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Brussels, 13 May 2013
Case No: 69544
Event No: 671404

EFTA SURVEILLANCE AUTHORITY

Ministry of the Environment
Myntgaten 2
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Preliminary assessment of some aspects amounting to a possible infringement by Norway against Articles 4 and 11 of the Water Framework Directive as regards heavily modified water bodies

1. Introduction

As mentioned in previous correspondence[1], the EFTA Surveillance Authority received a complaint against Norway on 10 March 2011 concerning the implementation of *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy*[2] ("the Directive") as concerns regulated water courses.

The complaint alleges that Norway has not correctly implemented the Water Framework Directive in that regulated water courses used for hydropower production, which appear to have been generally classified as "heavily modified water bodies" ("HMWB"), would not be subject to the procedures foreseen by Articles 4 and 11 of the Directive. Instead, they would continue to be subject to autonomous national procedures, which do not comply with the requirements of the Directive.

The case was discussed at the package meeting which took place in Oslo on 10-11 November 2011. A request for information was sent to the Norwegian Government on 22 February 2012[3] and the Authority received a response to this request by letter dated 31

[1] Letter of the Authority dated 14 March 2011 (Event N° 590196)

[2] Act referred to at point 13ca of Annex XX to the EEA Agreement. The Directive was incorporated into the EEA Agreement by Joint Committee Decision N° 125/2007 (OJ No L 047, 21.2.2008, p. 53 and EEA Supplement N° 9, 21.2.2008, p. 41), which entered into force on 1 May 2009.

[3] Letter of the Authority dated 22 February 2012 (Event N° 607006)

May 2012[4]. On 5 October 2012, the Authority forwarded a list of supplementary questions to the Norwegian Government by e-mail[5], which were discussed at the package meeting in Oslo on 25-26 October 2012.

On the basis of the information obtained from the Norwegian Government, the Authority's Internal Market Affairs Directorate ("the Directorate") has now undertaken a more in-depth examination of the case. However, in order to finalise the assessment and with a view to dissipate any remaining doubts, the Norwegian Government must clarify certain facts which seem to indicate an infringement against Articles 4 and 11 of the Directive. For this purpose, the Directorate will present in the following its view of the facts underlying this case, as well as its preliminary assessment of the compliance with the legal requirements laid down in the Directive.

2. Legal framework

2.1. EEA Law

The Directive has been incorporated into the EEA Agreement by Joint Committee Decision N° 125/2007 of 28 September 2007. It entered into force on 1 May 2009 for Norway and the other EFTA States, which was also the deadline for the transposition of the Directive by those States.

Article 4 lists the "environmental objectives" of the Directive. Article 4(1)(a)(iii) establishes that in making operational the programmes of measures specified in the river basin management plans for surface waters Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of the Directive.

According to Article 4(4), the deadlines established under paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when certain conditions specified in the Directive are met.

Article 5(1) lays down the obligation of the Member States to carry out certain technical analyses in order to achieve the environmental objectives of the Directive. According to this provision each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory an analysis of its characteristics, a review of the impact of human activity on the status of surface waters and on groundwater, and an economic analysis of water use is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of the Directive.

Article 11(1) sets out the obligation for each Member State to ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. Such programmes of measures may make reference to measures following from

[4] Letter of the Norwegian Government dated 31 May 2012 (Event N° 636436, Ref. N° 2012/00001)

[5] E-mail of the Authority dated 5 October 2012 (Event N° 649052).

legislation adopted at national level and covering the whole of the territory of a Member State.

Article 11(5) establishes that where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that relevant permits and authorisations are examined and reviewed as appropriate.

2.2. National Law

2.2.1. Legislative transposition of the Directive

In its notification of the national measures implementing the Directive ("Form 1") of 23 April 2009[6], Norway indicated that the Directive had been transposed through *Forskrift av 15. desember 2006 nr. 1446 om rammer for vannforvaltningen* ("the Water Regulation"), which entered into force on 1 January 2007.

The Water Regulation provides for the designation of HMWB, their characterisation, the differentiation according to type and the establishment of a type-specific reference condition based on the rules set out in the Water Framework Directive, which will allow, in turn, the establishment of a good ecological potential. The Water Regulation appears to require, in line with the Directive, that the status of HMWB be protected against deterioration and be improved in order for those water bodies to have at least good ecological potential and good chemical status, in accordance with the classification in Annex 5 to the Water Regulation, which transposes Annex V to the Directive. This objective will be achieved through programmes of measures, to be drawn up by 2015 for the various river basins, with the measures made operational within three years after that.

