

EUROPEJSKI OBSZAR GOSPODARCZY

URZĄD NADZORU EFTA

Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia o Nadzorze i Trybunale w sprawie Norweskiego Funduszu Energetyki (Norwegian Energy Fund) (sprawa nr 57473 — dawna sprawa nr 47756)

(2005/C 196/08)

Na mocy decyzji 122/04/COL z dnia 18 maja 2004 r., zamieszczonej po niniejszym streszczeniu w języku oryginału, Urząd Nadzoru EFTA rozpoczął postępowanie zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia pomiędzy Państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (Porozumienia o Nadzorze i Trybunale). Rząd Norwegii został poinformowany — otrzymał kopię wymienionej decyzji.

Urząd Nadzoru EFTA niniejszym wzywa Państwa EFTA, Państwa Członkowskie UE i zainteresowane strony do przesyłania uwag w sprawie środka, o którym mowa, w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia na adres Urzędu Nadzoru EFTA w Brukseli:

EFTA Surveillance Authority
35, Rue Belliard
B-1040 Brussels

Wymienione uwagi zostaną przekazane rządowi Norwegii. Zainteresowane strony przedstawiające uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o objęcie ich tożsamości poufnością.

STRESZCZENIE

Procedura

Pismem z dnia 5 czerwca 2003 r. rząd Norwegii, w trybie art. 1 ust. 3 protokołu 3 do Porozumienia o Nadzorze i Trybunale, zawiadomił Urząd Nadzoru EFTA (zwany dalej urzędem) o zmianach, jakim poddano dwa programy pomocy mające na celu uruchomienie „Programu dotacji na rzecz wprowadzania nowych technologii w dziedzinie energii” oraz „Środków informacji i edukacji w dziedzinie oszczędzania energii”.

Opis środka pomocy

„Program dotacji na rzecz wprowadzania nowych technologii w dziedzinie energii” był przez Norwegię prowadzony już na długo przed wejściem w życie Porozumienia EOG. Służył udzielaniu wsparcia inwestycyjnego na wprowadzanie technologii w dziedzinie energii odnawialnej. Drugim z programów, pod nazwą „Środki informacji i edukacji w dziedzinie oszczędzania energii” Norwegia udzielała wsparcia kampaniom oraz szkoleniom na rzecz oszczędności w dziedzinie energii dla przemysłu, sektora komercyjnego i dla gospodarstw domowych.

Programy zostały poddane zmianom. Przynajmniej, zostały połączone w jeden wspólny Fundusz Energetyki, z którego będą finansowane. Ponadto, nowy Fundusz winien być finansowany nie tylko w drodze dotacji publicznych, ale także z opłaty nałożonej na stawki dystrybutorów energii elektrycznej. Poza

tym, Fundusz Energetyki byłby administrowany przez nowo powstały organ administracyjny Enova, będący własnością skarbu państwa. Enova działa od 1 stycznia 2002 r., to jest od daty utworzenia Funduszu Energetyki.

Fundusz Energetyki ma za zadanie wspieranie oszczędności energii oraz wspieranie nowych, bezpiecznych dla środowiska form energii — których łączne zużycie do końca 2010 r. ma wynieść minimum 10TWh.

Wsparcie zgłoszone i stosowane do daty podjęcia decyzji

Co do inwestycyjnego wsparcia *energii odnawialnej*, Norwegia ogranicza się do wsparcia dla projektów energetycznych zgodnych z definicją *odnawialnych źródeł energii*, określoną w art. 2 dyrektywy (WE) nr 77/2001/WE. Energia wodna nie jest uprawniona do otrzymania tego wsparcia. Enova wylicza wartość pomocy jako aktualną różnicę między przewidzianymi w projekcie kosztami produkcji a ceną rynkową analogicznej ilości energii w trakcie dokonywania inwestycji, a więc stosuje kalkulację na bazie aktualnej wartości netto. Cena energii wybrana dla celów kalkulacji aktualnej wartości netto pochodzi bądź to z danych Nordpool (skandynawskiego rynku wymiany energii), bądź — w przypadku ciepłowni miejskich — jest to cena, jaką użytkownik końcowy płaci za energię z paliw kopalnych. W momencie powołania programu, wedle wiedzy dostępnej urzędowi, nie istniały ustalenia odnośnie do reguł określających szczegółowo jakie koszty, zwłaszcza w sferze inwestycji, są uznawane za kwalifikowane według Enovy.

Według władz norweskich, projekty powinny otrzymywać jedynie kwoty pomocy umożliwiające rozpoczęcie projektu, tj. doprowadzające do podjęcia decyzji o inwestycji. Jednakże, mechanizm wsparcia w ramach Funduszu nie zawierał dokładnych warunków pozwalających na stwierdzenie, czy doszło do rozpoczęcia projektu — a więc kiedy aktualna wartość netto dla danego projektu równa jest zeru. Nie pojawiły się żadne widoczne ograniczenia, które wzbraniałyby państwu dopłacać powyżej tej granicy. Każdy z projektów mógł również przynosić zysk z kapitału, ustalony na poziomie 7 % plus premia za ryzyko w zależności od rodzaju projektu i od rodzaju objętej nim energii.

Pomoc na środki służące oszczędności energii oblicza się tą samą metodą kalkulacji do aktualnej wartości netto, jak to ma miejsce przy projektach energii odnawialnej. Trzecią kategorią środków pomocowych jest wsparcie dla projektów obejmujących nowe technologie energetyczne dotyczące projektów, które przynosząc zyski wymagają dalszych nakładów na rozwój.

Enova udzieliła pomocy także programom edukacyjnym i informacyjnym. Niektóre z nich zakończono z dniem 1 stycznia 2004 r. Ponadto, udzieliła ona wsparcia na rzecz usług doradczo-konsultingowych w dziedzinie badań nad oszczędzaniem energii. W odniesieniu do przynajmniej części z tych programów Enova cieszyła się pełną swobodą decyzji. Prowadzi ona obecnie program zmierzający do poprawy umiejętności planowania energetycznego władz lokalnych.

Działalność Funduszu przewidziano na okres do dnia 31 grudnia 2010 r. Do przyjęcia decyzji, większość projektów wspieranych przez Enovę nie przekracza progu *de minimis*, lub też dotyczy zakupów (jak np. w ramach kampanii marketingowych na rzecz efektywnego używania energii) dokonywanych przez Enovę na zasadach obowiązujących przy zamówieniach publicznych.

Uwagi i proponowane zmiany systemu zgłoszone przez władze Norwegii

Władze norweskie zwracają uwagę, że proponowana aktualna wartość netto może zapewnić, że projekty nie będą dofinansowywane w stopniu wykraczającym poza „dodatkowe koszty inwestycji” na produkcję energii odnawialnej, nawet gdyby pominąć bezpośrednie porównanie z elektrowniami tradycyjnymi. Norwegia zaproponowała pewne poprawki w systemie celem uzgodnienia systemu Funduszu Energetyki z przepisami w zakresie pomocy publicznej zawartymi w Porozumieniu EOG.

Dla wsparcia energii odnawialnej, dotyczy to w szczególności zobowiązania do ograniczenia wartości dotacji do wysokości gwarantującej, że projekt o ujemnej aktualnej wartości osiągnie dzięki pomocy wartość zerową. Za wyjątkiem energii wytwarzanej z wykorzystaniem biomasy, której przysługuje wyższe wsparcie, Enova będzie przestrzegać progu określonego w pkt 54 wytycznych Urzędu Nadzoru w sprawie ochrony środowiska (ograniczających pomoc do różnicy między kosztami produkcji a ceną rynkową odpowiedniej energii) i nadal ograniczać pomoc do amortyzacji elektrowni. Koszty operacyjne projektów energii odnawialnej, które przekraczają analogiczne koszty przy zastosowaniu tradycyjnych źródeł energii nie powinny być uprawnione do takiej pomocy. Niezbędny zwrot z kapitału powinien być określany przez niezależnych ekspertów, zaś kwalifikowane koszty inwestycji powinno się wzorować na decyzji Komisji Europejskiej N 75/2002 —

Finlandia. Co do środków służących oszczędności energii, Enova przeprowadzi dodatkową kalkulację kosztów w myśl pkt 25 i 32 wytycznych Urzędu Nadzoru w sprawie ochrony środowiska, to jest przez porównanie wartości projektu z podobnym projektem nie zakładającym infrastruktury energooszczędnej. Co zaś do środka zakładającego wsparcie celów w zakresie informacji i edukacji, Norwegia będzie zgłaszać Urzędowi planowane na przyszłość programy. Wsparcie dla samorządów lokalnych powinno ograniczać się do pełnienia przez owe samorzady służby publicznej.

Pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG

Urząd czyni na wstępie założenie, że wymienione środki stanowią pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG. Dotacje z budżetu państwa, jak również opłata nakładana na taryfy dystrybucyjne stanowią część zasobów państwowych. Opłata ta jest nakładana i administrowana przez państwo, wpływa do funduszu utworzonego przez państwo, a jednocześnie ma wspierać pewne szczególne przedsiębiorstwa, jakimi są producenci odnawialnej energii.

Co się tyczy środków w zakresie informacji oraz edukacji wspieranych w przeszłości przez Enovę, Urząd zauważa, iż dla większości programów Enova korzystała ze znacznej swobody decyzji. Jak wykazuje orzecznictwo, pozwala to na zapewnienie niektórym przedsięwzięciom znacznie korzystniejszych warunków niż innym, i na skierowanie wsparcia w kierunku instrumentów o bardziej wybiórczym, nie zaś powszechnym, zakresie. Odbiorcy pomocy działają na rynku, w obrębie którego prowadzi się wymianę handlową w ramach EOG. Taka pomoc narusza lub grozi naruszeniem zasad konkurencji i handlu pomiędzy umawiającymi się stronami. W konsekwencji działanie Funduszu Energetyki stanowi nieuprawnioną pomoc państwa w rozumieniu art. 1 lit. f) część II protokołu 3 do Porozumienia o Nadzorze i Trybunale.

Zgodność z art. 61 ust. 3 lit. c) Porozumienia EOG łącznie w pozwiązaniu z wytycznymi Urzędu w sprawie ochrony środowiska

Urząd dokonał w swej decyzji odrębnej oceny systemu Funduszu Energetyki w formie zgłoszonej i stosowanej do czasu wydania decyzji, a także systemu ze zmianami zaproponowanymi przez Norwegię.

System zgłoszony i stosowany do daty podjęcia decyzji

Urząd uznaje pomoc na produkcję energii odnawialnej za rodzaj pomocy inwestycyjnej, która winna otrzymywać wsparcie zgodnie z zasadami ustalonymi w pkt 27 i 32 wytycznych Urzędu w sprawie ochrony środowiska. Wątpliwości Urzędu wynikają natomiast z faktu, iż system Funduszu Energetyki nie opiera się na metodach kalkulacji pozwalających na ustalenie kosztów dodatkowych poprzez zestawienie z tradycyjnymi formami produkcji energii elektrycznej. Urząd uznaje za wątpliwe, czy bez zaprowadzenia jakichkolwiek zmian, zaakceptować można proponowaną kalkulację na bazie aktualnej wartości netto, opartą na zasadach podobnych do zawartych w pkt 54 wytycznych Urzędu w sprawie ochrony środowiska. W szczególności, Urząd zaznacza, iż nie istnieją dostateczne gwarancje, które mogłyby wykluczyć wypadki nadmiernej rekompensy i co więcej zapewnić, by wsparcie obejmowało tylko koszty związane z inwestycją.

