

Case handler: Anne De Geeter  
Tel: +32 2 286 1883  
e-mail: [ADG@eftasurv.int](mailto:ADG@eftasurv.int)

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Norwegian Ministry of Petroleum and Energy  
Postboks 8148 Dep  
0033 Oslo  
Norway

Dear Sir/Madam,

**Subject: Request for Information concerning Directives 2009/72 and 2009/73's provisions related to national regulatory authorities for Norway**

By letter dated 14 February 2020 (Doc No 1112483), the EFTA Surveillance Authority ("ESA") invited the Norwegian Government to submit tables of correspondence ("ToCs") for the provisions related to national regulatory authorities of the following Acts:

*Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ("the Electricity Market Directive");<sup>1</sup>*

*Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ("the Gas Market Directive").<sup>2</sup>*

On 15 May 2020, the Norwegian Government submitted the requested information (Doc No 1133231, 1133233 and 1133235).

ESA's Internal Market Affairs Directorate ("the Directorate") is in the process of examining the information received from the Norwegian Government, with regard to the level of independence and tasks of the appointed national regulatory authority ("NRA"). For the purpose of this examination, the Directorate identified several areas where further clarifications are needed, and therefore requests the Norwegian Government to provide the information identified in this letter.

## **1. Establishment, structure and organisation of the NRA and appeal body**

The Directorate wishes to better understand how the requirements of the Electricity and Gas Markets Directives that NRAs are independent from the Government and the industry, that they exercise their powers impartially and transparently<sup>3</sup> and that parties affected by NRAs' decisions have a right of appeal to a body independent from the parties involved and the Government,<sup>4</sup> are implemented in Norway.

The Directorate therefore invites the Norwegian Government to explain how compliance with the criteria regarding independence, impartiality and transparency of *Reguleringsmyndigheten for Energi* ("RME") and *Energiklagenemnda* (the "Energy

<sup>1</sup> OJ L 211, 14.8.2009, p. 55, incorporated into the EEA Agreement at point 22 of Annex IV by Decision of the EEA Joint Committee No 93/2017 of 5 May 2017.

<sup>2</sup> OJ L 211, 14.8.2009, p. 94, incorporated into the EEA Agreement at point 23 of Annex IV by Decision of the EEA Joint Committee No 93/2017 of 5 May 2017.

<sup>3</sup> Articles 35 and 39 of, respectively, the Electricity and Gas Markets Directives.

<sup>4</sup> Articles 37(17) and 41(17) of, respectively, the Electricity and Gas Markets Directives.

Appeals Board”) are ensured in practice, bearing in mind the criteria taken into account in the European Commission’s Interpretative Note on Regulatory Authorities<sup>5</sup> and the study commissioned by the European Commission on NRA independence.<sup>6</sup> The Directorate also invites the Norwegian Government to share the rules of procedures applicable to RME and to explain how these rules were adopted, and how they are applied.

Considering that RME is organised as a unit within the Norwegian Water Resources and Energy Directorate (“NVE”), the Directorate welcomes all relevant information on how the independence and separation between RME and NVE is ensured.

The Directorate finally invites the Norwegian Government to explain how the administrative subordination of RME to the Ministry of Petroleum and Energy (“the Ministry”) works, and what is its impact on RME’s independence.

## **2. Tasks and powers of the NRA**

### ***2.1. Tasks related to the setting of terms and conditions or methodologies***

The Electricity and Gas Markets Directives provide that the NRAs shall be responsible for fixing or approving at least the methodologies used to calculate or establish the terms and conditions for (i) connection and access to national networks, including transmission and distribution tariffs or their methodologies, (ii) balancing services and (iii) access to cross-border infrastructures.<sup>7</sup>

The Directorate invites the Norwegian Government to describe the allocation of competences between the Ministry, NVE, RME and system operators with regard to the setting of electricity and gas tariffs as well as terms and conditions or methodologies under Articles 37(6) and 41(6) of, respectively, the Electricity and Gas Markets Directives, and to explain how this allocation allows RME to independently carry out its tasks.