2.2.2. Pre-existing legislation in the area of hydropower production

2.2.2.1. Regulation of Heavily Modified Water Bodies

In parallel to those rules, certain HMWB, namely those used for hydropower production, remain subject to a pre-existing legal framework.

Indeed, the licences to build, own and operate a hydropower installation, which include the environmental conditions to which such power plants are subjected, remain regulated by four Acts:

- Act of 14 December 1917 N° 16 relating to acquisition of waterfalls, mines and other real property etc. ("the Industrial Licensing Act");
- Act of 14 December 1917 N° 17 relating to regulations of watercourses ("the Watercourse Regulation Act");
- Act of 24 November 2000 N° 82 relating to river systems and groundwater ("Water Resources Act");
- Act of 29 June 1990 N° 50 relating to the generation, conversion, transmission, trading, distribution and use of energy etc. ("the Energy Act").

[6] Event N° 516263; Ref. N° 200500130-/JLB

On the basis of those acts, the national competent authorities set out the various conditions under which hydropower plants must operate. More specifically, it seems that environmental conditions are set on the basis of the Watercourse Regulation Act and the Water Resources Act.

These include requirements related to minimum water flows, restrictions on the manoeuvring of reservoirs, water levels in reservoirs, water temperature and water quality, biological status of the river and of the habitats along the river, requirements for fish ladders to increase ecological connectivity, measures to prevent erosion, restoration of fish stocks and other measures to restore habitats.

Those conditions constitute crucial parameters for the biological, hydromorphological, and physico-chemical status of the water bodies which are harnessed by the licensed hydropower installations. As a result, the status of water bodies used for hydropower production can only be ameliorated, if necessary in order to reach good ecological potential ("GEP"), through the amendment of the conditions set out on the basis of the above-mentioned acts.

2.2.2.2. Legal instruments designed to allow a revision of environmental conditions

There are several instruments which can be envisaged to revise those environmental conditions.

- The general clause of "revision of terms"

The main instrument is the so-called "revision of terms". All licences issued in accordance with the Watercourse Regulation Act after 1959 are subject to revision 50 years from the date of the licence or at the latest 30 years from the amendment in 1992. For every such licence, revision is legally possible at the latest within 2022. It seems that for time-limited licences granted prior to 1959, no possibility of revision is foreseen prior to the expiration of the licence. Furthermore, it appears that unlicensed hydropower installations cannot be subjected to a revision.

If the revision is not mandated in the licence, it is mandated in the Watercourse Regulation Act itself. The scope of this instrument is the same whether it is included in the licence or required by law. The clause is standardized and new licences can have their terms revised every 30 years. According to the Norwegian Government, this type of clause can be used to make changes not only in conditions set for the protection of the environment. This instrument can be used to ensure implementation of any mitigation measures mandated by the Programme of measures as foreseen by the Directive.

- Clause in the rules of manoeuvring

Such clauses are included in almost every licence issued in accordance with the Watercourse Regulation Act. The clause is standardized and can be used to impose changes in the manoeuvring at any time. The Norwegian Government considers these clauses to be a safety valve in the event an amendment is required at an earlier stage than at the time for the regular revision of terms[7]. Authorities may choose to use this instrument if the utility of water for environmental purposes is an argument for doing so.

[7] See letter of the Norwegian Government dated of 31 May 2012, p. 6.

This instrument is applicable for changes in the rules of manoeuvring. The clause does not exclusively apply to significant damage and nuisance that was not foreseen at the time of licensing.

- Standard environmental terms

The standard environmental terms containing additional measures for environmental purposes, has gradually been incorporated into the licences from 1960. They are based on standardized terms, but contain an open mandate to impose different types and customized improvement measures. Some licences also contain, in the rules on reservoir manoeuvring, a provision allowing the licensing authority to make the necessary changes if the manoeuvring of the reservoir causes serious harmful effects which were not foreseen when the licence was issued.

- Modification of a licence under Section 28 of the Water Resources Act

This provision allows the competent authorities, "in special cases", to rescind or amend terms and conditions or set new terms and conditions in hydropower licences, in the public or private interests.