Te same wątpliwości dotyczą wsparcia dla środków dotyczących oszczędności energii i projektów w zakresie nowych technologii energetycznych. W szczególności w odniesieniu do środków oszczędności energii, Urząd zauważa, że w przeciwieństwie do wspierania energii odnawialnych, które mogłyby być dofinansowane nawet do wartości 100 % dodatkowych kosztów inwestycji, wsparcie dla środków dotyczących oszczędności energii pozostaje ściśle ograniczone do intensywności pomocy równej 40 %. Co się tyczy projektów w zakresie nowych technologii energetycznych, Urząd musi jeszcze potwierdzić, czy są one ograniczone do projektów dotyczących zakładających wykorzystanie energii odnawialnych, co ma znaczenie dla zastosowania wytycznych w sprawie ochrony środowiska. Podobnie, Urząd będzie kontynuował dochodzenie na ile projekty te, wymagające dalszych działań, winno się raczej oszacować wedle wytycznych Urzędu nt. badań i rozwoju technologii.

Co do wsparcia udzielanego dotąd środkom w zakresie informacji oraz edukacji z przekroczeniem progów *de minimis*, Urząd stwierdza, że wsparcie to nie ograniczało się do pomocy udzielanej małym i średnim przedsiębiorstwom. Urząd uznaje, iż w zakresie pomocy na usługi doradcze i konsultingowe koszty takie mogłyby się kwalifikować do pomocy na rzecz małych i średnich przedsiębiorstw zgodnie z zasadami jakie ustalono w pkt 36 wytycznych Urzędu w sprawie ochrony środowiska. Tym niemniej, Urząd nie posiada dostatecznej wiedzy by stwierdzić z pewnością, iż wsparcie to ograniczało się do tej grupy przedsiębiorstw.

System obejmujący zmiany proponowane przez Norwegię

Urząd zbada, w ramach formalnego postępowania wyjaśniającego, na ile zaproponowana przez władze norweskie kalkulacja na bazie aktualnej wartości netto może być zaakceptowana w przypadku udzielania pomocy na inwestycje. Metoda ta pomija bezpośrednio porównanie projektu zakładającego wykorzystanie energii odnawialnej z wybraną elektrownią tradycyjną. Niemniej jednak metoda aktualnej wartości netto może, przy pewnych założeniach, zabezpieczać przed nadmierną rekompensacją, to znaczy przypadkiem, w którym otrzymane wsparcie przekracza dodatkowe koszty inwestycji.

Zgodnie ze wstępną oceną Urzędu, modelowa kalkulacja z użyciem aktualnej wartości netto, która przyjmowałaby stały przepływ przychodów i kosztów operacyjnych w danym okresie wykazuje, że przy niższych kosztach operacyjnych i wymaganej stopie zwrotu niewyższej niż dla tradycyjnych źródeł, elektrownia produkująca energię ze źródeł odnawialnych uzyskiwałaby dofinansowanie niższe od dodatkowych kosztów inwestycji. W oparciu o dane liczbowe podane przez Norwegię, wedle których koszty operacyjne elektrowni tradycyjnej mogą być dwukrotnie wyższe w porównaniu z

produkcją energii z odnawialnych źródeł, zagrożenie nadmierną rekompensatą jest nieznaczne. Mogłoby do niej dojść jedynie w przypadku projektów o wyjątkowo wysokim poziomie ryzyka, który mógłby zaniżyć aktualną wartość netto projektowi doprowadzić do wyższego dofinansowania. Realizacja tak ryzykownego projektu nie wydaje się prawdopodobna. Urząd zaznacza jednak, iż wobec równych lub zbliżonych kosztów operacyjnych elektrowni tradycyjnych i korzystających ze źródeł energii odnawialnej, oszacowanie ewentualności nadmiernej rekompensaty zależy w znacznie większym stopniu od stopy dyskontowej z doliczoną do niej premią z tytułu ryzyka. Norwegia zadeklarowała, że podejmuje się przestrzegać progu określonego w pkt 54 wytycznych Urzędu w sprawie ochrony środowiska, który ogranicza pomoc do różnicy między kosztami produkcji a ceną rynkową i ponadto ogranicza pomoc do amortyzacji elektrowni.

Urząd będzie nadal badać możliwość zastosowania w tym przypadku zasady ustalonej w pkt 54 wytycznych Urzędu w sprawie ochrony środowiska, stwierdza jednakże, iż wbrew innemu wytycznym w sprawie pomocy państwa, wszelka pomoc inwestycyjna i pomoc operacyjna na rzecz wytwarzania energii ze źródeł odnawialnych zalicza się do pomocy związanej z kosztami inwestycyjnymi. Wytyczne w sprawie ochrony środowiska pozwalają zasadniczo na wsparcie w ramach pomocy operacyjnej na wytwarzania energii ze źródeł odnawialnych, o ile ogranicza się ją do amortyzacji elektrowni.

Urząd podejmie dalsze kroki w kierunku ustalenia, czy projekt zakładający produkcję energii odnawialnej jest uprawniony do otrzymania pomocy państwa, mimo że z całą pewnością nie mamy tu do czynienia z pomocą państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG. W tym względzie Urząd podda analizie pkt 54 wytycznych w sprawie ochrony środowiska, w myśl którego „dalszej produkcji energii przez elektrownię wsparcie nie przysługuje”. Wedle wstępnego przeglądu sprawy przez Urząd, odpowiadałoby to próbie proporcjonalności zgodnie z art. 61 ust 3 lit. c) Porozumienia EOG, wedle której projekt powinien otrzymać tylko tyle pomocy, ile jest konieczne. Urząd ustanowi, w toku procedury wyjaśniającej, w jaki sposób możliwa byłaby dalsza pomoc w formie interwencji państwowej.

Urząd nie może jednak wydać ostatecznej opinii w kwestii wsparcia na rzecz projektów nowych technologii w energetyce, ani na temat wsparcia na usługi doradcze i konsultingowe. Zmiany dotyczące tych środków są nadal rozważane przez rząd norweski. Urząd nie przerwie głębszych badań nad mechanizmem finansującym w formie opłaty nałożonej na taryfy dystrybucyjne, którą można zakwalifikować jako opłatę parafiskalną, ponieważ pośrednio dotyczy ona wwozu. Jednakże ta opłata nie ogranicza się jedynie do wsparcia dla producentów krajowych.

EFTA SURVEILLANCE AUTHORITY DECISION**No 122/05/COL****of 18 May 2005****to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Norwegian Energy Fund (Norway)**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area ⁽¹⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾, in particular to Article 24 as well as Article 1(2) in Part I and Articles 4(4) and 10 in Part II of Protocol 3 thereof,

Having regard to the Authority's Guidelines ⁽³⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 15 relating to aid for environmental protection, thereof,

Whereas:

I. FACTS

1. PROCEDURE

By letter dated 5 June 2003 from the Norwegian Mission to the European Union, forwarding a letter from the Ministry of Petroleum and Energy and the Ministry of Trade and Industry dated 4 June 2003, both received and registered by the Authority on 10 June 2003 (Doc. No 03-3705-A, registered under case SAM 030.03006), the Norwegian authorities notified, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, alterations of two existing aid schemes, namely 'Grant programme for introduction of new energy technology' and 'Information and education measures in the field of energy efficiency'.

By letter dated 16 June 2003 (Doc. No 03-3789-D), the EFTA Surveillance Authority (hereinafter 'the Authority') informed the Norwegian authorities that due to the fact that the scheme had already been put into effect on 1 January 2002, i.e. before the notification, the measure would be assessed as 'unlawful aid' in accordance with Chapter 6 of the Authority's Procedural and Substantive Rules in the Field of State Aid ⁽⁴⁾.

By letter dated 23 July 2003 (Doc. No 03-5070-D), the Authority requested further information, to which the Norwegian authorities responded by letter dated 11 September 2003, received and registered by the Authority on 15 September 2003 (Doc. No 03-6210-A). On 9 October 2003 the Authority and the Norwegian authorities had a meeting to discuss various aspects of the case.

By letter dated 19 December 2003, the Authority requested further information (Doc. No 03-7431-D).

The Norwegian authorities replied to the information request by letter from the Norwegian Mission dated 15 July 2004, forwarding a letter from the Ministry of Trade and Industry dated 13 July 2004 and a letter by the Ministry of Petroleum and Energy dated 9 July 2004, received and registered by the Authority on 16 July 2004 (Event No 287857). A meeting was held between the Authority and the Norwegian authorities on 23 September 2004.

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994 and EEA Supplement No 32, 3.9.1994. The Guidelines were last amended on 15 December 2004.

⁽⁴⁾ That chapter was subsequently deleted by Authority Decision 14 July 2004, 195/04/COL.

By letter dated 5 March 2005 (Event No 311504), the Authority requested further information. The Norwegian authorities replied to this request by letter from the Norwegian Mission to the European Union dated 12 May 2005, forwarding letters from the Ministry of Modernisation dated 9 May 2005 and the Ministry of Petroleum and Energy dated 2 May 2005. The letter was received and registered by the Authority on 13 May 2005 (Event No 310982).

2. DESCRIPTION OF THE SUPPORT MEASURES

2.1. Description of the former support schemes for new energy technology and energy efficiency measures

With its notification, the Norwegian government announced alterations of two existing schemes in the field of energy which have been operating since 1978/1979.

The first scheme was the 'Grant program for introduction of new energy technology' by which the Norwegian government gave investment support for the introduction of renewable energy technology. The second scheme, 'Information and education measures in the field of energy efficiency' concerned support for campaigns and courses on energy efficiency for the industry, commercial and household sectors.

The schemes were funded by grants from the fiscal budget. While in the beginning the schemes were administered by the Ministry of Petroleum and Energy, they were gradually transferred to the Norwegian Resources and Energy Directorate (NVE) in the early nineties.

The Authority was made aware of the schemes in 1994 and activities under these schemes have been reported to the Authority as part of the yearly reporting from Norway.

2.2 The alterations to the schemes as of 1 January 2002

The notified alterations to the schemes, which are the subject of the current notification, concerned:

- (i) the merger of the schemes under a new funding mechanism, the Energy Fund;
- (ii) a different way of financing the schemes by introducing a levy on the electricity distribution tariffs in addition to continued grants over the State budget; and
- (iii) the administration of the Energy Fund by the newly established administrative body Enova. Likewise new provisions and an Agreement between the Norwegian State and Enova have been adopted, which should ensure that the support measures attain certain newly identified energy policy objectives.

2.2.1 Merger of the two support schemes

On 1 January 2002 the Energy Fund was established and the two schemes 'Grant Program for introduction of new energy technology' and 'Information and education measures in the field of energy efficiency' were merged under that Fund. The Fund serves as a financing mechanism for support measures, which continue under the new regime.

2.2.2 The new mode of financing the Energy Fund

Whereas the existing schemes were funded by grants from the State budget, the newly established Energy Fund is financed by grants from the State budget as well as by means of a levy on the electricity distribution tariffs (not a levy on the energy production itself).

This levy is provided for by the Energy Fund Regulation of the Ministry of Petroleum and Energy of 10 December 2001⁽⁵⁾. According to section 3 in conjunction with section 2a) of the Energy Fund Regulation, any company which has been granted a license according to section 4-1 of the Energy Act⁽⁶⁾ ('omsetningskonsesjoner') should, when it charges the end user for the withdrawal of electrical energy from the grid, combine the invoice with a 0,3 øre/kWh supplement for each withdrawal (see also section 4-4 Energy Act).

⁽⁵⁾ 'Forskrift om innbetaling av påslag på nettariffen til Energifondet' (regulation relating to the payment of a levy on the electricity distribution tariff to the Energy Fund, hereinafter 'Energy Fund Regulation').

⁽⁶⁾ Lov av 29. juni 1990 nr. 50 om produksjon, omforming, overføring, omsetning og fordeling av energi m.m, energiloven.

The licensee shall then pay, in turn, a contribution to the Energy Fund of 0,3 øre/kWh multiplied by the amount of energy for which the end user in the distribution network is invoiced.