The Directorate also invites Norway to clarify whether:

- there is, in the relevant Norwegian legal framework, an explicit obligation upon RME to publish the methodologies or the terms and conditions it is required to approve under Articles 37(6) and 41(6) of, respectively, the Electricity and Gas Markets Directives;
- RME has the powers to (i) amend terms and conditions or methodologies, including tariffs, and the electricity congestion management rules implemented by system operators and (ii) fix provisional tariffs or methodologies for the setting of electricity and gas tariffs, in accordance with Articles 37(9) and (10) and 41(9) and (10) of, respectively, the Electricity and Gas Markets Directives.

The Directorate finally wishes to better understand the scope of application of the Gas Directive in Norway. Therefore, the Norwegian Government is invited to provide a high level description of the Norwegian gas market (transmission and distribution networks,

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<sup>5</sup> Commission Staff Working Paper, 22 January 2010, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – The regulatory authorities (“Commission’s Interpretative Note on Regulatory Authorities”), available at: [https://ec.europa.eu/energy/sites/ener/files/documents/2010\\_01\\_21\\_the\\_regulatory\\_authorities.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_regulatory_authorities.pdf)

<sup>6</sup> Study commissioned by the European Commission Directorate General for Energy and undertaken by Spark Legal Network, Trinomics and University of Groningen. Report “Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy” was released in 2019 and available at: <https://op.europa.eu/fr/publication-detail/-/publication/e5f886d6-917d-11e9-9369-01aa75ed71a1>

<sup>7</sup> Articles 37(6) and 41(6) of, respectively, the Electricity and Gas Markets Directives.

storage and LNG facilities) and the extent of application of the Gas Market Directive to this market (e.g. system subject to gas tariffs).

## **2.2. Other tasks**

The Electricity and Gas Markets Directives entrust NRAs with monitoring activities, the scope of numerous of them being described in Article 37 and 41 of, respectively, the Electricity and Gas Markets Directives. The Directorate understands that RME has been entrusted with the overall competence of monitoring and controlling electricity and gas undertakings, and that the explicit scope of the NRAs' monitoring duties has not been mirrored in the Norwegian legal order. The Directorate further notes that it appears that the explicit scope of some other NRAs' tasks, not related to monitoring, is not mirrored in the Norwegian legal order.

To ease the examination of the information provided by the Norwegian Government in the ToCs, the Norwegian Government is invited to provide, for each task listed in Articles 37 and 41 of, respectively, the Electricity and Gas Markets Directives, as well as with regard to the certification tasks foreseen under Articles 10 and 11 of the Electricity and Gas Markets Directives, a brief and synthetic overview of the actions undertaken by RME, the actions that are undertaken by other bodies, including the Ministry, NVE and the Energy Appeals Board, the results of these actions, and for each task, the powers that can be exercised by each body (see also Section 2.3 below).

## **2.3. Powers**

The Electricity and Gas Markets Directives require NRAs to have appropriate powers to carry out their tasks.<sup>8</sup> NRAs should have the powers to issue binding decisions, carry out investigations and to impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the markets, require any information and impose effective, proportionate and dissuasive penalties on electricity and gas undertakings. NRAs should also have appropriate rights of investigations and relevant powers of instructions for identified dispute settlements.

The Directorate invites the Norwegian Government to clarify whether RME has the power to carry out investigations.

To ease the examination of the information provided by the Norwegian Government in the ToCs, the Directorate also asks the Norwegian Government to map the powers of RME and other competent bodies with the corresponding tasks, as described in Section 2.2 above.

## **3. Dispute settlement**

The Electricity and Gas Markets Directives allow parties having a complaint against a system operator in relation to that operator's obligation under the Directives to refer the complaint to NRAs, for decision within two months.<sup>9</sup> They also allow parties to submit a complaint for review to NRAs when they are affected by decisions taken by the NRAs on terms and conditions or methodologies, or where the NRAs have a duty consult on proposed tariffs or methodologies.<sup>10</sup>

In the electricity sector, the Directorate wishes to better understand the right to refer complaints to RME for "*disagreements on terms for connection to and use of the grid*".<sup>11</sup> It

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<sup>8</sup> Articles 37(4) and 41(4) of respectively the Electricity and Gas Markets Directives.

<sup>9</sup> Articles 37(11) and 41(11) of respectively the Electricity and Gas Markets Directives.

<sup>10</sup> Articles 37(12) and 41(12) of respectively the Electricity and Gas Markets Directives.

