

**27 MAY 2025**

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**LEGAL NOTE**

**ASSESSMENT OF THE NORWAY PRICE FOR ELECTRICITY IN  
LIGHT OF THE EEA AGREEMENT**

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To:

**Zero Emission Resource Organisation**

**Friends of the Earth Norway**

**NHO Elektro**

**Norwegian Heat Pump Organisation**

**Norwegian Electrical Trade Association**

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## 1. INTRODUCTION

The government has proposed introducing a fixed price scheme for electricity of NOK 0.40 per kWh (**Norway Price** or **the scheme**) from 1 October 2025. The proposed scheme will be a voluntary alternative to the current electricity subsidy scheme that all households and holiday homes will be offered. The proposal was sent for public consultation on 10 March 2025. On 31 March, the government also proposed introducing the Norway Price for households that use district heating. On 23 May, the government adopted a formal legislative proposal<sup>1</sup> for the introduction of Norway Price for both electricity and district heating (**the legislative proposal**).

CMS Kluge Advokatfirma AS (**CMS Kluge**) has been asked by Zero Emission Resource Organisation, Friends of the Earth Norway, NHO Elektro, Norwegian Heat Pump Organisation and the Norwegian Electrical Trade Association to assess whether Norway Price may be in violation of the EEA Agreement. We have provided a preliminary assessment in our memo dated 8 April 2025 (**the memo**). Thereafter, we were requested to provide a more detailed analysis, which is reflected in the present assessment (**the legal note**).

In section 2 of the legal note, we provide a summary of our assessment. Section 3 explains the proposed scheme and points out some possible effects. Section 4 quotes the government's assessment of the scheme against pertinent EEA law. Section 5 explores Norway Price's relationship with state aid rules. Section 5 assesses Norway Price against the EEA regulatory framework for electricity markets, in particular Directive 2009/72.

As indicated, the government has also proposed a similar regime for district heating, Norway Price for district heating. We will not specifically address this parallel regime in this legal note, as it is but a consequence of the regime for electricity. That being said, the regime for district heating may raise different legal issues that fall outside the scope of the present analysis.

## 2. SUMMARY

It is considered likely that a large majority of households would opt for Norway Price were it introduced, in particular in Southern Norway. As a consequence, **Norway Price will likely lead to increased electricity consumption, higher electricity market prices** in periods with otherwise high prices, and hence higher prices **for businesses and neighboring countries, additional revenues for (hydro)power producers and weakened incentives for electricity saving and consumer flexibility**.

**These effects** – stemming from the proposed intervention in the retail market for electricity – **entail in our view that two sets of EEA rules are challenged**, and in our view, **likely infringed**.

**First**, while the direct beneficiaries of Norway Price are private households, the scheme will in our view **indirectly benefit** an identifiable circle of beneficiaries, namely those producing **(hydro) electricity**, at the expense of other energy and electricity sources and energy saving technologies, such as solar and wind power, solar cells installed in private homes, heat pumps, wood fired heating and bio energy. These indirect benefits would constitute in our view probably **(unlawful) state aid** in the meaning of **Article 61 of the EEA Agreement**.

**Second**, Norway Price is in our view to be considered as a significant **public intervention in the electricity market**, where according to **Directive 2009/72** and pertinent case law, prices are in principle solely to be determined by the rule of demand and supply.

Such **state intervention can only be justified if it is necessary to achieve an objective of common interest, is proportionate and non-discriminatory**. In our view, **these conditions are probably not met for Norway Price**.

It is debatable whether **subsidizing the electricity consumption of** practically all households, and in particular **those that consume the most**, is such a legitimate objective, including because this objective

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<sup>1</sup> <https://www.regjeringen.no/no/dokumenter/prop.-148-l-20242025/id3102011/?epsremainingpath=id3102011%2f>

seems to run counter the environmental and climate policies of Norway and the EU alike. Decisively though, we consider that the **scheme is not proportionate**, precisely because it foremostly **benefits those that do not need public support**, and **alternatives which leave intact energy-saving incentives** and do not distort competition **are readily available**.

Introducing Norway Price thus entails in our view **significant legal risks**. For potential beneficiaries of unlawful state aid, it also entails an **economic exposure**. In our view, it would therefore seem prudent to opt for, or at the very least **explore**, such **alternative measures instead** of, or at least before, introducing Norway Price.

### 3. FACTUAL BACKGROUND AND CONSEQUENCES

#### 3.1 The proposed scheme – Norway Price for electricity

According to the government's proposal, Norway Price will entail a fixed price for electricity of NOK 0.40 per kWh from 1 October 2025. Norway Price will be a voluntary scheme that all households and holiday homes will be offered, so that it is up to each individual power customer to choose whether to use Norway Price or to retain the current electricity subsidy. The price is set based on historical average prices and expected prices but is expected to be (significantly) below market prices.

A consumption cap will be introduced on Norway Price, namely 4,000 kWh per month for homes, and 1,000 kWh per month for holiday homes.

The government expects that the scheme will entail public expenditure of approximately NOK 6.6 billion (and NOK 370 million for district heating). This estimate is inter alia based on an assumption that 70% of household in Southern Norway will choose Norway Price.

Distribution system operators (**DSOs**) will administer the scheme and be the contracting parties to the customers choosing Norway Price. DSOs will be responsible for settling the accounts of their Norway Price customers, and for incoming and outgoing payments so that the final price the customer pays for electricity corresponds to the Norway Price. No compensation to DSOs is provided for in the legislative proposal, such that the administrative expenses the scheme entails for DSOs will have to be financed by network levies.

The scheme is meant to have a duration until 31 December 2029. A regular review of the level of the Norway Price is also foreseen.

#### 3.2 Consequences and effects

In the first memo, we have pointed out some of the scheme's potential consequences. These have been further analysed since, including by a large number of affected actors that have responded to the public consultation<sup>2</sup>, which overall support the concerns presented in our memo. We refer to one of the analyses made by the consulting firm THEMA, "*Consequences of «Norgespris» in Norway and the Nordics*", dated 18 March 2025 (**THEMA report**).

In the following, we focus on those effects which we consider to be of greatest relevance for the ensuing legal assessment.

The government assesses the effects of Norway Price in section 5 of its consultation paper for the public consultation<sup>3</sup> and in section 3 of the legislative proposal. By and large, it confirms that the scheme will indeed lead to higher consumption of electricity, higher prices at certain times, weakened incentives to save electricity (or move consumption), including investments in alternative heating solutions, as exemplified by the following statement:

*"The Ministry considers that Norway Price could reduce incentives to invest in heating solutions based on alternatives to electricity, including heat pumps, wood burning, wood chips and pellets, compared with the current electricity subsidy scheme. In winter, when electricity prices are*

<sup>2</sup> <https://www.regjeringen.no/no/dokumenter/horing-av-forslag-til-ny-lov-om-norgespris-og-stromstonad-til-husholdninger/id3090841/>

<sup>3</sup> <https://www.regjeringen.no/contentassets/428d4ed2a03f47de9cc333609ff18106/horingsnotat-ny-lov-om-norgespris-og-stromstonad-til-husholdninger.pdf>

*typically high, the Norway Price will make alternative heating solutions less attractive relative to electric heating. It is difficult to estimate the extent to which the introduction of the Norway Price will affect the heating market.”<sup>4</sup>*

Generally speaking, the government acknowledges the presence of some of the scheme’s negative effects but claims that those are difficult to assess and/or largely immaterial.