2.2.3 *The administration of the Energy Fund by Enova*

On 22 June 2001, Enova SF was established. Enova is a new administrative body, which is owned by the Norwegian State via the Ministry of Petroleum and Energy. It has been operating since 1 January 2002, i.e. the date when the Energy Fund was established.

Enova's principal task is to implement the support schemes, administer the Energy Fund and to reach the energy policy objectives which the Norwegian Parliament approved in 2000. Enova's principal tasks are further specified in a new Agreement between the Norwegian State (the Ministry of Oil and Petroleum) and Enova SF (hereinafter 'the Agreement')⁽⁷⁾.

According to Enova's own description, '*the establishment of Enova SF signals a shift in Norway's organization and implementation of its energy efficiency and renewable energy policy*'.

3. NATIONAL LEGAL BASIS FOR THE SUPPORT MEASURE

The national legal basis is a Parliamentary Decision of 5 April 2001⁽⁸⁾ with provisions by the Ministry of Petroleum and Energy of 21 December 2000⁽⁹⁾ as well as the Energy Act of 29 June 1990 no 50 (Energi-loven) with regulation of 10 December 2001 No 1377 concerning the levy on the electricity distribution tariff (Forskrift om innbetaling av påslag på nettariiffen til Energifondet).

Section 3 of the abovementioned Agreement provides that Enova shall administer resources from the Energy Fund in accordance with and within the framework of the Norwegian Parliament's resolution on the establishment of the Fund and the restrictions that form the basis for the resolution, namely the Energy Act and the respective regulations on the Energy Fund, the Energy Fund resolutions and other governmental resolutions relevant to the administration of the Fund's resources.

Enova shall administer the Energy Fund in a manner which ensures that the targets stipulated below are reached.

4. THE OBJECTIVE OF THE SUPPORT MEASURES

According to the Norwegian government, the establishment of the merged schemes under the funding of the newly established Energy Fund and the administration by Enova, should achieve a more cost-effective use of public funding.

As regards the objectives of the schemes, section 4 of the Agreement stipulates as a primary objective that the Energy Fund shall be used to promote an environmentally sound change in energy consumption and energy production. This shall be achieved by promoting energy saving measures as well as by increased access to environmentally sound energy (the latter aims at an increased use of renewable energy sources).

The following performance objective is to be achieved by 2010:

The Fund's resources shall contribute to the saving of energy and new environmentally sound energy, which together shall make up a minimum of 10 TWh by the end of 2010, of which

- a minimum of 4 TWh shall be from increased access to water-borne heating based on new renewable energy sources, heating pumps and thermal heating, and
- a minimum of 3 TWh shall be from increased use of wind energy⁽¹⁰⁾.

⁽⁷⁾ Revised Agreement of 22 September 2004, '*Avtale mellom den norske stat v/Olje- og energidepartementet og Enova SF om forvaltningen av midlene fra Energifondet i perioden 2002-2005*'.

⁽⁸⁾ Odelstingets vedtak til lov om endringer i lov 29. juni 1990 nr. 50 om produksjon, omforming, overføring, omsetning og fordeling av energi m.m. (energilova). (Besl.O.nr.75 (2000-2001), cf. Innst.O.nr.59 (2000-2001) and Ot.prp.nr.35 (2000-2001)).

⁽⁹⁾ Ot.prp.nr.35 (2000-2001).

⁽¹⁰⁾ On Enova's webpage, the increased use of land-based natural gas is mentioned as a further objective.

The Agreement stipulates as a secondary objective that the Fund's resources shall contribute to the saving of energy and to new, environmentally sound energy, which together shall make up a minimum of 5,5 TWh (originally 4,5 TWh) by the end of 2005.

These goals should be viewed against the background of the energy production in Norway, which is almost exclusively based on the use of hydropower. As stated by the Norwegian government in its budgetary proposal (St.prp.nr.1 2004-2005), it is important for Norway to become less dependent on that energy type and therefore promote the use of other, in particular renewable, energy sources. The following figures reflect this dependency:

Electricity production, import and export, February 2004 — January 2005 (GWh)

Total	111 476
Hydro	110 296
Thermal electricity	893
Wind power	287
+ Import	14 774
– Export	4 468

As can be seen from this table, Norway also imports some of its energy. The percentage of electricity imports in percentage of total consumption was 8 % in 2002, 6,8 % in 2003 and 8,5 % in 2004 ⁽¹⁾.

5. THE ENERGY FUND SYSTEM AS NOTIFIED AND APPLIED UNTIL NOW — THE DIFFERENT SUPPORT TYPES

5.1. General remarks on the Energy Fund

Enova can give investment support for energy saving systems and for production and use of renewable energy sources as well as initial investment aid for new energy technologies.

The level of subsidy is determined by a technical and financial evaluation of each project and priority is given to those projects which give the highest kilowatt-hour (kWh), saved or produced, per subsidised NOK. This leads to a competition of projects for the receipt of public funds with the goal being to choose the most efficient projects.

Calls for project proposals are announced in major national and regional newspapers at least biannually and for most programmes four times a year.

5.2. Renewable energy

The eligible projects

As to the investment support for the production and use of *renewable energy*, Norway supports energy projects which are defined in Article 2 of Directive 2001/77/EC ⁽²⁾ as renewable energy sources (see point 7 of the Authority's State Aid Guidelines on Environmental Aid, hereinafter 'the Environmental Guidelines'). According to the Norwegian authorities, hydropower, which is the traditional energy source used in Norway, should not be entitled to support ⁽³⁾. According to the information available to the Authority, the current rules on the Energy Fund system do not seem to entail such an explicit limitation.

As to the notion of 'use' of renewable energy sources, the Norwegian authorities specified that this notion should cover situations in which the investment is made for internal production, whereby the producer and the user is the same entity (which is often the case for heat production).

Enova regards the following projects as qualifying for support in general terms: wind energy, bio energy, tidal energy, geothermal energy, ocean wave energy. For solar energy this comprises passive solar building integrated solutions, solar heating systems and PV (photovoltaic) production.

⁽¹⁾ Net import figures.

⁽²⁾ OJ 2001 L 283/33. The Directive as such has not yet been incorporated into the EEA Agreement.

⁽³⁾ However, this was only clarified by the Norwegian authorities *during* the preliminary investigation.

When it comes to the notion of 'bioenergy', the Norwegian authorities have clarified that this term is used for renewable energy (electricity or heat) *based on* biomass as defined under the Directive 2001/77/EC. Bioenergy indicates that the project includes the conversion from biomass to electricity and/or heat in contrast to biomass projects which only concern the production and processing of biomass itself. The Authority understands that there could be situations in which the bioenergy consists only of a fraction of biomass.

The calculation of the support — the net present value calculation method

Enova calculates the support as the present value of the difference between production costs of the project and the market price of the relevant energy at the time of investment, i.e. it uses a net present value calculation (cash flow calculation).

According to an example submitted by the Norwegian authorities, the calculation is carried out according to the following calculation mechanism. The example below is an actual wind power project ⁽¹⁴⁾.

Investments			
Wind turbine	NOK	(...)*	(...)
Infrastructure and foundation	<>	(...)	(...)
Power electronics etc.	<>	(...)	(...)
Project management	<>	(...)	(...)
Cost of property/land and public fees	<>	(...)	(...)
Financing cost	<>	(...)	(...)
Allowance	<>	(...)	(...)
Investment Total	<>	8 875 000	100 %
Price of energy			
	NOK/kWh	(...)	
Spot price (average)	<>	(...)	
High season	<>	(...)	1 500
Mid season	<>	(...)	hours (**)
Low season	<>	(...)	1 000
Green certificate price	<>	(...)	hours (**)
Operational aid	<>	0	500 hours (**)
Operating costs			
	NOK/kWh		
Operations and maintenance	<>		
Grid tariff	<>		
Other			
Financial criteria and results (**)			
Investment aid from Enova	NOK	600 000	
Discount rate		7 %	
Net energy price	NOK/kWh	0,267	
Economic life	Years	20 years	
Net income annual income	NOK	800 000	
Net present value (NPV)	NOK	(399 789)	
Net present value incl. investment aid	NOK	200 211 ⁽¹⁾	
Energy/aid ration	kWh (***)/NOK	5,00	

(*) Brackets indicate business secrets.

(**) Operating hours.

(***) Annual energy production.

(1) The Norwegian authorities later claimed, however, that the return on capital in this example was not correctly assessed which — if that was corrected — would bring the NPV to zero.

⁽¹⁴⁾ Letter by the Norwegian authorities dated 11 September 2003 (Doc. No 03-6210), Annex 1 — investment aid evaluation method, page 7.

The single parameters of the calculation are explained further below:

The investment costs

When the scheme was established, according to the information available to the Authority, no rules were adopted to specify in detail which costs, in particular with regard to the investment, are considered by Enova to be eligible. The Authority notes, from other abstract model examples brought to its attention, that some of the projects might have received support also for so-called financial and indemnity costs or miscellaneous costs.

As the eligible costs were not specified further, the Authority cannot be entirely certain that no costs other than investment costs were supported by the Energy Fund.

The relevant energy price

In order to choose the relevant market price, the Norwegian authorities distinguish between three different situations:

Firstly, they consider the case of renewable energy production which is fed into the transmission grid and therefore competes with traditional generation of electricity as quoted on the Nordpool power exchange. This is the case for wind, bio, waste, solar, tidal and ocean wave energy and here the price quoted in Nordpool serves as a reference. On the Nordpool power exchange, both spot prices and forward prices up to three years can be observed. As investments are based on the expectations of future electricity prices, Enova refers to forward contracts which are traded on a daily basis. To cancel out random price fluctuations, a six month average of the latest tradable future contracts is used. The price is quoted on the submission date of the project application, which occurs four times a year.

The second case is that of district heat, which is distributed on the local distribution net and competes with heat from fossil fuels or from electricity. In this situation, Enova refers to the actual contract price ⁽¹⁵⁾ paid by the consumer (the price of the ordinary energy — from fossil fuels and electricity).

The third scenario covers energy production which is not fed into the distribution net (e.g. on site power generation based on residual steam not fed into the power grid). Here, the end user price including taxes is used.

The 'triggering off' effect

The objective of the aid scheme is to encourage investment into renewable energies which would otherwise not take place due to the fact that the energy price obtainable in the market does not cover the costs. For that reason, the subsidy shall only compensate the extra costs of the production of renewable energy and the support granted by Enova shall not exceed the amount deemed necessary in order to trigger the project, i.e. to encourage a positive investment decision.

However, when the Energy Fund and Enova were established there were, according to the Authority's information, no further specifications as to when the triggering effect would be considered to have been reached, e.g. when the project reaches a zero net present value ⁽¹⁶⁾. While analyses were made to establish when the project would break even, there were no explicit limitations which prevented State support above that point.

When projects are granted support, Enova and the aid recipient enter into an aid contract, which regulates the terms on which disbursement will take place. The disbursements might be adjusted in accordance with any cost reduction during the construction period. After the investment is realised, there is a follow-up on the realised costs against costs estimated in the application. If these factors differ to the advantage of the applicant, Enova can adjust the financial aid downward to reflect the actual cost structure ⁽¹⁷⁾.

⁽¹⁵⁾ Large customers profit often from discounts because of their large delivery contracts. This is taken into account by Enova when comparing prices of competing energy sources.

⁽¹⁶⁾ As the above example shows, the support granted by Enova might in some instances have led to a positive net present value of the project. The Authority is aware that the calculation was only given as an example and that Norway claims that in the concrete case referred to the return on investment had not been correctly taken into account. If that had been the case, the net present value would indeed have been zero. However, as there have been no clear rules in place to limit the support to a zero net present value, the Authority cannot be certain whether the support would indeed not have exceeded the threshold of a zero net present value.