<sup>11</sup> Articles 37(11) of the Electricity Market Directive.

invites the Norwegian Government to (i) clarify the scope of disagreements covered by the “*terms for connection to and use of the grid*”, and (ii) explain why the two months’ deadline for RME’s decision can be extended.<sup>12</sup>

The Directorate also invites the Norwegian Government to clarify whether a review process is possible in Norway, and to which authority and how RME’s regulatory decisions can be appealed.

#### 4. Cooperation with other authorities and exchange of information

The Directorate understands that RME cooperates with several Norwegian authorities to conduct its tasks. The Directorate invites the Norwegian Government to clarify with which national authorities RME cooperates for the execution of its tasks, as well as the level and form of cooperation.

The Directorate notes from the ToCs submitted by the Norwegian Government that several Regulations require RME to share information with NVE, with the exception of confidential information (e.g. the Regulation relating to the quality of supply in the power system).<sup>13</sup> The Directorate invites the Norwegian Government to explain the purpose of the information sharing and its impact on the independence of RME.

#### 5. Other

The Directorate identified at this stage several provisions in the Norwegian legal framework that raised questions of interpretations. The Norwegian Government is therefore invited to clarify the following:

- the NEM Regulation,<sup>14</sup> Section 2-1, first subsection, and the Natural Gas Regulation,<sup>15</sup> Section 1-4, appoint RME as NRA for the sale of electricity and gas: is RME’s scope of competence limited to the sale of electricity and gas?
- the NEM Regulation, Section 2-4, second subsection, foresees that RME shall ensure that decisions taken by ESA are “*implemented in accordance with Norway’s EEA legal obligations*”<sup>16</sup>: how exactly is it foreseen that ESA’s decisions will be implemented into the Norwegian legal order?
- in Regulation C relating to the system responsibility in the power system, Section 26,<sup>17</sup> RME is entitled to issue orders for the implementation of the Regulations. Can RME also issue orders to ensure the implementation of the decisions taken by the system operator?
- are explicit measures foreseen for the breach of confidentiality obligations, in accordance with Articles 37(14) and 41(14) of the Electricity and Gas Markets Directives?

<sup>12</sup> Section 4-13 of the Regulation of 24 October 2019 No. 1413 governing network regulation and the energy market (NEM regulation). In Norwegian: *FOR-2019-10-24-1413 - Forskrift om nettregulering og energimarkedet (NEM)*.

<sup>13</sup> Regulation of 30 November 2004 No. 1557 relating to the quality of supply in the power system. In Norwegian: *FOR-2004-11-30-1557 - Forskrift om leveringskvalitet i kraftsystemet*.

<sup>14</sup> Regulation of 24 October 2019 No. 1413 governing network regulation and the energy market (NEM regulation). In Norwegian: *FOR-2019-10-24-1413 - Forskrift om nettregulering og energimarkedet (NEM)*.

<sup>15</sup> The Natural Gas Regulation of 14 November 2003 No. 1342. In Norwegian: *FOR-2003-11-14-1342 - Forskrift til lov om felles regler for det indre marked for naturgass (naturgassforskriften)*.

<sup>16</sup> In Norwegian: *I utøvelsen av sine oppgaver skal Reguleringsmyndigheten for energi sørge for at beslutninger truffet av EFTAs overvåkinsorgan i henhold til EØS-avtalen vedlegg IV nr. 47 blir gjennomført i samsvar med Norges EØS-rettslige forpliktelser*.

<sup>17</sup> Regulation of 7 May 2002 No. 448 relating to the system responsibility in the power system. In Norwegian: *FOR-2002-05-07-448 - Forskrift om systemansvaret i kraftsystemet*.

- The Norwegian Government is finally invited to further explain why it is considered not necessary to implement provisions of the Electricity and Gas Markets Directives related to the freedom of contract<sup>18</sup> and the relations with Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC, Directive 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.<sup>19</sup>

The Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *16 November 2020*.

Yours faithfully,

Kristin Saether Bangsund  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Kristin Saether Bangsund.*

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<sup>18</sup> Referred to in Articles 37(1)(l) and 41(1)(l) of respectively the Electricity and Gas Markets Directives.

<sup>19</sup> Referred to in Articles 40 and 44 of respectively the Electricity and Gas Markets Directives.