According to the preparatory works[8], the "*special circumstances*" which allow recourse to this provision are exceptional circumstances which, for example, result from an improvement of the knowledge base or from the realisation that the situation was originally misjudged because of the state of knowledge at the time the licence was issued; changes in values and social beliefs cannot justify recourse to Section 28 of the Water Resources Act.

It is unclear to what extent changes in environmental standards could justify recourse to this provision. According to the information provided by the Norwegian Government[9], this seems to be the case at least regarding the adoption of mitigation measures. The provision in Section 28 demands a balancing of interests, including negative impacts for energy production and environmental benefits. There are no restrictions in Section 28 with regard to implementing mitigation measures if there is a need for improvement due to the environmental objectives set in a RMBP. Revision of terms may be considered at any time, and is believed to be an adequate instrument to bring the aquatic environment in line with the objectives of the Directive.

- Imposition of licensing under Section 66 of the Water Resources Act

According to the Norwegian Government, this is necessary as an instrument to summon old unlicensed hydropower installations for licensing[10]. It can be used both on old regulated watercourses and on other old installations which operate legally, but without a licence. These modified waterbodies may have been established as licence-free because they did not need a licence pursuant to the Act prior to the Water Resources Act, or because they were established before these Acts came into force. For these power installations the legal instrument to set terms is section 66 of the Water Resources Act.

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[8] Cf. Ot.prp.nr.39 (1998-1999), p.345.

[9] See letter of the Norwegian Government of 31 May 2012, p. 11.

[10] See letter of the Norwegian Government of 31 May 2012, p. 11.

The Norwegian Government points out that according to the preparatory documents to Section 66 of the Act, this provision shall be applied only *"in special circumstances"*. It is stated that it will only be appropriate to impose licensing when there are substantial environmental concerns. This may be the case if a measure cannot be imposed due to lack of standard terms and lack of rules of manoeuvring, and this will prevent the implementation of mitigation measures mandated by the programme of measures of a river basin management plan (RBMP). Imposing licensing according to Section 66 may be considered at any time and is believed to be an adequate instrument to improve the aquatic environment in line with the Directive.

- General administrative law

Norwegian general administrative law allows for the reversal of a decision under certain circumstances. Section 35 of the Public Administration Act authorizes an administrative agency to change its own decisions regardless of whether there is a complaint. The purpose of this provision is to give the administration an opportunity to correct legal errors in the decision.

Moreover, the administration has a general non-statutory conversion right, which provides the opportunity to change the terms of a licence if legitimate public concerns call for doing so. Conversion in these cases is based on the principles of administrative law that gives the authorities the right to intervene if there are unforeseen circumstances or other weighty reasons for changing the licensing terms.

The assessment will depend on a weighing of interests where the amendments that causes inconvenience to anyone affected by the decision must be accorded considerable weight. The administration's non-statutory conversion right will primarily be considered for modification or imposition of certain conditions in a licence.

3. The Directorate's preliminary assessment

3.1. The exclusionary effect of "prioritising" in connection with the revision of licences

The Directorate considers that the starting point for assessing the compliance of national legislation/practice with the Water Framework Directive is the screening process currently being carried out by the Norwegian authorities and which is supposed to be concluded by June 2013. The Directorate understands that the aim of this screening process is, in essence, to identify all watercourses worth being protected. Once a national list of priorities has been established, the respective licences awarded for the purpose of hydropower production are supposed to be subject to a revision by national authorities if relevant environmental objectives require it.

3.1.1. Restrictive interpretation of the scope of protection

The Directorate understands this practice of *"prioritising"* within the framework of the said screening process as meaning that not the entirety but only some of the licences in question will ultimately be submitted to a scrutiny with a view to a possible revision. This approach raises some doubts as for the question of compliance of the national measures in question with the provision in Article 4(1)(a)(iii) of the Water Framework Directive, which explicitly obliges Member States *"to protect and enhance all artificial and heavily*

modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive." It seems that the Norwegian Government interprets the scope of protection granted by the Directive more narrowly than the wording of the provision actually suggests. Such an interpretation can hardly be regarded compatible with the aforementioned provision, as any national measures offering no more than just partial protection would fall short in the achievement of the objectives set out by the Directive. This would in turn amount to an infringement of Article 4 of the Directive.