⁽¹⁷⁾ In the Authority's understanding, there is no upwards adjustment in case of a disadvantage to the applicant.

The fair return on capital

The basis for the trigger off requirement includes a fair return on capital. The discount rate used is presently set at a rate of 7 % per annum (nominal, pre-tax rate) to which certain percentage points are added as a risk premium. The Norwegian government explained that the use of the capital asset pricing method is not suitable for project financing under the Energy Fund ⁽¹⁸⁾, as there are few renewable energy projects and even fewer are listed on the stock market from which the information to establish the risk of the asset would have to be derived.

The Norwegian government therefore suggested basing its analysis on public reports from acknowledged government institutions in Norway, whereby the risk premium would vary between 2,5 to 4,5 %, depending on the type of energy and project.

5.3. Energy saving measures

According to the system as notified ⁽¹⁹⁾, energy saving measures are calculated according to the same net present value calculation method used for renewable energy projects.

5.4. New energy technology

In this category, Enova supports technologies which still need some development and which need to be proven before they are economically viable. The projects might be linked both to energy efficiency or energy production.

Examples of such technologies are:

- a tidal energy installation (the tidal water which passes through a narrow strait drives a large propeller which again drives a generator);
- a wave energy installation (the movement in the waves is picked up and drives a generator);
- a hybrid wind and hydrogen installation (a wind turbine is used to produce electricity which again is stored as hydrogen which can be used for production of electricity when there is no wind).

Since these projects generate revenue, Enova uses the net present value calculation equally for them. The income of the projects is based on the generation of electricity and heat for sale, which, according to the Norwegian authorities, constitutes an income which makes the projects viable for the net present value calculation approach. The Authority has not yet seen limitation that this support is limited to the development of renewable energy technology. The Authority notes that some of the projects are in a pre-competitive stage.

5.5. Information and education programmes in the field of energy efficiency

Enova operates an energy information helpline, whereby information and advice are provided free of charge to anybody who is interested. Enova does not exercise any discretion as regards to whom such advice and information is provided.

Until 1 January 2004, Enova also provided a programme for the development of teaching material and learning concepts to stimulate and preserve knowledge in companies concerning renewable energies. This was done in a tendering process, and Enova paid 50 % of the development costs.

Likewise until 1 January 2004, Enova offered a programme on developing education courses in energy for technical personnel and engineers. This was organised by a tendering process. Only the first 50 persons to have completed the course got the course paid for by Enova.

⁽¹⁸⁾ A method which shows the risk adjusted return on capital as a function of the risk of the market portfolio and the risk of the asset (project) in question.

⁽¹⁹⁾ See however Norway's suggestion for the future handling of energy saving measures, section I 9.3 of this Decision.

Until 1 January 2004, Enova offered a programme by which queries which required concrete follow-up in undertakings on-site were handled by local sub-contractors which represented Enova in this field. The support was provided free of charge. The Norwegian authorities state that Enova did not enjoy any discretion in this respect.

While the programme was open to all interested undertakings, it seems that Enova enjoyed for some of the measures (teaching material, developing education) the discretion to dismiss projects which did not meet the objectives of the programme or could not ensure sufficient quality. The support element involved in these programmes might have exceeded the *de minimis* threshold as stipulated in the Act referred to under point 1e) of Annex XV to the EEA Agreement⁽²⁰⁾. These projects were neither limited to small and medium sized undertakings⁽²¹⁾ as mentioned in the Act referred to under point 1f) of Annex XV to the EEA Agreement nor structured to meet the requirements of the Act referred to as point 1d) in Annex XV to the EEA Agreement⁽²²⁾ (training aid).

Enova has also offered advisory and consultancy services free of charge to undertakings in the past, which were neither limited to aid below the *de minimis* threshold nor to small and medium sized enterprises. As of 2003, Enova granted money to firms to purchase such advisory and consultancy services, rather than rendering the service itself.

In addition, Enova runs a programme to improve energy planning skills in local municipalities, in particular public planning and area planning according to the Norwegian Planning and Building Act. The programme is offered free of charge.

The Authority so far does not have concrete or final data on the number of projects supported and the support granted for each project.

6. BUDGET AND DURATION OF THE SCHEME

The scheme came into force on 1 January 2002 and will remain in force as long as the agreement between the Norwegian State and Enova exists. The current duration of the agreement is 2002-2005. The agreement was revised in 2003 and in 2004. The prolongation of the agreement will be negotiated in autumn 2005 with a view to start a new period as of 1 January 2006. The envisaged duration time of the Energy Fund is therefore 31 December 2010.

The Norwegian Parliament had indicated that up to NOK 5 billion (approximately EUR 680 million) will be allocated to the scheme, over a period of ten years. This would result in a yearly budgetary allocation of approximately NOK 500 million (EUR 68 million). In the last three years EUR 46 million were spent in 2000, EUR 45 million in 2001 and EUR 38 million in 2002. As from 2002, approximately NOK 200 million (EUR 27 million) has been added yearly, stemming from the levy on the distribution tariffs.

7. NUMBER OF AID RECIPIENTS

Approximately 100 recipients per year are foreseen for the investment support for energy saving systems and renewable energy sources. About 200 aid recipients per year are foreseen for information and education measures.

Enova's total project portfolio until summer 2004 comprised 875 projects, of which 654 projects might have fallen below the *de minimis* threshold. Another 96 projects (above the *de minimis* threshold) concerned projects in favour of public entities and purchases carried out according to the public procurement rules⁽²³⁾. This left a number of 125 projects to assess further under the State aid provisions. During 2004, additional projects received aid and the total number relevant to the question of State aid rose from 125 projects to 232, of which 56 concerned renewable energy projects. The Authority lacks further information on the remaining 232 projects so far supported to assess whether they were in compliance with the State aid provisions.

⁽²⁰⁾ Incorporating Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001, p.30, into the EEA Agreement.

⁽²¹⁾ Incorporating Commission Regulation (EC) No 70/2001 on aid to small and medium-sized undertakings, OJ L 10, 13.1.2001, p. 33, as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 OJ L 63, 28.2.2004, p. 22 into the EEA Agreement.

⁽²²⁾ Incorporating Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.1.2001, p. 20, as amended by Commission Regulation (EC) No 363/2004 of 25 February 2004, OJ L 63, 28.2.2004, p. 20 into the EEA Agreement.

⁽²³⁾ Which should normally involve no aid element. Such services concerned e.g. the purchase of marketing services for energy efficient behaviour of private persons and undertakings.

8. AID CEILING/ NO CUMULATION

There is an additional criterion used by Enova that investment support is limited up to a maximum of 40 % of the total project costs or 50 % of the total investment related to new energy technology projects. However, as confirmed by the Norwegian authorities, these thresholds do not limit the support with regard to the aid ceilings stipulated in the Environmental Guidelines, as the project costs may be larger than the investment costs and in particular the extra investment costs as stipulated by the Guidelines.

As to the cumulation of the support granted by Enova with other government support, the Authority notes that in principle the projects might receive aid from other sources. The Norwegian authorities stated in the notification that they would ensure that the aid granted would never exceed the thresholds of the Environmental Guidelines. Applicants have to notify Enova if applications for additional government aid have been submitted.

9. INFORMATION SUBMITTED BY NORWAY

9.1 General remarks

The Norwegian authorities stress that the Energy Fund has been set up in order to increase the efficiency in the measures aimed at developing the market for renewable energy and energy efficiency technologies. This is best achieved by comparing various projects with each other and eventually giving support only to those projects which demonstrate the best ratio between the support granted and efficiency or production of renewable energy achieved. Such a comparison is however, in the view of the Norwegian government, only possible if a calculation method is used which takes account of the varying cost structures between different projects, i.e. a cash flow method, which is the commonly used investment criterion in a market based energy sector.

9.2 Renewable energy production

The system as notified and applied until now — the calculation method as such

The Norwegian authorities stress the poor market position of the renewable energies which undermines the possibility of these technologies to become a viable alternative to conventional technologies. The Norwegian authorities point out that it is internationally accepted that these energy sources have a competitive disadvantage and should therefore be supported. The Norwegian authorities refer to the Authority's Environmental Guidelines which establish a balance between environmental and competition interests. In this respect the Norwegian authorities note that by choosing the cash flow method it is in a position to compare different projects in a non-discriminatory manner and give aid only to those projects which — with the least support needed — achieve the highest benefit in environmental terms. By introducing an element of competition in the application process, the Norwegian authorities can ensure that the most efficient projects in environmental terms are supported and in the long run more renewable energy projects will be realised and will compete increasingly with conventional energy production. The Norwegian authorities therefore state that they should be entitled to use the same principles as laid down in point (54) of the Authority's Environmental Guidelines⁽²⁴⁾. There is no risk of overcompensation, as only the support needed to achieve a positive investment decision will be granted.

The Norwegian authorities assert that their suggested calculation method can ensure that the 100 % extra cost ceiling stipulated in point D.1.3 (27) of the Environmental Guidelines⁽²⁵⁾ will never be exceeded, as the support is aimed at compensating the disadvantage resulting from higher investment costs. The comparison with traditional energy sources, however, would lead to arbitrary results, as it is very difficult to find an appropriate reference investment. Also, in the Norwegian authorities' view investment in new renewable energy projects and investment in traditional production capacity are not mutually exclusive options, but the choice depends on the information about cost levels. In addition, large hydro or gas fired power plants might not be available options for political, regulatory and physical reasons. In particular in Norway, a country which is almost 100 % based on a renewable energy source (hydro) which incurs high investment costs, the extra cost approach⁽²⁶⁾ might not leave sufficient room for granting investment aid to other renewable energy sources.

⁽²⁴⁾ According to point (54) of the Environmental Guidelines, EFTA States may grant aid — limited to plant depreciation — in order to compensate for the difference between the production cost of renewable energy and the market price of the form of power concerned.

⁽²⁵⁾ Point (27) of the Environmental Guidelines states that EFTA States can be supported with 40 % of the eligible costs, however, where necessary, up to 100 % of eligible costs can receive support.

⁽²⁶⁾ According to point (32) of the Environmental Guidelines, for renewable energy the eligible costs are normally the extra costs borne by the firm compared with a conventional power plant with the same capacity.

The Norwegian authorities further underline that the support in question is a one-off subsidy which is granted in a lump sum and which does not entitle the project to receive further aid. In this respect, it is — while administratively easier to handle — less distortive than classical operating aid schemes, which would also be allowable under the Environmental Guidelines, but which distort competition over a given number of years (as long as the system is in place). The Norwegian authorities point out that depending on how such an operating aid system would be established, the difference to the investment aid system as suggested by the Norwegian authorities would be rather minimal. A Norwegian operating aid system with a legally binding contract for a given number of years, whereby the annual grants are fixed in advance and independent of the project's actual economic development would be allowable under the Environmental Guidelines' operating aid chapter, but in reality not be different from the solution to be used by Enova. The only difference would be that the aid is paid out by Enova as a lump sum. The Norwegian authorities further point out that the approach of the Environmental Guidelines to compare renewable energy projects to a conventional plant rather favours capital intensive projects and might result in overcompensation, whereas other projects might not receive a sufficient level of aid. In the Norwegian authorities' view the Environmental Guidelines consequently allow the addition of operating aid to investment aid. In order to find the appropriate aid level to make the project viable, Enova would then be forced to create a joint investment/operating aid scheme, which is far more complicated to manage.

Suggested modifications by Norway

However, with a view to making the system compatible with the Environmental Guidelines, the Norwegian authorities would be prepared to introduce certain amendments to its system, which are described below.

