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1 Oppgave

In Autumn 2021, shortly after the new power cables from Norway to the European Continent had opened, Norwegian electricity prices skyrocketed due to the much higher electricity prices on the Continent. Norwegian electricity companies and the Norwegian state profited greatly from this, while Norwegian consumers and businesses lost out. The electricity subsidy scheme that the government offered to Norwegian consumers after a year was far from sufficient to compensate for the price-rise. And for the business community, the electricity support hit the economy unevenly and there were reports of a spate (bølge av) of bankruptcies as a result of the high electricity prices.

The government claimed that the high electricity prices were caused by the Ukraine war and not the foreign cables. It nevertheless promised that it would “turn over all stones”, but believed that the scope for opportunity (“handlingsrommet”) was small because the restrictions that the EEA agreement set. And besides, Norway needed electricity from the EU, the government claimed.

After a couple of winter seasons with record-high electricity prices the pressure on the government grew immensely. In periods the prices were around 20 times what it was before the opening of the power cables. On 31 January 2025, around half a year before the 2025 parliamentary election to be held in September, the Norwegian government proposed to introduce Norway Price (norgespris) – a fixed price scheme for electricity of NOK 0.40 per kWh from October 2025 and running until the end of 2026 in the first round. The scheme with possible adjustments was meant to run until the end of 2029. The proposal was adopted by the Parliament before the Summer break.

The price of electricity with the fixed price scheme implied that consumers now paid around the same price as they did before the power cables were opened to the European continent. The government expected that the scheme would entail public expenditure of approximately NOK 6.6 billion (and NOK 370 million for district heating) for 2026. This estimate was inter alia based on an assumption that 70% of household in Southern Norway would choose Norway Price in 2026. All analyses showed that for nearly all households in Southern Norway, choosing the Norway Price would be the economically rational choice.

Several profitters of high electricity prices, such as providers of heat pumps (varmepumper), solar panels (solscellepaneler), fireplaces and ovens (vedovner) but also various environmental and climate groups protested the fixed price scheme. They claimed that the regime constituted a breach of the EEA agreement and sent a complaint to the EFTA Surveillance Authority (ESA).

More concretely, they claimed that the Norway Price-scheme infringed several provisions of Directive 2009/72 in particular article 3 as interpreted and applied by the Court of Justice of the EU (CFEU), for example in the recent case C-683/19 (*Viesgo Infraestructuras Energéticas*). In that connection, they claimed that directive 2009/72 must be interpreted in light of the directive's successor, Directive 2019/944, and its amendment, Directive 2024/1711, although these directives were not implemented in the EEA-agreement or transformed into Norwegian law.

In any case the complainants held that the result would be the same if EEA primary law was applied. In that connection they argued that the Norway price-scheme would lead to increased consumption of electricity. This, they claimed, would reduce the incentive for Norwegian households to save energy, but also, in turn led to greater use of fossil-fueled energy, which again had a negative impact on the environment and the climate.

The Norwegian government rejected the claims. They believed the Norway price-scheme did not constitute a breach of EU/EEA-law because it did not have any impact on the free movement rules. In any case, a breach could be justified, with reference to consumer protection and also the

importance that cheap electricity was for the Norwegian industry and thus workplaces, in particular in rural areas. And cheap electric energy in Norway was a precondition for consumers and businesses choosing electrical cars instead of fossil-driven vehicles, which clearly had positive impacts on the environment and climate. In any case, the government claimed, Norway could just stop the export of electricity and thereby withdraw electricity from the internal market altogether.

Question: Is the Norway Price-scheme in breach of the EU/EEA law? Please make sure to address all the claims put forward by the parties. (The question may be answered by using either EU law or EEA law).

Skriv ditt svar her...

The main question is whether Norway's Price-scheme is in breach of EU/EEA Law.

The complainants claim that the Price-scheme constitutes a breach of EU/EEA Law. Norway rejects the claim.

In the following, I will first discuss whether Norway's Price-scheme constitutes a breach of the four freedoms (point 1), and second, whether it constitutes a breach of Directive 2009/72 (point 2).

