in so far as it has not already been found compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c), meets the requirements of point 146 of the EAG.

## 10. The compatibility with the EEA Agreement of the parafiscal charge financing the Energy Fund

- (159) The Energy Fund is, in part financed by a parafiscal levy.<sup>83</sup> According to established case law of the European Court of Justice an aid measure cannot be separated from the method by which it is financed whereas its financing mechanism might render the whole aid scheme incompatible with the functioning of the EEA Agreement,<sup>84</sup> in particular if it involves discriminatory aspects. As a consequence, an aid scheme cannot be considered separately from the effects of its method of financing.<sup>85</sup> It is necessary to consider the financing mechanism together with the aid scheme, in particular, when a parafiscal charge has been explicitly created in order to finance an aid scheme, as has been the case for the notified scheme and its predecessors.
- (160) Parafiscal charges may conflict with the EEA Agreement for a number of different reasons. Such a charge might constitute a measure having equivalent effect to a quantitative restriction incompatible with Article 11 of the EEA Agreement, if it wholly offsets the burden on the domestic product. Alternatively, it might constitute a discriminatory internal tax incompatible with Article 14 of the EEA Agreement, if it partly offsets this burden.<sup>86</sup> Moreover, aid schemes financed by parafiscal charges hypothecated to the scheme may be incompatible with Article 61 of the EEA Agreement<sup>87</sup> in cases where the disturbance of competition and effect on trade which is inherently created by an aid scheme is increased by the method of financing.<sup>88</sup>
- (161) However, the Authority shall only take the method of financing into account in its state aid assessment where that method forms an integral part of the aid scheme.<sup>89</sup> For the charge to be regarded as forming an integral part of an aid measure, it must:
- “be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the aid and has direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the [functioning of the EEA Agreement]”.*<sup>90</sup>
- (162) The parafiscal charge in this case is specifically aimed at financing the notified scheme and revenue from the parafiscal charge is directly allocated to the Energy Fund under the Energy Fund Regulation.<sup>91</sup> However, the revenue from the charge

<sup>83</sup> See recitals (19) *et seq. supra*.

<sup>84</sup> See, to that effect, Cases C-261/01 and C-262/01 *Van Calster* [2003] ECR I-12249, paragraph 46, Case C-47/69 *France v Commission* [1970] ECR 487, paragraph 4.

<sup>85</sup> Case C-333/07 *Société Régie Networks* [2008] ECR I-10807, paragraph 89.

<sup>86</sup> Case C-206/06 *Essent Netwer Noord BV* [2008] ECR I-5497 paragraphs 41-42, referring to Article 90 EC (now 110 TFEU) which corresponds to Article 14 of the EEA Agreement.

<sup>87</sup> Cases C-261/01 and C-262/01 *Van Calster* [2003] ECR I-12249, paragraph 47 and Case C-47/69 *France v Commission* [1970] ECR 487, paragraphs 13-14.

<sup>88</sup> Case C-47/69 *France v Commission* [1970] ECR 487, paragraphs 16-24. Reference is also made to Section 1.3.6 of the EAG on limiting negative effects of the environmental aid.

<sup>89</sup> See, to that effect, Cases C-261/01 and C-262/01 *Van Calster* [2003] ECR I-12249, paragraph 49.

<sup>90</sup> Case C-333/07 *Société Régie Networks* [2008] ECR I-10807, paragraph 99.

<sup>91</sup> See recitals (19) *et seq. supra*.

goes into the general budget of the Energy Fund scheme and will potentially contribute to the financing of all the various forms of measures supported by the scheme. Consequently, the Authority considers that although the revenue from the parafiscal charge is necessarily allocated to the scheme it is not necessarily allocated to producers of electricity.<sup>92</sup>

- (163) In addition to being necessarily allocated to the aid, in order to be hypothecated to the aid, the revenue from the parafiscal charge must have a direct impact on the aid. According to the case law, such a direct impact can be established where the amount of aid is dependent on the revenue from the charge.<sup>93</sup> According to the opinion of Advocate General Stix-Hackl in *Casino France*:<sup>94</sup>

*“It is necessary to ascertain the extent to which the revenue from the tax directly affects the amount of the various aid measures granted, or, in the words of Advocate General Geelhoed in his Opinion in Streekgewest and Pape, (...) the extent to which the disappearance of the tax also removes the specific source of funding for the aid. In that regard Advocate General Geelhoed examined the criteria appropriate for establishing the existence of what he refers to as a ‘direct and inseparable link’ between the tax and the aid financed through that tax, explaining that a link of that kind would be much less apparent in cases where the use to which the revenue from the tax is put is subject to assessment by the competent national authorities, where the aid is financed only in part through the tax, where the revenue from the tax is earmarked for more uses than merely the aid in question and where the tax does not specifically affect the sector receiving the aid.*

- (164) In light of this, the Authority notes that the disbursements of aid stemming from the revenue from the parafiscal charge is subject to Enova’s assessment. Only projects found eligible in accordance with the selection process described in this Decision will get aid. The Energy Fund scheme is only partly financed by the revenue stemming from the charge. The Energy Fund is primarily financed by allocations over the state budget (allocations of the interest generated by the Base Fund) the revenue from the parafiscal charge is only part of a wider variety of sources financing the Energy Fund.<sup>95</sup> For 2011, for instance, the revenue stemming from the parafiscal charge constitutes less than half of the total annual budget. The existence of a direct impact is less apparent in cases where the amount of aid is not only dependent on the revenue stemming from the levy.
- (165) Additionally, the Energy Fund scheme does not only grant aid to producers of environmentally friendly electricity, but also grants investment support for *i.a.* energy saving measures, heat producers as well as producers of new energy technologies. Furthermore, some of the disbursements made by the Energy Fund does not even represent aid as they are granted to consumers that cannot be considered as undertakings. These factors serve to weaken the impact of the revenue stemming from the levy on the amount of aid.

<sup>92</sup> See also recital 46 *supra*.

<sup>93</sup> Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France* [2005] ECR I-9481, paragraph 49. See also Case C-333/07 *Société Régie Networks* [2008] ECR I-10807, paragraph 105.

<sup>94</sup> The Opinion of Advocate General Stix-Hackl in Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France* [2005] ECR I-9481, paragraph 74.

<sup>95</sup> See recitals (15) to (23) *supra*.

- (166) On this basis, the Authority considers that the revenue from the parafiscal charge does not have a direct impact on the amount of aid and that consequently, the charge does not form an integral part of the scheme.
- (167) The Authority notes that this assessment is based on the current impact of the revenue from the levy on the amount of aid granted. Substantive changes of the scheme and its method of financing may affect that finding.

## 11. Transparency

- (168) To ensure transparency in accordance with points 196-197 of the EAG, the Norwegian authorities have confirmed that program descriptions and criteria of all the chapters of all the programmes are available on Enova's website ([www.enova.no](http://www.enova.no)). Additionally, new calls for applications are announced in major national and regional newspapers.
- (169) In light of this, the Authority concludes that the Energy Fund scheme meets the requirements of points 196-197 of the EAG.

## 12. Reporting

- (170) The Norwegian authorities are subject to various reporting obligations with regards to the Energy Fund scheme.
- (171) Firstly, the Authority recalls the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Articles 5 and 6 of Decision No 195/04/COL to provide annual reports on the implementation of the scheme.
- (172) Secondly, the Norwegian authorities are reminded of the reporting obligation of point 193 of the EAG, according to which, the Norwegian authorities shall provide the following information as regards large undertakings:
- the names of the beneficiaries,
  - the aid amount per beneficiary,
  - the aid intensity,
  - a description of the objective of the measure and of what type of environmental protection it is intended to promote,
  - the sectors of activity where the aided projects are undertaken, and
  - an explanation of how the incentive effect has been respected, notably using the indicators and criteria mentioned in Chapter 5 of the EAG.
- (173) Finally, the Norwegian authorities have committed to, on a biannual basis, provide the Authority with reports on what constitutes the normal rate of return, for the various activities that are eligible for aid under the Energy Fund.

## 13. Conclusion

- (174) On the basis of the foregoing assessment, the Authority considers that the notified scheme is compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement.
- (175) The Norwegian authorities are reminded that all plans to modify this scheme must be notified to the Authority.

HAS ADOPTED THIS DECISION:

*Article 1*

The Energy Fund scheme notified on 9 July 2010 is compatible with the EEA Agreement.

*Article 2*

The implementation of the Energy Fund scheme is authorised accordingly.

*Article 3*

This Decision is addressed to the Kingdom of Norway.

*Article 4*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 18 July 2011.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
President

Sverrir Haukur Gunnlaugsson  
College Member