1. Norway will limit the support to projects falling within the definition of renewable energy sources in Article 2 a and b (for biomass) of Directive 2001/77/EC with the exception of hydropower, which will receive no State support under that programme.
2. The amount of aid will be calculated according to a net present value calculation to be based on the difference between the production costs and the market price. The aid will be given as a lump sum. The calculation method applied looks as followed (demonstrated with the example of an actual wind energy project, amounts expressed in NOK):

Eligible investment cost ⁽¹⁾		123 000 000
Production	kWh/year	(...)
Price	NOK/kWh	(...)
Annual income ⁽²⁾		
Operating cost	NOK/kWh	(...)
Annual operating cost		(...)
Annual net income		(...)
Economic lifetime years		(...)
Return on capital		6,33 %
NPV		– 38 000 000
Investment aid		38 000 000

⁽¹⁾ The investment cost occurs at the beginning of year 0.

⁽²⁾ The income occurs first time at the end of year 1.

As confirmed by the Norwegian authorities, financial costs, miscellaneous costs and indemnity costs are not included in the eligible costs.

3. The market price for electricity used in the above calculation will be taken from the relevant Nordpool prices or — in the case of district heating — should be the relevant price the end user of oil or electricity (whichever is lowest) faces when the decision about the State support is made. If the project economy is based on large customer contracts with prices deviating from the observable end user price of electricity and oil, the contract prices should be the relevant price. Regarding electricity production not fed into the grid, the end user price including taxes should be used.

4. The aid may cover a fair return on capital. However, the discount rate and the risk premium shall be established for Enova by an external expert for each renewable industry concerned.
5. The aid will only be granted for plant depreciation, which is to be understood as aid granted for investment costs only.
6. The eligible investment costs shall be those listed in Commission Decision N 75/2002 — Finland ⁽²⁷⁾.
7. No more aid will be given than the amount necessary to trigger the project. This means that in case of a *negative* net present value, — resulting from a net present value calculation which is calculated according to the parameters stipulated in number 2 above — State support can only be given to ensure that the project breaks even, i.e. to bring the net present value calculation up to a zero value.
8. A project with a calculated zero rate or a positive net present value without aid is not entitled to any aid.
9. The support granted under this scheme shall never exceed the threshold — with the exception of support for biomass — stipulated under D.3.3.1 (54) of the Environmental Guidelines.
10. Operating costs which exceed the operating costs for traditional power production from oil, gas and coal will not be included in the net present value calculation described under number 2. Hence renewable energy projects shall not be compensated for operating costs higher than for traditional power production from oil, gas and coal.
11. For biomass, operating aid exceeding the investment costs might be granted. Under no circumstances can more operating aid be granted than foreseen in point D.3.3.1 (55) ⁽²⁸⁾ of the Environmental Guidelines.
12. For support under the system, biomass will be defined as the 'biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste' (see Article 2(b) of Directive 2001/77/EC). In case of the support of bio energy which contains sources other than biomass, operating aid as stipulated above in number 11 should only be given for that part which contains biomass. The support of the other parts is limited to investment support as defined under number 6.
13. The scheme should be limited until 1 January 2011.

The Norwegian authorities have also submitted the following operating cost data for renewable and conventional energy production data:

Total running costs, NOK/kWh

Technology	O & M	Fuel	Total running costs
Figures from the IEA report: Projected costs of generating electricity 2005 update			
Coal	0,034 — 0,068	0,076 — 0,152	0,11 — 0,22
Gas	0,023 — 0,031	0,187 — 0,249	0,21 — 0,28
CHP			0,17 — 0,44

⁽²⁷⁾ A) Preparation and design costs, B) costs of buildings, machinery and equipment, installation costs or costs incurred for the adjustment and repair work of existing buildings, machinery and equipment C) Up to the limit of 10 % of the projects' eligible expenditure, costs arising from the purchase of land directly related to the investment and from the construction of electric lines. D) Costs ensuing the construction of a pipe to be connected to a district heating network. Costs incurred by the construction of a heat distribution network are eligible only in network projects involving new technology, E) Costs of civil engineering work and supervision of construction work, F) Costs of clearance and earth works, G) Commissioning costs and costs arising from training of operating personnel required for commissioning. In this context, commissioning refers to the act of operating, testing and adjusting a system of unit for the first time to ensure that it functions according to the specified performance, H) Costs of project-related information dissemination, I) Costs of monitoring the investment, J) Costs related to feasibility studies for the various types of projects (salaries of the participants in the project and indirect labour costs, equipment, accessories, software, travel, information dissemination, other direct or overhead expenses). The aid recipient's overhead costs, interests paid during construction, adherence fees and deductible taxes will not be eligible.

⁽²⁸⁾ According to point (55) of the Environmental Guidelines, biomass — which has higher operating costs — may receive operating aid which exceeds the amount of investment, if the EFTA State can show that the aggregate costs borne by the firms after plant depreciation are still higher than the market prices of the energy.

Technology	O & M	Fuel	Total running costs
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Figures from NVE report: Costs of the production of energy and heat in 2002

Wind	0,05		0,05
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Figures from the Enova project portfolio (examples)

Wind	0,05 — 0,10	0	0,05 — 0,10
Bio	0,07 — 0,15	0,2 -0,3	0,27 — 0,45
New renewable			0,05
District heating			0,05 — 0,10

9.3. Energy saving measures

As for the system notified and applied until now, the Norwegian authorities argue that the net present calculation should also be accepted for the calculation of support for energy saving measures. However, the Norwegian authorities proposed changes to the future application of the support measures for energy saving, as follows:

The Norwegian authorities will calculate the investment aid for energy saving measures according to point D.1.3 (25) ⁽²⁹⁾ of the Environmental Guidelines in combination with point D.1.7 (32) of the Environmental Guidelines, i.e. the investment costs of the project will be strictly confined to the extra investment costs necessary to meet the environmental objective. This means that the costs of the energy saving investment will be compared to the costs of a technically comparable investment that does not provide the same degree of environmental protection. In cases of investment in additional equipment and procedures with no other function than energy saving, where no alternative comparable investment exists, the comparable investment costs are set at zero. Replacement costs of machines to meet Norwegian required standards are not eligible for support.

1. The costs will be calculated net of the benefits accruing from any increase in capacity, costs savings engendered during the first five years of the life of the investment and additional ancillary production during that five-year period.
2. The eligible costs are confined to investment costs. In that respect, eligible costs should be the same as those listed by the European Commission in its Decision N 75/2002 — Finland ⁽³⁰⁾.
3. The amount of aid is limited to 40 % of the extra costs, calculated according to the above parameters and no operating aid will be given under that scheme. According to point (30) of the Environmental Guidelines, for small and medium sized enterprises the aid might be increased by 10 percentage points. For that purpose, small and medium sized enterprises are to be defined according to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of small and medium sized enterprises, OJ L 124, 20.5.2003, p. 36.
4. The Norwegian government will ensure that, if combined with other public subsidies, the total aid will not exceed the abovementioned limits.
5. The scheme shall be limited until 1 January 2011.

⁽²⁹⁾ According to point (25) of the Environmental Guidelines, energy saving measures can be supported at the basic rate of 40 % of eligible costs. According to point (32) of the Environmental Guidelines the support must be limited to the extra investment costs. Eligible costs are calculated net of the benefits accruing from any increase in capacity, cost savings engendered during the first five years of the life of the investment and additional ancillary production during that five-year period.

⁽³⁰⁾ See point I 9.2. number 6 and fn. 28 of this Decision.

9.4. Support for new energy technologies

The Norwegian authorities are currently considering remodelling this programme. The Norwegian authorities will notify to the Authority, should the revision include pre-competitive development activities according to Chapter 14 of the Authority's State Aid Guidelines (Aid for Research and Development) or will be based on the Act referred to in point 1f) of Annex XV to the EEA Agreement ⁽³¹⁾.

9.5. Information and education measures in the field of energy efficiency

The Norwegian government confirmed that the programmes for teaching material and learning concepts, education courses for technical personnel and on site follow-up ended on 1 January 2004 and will, if these or similar projects are to be taken up in the future, be notified to the Authority.

The Norwegian authorities further confirmed that the training programme for public entities relates to the public function of the local municipalities.

9.6. Miscellaneous

The Norwegian authorities further confirmed that the support is applied in a non-discriminatory manner also to foreign investors and that it will regularly report to the Authority on the application of the scheme.

II. APPRECIATION

1. PROCEDURAL REQUIREMENTS

Pursuant Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, *'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'*.

By notifying the Energy Fund scheme only in June 2003, after the Fund had been operative since 1 January 2002, the Norwegian authorities have not respected that obligation.

2. THE PRESENCE OF STATE AID

State aid within the meaning of Article 61(1) EEA

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.'

2.1. Presence of State resources

The measure must be granted by the State or through State resources. The support of the various investment projects is done by way of grants, which are financed from the State budget and from the levy on the distribution tariff. The financing via direct budgetary allocations fulfils the criterion of 'State resources'.

⁽³¹⁾ Incorporating Commission Regulation (EC) No 70/2001 on aid to small and medium-sized undertakings, OJ L 10, 13.1.2001, p. 33, as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 OJ L 63, 28.2.2004, p. 22 into the EEA Agreement.

With regard to the proceeds of the levy on the distribution tariff, the Authority takes note of the fact that according to the established case law and Commission practice, the involvement of State resources where money is transferred by a fund exists, when

- the fund is established by the State,
- the fund is fed by contributions imposed or managed by the State,
- the fund favours specific enterprises ⁽³²⁾.

The levy is imposed by the Norwegian State by a Regulation ⁽³³⁾ and the level of the fee is determined by the State. The proceeds of the levy are then poured into a fund which allocates them to the chosen projects. The levy benefits only certain companies, namely the producers of renewable energy or companies applying energy efficiency measures. The Authority therefore considers financing via the levy equally as State resources in the meaning of Article 61(1) of the EEA Agreement.

2.2. Favouring certain undertakings or the production of certain goods

Firstly, the notified scheme gives the companies concerned an advantage as they receive grants for the production and use of renewable energy sources, investment in new technologies and energy saving measures which further reduce the companies' energy spending.

Also the various information and education measures and advisory and consultancy services provided to these companies gave them an advantage as the programmes enabled the companies to apply more energy efficient consumption or production methods which could lead to energy cost reductions within the company. As regards the teaching material programme and the education courses for technical personnel, the advantage consisted of grants for the development of material or a paid course to develop competence. The on site programme and the programme on energy planning skills in local municipalities were provided without remuneration, which constitutes an advantage. As regards advisory services, the services were either rendered by Enova free of charge, or, as of 2003, money was handed out to companies to purchase these services on the market.

Secondly, the measure must be selective in that it favours 'certain undertakings or the production of certain goods'. The investment support either favours only a certain group of producers or users (with regard to renewable energy sources) or grants investment support to only certain companies chosen by Enova after comparing the projects in the application process (energy saving and new technology support) and deciding which is the most efficient project of the application round to be supported. As established by case law ⁽³⁴⁾, in a situation in which a fund enjoys 'a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of the beneficiaries, the amount of financial assistance and the conditions under which it is provided, (...) the system is liable to place certain undertakings in a more favourable situation than others' ⁽³⁵⁾. Not each project fulfilling the application criteria can be certain to be supported, as this depends on the other projects competing with it in the application round and the amount of money Enova is willing to allocate within the concrete round of project evaluations. As Enova is free to choose how often and which kind of project calls it organises, the system gives Enova a considerable margin of discretion, which makes the support measures selective ⁽³⁶⁾.

As for the information and educational support, it should be noted that the information helpline provided by Enova is open to all undertakings, without Enova enjoying any discretion as to who the advice is given to over this helpline. The measure could therefore be regarded as a general measure. This seems, however, different concerning the other information and educational measures provided by Enova, in particular the programmes which were ended on 1 January 2004, as Enova enjoyed discretion under the various programmes regarding whom to provide with information, educational and advisory support.