1. Breach of the four freedoms

First, it must be considered whether the Price-scheme constitutes a restriction on the four freedoms.

When assessing whether this is the case, the EEA Agreement will be applied. In accordance with the principles of homogeneity and loyalty, as laid down in Articles 1 (1) and 6 EEA, provisions of the EEA Agreement will be interpreted in light of case law from the European Court of Justice (ECJ) on parallel EU provisions, see also E-9/97 Sveinbjörnsdottir paragraph 53 et sequentes.

The question is whether the Price-scheme infringes free movement, and if so, which freedom is infringed.

Article 8 EEA secures free movement of goods between the parties of the EEA Agreement.

The application of the rules on free movement of goods presupposes firstly that the ware at hand -- electricity -- is a "good" within the meaning of the Treaty. Case law from the ECJ shows that electricity is to be considered a good, cf. C-556/15 *Hidroelectrica*. This criterion is fulfilled.

Secondly, there must be an inter-state element, meaning that the good must cross borders within the Union/Economic Area. Purely internal matters fall outside the scope of EU/EEA Law, cf. C-415/93 *Bosman* paragraph 49. This case concerns the export of electricity to the European Continent. EU is a part of the EEA Agreement. Consequently, the criterion of an inter-state element is fulfilled.

It must be noted that the nationality of the complainants is not presented. Therefore, it will not be highlighted.

The rules on free movement of goods are applicable.

The question is then whether Article 11 EEA is breached.

Article 11 EEA prohibits "quantitative restrictions" on imports of goods and "all measures having equivalent effect".

Quantitative restrictions covers "measures which amount to a total or partial restraint of ... imports [...]", cf. C-2/73 *Geddo* paragraph 7. This formulation seems unfitting for the case at hand. It must therefore be asked whether the Norwegian Price-scheme constitutes a measure having equivalent effect.

It follows from case law that "all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade" are to be considered as measures having an effect equivalent to quantitative restrictions, see C-8/74 Dassonville paragraph 5. Norway has by the Parliament's adoption of the Norway Price-scheme implemented a measure. It must be assessed whether this falls within the so-called Dassonville formula, as is presented above.

The complainants claim that the Norway Price-scheme would lead to increased consumption of electricity. Norway rejects this and claims that the scheme does not impact any free movement rules.

When consumers' consumption of electricity is partially subsidized, one can argue that most of, if not all, consumers will increase their energy consumption. This will in turn reduce their consumption of alternative sources of energy such as heat pumps, solar panels, fireplaces and ovens, the very energy sources the complainants are profiting from. On the other hand, it cannot with certainty be held forward that the price-scheme will result in this outcome. There is a possibility that some consumers will reduce their consumption of electricity and opt for other options, which would benefit the complainants.

Nevertheless, there is a *possibility* that the measure at hand hinders the import of energy from inter alia producers of solar panels, ovens, etc. The possibility of such an effect is in light of the Dassonville formula sufficient for the measure to constitute a restriction on the free movement of goods.

There are, however, some limitations to the Dassonville formula.

The Keck doctrine, established in joined cases C-267 and 268/91 Keck and Mithouard, excludes certain selling arrangements from the scope of the

Dassonville formula. This is contingent upon three conditions, the first of which being that the measure restricts or prohibits "selling arrangements", see C-267 and 268/91 *Keck and Mithouard* paragraph 16. See also E-16/10 *Philip Morris* paragraph 44.

Selling arrangements covers "provisions concerning inter alia the place and times of sale of certain products and advertising of those products as well as certain marketing methods", see C-71/02 *Karner* paragraph 38. In other words, only measures concerning where, when and by whom goods are sold, can be permissible under the *Keck* doctrine.

The restriction at hand sets a fixed price for electricity. Such a restriction concerns neither the place or time of sale of electricity, nor the advertising of such. Norway's measure therefore does not constitute a selling arrangement, and thus precludes application of the *Keck* doctrine.

Furthermore, the Dassonville formula is limited by a remoteness test. If the effect of the measure on the free movement is "too uncertain indirect" to be liable to hinder trade between Member States, it goes clear of the Dassonville formula, cf. C-69/88 *Krantz* paragraph 11.