This view is in contrast with some of the most pertinent voices responding to the public consultation, including leading analysts, which have made plausible estimates of different consequences of the Norway Price.

**First**, it seems clear that the scheme will lead to increased consumption of electricity by Norwegian households. According to the THEMA report, for example, consumption will rise by 1.2% in 2026, and by 7.4% in 2030 as compared with a scenario in which the scheme is not introduced.<sup>5</sup>

Higher electricity consumption by household customers **secondly** has certain inevitable effects. It will necessarily increase the market price (spot price) at times where it is higher than the Norway Price, because the existing incentive not to consume electricity (in such a situation) is significantly weakened. An estimate of this effect is contained on page 15 of the THEMA report, suggesting that market prices in Norway will increase by up to 3.7% in 2026, and 8.8% in 2030 as a result of the scheme, leading then to an increase of businesses’ and municipalities’ electricity expenses. Likewise, it will also lead to a significantly higher market price in neighboring countries (Denmark, Sweden, Finland). These potentially grave consequences appear to have motivated a number of authorities, associations and companies from neighboring countries to voice their concerns in the public consultation, testifying to the fact Norway Price’s effects likely will be felt also outside of Norway.

By means of example, there were clear warnings from neighboring countries that Norway Price could disrupt competition and price formation in the integrated regional electricity market.

Three key Swedish bodies – Svenska kraftnät (system operator), Energiföretagen Sverige (industry organisation) and Energimarknadsinspektionen (regulator) - submitted consultation responses expressing considerable skepticism. They fear that Norway Price will lead to increased electricity consumption, higher and more volatile electricity prices in the Nordic market, operational challenges for the power system and a negative impact on the price hedging market (forward and fixed price contracts). In other words, if Norwegian households are shielded from price signals, the rest of the market must bear the burden. Svenska kraftnät pointed out that reduced demand flexibility in Norway during price peaks could lead to higher power prices in both Norway and Sweden and create challenges for system operation. Energimarknadsinspektionen shared this assessment and referred to previous experience that changes in one part of the Nordic region affect prices and power flows in the entire region.

The industry organisation Energiföretagen Sverige was particularly concerned about market disruptions outside Norway. In particular, they were skeptical of the Norwegian assessment that the measure would have a limited impact on the wholesale market. With increasingly unpredictable power generation (wind, solar), flexibility in consumption is becoming increasingly important; thus, they consider that removing price signals in a large part of the market *cannot* avoid significantly affecting wholesale prices, a view largely echoed by Green Power Denmark. In short, it seems clear that the Scandinavian wholesale market will be significantly affected by the scheme.

Higher electricity prices **thirdly** will entail higher income for electricity producers, in particular for hydro (reservoir) electricity producers, who can also produce when the market prices are high (or switch off production when market prices are low). Solar and wind might conversely see their income being reduced, as they cannot switch off production when prices are low (and lower, as they would have been without Norway Price) and often cannot produce when prices are high due to a lack of wind or sunshine.<sup>6</sup> This in turn might lead to less investment in these types of electricity production.

**Fourth**, and as indicated above, households benefitting from Norway Price will no longer have an incentive to save electricity or move consumption to periods when market prices are lower. This will in turn

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<sup>4</sup> DeepL-machine translation of section 5.5.

<sup>5</sup> See for example page 20 of the report.

<sup>6</sup> <https://www.tu.no/artikler/norgespris-vil-gi-hoyere-spotpris-og-flere-13-kronerstimer/555459>

negatively affect a range of sectors and technologies, such as manufacturers and suppliers of wood-burning stoves, bio energy, heat pumps, solar panels and energy storage. Suppliers of smart energy technologies (control systems, electric car charging, water heaters, etc.) will also be negatively affected when the price incentives for electricity savings and consumer flexibility disappear for homes and cabins. This effect is not contested by the government and underlined by numerous respondents to the public consultation.

Overall, it is both unusual and noteworthy that even public authorities such as the Norwegian Competition Authority, SSB, NVE and NVE-RME are so outspokenly critical of a government proposal, emphasizing also that a strong intervention into the market seems at this juncture simply unnecessary, as NVE points out:

*“As mentioned in the consultation paper, electricity costs for Norwegian households have fallen sharply over the past couple of years, and last year they were almost back to the levels of 2018 and 2019. It is worth noting that in parallel with the fall in the price of electricity, the support schemes for households have been steadily strengthened. In other words, **we are seeing a trend where increasingly powerful support schemes are being introduced to mitigate a problem that has become increasingly smaller.**”<sup>7</sup>*

**Fifth**, one concern shared by many is that there are readily available alternatives that would sufficiently shield vulnerable consumers from high energy prices, such as direct transfers, but that those have not been assessed. As we will revert to under section 6, this lack of assessment has an important bearing on the proportionality assessment of the scheme. That being said, Norway Price will in any event benefit many more than just vulnerable households or customers. With the suggested cap at 4000 MW, only a fraction of both household and holiday home electricity consumption would not benefit from the scheme.<sup>8</sup> This means that even the wealthiest Norwegians will benefit from the scheme both as regards their primary homes as well as their holiday homes.

**Sixth**, and finally for the purposes of the present analysis, the proposed administration of the scheme has raised concerns as regards the role of distribution system operators (**DSOs**). Norway Price entails that the DSOs' role will be expanded beyond network operations, increasing direct customer contact and administrative burden, and hence blurs the line between the roles of DSOs and electricity suppliers. Several electricity suppliers emphasised the importance of maintaining a market model in which the electricity supplier remains the customer's primary point of contact. Their concern seems to be that the role of the electricity supplier will be eroded as a result of the introduction of the scheme. Further, smaller DSOs have pointed out that the administration of the scheme will entail significant administrative burden and costs, without there being a compensation system in place.

#### **4. THE GOVERNMENT'S ASSESSMENT OF NORWAY PRICE'S COMPLIANCE WITH EEA LAW**

The legislative proposal for Norway Price entails a short legal assessment of the scheme in the light of pertinent provisions of EEA

law. In the following, we include this assessment in full:

*“The Ministry has taken note of the consultation responses that refer to the Norway Price and the relationship with EU regulations. Klarkraft has referred to Article 61 of the EEA Agreement, and NHO Byggenæringen, NHO Elektro, Norsk Varmepumpeforening and the Institute for Electrical Energy at NTNU have commented on whether the proposal has been adequately assessed in relation to EEA legal obligations.*

*The Ministry assessed the proposal's relationship to **Article 61 of the EEA Agreement** in section 6.5.2 of the consultation paper. **The Norway Price scheme, like the electricity subsidy scheme, is designed to benefit household customers.** The scheme is administered by the grid companies, which do not receive any financial advantage for administering the scheme. **No undertaking receives state aid in contravention of the EEA Agreement's provisions on state aid.** Norway Price*

<sup>7</sup> <https://www.regjeringen.no/no/dokumenter/horing-av-forslag-til-ny-lov-om-norgespris-og-stromstomnad-til-husholdninger/id3090841/Download/?vedleggId=e2133186-bf3a-41f9-bb7f-f5e147dfa97b>

<sup>8</sup> See page 11 of the Thema report.