⁽³²⁾ Case C-173/73 *Italy v Commission*, [1974] ECR 709, Case C-78/76 *Steinike v Germany* [1977] ECR 595, Commission Decision N 707/2002 *the Netherlands*, N 490/2000 *Italy*.

⁽³³⁾ In that respect there is no doubt that the measure can be imputed to the State, who introduced the levy. This is a different situation from the system discussed in Case C-345/02 *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiens BV v Hoofdbedrijfschap Ambachten*, not yet reported, which concerned a charge decided by a board of professionals.

⁽³⁴⁾ C-241/94 *Commission v France* [1996] ECR I-4551, paragraph 23.

⁽³⁵⁾ See also Advocate General Jacobs in C-255/97 *DM Transport S.A.*, delivered on 24 September 1998, paragraphs 39 and 40.

⁽³⁶⁾ This is supported by Enova's own assessment of its role on its webpage, where it is stated: '*Enova SF enjoys considerable freedom with regard to the choice and composition of its strategic foci and policy measures*'.

This is apparent regarding the educational programme, in which only the first 50 applicants profited from a paid course by Enova (no other company was entitled above that figure).

With regard to teaching material, it seems that Enova enjoyed discretion to dismiss projects. The Authority has not seen additional documents on the tender process to assess on which basis projects were chosen by Enova. It appears, however, that for these support measures each undertaking interested in the training and educational programme would not automatically receive the support and it seems that Enova enjoyed a considerable margin of discretion over the information and education programmes⁽³⁷⁾, which speaks against a general measure. The Authority therefore preliminarily concludes that these support measures by the Energy Fund are selective.

With regard to the on site programme, for which the Norwegian authorities state that Enova did not enjoy any discretion, the Authority cannot — at this stage — conclude with the same certainty that this programme is selective.

For the advisory and consultancy programmes, the Authority has not seen any guidelines, from which Enova could not depart. It appears that Enova likewise enjoyed discretion in granting support under this programme.

As for the support to municipalities, the Authority considers that this support does not constitute a selective advantage in favour of an undertaking, if the aid was limited to the public entity function. It will only constitute an advantage, if the measure benefits the municipalities' commercial activities. Then the measure could fall under Article 61(1) of the EEA Agreement.

2.3. Distortion of competition and effect on trade between the Contracting Parties

To be aid in the meaning of Article 61(1) of the EEA Agreement, the measures must distort or threaten to distort competition and affect trade between the Contracting Parties. The measures are strengthening the competitive situation of the supported enterprises in the global and within the energy and electricity markets in the European Economic Area, where they actually or potentially compete with other energy producers⁽³⁸⁾.

The Authority notes that quite a number of projects supported in the past (see section I 7 of this Decision) might have fallen under the Act mentioned in point 1e) of Annex XV to the EEA Agreement (Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid), because the allocated grants are below the *de minimis* threshold. However, this neither applied to all of the supported projects nor was it a condition of the scheme.

As the electricity market is largely liberalised and there is trade flow in energy products and electricity between the EEA States (e.g. Norway imports and exports a certain percentage of its energy), the described (potential) distortion of competition takes place in relation to other EEA undertakings. This is further demonstrated by the fact that various types of energy are traded in Nordpool, a common framework between the Nordic countries. The Energy Fund system is therefore distorting or threatening to distort competition and affect trade between the Contracting Parties.

2.4. New aid

The Norwegian government states that the programmes merged under the Energy Fund mechanism existed before the entry of Norway into the European Economic Area. The schemes originally constituted existing aid within the meaning of Article 1(b)(ii) in Part II of Protocol 3 to the Surveillance and Court Agreement.

With the notification, the Norwegian authorities informed the Authority about alterations to the existing aid. These consist of the 2002 merger of the schemes under the newly established Energy Fund, the new administration of the support by creating the new administrative body Enova, which enjoys a large discretion concerning granting the support, new objectives in that the measures under the schemes should achieve certain measurable energy efficiency and production goals, as well as a new financing mechanism (levy on the distribution tariff). These changes were accompanied by a new set of legal provisions on Enova, which have an impact on the support granted in that the measures should now achieve new policy objectives agreed in 2002 between the Norwegian State and Enova.

⁽³⁷⁾ Contrary to the on site programme, the Norwegian authorities have not denied any discretion in favour of Enova in this respect.

⁽³⁸⁾ E.g. in relation to traditional energy producers, hydro power producers or other renewable energy producers not supported by Enova or companies not being supported for the application of energy efficiency measures.

These alterations were not purely of a technical or administrative nature (see Article 4(1) in the Authority's Decision of 14 July 2004 (195/04/COL)), but significantly changed the previously existing system and its legal framework, so that the modified support measures are to be classified as new aid within the meaning of Article 1(c) in Part II to Protocol 3 of the Surveillance and Court Agreement.

The Energy Fund system was belatedly notified to the Authority (see section II.1 of this Decision) and thereby infringed the standstill obligation in Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. The aid is thus to be classified as 'unlawful aid' within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement. Any unlawful aid which is not declared compatible with Article 61(3)(c) of the EEA Agreement, could be subject to recovery.

3. COMPATIBILITY OF THE AID

In the Authority's view, the aid measures do not comply with any of the exemptions provided for under Article 61(2) or (3)(a), (b) and (d) of the EEA Agreement. Therefore, it needs to be assessed whether the aid could be justified under Article 61(3)(c) of the EEA Agreement. Under this provision aid may be declared compatible if 'it facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

The Authority has doubts whether the conditions of this provision, which are to be read in conjunction with the Authority's Environmental Guidelines, are fulfilled. The Authority's 2001 Environmental Guidelines required the EFTA States to bring their environmental aid schemes into line with these guidelines before 1 January 2002. The Norwegian authorities accepted this commitment by letter dated 6 July 2001⁽³⁹⁾.

In the following assessment, the Authority will make a distinction between the Energy Fund system as notified to the Authority and applied since 1 January 2002 (see section II 3.1 of this Decision) and the future changes envisaged by the Norwegian authorities which intend to make the support compatible with the EEA State aid provisions (see section II 3.2. of this Decision).

3.1. The system as notified and applied since 1 January 2002

3.1.1. Support for production of renewable energy sources

The support granted by Enova has been characterised by the Norwegian authorities as investment aid. The Authority has analysed the support measure in order to establish the nature of the aid. The difference between the two forms of aid, investment aid and operating aid, is that the latter is aid which reduces the charges resulting from ordinary everyday activities (running costs), which, in normal commercial circumstances, are borne out of the budget of the undertaking⁽⁴⁰⁾. However, according to the Authority's preliminary view, the support for renewable energy sources aims at concrete investments in an environmentally friendly energy type and does not reduce ordinary running costs of the undertakings in question. The Authority, at the present stage of the procedure, therefore classifies the aid as investment aid.

Investment aid for renewable energy production is, according to point D.1.3 (27) of the Environmental Guidelines, allowed for 40 % of the eligible costs. However, where necessary — a criterion which is not specified further — 100 % of the eligible costs can be supported, whereby the installations concerned will then not be entitled to receive any further support. The eligible costs should be strictly confined to the extra investment costs necessary to meet the environmental objectives, which means that these are normally the extra costs borne by the firm compared with a conventional power plant with the same production capacity (D 1.7 (32) of the Environmental Guidelines). The aid must be calculated net of the benefits accruing from any capacity increase, cost saving engendered during the first five years of the life of the investment and additional ancillary production during the five-year period. The Environmental Guidelines stress (in point (27)) that the support of this energy source is one of the objectives which should be encouraged the most.

The Authority notes that the 'extra cost approach' of the Environmental Guidelines is not followed by the system as notified, as no comparison with traditional energy production is carried out. This is sufficient for the Authority to raise doubts on whether the approach by the Norwegian authorities to use a net present value calculation instead, is compatible with the functioning of the EEA Agreement.

⁽³⁹⁾ Doc. No 01-5475-A.

⁽⁴⁰⁾ See Case 409/00 *Spain v Commission*, [2003] ECR I- 1487, paragraph 55 with a reference to Case C-351/98, *Spain v Commission* [2002] ECR I-8031 paragraph 43, Case T-459/93 *Siemens SA v Commission* – [1995] ECR II-1675 paragraph 77.

As far as the notification of the Energy Fund system and its application until today is concerned, the Authority does not have — at *this* stage of the assessment — to enter into a detailed analysis as to whether alternatively the aid could be calculated according to the principles applied to operating aid (point D.3.3.1 (54) of the Guidelines). It suffices to note that even under the application of these principles, the Authority would — without the envisaged amendments of the scheme mentioned under section I 9.2 of this Decision — have doubts on the compatibility of the system as notified and applied until now.

The main concern is that the Energy Fund system — as applied hitherto — might in certain instances lead to overcompensation, as the provisions regulating the Fund do not contain precise limitations to ensure that the support does not exceed the difference between the market price of the energy concerned and the production costs. In particular, the net present value calculation as suggested by Enova in the notification, does not contain sufficiently clear stipulations of the single components of the calculation method, see point (54), third subparagraph of the Environmental Guidelines. For example, it is not spelled out that the aid may never exceed the threshold stipulated in point (54) of the Environmental Guidelines or that support could only be given to achieve a zero net present value⁽⁴¹⁾. However, as the net present value calculation suggested by Enova includes a return on capital, the Authority is of the preliminary view that support to be granted in excess of a zero net present value of the project will result in overcompensation.

Likewise, the Authority cannot be certain whether the chosen discount rate of 7 % is correct for all industries and whether the mechanism to establish the discount rate (by reference to government reports and pre-established ranges of risk premiums for certain industries) is sufficient to establish a rate which precludes overcompensation.

It is further stated that the system stipulates that an applicant has to inform Enova about any other applications of aid and that the Norwegian authorities will assure that the aid does not exceed the allowed threshold under the Environmental Guidelines.

The Authority notes that the evaluation aid method presented by Enova⁽⁴²⁾ states that other government aid is taken into consideration, without, however, explicitly referring to an upper threshold as stipulated under point (54) of the Environmental Guidelines. The Authority is aware that some projects receive aid from different sources⁽⁴³⁾ and can not be entirely certain whether the cumulation rule has been respected by Enova in all cases.

As further eligible costs are not clearly defined in the system as notified, the Authority would also not be able to ascertain that aid is indeed limited to plant depreciation as stipulated by point (54) of the Environmental Guidelines⁽⁴⁴⁾.

3.1.2. Energy saving measures

The Authority notes that similarly to energy saving measures, the support envisaged by the Norwegian authorities is not calculated according to methods which compare renewable energy production with production of traditional energy, see point D.1.3 (25) and D.1.7 (32) of the Environmental Guidelines. This raises doubts as to the compatibility of the system as notified and applied with the functioning of the EEA Agreement.

⁽⁴¹⁾ See Annex 1 of Norway's letter of 11 September 2003. While it is stated in several places in the document that Enova will establish under which conditions the project will break even, it is not explicitly stated anywhere that the aid cannot surpass a zero net present value threshold or will respect the threshold mentioned in point (54) of the Environmental Guidelines. On page 3 of the same letter the *triggering off effect* is linked to a positive investment decision, which is not necessarily identical to a zero net present value. In conjunction with the example quoted above, section I 5.2 of this Decision, which showed a *positive* net present value after the granting of investment aid by Enova, the Authority cannot be certain that the zero net present value has been respected in all instances. The Authority notes that the wind project quoted under section I 5.2 of this Decision is only a model calculation from which it cannot be necessarily deduced that the projects actually supported received excess aid. It further notes that Norway later explained that the positive net present value resulted from too low a rate on return on capital. However, the example only further confirms the Authority's view that the absence of sufficiently clear criteria could create the opportunity for granting aid which is, inadvertently, in excess of Enova's own stipulations.

⁽⁴²⁾ In letter dated 11 September 2003 from the Norwegian authorities, Annex I, page 5.