As previously stated, the effects of Norway's Price-scheme can be seen as uncertain. This suggests that the measure's effects are too remote for them to constitute a restriction on the free movement of goods. However, it is likely that some consumers will up their consumption of electricity and thus reduce their consumption of alternative energy sources such as fireplaces, ovens, etc. On these grounds, the measure is not too remote to constitute a restriction.

None of the limitations to the Dassonville formula are applicable.

Norway's Price-scheme constitutes a restriction on the free movement of goods and is as a point of departure unlawful.

Norway claims that the Norway Price-scheme can be justified.

Justification of a restriction on the free movement of goods presupposes that two requirements are met: (i) The measure must pursue a legitimate aim; and (ii) it must be proportional, cf. C-110/05 *Commission v. Italy* paragraph 59.

Article 13 EEA lists express legitimate aims for justification. These can be invoked in cases of direct discrimination, i.e., measures placing a different burden in law and in fact on domestic products and those of other States. In cases of indirect discrimination or non-discrimination, the measure can also be justified with reference to "mandatory requirements" or "overriding reasons" of public interest, cf. C-120/78 *Cassis de Dijon* and C-110/05 *Commission v. Italy*.

The measure at hand is presumptively non-discriminatory (or indirectly discriminatory) in the sense that it does not distinguish between domestic and foreign electricity, but can have a restrictive effect on imports/market access. Consequently, the measure can be justified with reference to both express legitimate aims in Article 13 EEA as well as mandatory requirements.

Norway has presented three legitimate aims with the measure at hand.

First, the measure is meant to pursue the aim of consumer protection. Case law recognizes defence of the consumer as a legitimate aim, see C-120/78 *Cassis de Dijon* paragraph 8. There are no indications that this in reality is not an aim with the measure at hand. Therefore, the aim must be deemed legitimate.

Second, the measure is intended to ensure "cheap electricity ... for the Norwegian industry and thus workplaces". This must be characterized as purely economic considerations, which are illegitimate by nature. This aim is therefore not legitimate.

Third, the measure seems reasoned with environment and climate protection. These are legitimate aims, cf. TFEU article 191.

Summarized, consumer protection and the protection of environment and climate are legitimate aims, while ensuring cheap energy is not.

For the measure to be lawful, it must be proportional, cf. C-110/05 Commission v. Italy paragraph 59. See also C-55/94 Gebhard paragraph 37.

The principle of proportionality entails two 'tests', both of which must be passed in order for the measure to be justified and thereby lawful as a derogation to the principle of free movement.

The first test is a suitability and coherence test. The measure must be suitable for attaining the legitimate aims it pursues, and the Member State's pursuit of those aims must be coherent/consistent, cf. C-55/94 Gebhard paragraph 37 and E-3/00 Kellogg's paragraph 41.

Norway has implemented a fixed price on electricity. This is undoubtedly suitable for achieving the aim of consumer protection, since consumers in a sense are given financial aid and thus easier can cope with high prices.

With regards to climate and environment protection, the suitability of the measure at hand is not as obvious. On the one hand, the measure may incentivize consumers to choose electrical cars instead of fossil-driven vehicles, as claimed by Norway. On the other hand, it does not necessarily

incentivize consumers to save energy, but to increase their energy consumption, and perhaps lead to greater use of fossil-fueled energy, as put forward by the complainants.

The selection of electric cars instead of fossil-driven vehicles can in itself suggest that the measure is suitable for protection of environment and climate. The strength of this argument is, however, weakened by the possibility of opting for more fossil-fueled energy in other areas, as well as the fact that lower energy prices can increase power usage by electric vehicles, making this option less potent. These are nevertheless speculative arguments which cannot be given substantial weight. I consider, under some uncertainty, the measure suitable also for the protection of environment and climate.

The criterion of coherence (or consistency) presupposes that the Member State pursues the legitimate aims cohesively through its rules and regulations. In light of case law, the parallel existence of rules contradicting the aims of a measure would suggest otherwise, cf. C-121/85 Conergate paragraph 15 and E-3/00 Kellogg's paragraph 41.