*is limited to commercial customers, does not interfere with the organisation of the electricity market and does not regulate prices in the end-user market. The proposed legislation on Norway Price also means that district heating customers will have the same opportunity to choose Norway Price as electricity customers.*

*Like the electricity subsidy scheme, Norway Price is a state subsidy scheme for households and not a fixed-price agreement in the end-user market. **Norway Price therefore does not directly interfere with or have a significant impact on other players in the wholesale market.** As explained by the Ministry in the consultation paper, the impact on wholesale prices of introducing Norway Price is expected to be limited, given the high degree of flexibility in the Norwegian power market and the fact that prices depend on a number of factors within Norway and in neighboring countries. In any case, the impact will not differ significantly from the current situation with the electricity subsidy scheme. Furthermore, the Ministry does not expect the Norway Price to increase the likelihood of energy shortages or power rationing, nor does it expect the scheme itself to have a significant impact on households' electricity consumption or district heating consumption. **The Ministry therefore considers that neither the electricity subsidy scheme nor the Norway Price scheme will be in breach of the state aid rules.***

*Because Norway Price is not a state intervention in the setting of electricity prices, either in the end-user market or in the wholesale market, and therefore does not constitute an obstacle to a competitive electricity market covered by the Directive, **the Ministry considers that the scheme will not be in breach of Directive 2009/72/EC (the Electricity Market Directive).** 2009/72/EC (the Electricity Market Directive). “<sup>9</sup> (emphasis added)*

We will revert to the government's assessment in the following section.

## **5. ASSESSMENT UNDER ARTICLE 61 OF THE EEA AGREEMENT**

### **5.1 Introduction**

In the memo, we raised the possibility that Norway Price might constitute state aid. Article 61(1) of the EEA Agreement prohibits (in principle) the granting of state aid to undertakings or to the production of certain goods. A breach of the state aid rules, i.e. the granting of aid without prior authorisation by ESA, may ultimately result in the aid recipient having to repay the aid to the aid grantor.

The government seems to consider that the scheme cannot entail state aid, because it is similar to the existing electricity subsidy scheme, and only benefits consumers.

We cannot see how the alleged similarity with the existing electricity subsidy scheme is relevant. To our knowledge, the electricity subsidy scheme has never been notified to ESA. In any event, there are clear differences between the two schemes, and the effects of Norway Price will, as we will show in the following, make it (more) likely that it entails unlawful state aid.

### **5.2 Assessment**

#### **5.2.1 Legal framework**

By means of introduction, it is correct to state that Norway Price does not entail that the direct beneficiaries of the schemes – households – receive state aid in the meaning of Article 61(1), as they are, indeed, not undertakings.

However, under certain circumstances, schemes benefiting private individuals may entail *indirect* advantages for other actors that are to be regarded as state aid, as explained succinctly by the EFTA Surveillance Authority's (ESA or **the Authority**) guidelines on the notion of state aid (“**NoA**”):

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<sup>9</sup> See Section 3.3.15 of the legislative proposal; DeepL-machine-translation.

*“An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). The direct recipient of the advantage can be either an undertaking or an entity (natural or legal person) not engaged in any economic activity.*

*Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (for example through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an ex ante point of view. An indirect advantage is present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, de facto or de jure, made conditional on the purchase of goods or services produced by certain undertakings only (for example only undertakings established in certain areas).”<sup>10</sup> (emphasis added)*

Consumer subsidies such as Norway Price may thus amount to state aid when it can be determined *ex ante* that they will benefit an identifiable group of undertakings, or sectors.

Case law and practice shed further light on the distinction between mere secondary effects, and indirect state aid.

Consider for example the leading case in this area, *Mediaset*.<sup>11</sup> In that case, Italy had introduced a consumer subsidy for the purchase of digital terrestrial decoders, which the Commission considered as state aid to terrestrial broadcasters and digital cable operators, notably because it would strengthen the market position of these operators vis-à-vis for example satellite television providers.

The EU Court of Justice (CFEU) emphasised that a necessary (and sufficient) condition for a measure to be regarded as indirect state aid is that “it is liable to place some [of them] at an advantage compared with others”<sup>12</sup>, and that “a national measure which discriminates between undertakings, in the sense that it is liable to place some of them at an advantage compared with others, is to be regarded as [...] State aid [...] That is the case, for instance, where a measure subsidises the purchase by consumers of a product which is used by an undertaking for the provision of a service while the purchase of the product used by another undertaking for the provision of a similar service is not subsidised”.<sup>13</sup>

Thus, when **identifiable undertakings or sectors benefit from a consumer subsidy, at the expense of other undertakings or sectors that could have provided the same or a similar service to the consumer**, the consumer subsidy **becomes state aid**.

ESA’s decision-making practice, referred to in the memo, illustrates the foregoing further.

In addition to the examples mentioned there, recall that ESA considered for instance that a support measure for the Norwegian wood industry “provides an incentive for farmers to build their production facilities in wood. This incentive appears to be liable to stimulate the demand for wood building materials compared to a counterfactual scenario where such additional aid is not provided”.<sup>14</sup>

Likewise, it was considered that a measure supporting alternative fuel infrastructure “can stimulate the demand for zero/low emission vehicles, vessels and other machinery, eventually benefitting their respective manufacturers, as well as undertakings operating in the sectors related to the supply chain of alternative fuels infrastructure, compared to a reference situation in which no such aid would be granted.”<sup>15</sup>

The Authority has not definitely concluded on the presence of indirect aid in the two cases quoted above. However, these cases illustrate that consumer subsidies granted for a specific technology or sector can constitute indirect aid, even when the indirect beneficiaries are not easily identifiable. Further, they show that the economic ripple effects of consumer subsidies tend to affect competition, even if those subsidy schemes are relatively minor.

As we will see in the following, the sheer economic significance of Norway Price, and its negative effects for a range of energy and energy saving sectors and technologies, make for a comparatively straightforward

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<sup>10</sup> NoA, paragraph 115-116.

<sup>11</sup> See cases T-177/07 and C-403/10 P.

<sup>12</sup> C-403/10 P, para. 74.

<sup>13</sup> C-403/10 P, para. 107.

<sup>14</sup> Decision No 037/24/COL, para 83.