⁽⁴³⁾ E.g. the *Utsira* project which receives aid from Enova, the Research and Development Council and the Norwegian Pollution Control Authority.

⁽⁴⁴⁾ See on the notion of plant depreciation also section II 3.2.1 of this Decision.

As to the net present value calculation suggested by the Norwegian government and whether such a calculation could be justified, it suffices to state that — apart from the concern of overcompensation (see 3.1.1) — the possibility mentioned under point D.3.3.1 (54) of the Environmental Guidelines — to whose principles the Norwegian authorities refer — is only open to renewable energy production and not to energy saving measures. Also from the provisions on investment aid (point D.1.3 (25) of the Environmental Guidelines) it becomes clear that renewable energy support is treated more favourably than energy saving measures. While for the former up to 100 % of eligible costs might be supported (where necessary), the support for energy saving measures is limited to 40 %. The Authority therefore has doubts that this calculation method could be used at all for energy saving measures.

3.1.3. *Investment in new energy technology*

At the present stage of the proceedings, the Authority does not yet have a full picture whether the support of such technology is limited to renewable energy sources or could also cover *other* types of energy technology, which is relevant for determining which provisions of the Environmental Guidelines would apply to the support in question.

In any event, as to the application of the net present value calculation, the Authority's preliminary findings under section I 3.1.1 of this Decision would apply.

The Authority will investigate further whether the aid in question is investment support under the Environmental Guidelines or rather aid for research and development which should have been assessed under the Authority's Research and Development Guidelines.

3.1.4. *Information and educational measures*

The Authority does not have sufficient information to assess whether the projects exceeding the *de minimis* threshold supported under this heading (in particular the programme on teaching material, educational courses for technical personnel, the on site follow-up) can be declared compatible with Article 61(3)(c) of the EEA Agreement.

The Authority notes that the schemes were not limited to small and medium sized companies, as stipulated in the Act mentioned in point 1f) in Annex XV to the EEA Agreement (aid to small and medium-sized enterprises) ⁽⁴⁵⁾. Nor can the Authority be certain at this point whether such support would have been limited to investment as stipulated in Article 4 of that Regulation.

Likewise the Authority does not have sufficient information to ascertain the application of the Act mentioned as point 1 d) in Annex XV to the EEA Agreement (training aid) ⁽⁴⁶⁾.

The Authority notes that in particular with regard to the advisory and consultancy services paid for by Enova, some of the support might be acceptable as part of the eligible costs for energy saving measures or investment support for renewable energy, or alternatively, under point D.2 (36) of the Environmental Guidelines, as far as small and medium sized enterprises are concerned. However, the Authority does not have sufficient information on all the projects supported so far to make this analysis and notes in general that the system as such does not contain any limitation to these companies. The Authority does not see any other Guidelines or Block exemptions that would justify these measures.

3.2. **The system with the envisaged amendments by the Norwegian authorities**

3.2.1. *Renewable energy investment support*

The Authority will, during the formal investigation procedure, examine whether the net present value calculation suggested by the Norwegian authorities can be accepted for the grant of investment aid. The starting point for the Authority's analysis is point D.1.3 (27) of the Environmental Guidelines which stipulates that the rate for investment in support of renewable energy sources is 40 % of the eligible costs. Where necessary — a criterion not further specified in the Environmental Guidelines — investment aid up to 100 % of eligible costs can be granted. The eligible costs (see point D.1.7 (32) of the Environmental Guidelines) normally consist of the extra costs borne by the firm in comparison to a conventional power plant with the same capacity.

⁽⁴⁵⁾ See fn. 22 of this Decision.

⁽⁴⁶⁾ See fn. 23 of this Decision.

At this stage in the proceedings, the Authority makes the following observations on the use of the net present value calculation as suggested by the Norwegian authorities. The method proposed by Norway does not make a straight comparison between a renewable energy project and a chosen conventional plant. However, the net present value method may, with certain assumptions, ascertain that there will never be any overcompensation in the sense that the received support exceeds the extra investment costs.

We may compare a renewable energy plant to a hypothetical conventional plant of the same capacity in terms of output, but with different cost structures. A stylized example assuming constant flows of revenue and operating costs over a given time span may shed light on the relationship between a subsidy to a renewable plant and the extra investment costs such a plant would require compared to a conventional plant. Letting subscript 1 relate to conventional plants and subscript 2 to renewable plants, and introducing the following variables,

r = annual revenue

c_k = annual operating costs, $k = 1,2$

I_k = investment costs, $k = 1,2$

i_k = required rate of return $k = 1,2$

n = number of years

d_k = present value factor of future cash flows = $\sum_{j=1}^n \frac{1}{(1 + i_k)^j}$, $k = 1,2$

S = subsidy to make net present value of renewable plant equal to zero,

one can write:

$$(1) rd_1 - c_1d_1 - I_1 = 0$$

implying that the net present value of a conventional plant is equal to zero (*), and furthermore

$$(2) rd_2 - c_2d_2 - I_2 + S = 0 (**).$$

As (1) = (2), S can be expressed as

$$(3) S = (I_2 - I_1) + (r - c_1) d_1 - (r - c_2) d_2$$

It is evident that for a given investment in a renewable energy plant, S , will increase the higher the operating costs, c_2 , are. Likewise, the subsidy will increase the higher the required rate of return, i_2 , is and consequently the lower d_2 is. The higher the discount factor is, the lower the present value of the future net income stream, $r - c_2$, is.

If the required rate of return is equal for a conventional and a renewable energy plant, i.e. $i_1 = i_2$ and $d_1 = d_2 = d$,

(4) can be written:

$$(5) S = (I_2 - I_1) - (c_1 - c_2)d.$$

This implies that as long as operating costs for a conventional plant, c_1 , are higher than those for a renewable plant, c_2 , then the subsidy, S , will be smaller than the extra investment costs for the renewable plant, $(I_2 - I_1)$. In that case there is no risk for overcompensation in that the subsidy will exceed 100 % of the extra investment costs.

(*) In practice it would be equal to zero or positive, otherwise it would not be brought about. For simplicity it is assumed here that it equals zero.

(**) As the plants are equal in size, the sales revenue, r , will be the same in both cases.

It may be illustrative to look at some concrete examples. The actual wind energy project referred to in section I.9.2 above required an investment aid of NOK 38 million. On the basis of the data in the table on operating costs for various power plants in the same section, it may be reasonable to assume that operating costs for a conventional plant may be twice as high as for the wind energy project. Using such an assumption and applying the formulas above, the aid intensity for the mentioned wind energy project, measured as subsidy in relation to extra investment costs will be 40 %. It is thus assumed that the required rate of return, 6,33 %, is equal for both projects. If, however, the required rate of return for the wind project would be 2 percentage points higher, i.e. 8,33 %, the subsidy amount would increase to some NOK 52 million and the aid intensity would increase to 55 %.

In the cases described, where operating costs are twice as high for conventional as for renewable energy plants, it is rather unlikely that there would be any overcompensation. This would occur only with exceptionally high risk premiums attached to renewable energy projects, and hence these projects would be rather unrealistic.

On the other hand, if the operating costs for a renewable energy plant approach the operating costs for a conventional plant and the required return for the former is higher than for the latter due to a perceived extra risk related to investment in renewable energy, the picture may be different. If it is assumed that operating costs are equal for both alternatives, $c_1 = c_2 = c$, then (4) can be written:

$$(6) S = (I_2 - I_1) + (r - c)(d_1 - d_2).$$

Higher required return for a renewable energy plant means that $d_2 < d_1$, and in that case the subsidy will exceed the extra investment costs.

According to point 10 in section I.9.2 above, Norway commits itself not to grant aid to renewable energy projects for operating costs that exceed those for conventional plants. In the Authority's understanding, this may mean that operating costs equal to those for conventional plants may be covered. If this understanding is correct, the result may be, in light of what has been said just above, still overcompensation.

However, the commitment as stated in point 9 and 5 in section I.9.2 may pose a more efficient constraint for the amount of aid granted. According to this commitment, the Norwegian authorities will, except for biomass, not grant aid beyond the threshold in point (54) of the Environmental Guidelines. Point (54) establishes that operating aid may be granted to compensate for the difference between production costs of renewable energy and the market price for the power concerned. However, the aid may be limited to plant depreciation.

At the outset, aid to compensate for the difference between production costs and market price is just what is necessary to achieve a net present value for the project equal to zero. As long as this aid is less than the actual depreciation, it is considered to be compatible.

While point (54) of the Guidelines refers to current operating aid, the Authority's preliminary view is that the principle thus established may as well be applied to aid granted in relation to an investment provided that the value of the aid does not get higher than point (54) provides for. That will be taken care of if the value of annual depreciation is discounted to present value and that this value sets a ceiling of the amount of aid that can be granted.

According to this principle investment aid may be granted to compensate for the difference between production costs and market price as long as this amount is lower than the discounted value of future depreciation.

As explained above the amount of an investment subsidy aimed at compensating for the difference between production costs and market price will increase with increasing discount factor (required rate of return including risk premium). In that case the present value of future net operating income will diminish thus requiring more aid to make the project profitable.

While the amount of subsidy thus increases with increasing requirements to return, the present value of annual depreciation decreases. This limits the amount of aid that can be granted as risk premiums and thus requirements of return on investment in renewable energy projects increases. The project as mentioned in I.9.2 above may illustrate this. The aid amount was calculated to NOK 38 million using a discount rate of 6,33 %. Assuming a linear depreciation over the life-time of the project, the present value of depreciation is NOK 61 million. If the discount factor were to be increased, the amount of aid would need to be increased to break even while the value of future depreciation would decrease. At a discount rate of 8,25 % the need for subsidy would be NOK 51,4 million. The present value of future depreciation would reach the same amount. Higher discount rates would increase the amount required to break even while the allowable subsidy would decrease making the project unprofitable and hence unworkable.

As the present value of future depreciation is unaffected by development of operating costs, it is also constraining how much subsidy can be granted because of increasing operating costs. As shown above the present value of future depreciation in the quoted example, using a discount factor of 6,33 %, is NOK 61 million. If operating costs were higher than in the quoted example, that could be catered for to the extent that the total subsidy was within this limit. In the concrete example, operating costs 40 % higher than those specified could be compensated for, but not more than that.

As stated above, in the Authority's preliminary view the principles of point (54) of the Environmental Guidelines can be used to allow for such a calculation method. According to point (54) of the Environmental Guidelines, aid to renewable energy projects can be granted as the difference between the production costs of a renewable energy project and the market price, limited however to *plant depreciation*, which is, in the Authority's view, to be understood as investment depreciation. Against this background, the Authority then notes that the aid granted under point D.3.3. (54), while described under the heading 'operating aid', in reality also concerns investment aid. In other words, both aid given under point D.1.3 (27) and aid given under point D.3.3 (54) in reality deal with investment support⁽⁴⁷⁾. This can be already derived from point (53) of the Environmental Guidelines which introduces the operating aid calculation with the words that *'in the renewable energy field, unit investment costs are particularly high and generally account for a significant proportion of the firms' costs and do not allow firms to charge competitive prices on the market.'* Based on the assumption that it is the high (extra) investment costs which cause the competitive disadvantage, point (54) of the Environmental Guidelines allows for the covering of these investment costs (plant depreciation) in full (i.e. up to 100 %), as far as they cannot be covered by the market price. The support by Enova respects this threshold.

It should be noted that contrary to how operating aid is normally treated under the State aid provisions, for renewable energy projects the Environmental Guidelines stipulate that operating aid should normally be allowed, see point (49) of the Environmental Guidelines⁽⁴⁸⁾. A renewable energy project can legitimately receive both investment aid and operating aid under the Environmental Guidelines, as long as the threshold for operating aid is not exceeded (see point D.3.3.1 (54), second paragraph of the Environmental Guidelines⁽⁴⁹⁾). This shows that Enova could legitimately have chosen to support these projects solely on the basis of operating aid principles and granted up to 100 % of the investment costs exceeding the market price with an aid scheme which granted project financing in instalments rather than in the form of a lump sum payment foreseen by the Energy Fund system. The difference of a one-off investment lump sum payment as envisaged by the Norwegian authorities compared to an operating aid system which would grant aid in fixed instalments over a certain period of time, is small. While administratively easier to handle, the aid granted by Enova might be rather less distortive than a continuous classical operating aid scheme⁽⁵⁰⁾. The Authority will analyse this point further in its investigation.

In the formal investigation procedure the Authority will further investigate the possibilities of Enova to grant further assistance for the energy produced by the project. Point (54) of the Environmental Guidelines stipulates that aid might only be granted for plant depreciation and that *'[a]ny further energy produced by the plant will not qualify for any assistance'*. In the Authority's preliminary view this formulation constitutes a concretisation of the proportionality test under Article 61(3)(c) of the EEA Agreement which provides for only so much aid so that a project can reach the (horizontal) objectives, in this case environmental protection. The need for support for renewable energy projects is based on the competitive disadvantage which these projects face in relation to traditional energy production. They are therefore entitled to receive aid to reach the market. The aid is therefore smaller the bigger the income base of the project. In concrete terms, the Authority is concerned that without any further modifications to the Enova system, projects funded by Enova might receive, in future, State support. Given that the net present value calculation used by Enova

⁽⁴⁷⁾ The only exception is support for biomass, for which the 'real' running costs of the company are supported, if it exceeds the investment; see point (55) of the Environmental Guidelines.

⁽⁴⁸⁾ Normally investment aid and operating aid are treated according to very different principles under the State aid provisions, taking into account that operating aid normally does not contribute to any horizontal objectives but just reduces the company's running costs without creating an overall benefit for society. Operating aid should therefore, in principle, not be allowed under the State aid provisions. Here, however, the Environmental Guidelines make a different choice for the support of renewable energy projects.

⁽⁴⁹⁾ The aids would then be calculated together to establish that the threshold of point (54) is not exceeded. See e.g. Commission Decisions N 727/2002 – the Netherlands, MEP – Stimulating renewable energy and N266/2003 – the Netherlands, The Q7 Wind project, where the project first received operating aid and later investment aid. The European Commission established, in the second decision, that the investment aid added to the already authorised operating aid scheme did not exceed the maximum operating aid amount.

⁽⁵⁰⁾ In this respect it should also be noted that the European Commission has, in its decision on investment aid which has been calculated according to the extra cost approach, also taken the companies' operating costs into account, see e.g. N 266/2003 – the Netherlands, where the operating costs of the company were considered in the assessment of the cost savings calculation. This demonstrates that for both, investment aid and operating aid, operating costs are indeed to be considered. It is therefore not to Norway's advantage that the calculation method in D.3.3.1 (54) of the Environmental Guidelines includes the operating costs as a calculation factor.

already includes a fair return on capital, such further support is likely to result in excess profit. The Authority will therefore investigate whether there is need for a further limitation to the system, in that a supported project, which has reached a zero net present value and for which the threshold of point (54) of the Environmental Guidelines has been met, is not entitled to receive further support, regardless of whether this support would legally qualify as State aid. This would mean that under the item 'income' in the net present value calculation used by Enova, *all* income must be taken into account, i.e. not only commercial revenues, but also other benefits resulting from State intervention.

The Authority notes positively that regarding the possible introduction of a green certificate system⁽⁵¹⁾ which might be introduced in the near future, the Norwegian authorities have stated that contracts with recipients of Enova support contain a clause stipulating that the whole amount of investment support must be reimbursed prior to entry. As the Authority has doubts on the necessity of the aid, it will examine whether the clause must be extended to other types of government intervention.

The Authority still questions the Norwegian authorities' suggestion that the net present value calculation for renewable energy projects should also cover such projects which, due to higher operating costs which cannot be supported in the Authority's view, end up with a negative present value. The Norwegian authorities have suggested to the Authority to amend the Energy Fund system in that '*operating costs which exceed the operating costs for traditional power production from oil, gas and coal will not be included in the net present value calculation described in number 2*'⁽⁵²⁾. Hence renewable energy projects shall not be compensated for operating costs higher than for traditional power production from oil, gas and coal.' The Authority is not certain whether such projects would not better fit the logic of the support of new energy technologies and should be supported under that programme. The current approach seem to involve a deviation from the rationale of the net present value approach in that the support should enable the project to reach the market, which with the formulation chosen by Norway would not be the case. The Authority will investigate this point further.

As to the eligible costs, the Authority notes that the Norwegian authorities wish to base the investment costs on the list of accepted cost items in Commission Decision N75/2002⁽⁵³⁾. The Authority might find support for these costs acceptable, as long as they concern extra investment necessary to meet the environmental objective. However, the Authority already states at this stage of the procedure that only such costs which actually occur in a project can be supported. E.g. as far as the Commission Decision, in the case of Finland, accepted certain costs related to district heating items, these cost items cannot be transferred to other projects. The Authority further notes that in line with Commission Decision N 266/2003 — O7 wind project, the Netherlands, the financial costs of the project are *not* eligible. This covers the depreciation, the recipient's overhead costs, interest paid, adherence fees and deductible taxes. The Norwegian authorities have confirmed to the Authority that financial costs will not be included in the calculation, neither will so-called 'miscellaneous' or 'indemnity costs'.

In its assessment the Authority will also take into account that according to point D.1.3 (27) of the Environmental Guidelines, renewable energy sources are one of the environmental objectives that should be encouraged the most. While Norway uses predominantly renewable energy in the form of hydro power, there could be concerns about a potential increase of energy imports into Norway, given that hydro power suffers from various instabilities. In order not to substitute the dependency on hydro power with a dependency on energy imports (from fossil fuels), the Norwegian authorities have developed the current support scheme.

3.3. Energy saving measures

The Norwegian authorities suggest amending the notified system (see section I. 9.3 of this Decision) and intend, for the support of energy saving measures, to apply the 'extra cost approach' as stipulated in points (27) and (32) of the Environmental Guidelines. The Authority notes that this approach as such is in line with the Environmental Guidelines.

3.4. New energy technologies

Given that the Norwegian authorities are considering reviewing the mechanism, the Authority cannot yet form a final view on this aid measure. If unchanged, the comments made under section II 3.1.3 of this Decision remain valid.

⁽⁵¹⁾ A system by which power producers earn Green Certificates as proof of energy being generated from renewable sources. For additional revenue, producers can sell their Green Certificates separately from their electricity. The certificates are often traded at a minimum price set by the Government, which may not classify as State aid. See Case C-379/98 *Preussen Elektra* [2001] ECR I-2099. Norway is considering the introduction of such a system possibly for 2007.

⁽⁵²⁾ See section I 9.2. number 10 of this Decision.

⁽⁵³⁾ See fn. 28 of this Decision.

3.5. Information and education measures

The Authority notes that the majority of the programmes, i.e. the programme on the development of teaching materials and learning concepts, as well as the education courses in energy for technical personnel and engineers/on site follow up ended on 1 January 2004. If any of these programmes — or similar programmes — are to be started again, the Authority should be notified in case the programme triggers off a notification requirement (e.g. programmes above the *de minimis* threshold, etc.) The Authority therefore does not need to further comment on the projects.

As to the advisory and consultancy services, the Authority is still awaiting further information from the Norwegian authorities as to whether these services should be only given to small and medium sized undertakings in the future and might therefore be acceptable either under point (36) of the Environmental Guidelines in conjunction with Commission Regulation (EC) No 70/2001 on aid to small and medium sized enterprises or as part of the investment costs for energy saving measures according to points (27), (32) of the Environmental Guidelines. The Authority cannot, therefore, develop a definite view on this support measure.

As to the programme in favour of local municipalities, the Authority is awaiting further explanation as to the way in which it is guaranteed that the programme does not benefit the commercial activities of the local authorities.

3.6. Annual Reporting

If the Authority were to accept the amended Energy Fund system in a final Decision, it would require the Norwegian authorities to report in a detailed manner on the support of, in particular, the energy saving measures, renewable energy products and new energy technologies. However, the details of the reporting obligation will only emerge during the formal investigation procedure.

3.7. The financing mechanism

According to established case law, one cannot separate an aid measure from the method by which it is financed. As the European Court of Justice has held, the financing mechanism of a support scheme might render the whole aid incompatible with the common market⁽⁵⁴⁾, in particular if it entails discriminatory aspects. The need to consider the financing mechanism together with the aid scheme is in particular requested, when the levy has been explicitly created for the financing of the aid scheme, which is the case for the Energy Fund.

This means that the Authority has to take into account that the measures supported by the Energy Fund are financed via a levy on the distribution tariff. This levy on the distribution tariff, while not levied on the energy production as such, will indirectly also concern imported energy. In this respect the Authority notes, in particular, that the levy is linked to the volume of energy consumption, and not levied at a fixed rate⁽⁵⁵⁾. However, the link to the volume generally reflects the polluter-pays principle of the Environmental Guidelines and, in line with Commission practice, the financing mechanism might be declared compatible with the State aid provisions⁽⁵⁶⁾.

In this respect it should be taken into account that there is no restriction in the whole support scheme that the aid should only benefit Norwegian producers. In particular for energy saving measures, it is likely that a certain share of subsidiaries of foreign companies active in Norway will profit from the measures. However, the Authority will require further information on this point to form a final view.

⁽⁵⁴⁾ Cases C-261/01 and C-262/01, *Belgische Staat between Calster, Cleeren, Openbaar Slachthuis NV*, paragraph 46, Case C-47/69 *France v Commission* [1970] ECR 487, paragraph 4.

⁽⁵⁵⁾ This was considered relevant in some Commission decisions on 'stranded costs', see N 161/04 — Portugal and N 490/2000. In the two cases, the levy was linked to consumption, but was not shared equally between domestic and foreign operators. However, at this stage it is not clear whether this case law is relevant for the present case.

⁽⁵⁶⁾ See e.g. Commission Decision 707/2002 — the Netherlands, N 553/01 — Ireland.

4. CONCLUSION

The Authority therefore concludes that it has doubts as to whether the Energy Fund system is compatible with the functioning of the EEA Agreement, in particular with Article 61(3)(c) of the EEA Agreement in conjunction with the Authority's Environmental Guidelines. These doubts concern the system as notified in 2003 and applied since 1 January 2002. The Authority in particular notes that it does not have information on the projects so far supported by the Energy Fund to establish whether they would be in compliance with the amended Energy Fund system, should the Authority accept the latter suggestions by the Norwegian authorities. The doubts, however, also extend to some aspects of the suggested amendments for the future application of the system, as outlined in this Decision.

Consequently, and in accordance Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit its comments within one month of the date of receipt of this Decision.

In light of the foregoing considerations, the Authority requires the Norwegian government, within one month of receipt of this Decision, to provide all documents, information and data needed for the assessment of the compatibility of the support measures under the Energy Fund,

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Norwegian Energy Fund.
2. **The Norwegian government is requested, pursuant to Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within one month from the notification of this Decision and to provide all such information as may help to assess the aid measure.**
3. The Norwegian government shall be informed by means of a letter containing a copy of this Decision.
4. The EC Commission shall be informed, in accordance with Protocol 27(d) of the EEA Agreement, by means of a copy of this Decision.
5. Other EFTA States, EC Member States, and interested parties shall be informed by the publishing of this Decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication.
6. This Decision is authentic in the English language.

Done at Brussels, 18 May 2005.

For the EFTA Surveillance Authority

Einar M. BULL
Acting President

Bernd HAMMERMANN
College Member
