

Case No: 64956
Event No 492547
Dec. No: 101/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 February 2009

concerning the unilateral inclusion of additional greenhouse gases and activities by Norway in the Community emission trading scheme pursuant to Article 24 of the Act referred to at point 21al of Annex XX to the Agreement on the European Economic Area (*Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*), as adapted to the Agreement by Protocol 1 thereto

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter “the Surveillance and Court Agreement”),

Having regard to the Act referred to at point 21al of Annex XX to the EEA Agreement,

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC,

as adapted to the Agreement by Protocol 1 thereto (hereinafter “the Act”), in particular Article 24 thereof,

Having regard to the following considerations:

On 23 June 2008, Norway submitted an application for the unilateral inclusion in the Community scheme of the emission of nitrous oxide (N₂O) associated with the production of nitric acid (HNO₃) as an additional gas and activity pursuant to Article 24(1) of the Act. By letter dated 6 January 2009, Norway amended its application and provided supplementary information.

According to the Norwegian application, this inclusion concerns two existing installations managed by one single operator. The requested starting date for the

opt-in is 1 July 2008. The application proposes to use the general allocation principle developed for the National allocation plan. Accordingly, for the trading period 2008-2012, the annual allocation of allowances free of charge to the installations producing nitric acid will correspond to 50% of the installation's annual average historical N₂O emissions during the base period 1998-2001. As a result, a total of 3 954 826 tons of CO₂ equivalent will be allocated to these installations for the period from 1 July 2008 to 31 December 2012. Moreover, there will be no general reserve of allowances set aside for new entrants producing nitric acid or for sale in the market in relation to the opt-in for that trading period.

In accordance with Article 24 of the Act, the Authority has assessed the application under all relevant criteria, in particular effects on the internal market, potential distortions of competition, the environmental integrity of the scheme and reliability of the planned monitoring and reporting system.

The Authority has verified that the proposed allocation will ensure a level playing field within the European Economic Area. To this end, the Authority has taken full consideration of emission levels that can be expected pursuant to the Act referred to at point 1f of Annex XX to the EEA Agreement (*Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control*, hereinafter “the IPPC Directive”), in particular the maximum emission levels to be permitted with the use of Best Available Techniques according to the BREF for the nitric acid industry¹, and of the unilateral inclusion of N₂O emissions from nitric acid production in the EU Emission Trading Scheme proposed by some EU Member States.

The Authority considers that the unilateral inclusion proposed by Norway will not create negative effects on the internal market, since the included installations are put neither into a favourable nor into an unfavourable position compared to non-included competitors or to installations included in the scheme by some EU Member States.

The proposed inclusion in the EU Emission Trading Scheme of N₂O from nitric acid production should result in a real reduction of emissions compared to business as usual. The emission level corresponding to the number of allowances created by the opt-in is lower than the emission levels that can be expected pursuant to other environmental legislation, in particular the IPPC Directive. The inclusion will encourage further N₂O emission reductions to be achieved by the Norwegian installations. This inclusion will probably result in a faster application of N₂O-abatement technologies than would otherwise be the case, as it will provide the industry with strong economic incentives to develop new cleaner technologies and to implement measures that would result in significant environmental benefits, in particular in comparison to the implementation of the IPPC Directive. Thus, it will preserve the environmental integrity of the scheme.

The additional abatement costs induced by the opt-in are in the range of the expected benefits from inclusion in the EU Emission Trading Scheme without creating excessive financial gains or losses. Thus, it ensures the appropriate balance between

¹ Reference Documents (BREF) on Best Available Techniques for the manufacture of large volume inorganic chemicals — ammonia, acids and fertilizers (the BREF LVIC-AAF), adopted by the Commission on 3 August 2007, pursuant to the IPPC Directive.

the environmental benefit of the EU Emission Trading Scheme and acceptable economic consequences and technical risks for the installations.

The unilateral inclusion of nitric acid production is consistent with the policies and measures submitted by Norway in its national allocation plan.

Monitoring and reporting guidelines for emissions of nitrous oxide have been adopted by Commission Decision of 17 December 2008², but not yet incorporated into the EEA Agreement. Pending the incorporation of the monitoring and reporting guidelines for N₂O emissions into the EEA Agreement, Norway is applying, since 1 July 2008, an equivalent monitoring and reporting system, which complies with the guidelines for the monitoring and reporting of greenhouse gas emissions adopted pursuant to Article 14 of the Act. Therefore the Authority considers that the planned monitoring and reporting system is reliable and accepts the retroactive application of the opt-in from 1 July 2008.

The Authority, furthermore, has made a preliminary assessment of the compliance of the opt-in proposed by Norway with Article 61 of the EEA Agreement and Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement. The allocation of allowances free of charge to certain activities confers a selective economic advantage to the installations concerned which has the potential to distort competition and affect trade between Contracting Parties to the EEA Agreement. The allocation of allowances for free appears to be imputable to the Norwegian State and to entail the use of State resources. The aspects of imputability and State resources are strengthened by Norway's participation as of 2008 in international emissions trading and in the other flexible mechanisms, i.e. the Joint Implementation and the Clean Development Mechanism. This enables a State to take discretionary decisions influencing its budget and the number of allowances granted to industry. In particular, as all allocations must as from the start of the trading period from 2008 to 2012 be covered by Assigned Amount Units, which are tradable between contracting parties, any allocation free of charge directly reduces the quantity of Assigned Amount Units that each State can sell to other contracting parties or increases the need to buy such Assigned Amount Units. The Authority therefore at this stage considers that the proposed opt-in could potentially imply State aid pursuant to Article 61(1) of the EEA Agreement. At this stage, the Authority has no indication that any State aid potentially involved may be found incompatible with the functioning of the EEA Agreement should it be assessed in accordance with Article 61 of the EEA Agreement and Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement.

The measures provided for in this Decision are in accordance with the opinion delivered by the EFTA Committee on greenhouse gas emission trading assisting the EFTA Surveillance Authority.

HAS ADOPTED THIS DECISION:

² Commission Decision of 17 December 2008 amending Decision 2007/589/EC as regards the inclusion of monitoring and reporting guidelines for emissions of nitrous oxide (OJ L 24, 28.1.2009, p. 18).

1. The application submitted by Norway on 23 June 2008, as amended by letter dated 6 January 2009, pursuant to Article 24(1) of the Act referred to at point 21a) of Annex XX to the EEA Agreement (*Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*), for the unilateral inclusion in the Community scheme of the emission of nitrous oxide (N₂O) associated with the production of nitric acid (HNO₃) as an additional gas and activity is approved.
2. This Decision shall apply as of 1 July 2008.
3. This Decision is authentic in the English language.
4. This Decision is addressed to Norway and shall be notified to that State.

Done at Brussels, 27 February 2009.

For the EFTA Surveillance Authority



Per Sanderud
President



Kristján Andri Stefánsson
College Member