<sup>15</sup> Decision No 034/21/COL, para 54.



assessment, and entails that this scheme would most likely fall foul of the prohibition to grant state aid pursuant to Article 61(1) of the EEA Agreement.

### 5.2.2 Application to Norway Price

In our view, the scheme discriminates between undertakings and sectors at two levels, at both of which it can entail the granting of state aid. As we will show in the following, **Norway Price favours certain identifiable forms of electricity production over others, and electricity production (and consumption) more generally over competing energy, heating and saving technologies.**

**First**, as indicated above in section 3, Norway Price likely places producers of flexible peaking power such as in particular producers of hydro reservoir power at an advantage compared with other electricity production technologies, such as in particular intermittent, inflexible power production as wind and solar.

This effect, which to our knowledge has not undergone detailed assessment, seems nonetheless to be an inevitable consequence of the law of supply and demand.

Indeed, one obvious effect of Norway Price is that it will increase the market price additionally when it is high (at times of "*dunkelflaute*") – because household customers do not have an incentive to save electricity then. This in turn will lead to higher market prices, which will increase revenues for those electricity producers that can increase electricity production at any time.

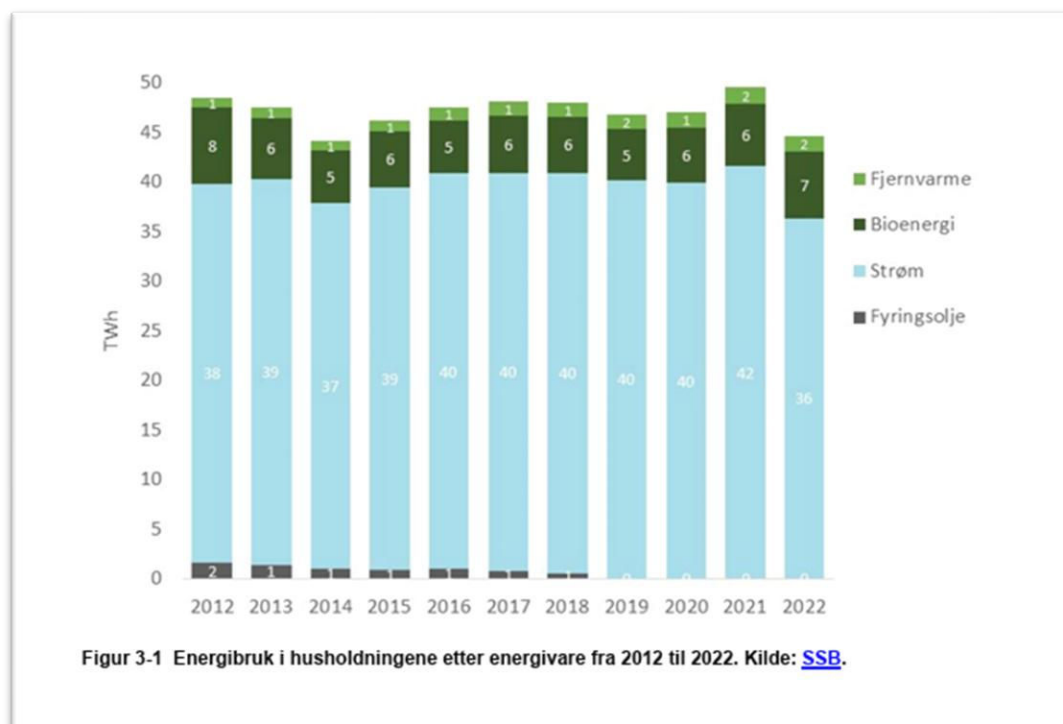
Conversely, when electricity is abundant (at times of "*sonnenbrise*"), and market prices are below Norway Price, consumers may actually use less energy than otherwise, because they no longer have an incentive to move consumption to these periods. This may then in fact lead to lower market prices as would have been established in the absence of Norway Price, leading to reduced revenues for those electricity producers that cannot (easily) regulate or switch off production, notably wind and solar electricity producers.

Accordingly, Norway Price will favour certain types of electricity production over other types – an effect that is foreseeable ex ante and amounts to an advantage accruing only to a group of identifiable undertakings. As all electricity producers provide the same service (electricity production), this would in our view qualify as indirect state aid. An economic analysis quantifying these effects could further corroborate our findings.

This would seem unnecessary, however, given that this effect seems so obvious, and that the scheme has another discriminatory effect which also entails the granting of state aid.

Indeed, one of the least controversial consequences of Norway Price is that it will remove or at least strongly weaken consumers' incentive to consume less electricity, and thereby also remove incentives to invest in electricity saving measures such as heat pumps, insulation, solar cells, etc, or choose alternative heating fuels such as bioenergy or wood. In other words, Norway Price **secondly** favours but one type of energy consumption, at the expense of other types of energy and energy saving.

It is in our view illustrative of the foregoing that the government emphasises the fact that district heating consumers will be granted the same benefits as the electricity customers, seemingly implying that the equal treatment of these two energy types or heating sources is necessitated by state aid rules. However, there are other competing energy sources that do not benefit from a Norway Price, such as bioenergy, as the following overview of energy consumption in Norwegian households illustrates:



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Looking solely at the above, it would thus appear as if leaving bioenergy out of the scheme would make the scheme selective at the level of energy types benefitting from the scheme, or in the words of the CFEU, a “measure [that] subsidises the purchase by consumers of a product [here: electricity or district heating] which is used by an undertaking for the provision of a service while the purchase of the product used by another undertaking for the provision of a similar service [here: bioenergy] is not subsidise”.

Further, the above graph only conveys a fragmented picture of competitive relationships in the energy consumption and savings market for households, and in particular the heating market.

The legislative proposal itself states that electricity currently represents approximately 75% of energy consumption for heating in households<sup>17</sup> – and that district heating companies are in direct competition with amongst others electric heating and heat pumps<sup>18</sup>. The competitive relationship between these types of energy or heating types or technologies suggests that favouring some, but not the others, entails indirect state aid. Indeed, the government’s reference to having introduced a scheme for district heating in the legislative proposals assessment of Norway Price against Article 61(1) of the EEA Agreement could indicate that also the government recognises the risk of awarding indirect aid, had district heating not been afforded a similar treatment as electricity. If so, it remains unclear why leaving out some other energy sources and heating technologies would not have the same legal effect.