3.1.2. Omission to undertake technical analyses

This conclusion can hardly be contested by the argument brought forward by the Norwegian Government, whereby a lack of priority *"does not preclude the imposition of measures that will lead to ecological improvements"*[11]. As the Norwegian Government has explained, a lack of priority entails that the licensee will be imposed *"standard terms of licences"* according to the Watercourse Regulation Act[12]. The Directorate understands this statement as a reference to the *"specific measures"* envisaged in Article 11 of the Directive. According to this provision, each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking into account the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. However, the Directorate holds the view that it is doubtful that the intended practice of imposing *"standard terms of licences"* could actually be considered a *"specific measure"* within the meaning of Article 11, as long as it is not based on the results of the necessary analyses foreseen in Article 5 of the Directive.

Article 5 of the Directive defines the type and the scope of the technical analyses to be carried out by the national authorities in charge. In essence, an analysis of the characteristics, a review of the impact of human activity on the status of surface waters and on groundwater, and an economic analysis of water use must be undertaken for each river basin district or of the portion of an international river basin district falling within a State's territory. Since *"prioritising"*, as understood by the Norwegian Government, seems to exclude this kind of technical analysis, at least for those river basins lacking priority, it would appear that a basic requirement imposed by Article 11 of the Directive would not be fulfilled in the case at hand either. For this reason, in the Directorate's opinion, Norway might also have incorrectly implemented Article 11 of the Directive.

The Directorate invites the Norwegian Government to take a position on this issue and explain how the ongoing screening process is in its opinion expected to achieve the aim stated in Article 4(1)(a)(iii) of the Directive, consisting in granting an overall protection. The Norwegian Government should also explain how Norway intends to implement Article 11 of the Directive, especially in view of the possible *"specific measures"* to be adopted in case of necessity.

[11] See letter of the Norwegian Government of 31 May 2012, p. 9.

[12] See letter of the Norwegian Government of 31 May 2012, p. 9.

3.1.3. Failure to base the environmental objectives on new knowledge obtained by analyses

As stated above, it is of utmost importance that the Member States carry out a series of analyses that provide relevant knowledge based on which the necessary measures can be adopted. The conducting of technical analyses has been conceived by the European legislator as an essential prerequisite, precluding Member States from deviating thereof at their own discretion. For that reason, the Directorate is of the opinion that an omission to do so would amount to a breach of the obligations emanating from Articles 4, 5 and 11 of the Directive.

As the Norwegian Government has pointed out[13], *"environmental objectives for regulated watercourses in the 6 year period of the plan shall be based on existing conditions in the licences"*. A literal interpretation of this sentence suggests that the environmental objectives set by the Norwegian authorities will essentially be based on knowledge and facts available at the time when the licences were granted. This could in principle be construed as meaning that technical analyses such as the one foreseen in Article 5(1) of the Directive aiming at gathering new relevant information are presumed to be redundant by the Norwegian Government. Instead, it appears to be inclined to rely on pre-existing knowledge.

The Directorate holds the view that this approach can hardly be considered compatible with the Directive. Given the fact that in some cases some considerable time may have passed since the respective licences were granted, this would mean that the Norwegian Government actually intends to base its environmental objectives on knowledge which in some circumstances might be outdated. If that were the case, the measures Norway expects to adopt would certainly not meet the criteria set out by the Directive. The good ecological potential of heavily modified water bodies used for hydropower would not be based on the *"maximum ecological potential"*, as defined on the basis of the methodologies outlined in Section 1.3 of Annex II/and or the expert judgment required by the Directive. It would rather be based on a simple administrative situation. This would be an indication that the process of screening and preparation of a list of prioritised watercourses has not been fully integrated into the procedures foreseen by the Directive.
The Directorate invites the Norwegian Government to clarify the exact meaning of the statement reproduced above and to specify how Norway intends to comply with the obligation to base its environmental objectives on recent data.

3.2. Fragmentation of the national legal framework

Another aspect which deserves particular attention in the case at hand concerns the establishment of an adequate national legal framework which implements the Directive. According to the Norwegian Government, when it assumed the obligation to incorporate the Directive into the EEA Agreement it was of the opinion that the necessary legal instruments to implement Management Plans and Programs of Measures in accordance with the requirements in the Directive were already in place[14]. The Directorate interprets this statement as an indication that Norway has refrained from amending its legislation in the specific sector of hydropower production in order to bring it in line with the environmental requirements introduced by the Directive. As will be shown hereafter, this

[13] See letter of the Norwegian Government of 31 May 2012, p. 3.