First, it must be noted that Norway's "sudden change of heart", i.e., the change in opinion on the lawfulness of the measure at hand from 2021 to 2025, does not necessarily in itself indicate inconsistent pursuit of the measures at hand. The understanding of EU/EEA Law is decisive in assessing which measures one can implement.

Consumer protection is presumably consistently pursued through Norway's rules and regulations, and the criterion on coherence seems fulfilled.

Protection of environment and climate is in general apparently pursued in a consistent manner. However, in this case, the measure can pose as a double-edged sword; on the one hand, it could incentivize the purchase of electric

vehicles, and, on the other hand, might encourage increased power usage and opting to fossil-fueled energy. This does not reflect coherent/consistent pursuit of the aim of environment and climate protection.

In light of the above-mentioned, only the aim of consumer protection is deemed suitable and consistently pursued, fulfilling the first criterion for justification.

The second test entailed in the proportionality principle is a necessity test; the measure must not go beyond what is necessary to achieve the legitimate aim it pursues, cf. C-55/94 Gebhard paragraph 37 and E-16/10 Philip Morris paragraph 81. As stated in C-126/15 Commission v. Portugal, "when there is a choice between several appropriate measures, recourse must be had to the least onerous" (paragraph 64). In other words, the measure which is chosen must be the least restrictive of those at hand.

The question is then whether the measure at hand is necessary to achieve the aim of consumer protection.

It is apparent that consumers were suffering under high electricity prices. The prices were sometimes around "20 times what it was before the opening of the power cables". Norway had significant motivation to implement measures with the hopes of improving the situation of consumers. The measure which is chosen, involved setting a fixed price on electricity -- an appropriate measure for easing the financial burden on the consumer. An argument for necessity, is that this measure achieves the objective concerned and is of a temporary nature.

Norway's measure is, however, not the least restrictive measure. For example, Norway could instead of subsidizing electricity bills transfer some free energy to the consumer, whilst a portion of the energy required had to be covered by

the consumer themselves. This would ensure that all consumers had a "baseline" of energy available to them free of charge, without lowering the electricity price. The economic effect could be as good, if not greater, than the effect of the chosen measure.

Another alternative measure which could have been chosen, is opting for a more pragmatic approach, i.e., implementing a scheme which subsidizes electricity bills in accordance with the levels of prices -- a "variable price"-scheme. Instead of a fixed price, the price could vary in accordance with the actual electricity price. This would ensure that there in times of extremely high electricity prices, is no excessive consumption of electricity.

Finally, Norway could limit its financial support to a selected group of consumers which have a demand for such support. This is apparently not the case. Norway's Price-scheme seems applicable to all its citizens. Financial support to a selected group of consumers could nevertheless also be unlawful.

The presented alternatives could result in increased use of fossil-fueled energy, which does not achieve the aim of environment and climate protection. This demonstrates that the aim of consumer protection and environment and climate protection in this case are incommensurable and separate aims.

Seeing as there were alternative and less restrictive measures which could have been implemented, Norway's measure does not pass the necessity test.

Norway's measure is disproportional and thus in breach with EU/EEA law. Accordingly, Norway's claims are to be rejected.

Conclusion: Norway's measure is in breach of the rules on free movement of goods.

The candidate notes that the case at hand could actualize the rules on freedom of establishment, as the measure at hand impedes or renders less attractive the exercise of freedom of establishments supplying electricity, cf. C-106/16 Polbud paragraph 46. But because there is no information on the nationality of the complainants, and they therefore must be presumed nationals of Norway, the criterion on cross-border element does not seem fulfilled and therefore precludes the situation from the scope of the establishment rules. The assessment of a potential breach of this freedom would nevertheless be almost identical to the assessment given above.

2. Directive 2009/72

The complainants claim that the Norway Price-scheme infringes Directive 2009/72 interpreted in the light of the ECJ and the directive's successor and its amendment. Norway rejects this.

The first question is whether Directive 2009/72 must be interpreted in the light of Directive 2019/944, and its amendment, Directive 2024/1711.

The latter directives are not implemented in the EEA Agreement and thus are not EEA law. The EEA Agreement is, as put forward by the EFTA Court in E-9/97 Sveinbjörnsdottir, "an international treaty sui generis which contains a distinct legal order of its own" (paragraph 50).

EU legislation does not automatically influence EEA law, but must as a point of departure be implemented. The principles of homogeneity and loyalty do, however, require interpretation of EEA law in accordance with parallel EU provisions. This applies also for the interpretation of the directive under Norwegian law.

Seen as the directives at hand do not form an integral part of the EEA Agreement (energy market), they are presumably not binding when

interpreting the predecessor directive, see for comparison E-9/97 Sveinbjörnsdóttir paragraph 63. It must be noted that much of the content of the later directives reflect that of the first directive, and thus not substantially influences the result of the following assessment.

The question is then whether the Norway Price-scheme infringes Directive 2009/72.

Article 3 (2) of Directive 2009/72 provides the following:

"Having full regard to the relevant provisions of the [FEU Treaty], in particular Article [106] thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the [European Union] to national consumers. [...]"

The first question is whether Norway's financial contribution amounts to a public service obligation within the meaning of Article 3 (2) of Directive 2009/72.

The concept of "public service obligations" corresponds to "public intervention measures in the functioning of the electricity market, which require undertakings operating in the electricity sector, for the purpose of pursuing a general economic interest, to act on that market on the basis of criteria imposed by the public authorities", see C-683/19 Viesgo Infraestructuras Energéticas paragraph 31.

In the present case, Norway has conferred an obligation on suppliers of electricity to supply electricity at a reduced rate. Such an obligation is a public service obligation within the meaning of Article 3 (2) of Directive 2009/72, cf. C-683/19 Viesgo Infraestructuras Energéticas paragraph 32.

State intervention such as in this case, can be accepted within the framework of Directive 2009/72 if three conditions are satisfied.

First, that intervention must pursue an objective of general economic interest, see C-121/15 ANODE paragraph 36 and C-683/19 Viesgo Infraestructuras Energéticas paragraph 44.

It follows from Article 3 (2) of Directive 2009/72 that Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to "price of supplies" and "environmental protection".

The obligation at hand pursues the objectives of consumer protection (reduction of energy prices) and environmental and climate protection. The first objective is per se an objective of general economic interest.

Environmental protection is in light of the wording of Directive 2009/72 also such an objective. Climate protection is not explicitly mentioned, but might fall within the objective of environmental protection. (See also Article 3 (10)).

The first criterion is fulfilled.

Second, the obligation must comply with the principle of proportionality, see C-683/19 Viesgo Infraestructuras Energéticas paragraph 44. Case law shows that compromising energy suppliers' freedom to determine price for a period that is limited in time, may fulfill the criteria of proportionality, and

entails a re-examination of the need for intervention, see C-683/19 Viesgo Infraestructuras Energéticas paragraph 55.

Seeing as this case concerns a scheme meant to run until the end of 2029, it does not appear to be proportional. Norway has nevertheless planned to make "possible adjustments" during this period, which can indicate that the government will assess the need for intervention. The scheme is though scheduled to run for approximately four years, which does not suggest that it will be stopped due to a lack of need for intervention. On this background, the obligation is deemed disproportional.

Since Norway's measure seeks to protect consumers and industries "particular in rural areas", it seems fitting to point out that public service obligations consisting in supplying electricity at a reduced rate to *certain vulnerable consumers*, results in a difference in treatment which cannot be justified, cf. C-683/19 Viesgo Infraestructuras Energéticas paragraph 53.

The requirements for legality in Article 3 (2) of Directive 2009/72 are not fulfilled. Norway's Price-scheme thus infringes this provision.

As the complainants have claimed, primary EEA Law and Directive 2009/72 have the same result with regards to the lawfulness of Norway's scheme. Norway's statement about being able to "stop the export of electricity and thereby withdraw electricity from the internal market altogether", is false.

Conclusion: Norway's public service obligation is in breach with Directive 2009/72.

**Knytte håndtegninger til denne
oppgaven?**
Bruk følgende kode:

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