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The Norwegian Offshore Wind Paradox: Energy sea production compliant with EEA law?

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> This blog post discusses the proposed rules for the offshore electricity production in Norway in the context of EEA energy law and whether the rules are a boon or a missed opportunity.

Norway out into the sea: towards clean energy production?

On 2 July 2019 the Oil and Energy Ministry of Norway submitted for public consultation a Proposal for a Regulation on Energy Sea Production (Forslag til forskrift om fornybar energiproduksjon til havs, "the Proposal"). This suggested piece of administrative legislation sets the foundations for the regulation of offshore wind electricity generation – as well as other forms of energy production in the sea. In addition to the proposal itself, the Norwegian government called for opinions concerning two areas in the Norwegian Exclusive Economic Zone to be opened for the construction of new capacity generation of offshore wind power and whether a third should be opened.

As mentioned in the Proposal, the areas that are being proposed to be opened for new generation capacity have to follow the basic rules established in the Offshore Renewable Energy Production Act. According to the act, the construction of energy generation can only be made after the Norwegian Government has opened specific geographical zones for license application.

The Proposal develops the basic rules in the Offshore Renewable Energy Production Act and create an authorization procedure which some have labelled as a 'first to come first to be served' basis involves the submission of an application to the Ministry of Petroleum and Energy ("the Ministry"). Once submitted, the application is reviewed – the Proposal is silent concerning the detailed parameters for evaluation – and if the authorization is granted, then the area is assigned for 30 years for the development of the generation capacity project.

The rules concerning authorization for new electricity generation capacity are, however, not a matter of pure national law. In May 2017, Norway, Iceland and Liechtenstein incorporated the Third

Energy Package of 2009 into the EEA Agreement. More than two years later, the Icelandic parliament finally approved the decision of the EEA Joint Committee after plenty of controversies.* As a result the Third Energy Package is now part of Annex IV of the EEA Agreement, with some minor modifications, particularly the role of the EFTA Surveillance Authority in cross-border matters.

In this blog post, we discuss the adequacy of the proposed authorization rules for offshore wind electricity generation in the Norwegian sea pursuant to the Proposal and the more general framework of the Offshore Renewable Energy Production Act vis-à-vis the EEA legal requirements of the Third Energy Package. As a spoiler, the answer is *"yes … but … or perhaps not really … or not yet"*.

The Norwegian proposal for offshore wind licensing

Building on the already established rules in the Offshore Renewable Energy Production Act, Chapter 2 of the proposal includes some more detailed rules on the licensing process with paragraphs on notices, project-specific impact assessments, license application and detail-plans.

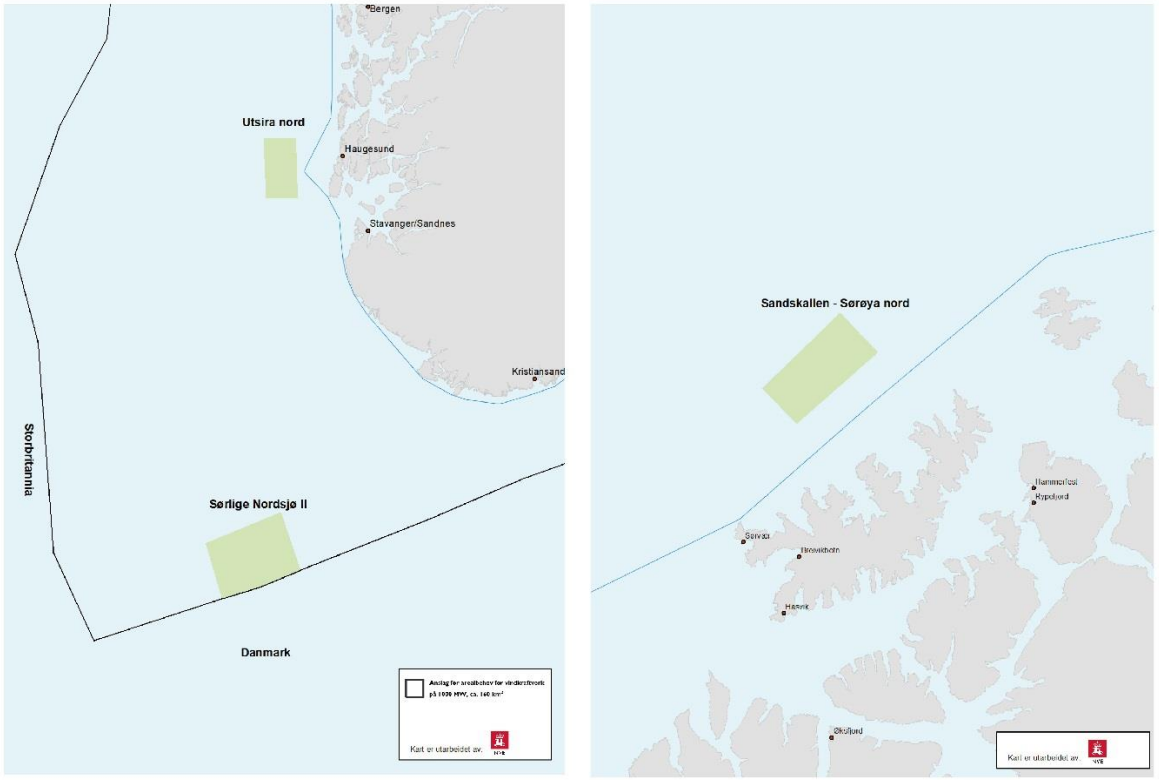
In general terms, the Proposal sets up a two-tier system for the authorization and licensing of new generation. Possible applications can only be made in pre-designated areas and then follow two stages. First, an interested party will lodge a request for a pre-approval of a project plan with a project-specific impact assessment. If approved by the Ministry, then this party has an exclusive right to, within two years, apply for a license to carry out the generation activity. Such a scheme seems anchored on a "first to come first to be served basis" (see statement Norwegian Offshore Wind Cluster).

Paragraph 3 of the Proposal states that legal persons that want to apply for a license to build, own or operate an energy production facility – including but not limited to windmills - must first fulfill the requirements of § 3-5 in the Offshore Renewable Energy Production Act. According to this provision, only legal persons may be granted a license. They also should be registered in Norway or in other countries pursuant to international agreements, such as the EEA, and it is for the Ministry to regulate the conditions for the licensing approval. Once this is done, then it must send a notice to the Ministry along with a draft of a project-specific impact assessment.

According to § 4 of the Proposal, the draft must include a description of the energy facility, development plans, location and possible impact on the environment, society or other industries. The notice must also include information on the applicant's business. The Ministry will then send the draft out on a public hearing for relevant authorities and organizations to assess and give feedback. Based on the notice, draft and feedback, the Ministry can choose to approve it or not (§4 of the Forslag til forskrift om fornybar energiproduksjon til havs), and if it gets approved the legal person who sent the notice has two years to apply for a license (§7 of the Forslag til forskrift om fornybar energiproduksjon til havs). Once the notice has been approved, no other proposals at the same location for equivalent activities will be processed for the next two years (§4 of the Forslag til forskrift om fornybar energiproduksjon til havs). The Ministry explains that the reasoning behind this is the

fact that developing an offshore project for the production of renewable energy is expensive, and therefore they do not wish to process more notices than needed.

Only the legal person that has received the approval of the notice and impact assessment may apply for a license for the activity within this two-year period. This leads to a situation where when a notice and draft of impact assessment is approved, before there has even been any application for licensing, other possible applicants are locked out of participating in the licensing process until the two-year deadline has passed, or until the license application is declined. Because of this the parties looking for a license will have to compete based on their notices, not through the license application itself. The problem is that the proposed regulation does not say anything about procedures or guidelines to how the Ministry will choose between the notices submitted.



Areas considered for licensing. Source: [Forslag til forskrift om fornybar energiproduksjon til havs]

The licensing process continues with the legal person behind the approved notice having to conduct a more detailed impact assessment/consequence analysis which they submit along with the license application. Paragraph 6 of the proposed regulation stipulates a list of minimum requirements to the impact assessment, with them being mostly the same as for the earlier submitted draft but more detailed, while § 7 says that the application has to include information on the applicant, financial capacity, which area the license application is for and information on the planned facility including estimated capacity and production, solutions for connecting to the grid and cost estimates.

If the license is granted it will have a duration of up to 30 years with a possibility to extend.

Rules for pilot projects §12

The proposal also contains further regulation on the procedure for pilot projects, which are of importance due to the novel nature of the technology and which are more lax and flexible than the normal licenses. Paragraph 12 states that the procedures mentioned for regular projects do not apply to pilot projects, the license can be applied without notice, although the requirements set for impact assessment and licensing application of §6 and 7, respectively, still apply. The Ministry can also set terms and conditions for a pilot project, like for example require a detail-plan be made and approved. Pilot projects are also not bound geographically, as they can be applied to be constructed outside the areas opened by the government for license application.

EU/EEA regulation of licensing for electricity generation

Member States of the EEA are subject to EU and EEA rules concerning the procedure for licensing – or more properly, authorizing – the construction of new generation of electricity. Due the to the EEA two-pillar structure and the complex incorporation of the Third Energy Package into EEA law, the rules on authorization for new generation of electricity are not the same. In the EU pillar, the applicable rules are those contained in the Directive 2019/944, which was part of the Clean Energy Package (see in particular Article 8 for the authorisation procedure). EFTA countries, however, are bound to the rules governing electricity incorporated in the Third Energy Package from 2009. Regarding authorization for new generation capacity the Electricity Directive 2009/72 is relevant.

The Electricity Directive 2009/72 includes two provisions relevant for the generation of electricity. First, Article 7 deals with the authorization procedure for construction of new generating electricity capacity. Second, Article 8 sets requirements concerning the possibility of "providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria".

Of these two procedures, Article 7 setting the authorization regime is the most often used, with the possibility for tendering for new capacity (for example, by purchasing the construction of new capacity) in Article 8 as an option in cases of security of supply or new technologies. According to Article 7 Norway shall "adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria" to allow for the construction of new generation capacity. The idea behind the provision is to create competition in the market and prevent centrally planned solutions or that only incumbent or large players are able to build the generation. In this sense, Recital (43) of the Directive 2009/72 states: "[n]early all Member States have chosen to ensure competition in the electricity generation market through a transparent authorisation procedure".

The Middelgrunden offshore wind farm in Öresund, Denmark (Wikipedia)

This authorization procedure shall be based on objective, transparent and non-discriminatory criteria. Which shall be made public and applicants shall be informed of the reasons for the refusal to grant an authorization. As part of the authorization criteria, Member States must take into account several aspects,
namely:

- Safety and security
- Protection of public health
- Environmental protection
- Land (or sea) use
- Use of public ground
- Energy efficiency
- Nature of primary resources
- The characteristics of the applicant (technical, economic and financial capabilities)
- Contribution of the generating capacity to increase renewable energy
- Contribution of the generating capacity to reduce emissions

This authorization documentation may require the previous granting of a license to the entity that intends to develop the new generation capacity. In the case of generation of energy in the sea, Norway indeed requires a license to operate which shall be granted by the competent ministry (§3-1 of the Lov om fornybar energiproduksjon til havs [havenergilova]). And the Ocean Energy Act grants power to the Ministry to issue regulations concerning the requirements for the granting of a concession as well as detailed plans for the construction of new generation capacity §3-3 of the Lov om fornybar energiproduksjon til havs [havenergilova]).

So … what's included or not included?

The Norwegian Proposal, as discussed above, sets a "concession" system for the licensing and authorization of construction of new electricity generation capacity in the sea that is divided into two parts or stages. First, interested parties must submit a notice concerning their interest to carry out one or more activities related to energy activity – not only generation. If this notice is approved,

then no other projects will be evaluated for two years, the time in which the interested party can then submit a request for a license. This effectively locks that area for anyone else and creates a monopoly for the applicant. Then, a license application is made and reviewed, which may lead to the granting of an exclusive license for up to 30 years.

The option to resort to this dual system is not barred by EU/EEA legislation. The Directive does not mandate the draft of such criteria in a particular legislative document (law or administrative provision) nor imposes a particular system for the adjudication. What it stems from Article 7 of the Directive is, however, that this criterion is to prevent favouritism and discrimination, promote the competitive development of liberalized energy markets (see Recital (43) of Directive 2009/72).

Source: EFTA Surveillance Authority

As the Proposal stands, this clear, objective and non-discriminatory criteria is lacking. While there is some, there is not enough. Indeed, the current proposal is very vague, and one could say that it is even insufficient concerning the requirements imposed by EEA law regarding the authorisation procedure, "which shall be conducted in accordance with objective, transparent and non-discriminatory criteria" (Article 7 of Directive 2009/72).

No specific assessment criteria are developed neither for the first nor the second round which makes it rather unclear for potential applicants, and offers little incentives to companies to invest at this stage. We are not alone in this assessment. For example, NORWEA (Norsk Vindkraftforening) has expressed their concern about how unclear and silent the regulation is on how the Ministry will choose between the applicants, and on what grounds the submitted notices will be chosen and prioritized. Aker Solutions also expressed their concern on how unclear the regulation is on the granting of licenses where there are several parties submitting notices for the same area and give feedback that predefined criteria would create greater predictability.

Whether this objective criteria for the assessment of the notice and the license proposal will be elaborated in the future by the ministry through other documents is yet to be seen. In its absence,

then authorisation and licensing processes for offshore wind in Norway would not be compliant with EU/EEA Law. It is expected, however, that the criteria will be developed in the future by the energy regulator as part of the licensing process, a practice common in other countries.

A missed opportunity?

From the authorization and licensing rules included in the Proposal it can be highlighted that as they stand they appear as a missed opportunity for clarity, guidance and creating an efficient and effective framework to allow for the development of offshore wind electricity production n Norway. The rules are timid and the system that has been designed does not foster intense competition for the areas to be opened as it follows a first to come first to be served mechanism, instead of, for example, setting licensing rounds as it is normally done in other countries or for other energy industries, like oil and gas. Competitive, open and less time-constrained licensing rounds are likely to lead to better outcomes in terms of offers and conditions.

A last point that is simply absent in the proposal is whether there will be any support schemes for renewable energy production. Such measures are quite common in other European countries to foster the renewable energy industry without breaching State aid rules. No indication is given on whether energy auctions, power purchasing agreements, feed-in tariffs or other support schemes. Without these, at least for now, it is unlikely that offshore wind will take off in Norwegian shores.

Endnote

* In fact, in the case of Iceland and due to their isolated nature, a special «deal» concerning the Third Energy Package rules was agreed between the EU and the EEA Partners in the EEA Joint Commission alleviating some of the burdens and requirements related to cross-border exchanges and infrastructure in electricity. Because of this, "the provisions on ACER (Agency for the Cooperation of Energy Regulators) and the Regulation on cross-border electricity exchanges will not have any tangible impact on Iceland's sovereign decision-making on energy matters." This has also been confirmed by an official statement of the EEA EFTA States.

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