[14] See letter of the Norwegian Government of 31 May 2012, p. 3.

legal framework shows certain deficiencies likely to put at risk the achievement of the goals set by the Directive.

3.2.1. Failure to ensure consistent and coherent action

The Directorate understands the Directive as a dynamic instrument for continuous assessments of the potential for environmental improvement every six years[15]. Therefore, national measures implementing the Directive have to ensure consistent and coherent action in the whole territory of Norway. As recital 14 of the Directive states, its success relies on *"close cooperation and coherent action at Member State and local level"*. Moreover, recital 30 emphasizes the necessity *"to ensure a full and consistent implementation of the Directive"*. These objectives certainly also apply to the obligation laid down in Article 11(5) of the Water Framework Directive to examine and to review relevant permits and authorizations as appropriate. The consequence is that the licences in question will have to be examined and reviewed, regardless of the type of legal regime applicable to a specific watercourse. However, the Directorate has certain reservations concerning the suitability of the measures adopted by Norway to face this challenge, as will be explained below.

According to the explanation provided by the Norwegian Government, a large variety of legal regimes applies to regulated watercourses, ranging from licence clauses explicitly allowing a revision of terms if environmental requirements demand it, to legal tools foreseen in specific acts of national law[16]. As explained by the Norwegian Government, if necessary, specific tools of general administrative law and even non-statutory law allowing public authorities to achieve a reversal of an administrative decision may be available in order to comply with the requirements of the Directive. The Directorate understands that every legal regime the Norwegian Government has referred to in its observations has its own set of rules, both of substantive and procedural nature, conferring on public authorities the power to take action under certain conditions, some of them requiring a justification or even the existence of *"special circumstances"* in order to allow a modification of licences or the rules for running hydropower installations in general.

It is worth noting at the outset that Member States are, as a matter of principle, granted broad discretion when implementing into national law Directives which have been incorporated into the EEA Agreement by EEA Joint Committee Decisions. According to the legal definition contained in Article 288(3) TFEU, "a directive shall be *binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*. This definition has been reproduced in almost identical terms by Article 7(b) of the EEA Agreement. Furthermore, it should be recalled that, according to a settled case-law of the Court of Justice of the European Union ("the Court"), the transposition of a Directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation; a general legal context may, depending on the content of the directive in question, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner[17]. Therefore, a State

[15] Point 1.3(ii) of Annex II to the Directive.

[16] See letter of the Norwegian Government of 31 May 2012, p. 5 and following.

[17] See Case C-96/95, *Commission v Germany*, [1997] ECR I-1653, paragraph 35; Case C-410/03, *Commission v Italy*, [2005] ECR I-3507, paragraph 60; Case C-388/07, *Age Concern England*, [2009] ECR

is in principle entitled to implement EEA law by means of legal instruments already known in its own legal system[18], provided that the full application of a Directive is guaranteed on the national level.

In its judgment of 30 November 2006 in the case C-32/05 (Commission/Luxembourg), the Court confirmed the applicability of these principles in connection with a State's obligation to properly implement the Water Framework Directive in its domestic legal system[19]. As the Court pointed out, in principle, even *"the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures provided, however, that those principles actually ensure the full application of the Directive by the national authorities"*[20]. In that context, it its worthwhile recalling the Court's accurate observation that the Directive contains provisions of different types, some more precise than others, which impose concrete obligations on the Member States. These provisions require them to take the necessary measures to ensure that certain objectives, sometimes formulated in general terms, are attained[21]. For example, Article 2 of the Directive, read in conjunction with Article 4, imposes on Member States precise obligations to be implemented within the prescribed timescales in order to prevent deterioration of the status of all bodies of surface water and groundwater. Other provisions, such as Article 11(5), are formulated in a clear and unequivocal manner, as they oblige the Member States to examine and review permits and authorisations as appropriate. The Directorate considers these provisions to be relevant in the case at hand. It is also of the opinion that, in view of the clarity of these provisions, a Member State cannot withdraw from its obligations under the Directive.