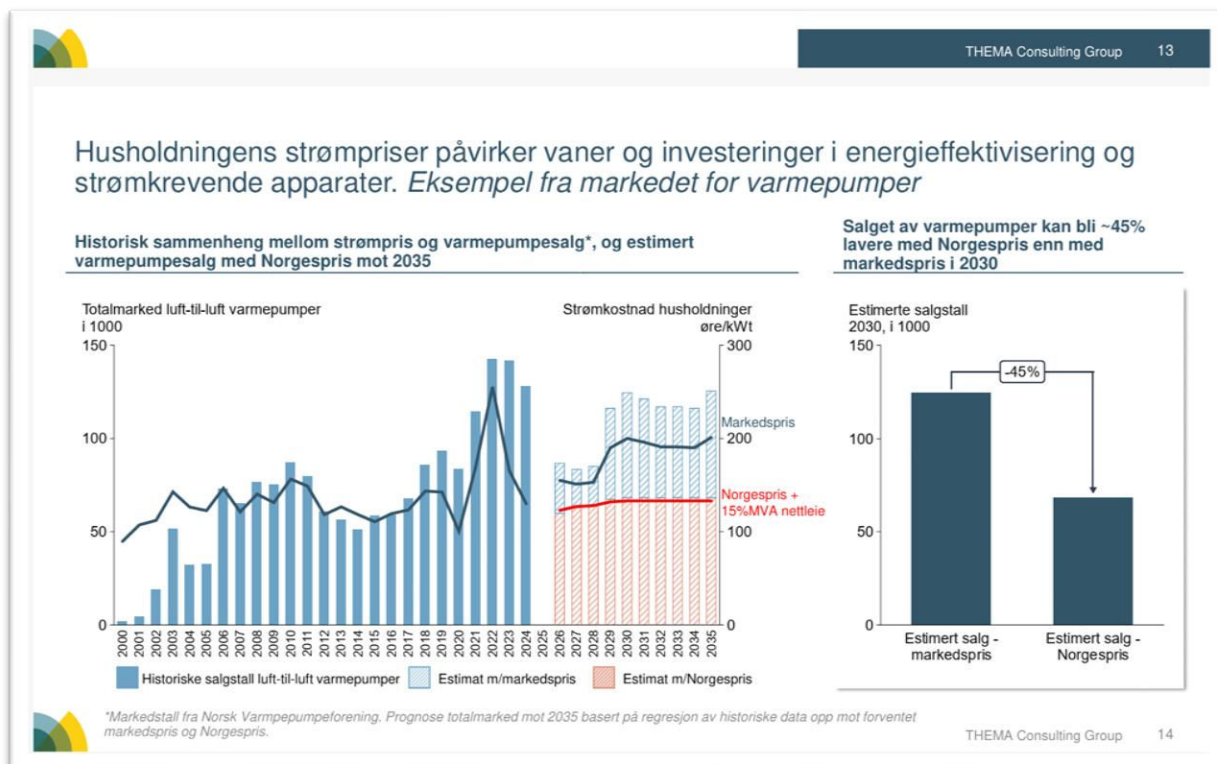
Indeed, high electricity and energy prices entail strong incentives for customers to save energy including by installing solar panels and improving energy efficiency including through the purchase of heat pumps, for example.

The latter can be illustrated with the following graph from a report by THEMA, estimating Norway Price will entail a 45% reduction the sale of heat pumps compared to a scenario where electricity was sold at market prices:

<sup>16</sup> NVE’s Energibruksrapporten, page 12, available at [https://publikasjoner.nve.no/rapport/2023/rapport2023\\_35.pdf](https://publikasjoner.nve.no/rapport/2023/rapport2023_35.pdf)

<sup>17</sup> See section 2.1.2.

<sup>18</sup> See section 4.3



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In short, and as indicated in section 3, the scheme removes or at least significantly reduces households' incentives to invest in energy saving or alternative energy sources. Accordingly, it indirectly favours electricity consumption and puts all technical solutions that can reduce electricity consumption at a severe disadvantage.

In many ways, Norway Price can be, from a state aid point of view, considered as the flip side of the Norwegian scheme on support for alternative, renewable heating and electricity savings in private households, which the Authority considered as entailing indirect aid in decision 329/09/COL, and where it considered that:

*“In the case under assessment, the subsidy to private households for investments in specific alternative renewable heating technologies provides them with an economic incentive to purchase these products. The **measure creates an incentive for consumers to switch from traditional electric heating to alternative heating systems**. A higher demand from consumers can result in higher profits for these kinds of technologies which provides an advantage to the undertakings active in the sector of the technologies covered by the scheme in comparison with other undertakings”<sup>20</sup>*

Norway Price conversely creates an incentive to retain electric heating at the expense of alternative heating systems. It therefore arguably constitutes just as much indirect aid as the scheme for alternative heating and electricity saving did.

However, and importantly, the effects of Norway Price will be much more pronounced. Recall that ESA's decision 329/09/COL related to a scheme had a budget of ca. NOK 150 million, and ca. NOK 30-40 million annually, whereas Norway Price is estimated by the government to cost ca. NOK 7 billion in 2026 alone, a number many consider as an implausibly low estimate.

It seems economically impossible for a consumer subsidy scheme of that scale to evaporate without significant economic effects beyond the direct recipients. Indeed, as briefly highlighted in section 3, it seems likely that Norway Price will entail economic effects that foreseeably benefit electricity production

<sup>19</sup> Page 14, <https://zero.no/wp-content/uploads/2025/02/Virkninger-av-Norgespris.-Utvidet-rapport-250224.pdf>

<sup>20</sup> See section 1.2.1.

and consumption, and as shown above, in particular certain kinds of electricity production, at the expense of alternative technologies.

In our view, the scheme therefore entails state aid in the meaning of Article 61(1) of the EEA Agreement. We have thus far not explored if such aid could be compatible with the EEA Agreement nonetheless, which at first sight seems unlikely. If desirable, we can supplement our analysis on this point at a later point in time.

### 5.3 Conclusion

Provided that Norway Price will be implemented in accordance with the legislative proposal, it will in our view **probably entail the granting of unlawful and most likely incompatible state aid**. Not at least in view of the scheme's economic significance, it would then most probably entail the recovery of significant sums from a potentially large group of economic actors.

## 6. ASSESSMENT UNDER DIRECTIVE 2009/72

### 6.1 Introduction

In the memo, we raised the possibility that Norway Price might infringe Directive 2009/72 and pertinent, related case law. The government seems to consider that this will not be case, in particular because Norway Price is similar to the existing electricity subsidy scheme, and does not constitute a state intervention in the setting of electricity prices, neither in the end-user market nor in the wholesale market. Furthermore, in response to a parliamentary question, the Minister has referred to "*the preamble to the Electricity Market Directive [which] states that Member States should ensure that private customers have the right to electricity at clearly comparable, transparent and affordable prices, and that vulnerable customers should be protected*".<sup>21</sup>

In the same vein as for the assessment regarding Article 61 of the EEA Agreement, we do not see how the alleged similarity with the existing electricity subsidy scheme can be decisive. While also this existing scheme might be problematic under Directive 2009/72, it is nonetheless a different scheme with different consequences. As far as we are aware, it has not undergone a detailed assessment against Directive 2009/72 either. An assessment of electricity subsidy scheme falls in any event outside the scope of the present analysis, which focuses on the proposed Norway Price.

### 6.2 Assessment

#### 6.2.1 Legal framework

As we pointed out in the memo, there is established jurisprudence relating to Directive 2009/72 and its predecessor<sup>22</sup>, making clear that *price regulation* is only compatible with the Directive under certain circumstances.

The lead case *Federutility* concerned an Italian law which allocated to the regulator the power to define reference prices for gas supplies to domestic customers. The CFEU held that the principal presumption of the rules on the internal energy market is the development and maintenance of competitive markets. Accordingly, the price for the supply of energy should be the result of market forces, not one which is set by the State. Indeed, according to the Court, it follows "*from the very purpose and the general scheme of the Directive that the price for gas supplies had to be determined solely by the operation of supply and demand*". This line was confirmed by a series of cases including *ENEL*<sup>23</sup>, *Commission v Poland*<sup>24</sup> and

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<sup>21</sup> <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qnid=104426>; DeepL-machine translation.

<sup>22</sup> As well as Directive 2009/73, and its predecessor, which relate to gas markets.

<sup>23</sup> Case C-242/10.

<sup>24</sup> C-36/14.

ANODE<sup>25</sup>. In these cases, the Court also developed on the circumstances under which price regulation nonetheless can be compatible with the Directive.

Before we revert in greater detail to those circumstances, note that this jurisprudence was also applied to schemes that do not directly fix prices but entail another form of state intervention affecting the free formation of prices by the rule of demand and supply.

A recent example of this is case C-683/19, concerning a discount to market prices for vulnerable (retail) customers in Spain. The main question in the judgement related to financing of the discount, not the discount itself. However, no indications can be gleaned from the judgement that had the government financed the discount directly, it would not have been considered a “state intervention”, which in principle falls foul of Directive 2009/72. Conversely, in particular the AG’s opinion, explain convincingly that the regulated discount was a constitutive part of a wider public service obligation, which also contained financing obligations of that discount for a range of undertakings.

It would thus seem clear that *any* State intervention *affecting* prices being established solely by market forces can only be compatible with Directive 2009/72 under certain conditions, and that this state intervention can also relate to rebates or subsidies for retail consumers.

That being said, it is also, and arguably particularly, free competition in retail markets that is meant to being preserved, as illustrated by a case relating to a Spanish measure supporting certain sources of electricity production (gas) in order to achieve a reduction in prices on the wholesale market, which should in turn lead to a reduction of prices on the retail market.

In this case, T-596/22, the Court found that the measure “*in so far as it limits the direct involvement of the national authorities in price formation on the wholesale market and **does not extend it to the retail market** [...] preserves as far as possible the principle of the free formation of electricity prices on the basis of demand and supply*”.<sup>26</sup>

The formulation that the Spanish measures “preserved as far as possible” the free formation of prices, brings us to the circumstances under which state intervention can be lawful.

In this regard, the CFEU recalled for example in ANODE that “*although State intervention in the fixing of the price of supply of natural gas to the **final consumer** constitutes an obstacle to the achievement of a competitive natural gas market, that intervention may none the less be accepted within the framework of Directive 2009/73 if **three conditions** are satisfied.*

- *First, the intervention must pursue an **objective of general economic** interest,*
- *secondly, it must comply with the **principle of proportionality**, and,*
- *thirdly, it must lay down **public service obligations that are clearly defined, transparent, non-discriminatory** and verifiable, and guarantee equal access of EU gas undertakings to consumers”<sup>27</sup> (emphasis added).*

Regarding in particular the principle of proportionality, the Court held that

*“compliance with the principle of proportionality means, first, that the measure in question must be appropriate for securing the objective of general economic interest which it pursues”<sup>28</sup> and that the method of intervention used must not go beyond what is necessary to achieve the objective of general economic interest being pursued<sup>29</sup>. [...]*

*the requirement of necessity must also be assessed with regard to the scope ratione personae of the measure in question and, more particularly, its beneficiaries.”<sup>30</sup>*

In our view, case law relating to Directive 2009/72 thus entails that ***any public intervention in electricity markets, be it at the wholesale or retail level, is only compatible with EEA law if that intervention***

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<sup>25</sup> C-121/15.

<sup>26</sup> Paragraph 80. Note that the case concerns Directive 2019/944 (the Fourth Electricity Directive).

<sup>27</sup> Paragraph 36.

<sup>28</sup> Paragraph 55.

<sup>29</sup> Paragraph 64.

<sup>30</sup> Paragraph 66.

**pursues a clearly defined objective of general economic interest in a proportionate and non-discriminatory manner.**

As we will show in the following, Norway Price is such an intervention, and it is highly doubtful that it pursues an objective of general economic interest in a proportionate manner.

Further, Directive 2009/72 also provides for the unbundling of distribution and supply of electricity.

Of particular relevance here is Article 26(1), providing that “*Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of legal form, organisation, and decision-making from other non-distribution activities*.” “Distribution” is defined in Article 2(5) as “*the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply*”.

## 6.2.2 Application to Norway Price

### (a) Norway Price is a state intervention and tantamount to price regulation

As indicated, the government seems to suggest that Norway Price, being a subsidy scheme for household customers, is not to be considered as a state intervention. At the same time, the government also suggests, by reference to the Directive’s preamble, that is a *justified* intervention.

It thus seems appropriate first to analyse whether Norway Price is to be considered a “state intervention” in the meaning of the Directive and the jurisprudence related thereto.

A literal understanding of the term “state intervention” suggests that Norway Price is such an intervention. For example, the term is defined by Policonomics as “*any action carried out by the government or public entity that affects the market economy with the direct objective of having an impact in the economy, beyond the mere regulation of contracts and provision of public goods*”.<sup>31</sup> Evidently, Norway Price is intended to, and will, have an effect on the economy.

Furthermore, the jurisprudence referred in section 4.1 above makes clear that any measure that interferes with electricity prices being purely a result of market forces is to be considered as “state intervention”. Thus, if the measure in question has the effect of influencing the prices electricity customers must pay, there is a state intervention in the meaning of this jurisprudence.

This seems undoubtedly to be the case for Norway Price. Indeed, the scheme will de facto fix the price for a large share of Norwegian household customers. Accordingly, on the retail level, electricity prices will be almost fully detached from market prices and, importantly, market signals. That is in our view sufficient for the scheme to be considered as state intervention.

Further, it cannot in our view be contested that the scheme will impact and hence interfere with market dynamics also on the wholesale market, as indicated in section 3. Anybody but household customers who have chosen Norway Price will presumably pay at times more than what would have been the market price in the absence of the intervention, both in Norway and in neighbouring countries. The scheme might even affect incentives for new (wind and solar) electricity production to be installed.

In any event, there is no indication in jurisprudence that only measures “directly interfering” with the wholesale market are to be considered as state intervention. In fact, most cases that the CFEU has dealt with concern price regulation or other types of state intervention on the retail level, and most recent jurisprudence suggests that it is in particular competition on the retail market that ought to be protected from state intervention.

Finally, from an economic perspective, Norway Price would appear to be tantamount *in effect* to price regulation. The fact that the State assumes the economic burden for the measure, i.e. compensates consumers for the difference between market price and regulated price, instead of imposing the burden on economic actors, does not make Norway Price less of a “price regulation” in our view. Further, price regulation in the meaning of pertinent case law does not have to apply to all customers or be mandatory.<sup>32</sup>

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<sup>31</sup> <https://policonomics.com/government-intervention/>

<sup>32</sup> Compare case C-121/15, *ANODE*.

In view of the foregoing, it follows that Norway Price should be considered as “state intervention” in the meaning of the case law pertaining to Directive 2009/72.

Finally, and for the sake of completeness, we do consider that Norway Price significantly will affect competition.

As indicated in the foregoing, different energy (and even electricity) sources will be affected by the scheme in a different manner.

However, even in the retail electricity market, the scheme will probably dampen competition between electricity suppliers. A state-subsidised fixed-price scheme will make it impossible for the market to offer market-based fixed price contracts, which already became largely irrelevant in the wake of the electricity subsidy scheme’s introduction. Further, electricity suppliers also develop and compete with innovative services that monitor electricity prices, and steer consumption to periods with lower prices. Such services will become at least less relevant, if not almost fully redundant. The scheme will therefore impact the market’s ability to create, and importantly, reward innovation.

The foregoing illustrates why preserving market-based price signals is so important, and so highly valued by the EEA legal order. When public intervention weakens or removes such price signals, this requires justification. As we will see in the following, we query if Norway Price can be justified.

(b) *State intervention to ensure reasonable prices (for defined vulnerable customers) is not necessarily compatible with the EEA Agreement*

In light of Minister Aasland’s response to the parliamentary question referred to above, it would seem probable that the government in fact might share the view that Norway Price constitutes a state intervention, given the reference made to the Directive’s preamble.

Recall then recital 45 of the Directive’s preamble, which Minister Aasland presumably refers to:

*“Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent and reasonable prices. In order to ensure the maintenance of the high standards of public service in the Community, all measures taken by Member States to achieve the objective of this Directive should be regularly notified to the Commission.*

[...]

*Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system. Where universal service is also provided to small enterprises, measures to ensure that such universal service is provided may differ according to whether they are aimed at household customers or small enterprises.”<sup>33</sup> (emphasis added)*

It is true then, that EEA EFTA States are entitled to intervene in markets in order to ensure the provision of electricity at reasonable prices. However, as the established case law makes clear, such measures – “state intervention” – have to conform to the conditions specified in that case law (objective of general economic interest, proportionate, clearly defined). For *vulnerable* customers, which Member States have a duty to define pursuant to Article 3(7) of the Directive, it is furthermore permitted to adopt specific measures relating to the payment of electricity bills.

Norway Price is available to every household in Norway, as well as for holiday homes. It cannot be reasonably argued that every household is to be considered as vulnerable. In any event, a definition of vulnerable customers is absent from the legislative proposal.

Further, if a state intervention such as Norway Price really is a measure relating to the payment of electricity bills, can at least be debated. In our view, it is to be seen as price regulation, financed by the public purse.

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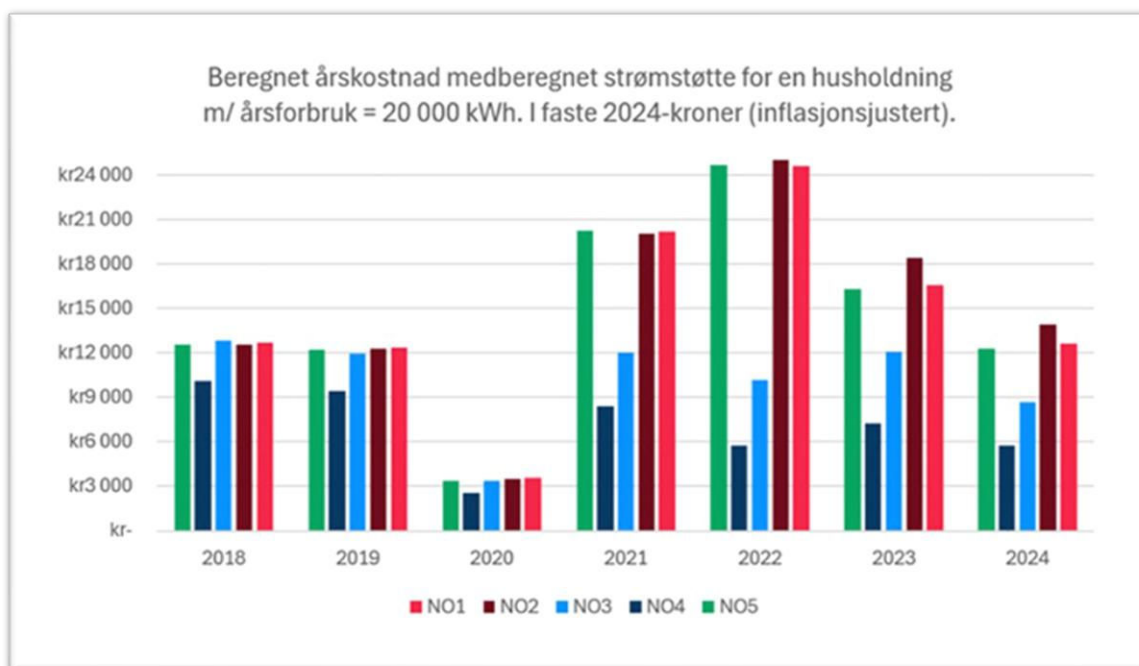
<sup>33</sup> Directive 2009/72, recital 45.

In any event, and decisively, the fundamental question is not whether EEA EFTA States *can* intervene in markets in order to ensure that electricity customers receive electricity at reasonable prices. They can. Such intervention must however be line with the test as formulated by jurisprudence, i.e. (i) pursue an objective of general economic interest, (ii) be proportionate and (iii) clearly defined and non-discriminatory. We will in the present analysis focus in particular on the former two conditions.

(c) *Norway Price may not pursue an objective of common interest*

EEA EFTA States are granted wide discretion in defining “objectives of common interest”, and in light of Directive 2009/72’s relevant provisions, as well as pertinent case law, it is in principle clear it is permissible to put in place measures to shield electricity consumers from overly high market prices.

That being said, one can query whether the introduction of a scheme of the economic scale and significance for all households (and holiday homes!) is in the common interest, when electricity prices are back to pre-crisis levels, and there already is an electricity subsidy scheme in place, as the following illustrates shows:



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It would thus seem arguable to suggest that Norwegian household already enjoy reasonable electricity prices, and pushing prices down further is no longer in the common interest.

Given furthermore the focus of Directive 2009/72 on the need to protect (and define) vulnerable customers, it seems particularly questionable if subsidising the electricity consumption of the wealthiest, and their holiday homes, is an objective of common interest.

Finally, it seems in our view clear that the scheme’s environmental effects are harmful, due to the potentially negative effect on both energy saving and use of alternative energy sources, when electricity is at the same time becoming both rare and necessary to de-carbonise our economy.

The EFTA Court has recently held that

*“According to Article 73 EEA the action by the Contracting Parties relating to the environment shall have the following objectives: (i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health and (iii) to ensure a prudent and rational utilization of natural resources.*

[...]

<sup>34</sup> Source: NVE.



*The Court recalls that **combating climate change is an objective of fundamental importance** given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights”<sup>35</sup> (emphasis added)*

Arguably, such considerations imply that EEA EFTA States’ discretion to define “objectives of common interest” that are in conflict, or at least create tension with the Article 73 of the EEA Agreement and the objective of combating climate change is more limited than previously thought. We would need to analyse this line of argument in greater detail in order to conclude.

In any event, these considerations may also have a bearing on what is in our view decisive, namely that the scheme seems to be in conflict with the proportionality principle.

*(d) Norway Price is probably in conflict with the proportionality principle*

In light of pertinent case law, a state intervention into the electricity market is proportionate if the measure is appropriate to achieve the objective, and it is limited to what is strictly necessary to achieve the objective, including in particular its circle of beneficiaries.

Appropriateness has a nuanced meaning in the case law of EEA courts, and is sometimes understood as the suitability of a measure to achieve a certain objective, and in other instances more as a test of whether or not the chosen measure is most appropriate, i.e. whether there are other measures that would better achieve the objective. While it is true that EEA EFTA States do not have to demonstrate, positively, that no other conceivable measure would (better) achieve the objective, it is in our view nonetheless arguable that EEA EFTA States at the very least need to consider different policy choices – which in the case at hand are readily available. It suffices here to refer to the Commission’s Communication “*Tackling rising energy prices: a toolbox for action and support*”,<sup>36</sup> and our considerations in the memo.

In any event, it is in particular the question whether Norway Price is limited to what is “strictly necessary” that is decisive. In our view, that is not the case.

First, in view of the grave implications of the scheme for businesses, other energy sources and energy saving technologies, and neighboring countries, and the availability of measures that would not have such effects – such as pure money transfers, the scheme cannot be considered as proportionate.

Let us for example assume that the budgeted NOK 7 billion for 2026 would be distributed amongst the 20% poorest households<sup>37</sup>. This would amount to ca. NOK. 14 000 per household – and would cover the total electricity cost of an apartment with a yearly electricity consumption of 10 000 kWh at price of NOK 1.4 per kWh. Such a measure would not interfere with the electricity market, would preserve incentives to save energy, and would not negatively affect other energy sources and saving technologies.

Second, and further to our above considerations as regards the circle of beneficiaries, it seems at least questionable if it is proportionate to protect the electricity consumption of the wealthy and wealthiest from market signals, given also the fact that it is those that surely have both the (economic) ability and incentive to invest in energy saving and efficiency.

Granted, in pertinent jurisprudence, the main consideration thus far as regards the circle of beneficiaries has mainly related to the distinction between households versus other, commercial customers.

In our view, that does however not necessarily mean that a distinction ought not also be made for different types of households, and that a measure that applies particularly forcefully to those with high electricity consumption – which are the wealthiest households – would require particular justification. The measure thus has a regressive effect, and thus seems inappropriate from a social policy perspective.

Further, recall that Directive 2009/72 obliges EEA EFTA States to protect the vulnerable customers, and that Norway Price is a voluntary scheme, which will benefit those with most resources to the greatest extent. Presumably inertia among the poor will in fact mean that they will subscribe to Norway Price to a lesser extent than the wealthy.

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<sup>35</sup>Case E-18/24, paragraphs 66-67.

<sup>36</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A660%3AFIN&qid=1634215984101>

<sup>37</sup> Ca. 500,000 of a total of ca. 2,5 million households in Norway.

This may well mean that a share of vulnerable households ends up paying with higher electricity costs than in a scenario without Norway Price.

For the above reason, we consider that Norway Price would constitute a disproportionate intervention in the electricity market, which for that reason alone is in breach of Directive 2009/72 and the EEA Agreement.

(e) *Norway Price may entail discriminatory financing of the scheme's administration costs*

As indicated in Section 3, the administration of Norway Price will entail considerable costs for DSOs. No compensation for these costs is provided for in the legislative proposal. Accordingly, costs will need to be financed through the network applied to all electricity customers.

This means that both households not opting for Norway Price, and electricity consumers that are not eligible under the scheme, will ultimately have to bear these costs.

In our view, this may entail an element of discrimination which is incompatible with Directive 2009/72. In a case relating to the financing of a gas storage obligation in Bulgaria, for instance, the CFEU held that because the obligation benefitted all consumers, it was *prima facie* not discriminatory for the financial burden to be allocated to all consumers, according to their consumption<sup>38</sup>.

In the case of Norway Price however, the scheme will demonstrably not benefit all electricity consumers. Allocating the costs of the scheme to those that do not benefit from it, and who in addition may experience higher electricity prices and network tariffs because of it, is thus arguably discriminatory.

The foregoing would in any event be deserving of a more detailed analysis, which we could provide if desirable.

(f) *DSOs' role may not be compatible with the unbundling rules of Directive 2009/72*

As indicated above and in the government's consultation paper, a central premise of Directive 2009/72 is the so-called unbundling rules, requiring a separation between distribution activities and other activities, chiefly to prevent DSOs – with operate natural monopolies – to exploit their monopoly position in adjacent markets, such as electricity supply, and enable competition in these markets where natural monopolies do not exist.

In Norway, DSOs are either companies that only perform distribution activities<sup>39</sup>, or form part of so-called vertically integrated undertakings, i.e. companies that perform also other activities than distribution.

Article 26(1) provides that “*where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of legal form, organisation, and decision-making from other non-distribution activities*”. (emphasis added)

The administration of Norway Price would in our view need to be considered as a “non-distribution activity”, meaning that this activity must be separated, in compliance with the Directive's unbundling rules, from distribution activities. However, Norway Price imposes the administration of the scheme on DSOs. In particular for vertically integrated DSOs, this would seem to be incompatible with the Directive, based on purely a literal interpretation of the Directive's pertinent provisions. Administration of Norway Price being a “non-distribution activity”, it would need to be independent from distribution in terms of legal form, organization and decision making.

In addition, and in line with concerns raised in the public consultation, the administration of Norway Price necessitates more direct exchanges of DSOs with customers, possibly eroding the role electricity suppliers have and ought to have in the market. The administration of Norway Price by DSOs thus creates precisely the type of risks that the unbundling requirements are meant to prevent, namely that (integrated) DSOs can leverage their “monopoly” position to fortify their position in electricity supply.

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<sup>38</sup> Case C-5/19.

<sup>39</sup> Article 2(5) defines distribution of the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers but does not include supply.

Within the scope of the present assignment, we have not been able to analyze this issue in greater detail. In our view, it would be deserving of a more thorough analysis, as it would seem to raise complex legal and economic concerns that can be of great significance for the highly competitive and well-functioning market for electricity supply in Norway.

### **6.3 Conclusion**

Provided that Norway Price will be implemented in accordance with the legislative proposal, it will in our view **probably infringe Directive 2009/72**.

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