The Directorate holds the view that, based on the information currently available, the effective implementation of the Directive in Norway cannot be regarded as guaranteed. In fact, both the diversity and complexity of legal regimes currently in force are rather likely to constitute a hindrance to the general objective to ensure consistent and coherent action. The current legal situation lacks clarity, as the several regulations and legal instruments allegedly available to Norwegian authorities constitute a patchwork whose constituent parts do not seem to correlate. Against this background, it is questionable that a fragmented legal framework without inner cohesion will manage to transpose a compact legislative programme such as the one contained in the Directive accurately. Evidence provided by the Norwegian Government in its written observations suggests that a different approach will be needed in order to deal with every individual case, depending on the respectively applicable legal regime. Public authorities will have to resort to different legal instruments in order to attain basically the same goal. Even so, there is no guarantee whatsoever that similar cases will be handled by public authorities in the same manner.

From that perspective, the different legal instruments might separately have limited significance and will neither individually nor combined be able to replace the body of

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I-1569, paragraph 42; Case C-102/08, *SALIX*, [2009] ECR I-4629, paragraph 40 and joined Cases C-180/10 and C-181/10, *Slavy*, not yet reported, paragraph 34.

[18] See Case C-334/92, *Wagner Miret*, [1993] ECR I-6911.

[19] See Case C-32/05, *Commission/Luxembourg*, [2006] ECR I-11323.

[20] See judgment *Commission/Luxembourg*, par. 34.

[21] See judgment *Commission/Luxembourg*, par. 42.

rules for environmental improvement processes that the Directive represents. The necessity of different approaches might ultimately undermine coherent action by public authorities. Furthermore, it cannot be ruled out that the complexity of this task might eventually discourage public authorities from taking action if the examination and review of licences turns into a cumbersome task in the long run. Quite apart from this, it should not remain unmentioned that the Norwegian Government has failed to specify the exact figures of hydropower facilities regulated by the different legal regimes[22], which raises questions regarding Norway's capacity to assess the magnitude of the upcoming challenges.

For the reasons stated above, the Directorate is of the opinion that the lack of a set of legal instruments carefully tailored to implement the Directive at the national level has the potential to put at risk the achievement of its objectives.

3.2.2. Failure to provide legal certainty

Although the Norwegian Government seems to have developed a series of possible solutions aimed at coping with any legal obstacles likely to arise in the event that environmental amendments were to be made, it appears that the effectiveness of those solutions might remain merely theoretical, as the Norwegian authorities do not seem to have made use thereof before. As a matter of fact, it remains unclear under which conditions the relevant provisions may be invoked in practice. The Norwegian Government has failed to explain in detail how for instance environmental concerns could possibly justify an amendment of conditions by means of provisions such as the ones contained in Section 28 or in Section 66 of the Water Resources Act which, according to the information available in the preparatory works, were originally designed to allow this only in *"special circumstances"*[23]. As can be deduced from the wording of these provisions, the existence of special circumstances would have to be proven on the basis of a case-by-case analysis. It must also be assumed that, being an exception to the legal regime applied, such provisions would rather have to be interpreted narrowly. Thus, the threshold set by the law might turn out to be too high in order to allow State action. It is worth noting that the Norwegian Government seems to be conscious of the exceptional applicability of these provisions, as it firstly confirms the Directorate's interpretation of Section 28 of the Water Resources Act and secondly rules out a general use of Section 66 of the same Act with reference to the explicit will of the Norwegian legislator, laid down in the preparatory works[24].

The Directorate is not convinced that an amendment of conditions by means of these provisions could be achieved without being challenged by the operators of hydropower facilities or third parties. The use of these provisions is not just a procedural matter but rather a matter of substantive law, which would have to be clarified at the national level. The Directorate is of the opinion that the question of efficacy of the legal instruments available is intrinsically connected with the aspect of legal certainty. Should the solutions

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[22] See document "Informal information from Norway" handed out at package meeting in Oslo 26 October 2012, answer of the Norwegian Government to question 2 (page 6).

[23] See letter of the Norwegian Government of 31 May 2012, p. 11, in which it explicitly confirms the understanding by the Authority of the scope of Article 28 of the Water Resources Act, expressed in its letter dated of 22 February 2012, p. 9.

[24] See letter of the Norwegian Government of 31 May 2012, p. 11.

developed by the Norwegian Government not stand a test of legality from a constitutional or administrative law viewpoint, this could severely weaken the implementation of the Directive in Norway.

The Directorate invites the Norwegian Government to elaborate on the aspect of legal certainty by explaining to what extent the solutions developed in order to achieve the amendment of conditions in order to meet environmental requirements stand on firm legal ground.

3.2.3. Uncertainty regarding the observance of deadlines

The Directorate considers it important to emphasize the fact that implementing the Directive in a uniform manner in the whole territory of Norway will require a concerted action by all the national authorities involved. However, it is doubtful that the solutions referred to by the Norwegian Government may be effective in practice, as it seems - at least from this perspective - uncertain that the screening process and the ensuing revision process will manage to meet the deadlines foreseen by the Directive. Experience with similar cases has shown that procedures are extremely lengthy. The first revision procedure concerned four licences linked to the *Vinstra* river and took 12 years to complete (1996-2008). The other one concerned *Tesse* and took 20 years to complete (1991-2011). Despite allegations on the contrary, no evidence has been provided by the Norwegian Government[25] that the processing time needed in the *Vinstra* and *Tesse* cases will not be representative for future cases. Besides, it needs to be taken into account that the revision of up to 350 licences will stretch the resources of the Norwegian administration and will most probably take more than 10 years.

Furthermore, it is important to bear in mind that a revision of terms will depend as well on whether this faculty is bound by any timelines or not. For example, according to the information provided by the Norwegian Government, clauses in the rules of manoeuvring can be used to impose changes of manoeuvring at any time, while the general clause of revision of terms merely allows such a revision every 30 years[26]. Those timelines constitute procedural hurdles the Norwegian authorities do not seem to be able to overcome by means of alternative legal instruments. It is therefore questionable whether in the latter case it would be possible to carry out a revision every six years, as foreseen in the Directive. From a legal standpoint, a failure to comply with the obligation to examine and review the terms valid for every licence within the timelines established by the Water Framework Directive would in any case constitute a breach of Article 11(5).

The Norwegian Government seems to be aware of this problem and has therefore announced its intention to seek, if necessary, an extension of deadlines pursuant to Article 4(4) of the Directive, however without specifying the exact reasons[27]. As regards the possibility for a Member State to request an extension of deadlines, it is important to note that this provision may not be invoked in a systematic manner in order to justify any random case of delayed implementation. Far from being a simple blanket norm, Article 4(4) of the Directive allows for an extension of deadlines only on fulfilment of specific conditions laid down by law, which will have to be proven by the implementing State on a

[25] See letter of the Norwegian Government of 31 May 2012, p. 7.

[26] See letter of the Norwegian Government of 31 May 2012, p. 6.

[27] See letter of the Norwegian Government of 31 May 2012, p. 10.

case-by-case basis. As Article 4(b) of the Directive clearly states, the reasons for an extension of deadlines will have to be specifically set out and explained in the river basin management. Recital 30 of the Directive explains the rationale behind this regulation by stating that *"[i]n order to ensure a full and consistent implementation of the Directive any extensions of timescale should be made on the basis of appropriate, evident and transparent criteria and be justified by the Member States [...]"*. The invocation of this provision will thus have to be submitted to a strict control of legality in order to avoid abuse. To conclude, it is worth noting that an extension of deadlines is not unlimited in time but rather restricted to maximum two periods of six years each, pursuant to Article 4(c) of the Directive.

The Directorate is convinced that an interpretation of this provision in the opposite sense would seriously endanger the timely achievement of the objectives set by the Directive and must therefore be rejected.

The Directorate invites the Norwegian Government to take a position on this issue and explain how Norway intends to carry out the examination and the review of licences within the timelines set out by the Directive.

4. Final remarks

A preliminary assessment of the efforts undertaken by Norway to implement the Water Framework Directive leads to the conclusion that the measures adopted fall short of the objectives set by the Directive, the reason for this being essentially:

- an incomplete protection for modified bodies of water;
- a lack of updated information allowing the planning of environmental objectives;
- an insufficiency of the national legal framework in order to achieve a revision of authorizations.

At this stage and on the basis of the information available, the Directorate takes the view that the indicated shortcomings amount to an infringement of Articles 4 and 11 of the Directive.

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by *24 June 2013*. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in this matter in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Yours faithfully,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate