8ECKER BÜTTNER HELD

This expert opinion was prepared for our client and on the basis of the existing client agreement with our client. It is intended for our client's own use. Our written consent is required before the report is "passed on" in whole or in part, published or referred to in the client's external relationship.

We do not assume any responsibility or liability towards third parties who use the contents of this report in whole or in part as a basis for their own decisions, unless this third party has been expressly included in the scope of protection of the mandate agreement with our client by written agreement or we have agreed otherwise with this third party in writing.

11.03.2021

BECKER BÜTTNER HELD

Table of contents

A. Facts 5
B. **Question** 6
C. **Legal evaluation** 7

I. First objection: designation of the green electricity property by the EVU without invalidation of the HKN. 7

z) Presentation of objection and question 7
z) Legal evaluation 8
3i Result 9

II. Second objection: double designation of green electricity by final consumers in Norway g

z) Presentation objection and question g
a) Legal framework to designation of the electricity mix by final consumers zo

a) Designation of the Electricity mix through Final consumers/companies in Norwayzo
b) Actual designation by company zz
c) Excursus: Designation according to GHG

protocol requirementszz 14

Violation of HkRNDV

a) Arguments against a violation of § g6 para. z HkRNDV
b) Arguments "forviolation of § ¿6 par. z HkRNDV -s
c) State requirements to preclude double utilization. z6
d) InterIm resultS *7

4J Violation of EE-RL zoz8 z8

a) General rules in the EE-RL zoz8 z8
b) Obligation to use HKN according to the new EE-RL z8
c) Interim result zg

III. Third objection: issuance of HKNs for subsidized facilities. 2O

z) Presentation of the objection 20
z) Legal evaluation according to EE-RL aoog 20
3) Legal assessment according to EE-RL zoz8 20
4s result za

IV. Fourth objection: incorrect information in the certificate of origin 22

z) Presentation of the objection 32
z) Legal assessment 22

BECKER BUTTNER HELD

V. Further objection: designation of electricity mix by NVE and designation of RES without using HKN. *3

D. Overall result at

I. Double reporting by energy suppliers in electricity labeling zg
II. Double designation by companies zg
III. Promotion of electricity for which HKNs are issued -s
IV. Incorrect information on the HKN to
V. Electricity labeling through publication of the electricity mix by NVE -s

E. Appendices 26

© BBH, 2021

A. Facts

According to the Renewable Energy Directive aoog (hereinafter: RES-Directive zoog)* as well as the corresponding successor directive, the Renewable Energy Directive aoz8(hereinafter: RES-Directive zo:t8g, member states of the EU are obliged to recognize the guarantees of origin (hereinafter: HKN) issued according to the RES-Directive. The recognition of a HKN can only be refused if there are reasonable doubts about its accuracy, reliability or truthfulness. The obligation also applies to states that apply the EE Directive, in particular EFTA states, which includes Norway. In Germany, the recognition of foreign HKNs is carried out by the Federal Environmental Agency (hereinafter: UBA). In German law, the requirement of the Renewable Energy Directive for the recognition of HKNs is regulated by S 36 para.x
HkRNDV implemented.

In ao, BBH - together with the Öko-Institut - examined on behalf of the UBA whether the prerequisites for the recognition of HKNs from other countries exist. In the process, Norway was also examined and the recognition of HKNs from Norway was assumed in principle.*

BBH has now been presented with indications of new findings, according to which there could be reasonable doubts about the correctness, reliability or truthfulness of the HKNs from Norway, and thus the eligibility of Norwegian HKNs in

---

1 Directive aoo9/z8/ECDirective (EU) of the European Parliament and of the Council of *3- ApFil *^^9 ZUF Promotion of the use of energy from renewable sources and amending and subsequently repealing Directives zoox/77iEGand aoo3/3 /EG, available at. at kcps:I/eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:320OgLO028&from=DE(lastcalledon °-- 3-* *^t-

* Directive(EU) aoz8/zoozof the European Parliament and of the Council of zz December zoz8 on the promotion of the use of energy from renewable sources (recast), available at at https:/leur-lex.europa.euilegal-content/DE/TXT/HTML/?uri=CELEX:3äO18Lzooz&from-DE(lastcalled on oz.o3.zoaz'-

Guarantees of Origin Implementing Ordinance of z$. October zozz (BGBl. I S- **S7) which was amended by Article z paragraph g of the Geseaesvom az. December z°-st^GBI·15. zgg8), available at hftps://www.clearingstelle-eeg-kwkg.deis "ites/default/files/HkNDV_zzzoz$_UBA.pdf(lastcalled amo-- 3-2O21)·

4 Öko-Institut e. V.I B8H, Summary ofthe assessment of national guarantees of origin for electricity produced from renewable sources(GO) and disclosure systems forthe purpose ofdecisions about the recognition of imported GO, commissioned by dès UBA/BMWi, available at https://www.umweltbundesamt.de/dokument/summary-of-the-assessment-of- national-guarantees-of-z (zuleat abgerufen am O'-+3-* **'-

questioned.' In particular, a double marketing of green electricity in Norway should be legally possible, since there are no legal requirements for the use of HKNs in the proof of green electricity. In addition, a double subsidy with HKN and statutory subsidy is possible. Finally, misleading information on the HKN regarding the commissioning date and subsidy is permissible in the absence of clear regulations.

After an initial assessment, BBH had identified further issues to be investigated in particular under Norwegian law. Subsequently, the law firm *Hjort* examined the issues of Norwegian law and prepared an opinion on this matter ("Legal Memorandum", Appendix z) .[6]

B. Question

It is to be examined by a legal expert whether, against the background of new indications concerning the HKN system in Norway, there are justified doubts about the correctness, reliability or truthfulness of the HKNs issued in Norway and whether, accordingly, an import of the Norwegian HKNs into the German HKN register is excluded pursuant to s 36 para. z HkRNDV. Specifically, the following objections should be raised
be examined:

z. Objection: Double marketing of the green power property underlying the Norwegian HKNs could occur, because it could be sufficient for electricity suppliers to provide evidence for the supply of Norwegian green power via HKNs that a corresponding contract for the supply of HKNs is presented and a cancellation of the HKNs is not mandatory.

z. Objection: There could be double marketing because Norwegian large consumers, especially industrial companies, use the national and re- gional generation mix, which is almost zoo 0A renewable in Norway, when reporting their electricity mix instead of using HKN, although the Norwegian electricity mix is in fact only renewable to a smaller extent, taking into account the ex- port of HKN, which is also evident from the electricity mix published by NVE for the purpose of electricity labeling.

[S] The arguments were, among others, elaborated in an e-mail from zz. February 2ozo as well as the presentation of Thema Consulting attached to the email.

Objection 3: The HKNs for electricity from state-subsidized renewable energy plants in Norway can be exported abroad directly or indirectly via other intermediaries, thereby generating additional revenues. However, the revenues from the HKNs are not priced into the Norwegian government subsidy. The use of the green power property for subsidized electricity abroad could argue against the ability of the HKN to be recognized.

4. **Objection: The information on Norwegian HKNs could be incorrect or misleading, because HKNs are issued with the indication "without subsidy" for plants that actually receive subsidy later. The reason for this is that plants have a trial year in which no subsidy is paid out. In fact, however, the plants would receive subsidies later and could only be built economically because of the later subsidies.**

The examination of European law and German law relevant for the processing of the questions is carried out by BBH. BBH has not examined the questions of Norwegian law itself, but takes the results exclusively from the legal opinion of the law firm "Regal Memorandum", Annex z). The accuracy of the contents of the Legal Memorandum is the sole responsibility of the law firm Regal Memorandum. is responsible.

C. Legal evaluation

I. First objection: designation of the green power property by EVU. without invalidation of the HKN

z) Presentation objection and question

The first objection raised was that it is sufficient to submit a contract for the supply of green electricity via HKNs in Norway in order to provide proof of the supply of HKNs. In Norway, on the other hand, it is not mandatory to invalidate the HKN. This would not exclude double marketing, because the non-validated HKNs could be exported and thus sold and used again.

Such double marketing could be a violation of ä 36Abs. z Satz z Nr. HkRNDV. According to this provision, there is no reasonable doubt as to the accuracy, reliability or truthfulness of the HKN, if it is excluded that is that the amount of electricity in the state of generation and additionally in the exporting" " ""

The electricity from renewable energy sources (hereinafter referred to as "RES") is declared to final consumers by the state. If, according to the requirements of electricity labelling in Norway, a contractual agreement for the purchase of HKNs is sufficient for the declaration of green electricity and devaluation is not required, the HKN could be contractually promised to a Norwegian utility and, based on this, the corresponding electricity quantity could be declared as green electricity by the utility and, on the other hand, the non-devalued HKN could be exported to the register of another state. This would allow a double reporting of the electricity quantity as electricity from renewable sources.

a) Legal assessment

It is questionable whether Norwegian law actually permits the designation of green electricity without devaluation of the HKN and thus, on the one hand, the HKN can be exported to Germany and, on the other hand, the electricity volume on which the HKN is based can be designated as green electricity in Norway.

The "Regulation on Guarantees of Origin for the Production of Electric Energy" (HKN Regulation) does not contain any direct regulations in this regard. In principle, the regulation only stipulates the content and issuance of HKNs. At the same time, it is stated that the regulation does not directly regulate the use of HKNs. In addition, the market and any other regulations of the authorities would decide when and how an HKN is to be used.

Important rules for the use of HKNs also result from the pre-writing NI-3^^ * M 11.O3.-9 g (Grid and Settlement Ordinance).° According to the legal assessment of the Norwegian law of results from § 8 (ç) of the Grid and Settlement Ordinance"° in conjunction with the explanations

LOV-zggo-o6-*9-5 -I 4-3. LOV-zggo-o6-zg-5o-§ zo-6, submitted to the German Über-setting, see appendix s- -

^ See Notes to the Rule on Proofs of Origin, Appendix 3. p.7(ZU§ AZ).

* "Forskrift om maling, avregning, faktureńng av nettjenester og elektrisk energi, nettsels-kapeu nøytralitet **mv;** https://lovdata.no/dokument/SF-/forskrift/zgss- **3-^^-3*1/KAPIT-**TEL_8#9tC2@0Â7 -s. submitted in English translationfrom iehe Appendix4-

Forskrift om måling, avregning, fa urering av nettjenester og elektrisk energi, nettsels- kapets neytralitet mv, hNps://lovdata.noldokument/SFiforsknki'99g-O3-^^-3 6KAPIT- TEL_8#9łCz9łAy8- , presented in English translation by see Appendix ş.

of NVE that it would be contrary to this regulation and the Marketing Act for an electricity supplier to supply electricity from RES without devaluing a corresponding amount of HKNs.** / further states that although it would in fact be possible for Norwegian electricity suppliers to report electricity from RES to end customers without devaluing HKNs, this would not be legally permissible. In addition, RES can be declared without the use of HKN if the declaration is based on the NVE mix, which to a lesser extent also includes RES shares.^ For further justification, please refer to the elaborations of him Legal Memorandum (Annex 1)."

a) Result

As a result, an analysis of Norwegian law does not, in our view, confirm the assumption of legally permissible double marketing, where electricity suppliers report electricity from RES without using HKNs. This does not exclude that electricity suppliers de facto report electricity as RES without ending HKNs. However, we do not have any concrete indications of this. On the other hand, a purely factual possibility of double marketing should not lead to the HKŃ from Norway being ineligible for recognition under § 36.
Para. z HkRNDV are, unless legal violations are proven on a large scale
and the Norwegian State nevertheless did not make any changes to the legal framework o-
The company is obliged to carry out checks in order to counteract such malpractice.

II. Second objection: double designation of green electricity by final consumers in Norway

z) D,arstellung Objection **and Questioning**

As a second objection, it was raised that for Norwegian large-scale consumers, especially Industńeuntecompanies, there are no elnquite requirements wle

---

"Norges vassdrags- og energîdirektorat.

°^ LOV-aoog-oz-og-a: Lov om kontroll med markedsføring og avtalevilkar mv. (markedsføringsloven). The Marketing Act prohibits erroneous and misleading advertising, and also contains a general ban against unreasonable and misleading business practices, however a more in-depth account of the Marketing Act is outside the scope of this opinion.

[13] These statements coincide, incidentally, with the statement in the CA-RES questionnaire for Nor- because, where question 3 states, among other things, "The only way to claim the use of elec- tricity from renewable sources is by cancelling RES GOs."

^ See the detailed account in the Legal memorandum of - 3 *- '

*Legal memorandum, ch. z.z., 5. z-5.

proof of purchase of green electricity must be provided. It may also be permissible to use the national or regional generation mix, which is almost 1oo 9t renewable in Norway ("location-based method"), instead of using HKN. In fact, taking into account the substantial export of HKN, only a small part of the Norwegian electricity mix is renewable, which is also evident from the electricity mix published by NV.E for the purpose of electricity labeling.

Should this objection be true and should it be possible to report green electricity shares although the electricity mix actually originates to a considerable extent from non-renewable energy sources due to the export of HKN, this could constitute a violation of f 36 para. z sentence a no. 4 HkRNDV. Because with this Electricity from RES from Norway would be reported both via the exported HKNs and on the electricity mix reported by companies.

Firstly, it is questionable whether consumers or companies are actually entitled to determine the electricity quantities used in a way other than on the basis of the electricity supplier's electricity characteristic and whether, in particular, a declaration on the basis of the location-based method is permissible (see a). Secondly, it is questionable what consequences this will have for the recognition of electricity certificates from Norway in Germany, in particular whether this will affect the correctness, reliability and
and truthfulness of the HKN according to 36 AbS. z Nr. 4 HkRNDV is endangered, because the electricity quantities in the state of generation and in the exporting state are shown to final consumers as electricity from renewable sources (on this under 3t. Finally
it is examined whether the EE-RL to be implemented by oz.O7.zozz zoz8 results in a different valuation (see g).

a) Legal framework for **the designation of** the electricity mix by **end-consumers** cher

a) Designation of the electricity mix by final consumers/companies in Norway

The following key statements on the reporting of electricity from renewable sources by companies and consumers in Norway can be derived from the explanations in the Legal Memorandum:

- Companies are entitled but not obliged to disclose the electricity mix they use.

- The Marketing Act is the **only** legal barrier for companies to disclose the electricity mix they use. There are no other legal regulations or barriers in Norway.

- End users/companies are also entitled to maintain an account with the Norwegian HKN register, as there are no formal requirements for maintaining an account in Norway. This means that end consumers can also purchase and validate HKNs themselves.

- Electricity suppliers must perform electricity labeling either on the basis of the electricity mix published by NVE or with the help of HKNs. In any case, the Norwegian legal situation does not provide for electricity suppliers to perform electricity labeling on the basis of the location-based method.

- Norwegian law does not prohibit companies from using the location-based method when reporting on the electricity mix, for example in company reports or when marketing products produced with the electricity. The location-based approach is understood to mean that it matters what the electricity physically comes from in the state (or other defined area) where the electricity is consumed.** Thus, unlike electricity suppliers, end-users are not obliged to use the electricity mix calculated by NVE.

b) Actual designation by companies

The following key statements result from the Legal Memorandum of : ,

- Companies that report their own electricity mix generally refer to the requirements of the Greenhouse Gas Protocol standard (GHG standard).

- The companies studied all use the location-based method in full or in part.)

The reporting of electricity from RES by companies in Norway on the basis of the location-based approach can lead to a double reporting of RES. This is because electricity from RES is used by companies for reporting or verification in company reports, even though the

'^ See Legal Memorandum, p. 6. "

Property of the electricity as electricity from RES via HKN has already been exported from Norway and is used in another state.

The problem of double marketing due to the designation of companies with the location-based approach is confirmed by a comprehensive study by Oslo Economics.'* According to this study, many large companies such as Alcoa, Hydro and Borregaard use the location-based approach Ç,lòcation-basedmethod"). The study concludes that this results in double marketing. The study explicitly states:

> *"The large Norwegian industrial c0ł łRanieswe have* intervievv'ed *choose to disregard NVE'sproduct declarationfarpowerpurchases* withovtgvar*antees* o/ ozïgín *when documenting the energy sources for* their/*ow'er *€On5U*^R-"on.Instead, they* </ocvment *the* energy sources/or *their elec*tr/c"/ty *consumRtion by showing that the R--+uction mix in Norway "is g8 percent renewable, which many of their cu tomers* acce/*l/pr€/€r. At *the same time,* the *guarantees o/oriyin/or/*°**O/the* same/*ovrer *has been* sold, *mainly* to/oreign *COłTłpanies, who use this* to *document that their electricity consumption is* renew'a6/e. *Thefact* thnt *'fi* erent *methods are used* to /focvment *the* enerpy *sources* o/ *the* same *efectrïci y means that some o/thesomerenewn6/eenerpysourcesare* morketezf *twice.'*^*

c) Excursus: **Designation** in accordance with GHG Protocol requirements

In various documents, the GHG Protocol contains specifications on how the CO emissions of companies are to be calculated in detail. The calculation of CO emissions is also the basis for checking the achievement of the so-called Science-Based Targets(SBT). According to the GHG Protocol, emissions are divided into different scopes, whereby scope a includes indirect greenhouse gas emissions from the generation of electricity purchased and consumed by a company. The GhG Protocol, Scope z Guidance (hereinafter: Scope z Guidance) contains specific requirements for determining scope z emissions.

The study by Oslo Economics, "Utredning om opprinnelsesgarantier og varedeklarasjoner for strøm" is publicly available, but unfortunately only in Norwegian. (available 'at https://www.regjeringen.no/contentassets/oeyyfş ze93<4oe8aşdadefzcdao8d86/oslo-economics---utredning-om-opprinnelsesgarantier-og-varedeklarasjoner-for-strom-*974*s9.pdf}.

'^ Oslo Economics, Utredning om opprinnelsesgarantier og varedeklarasjoner for strøm, P. 6 (quoted and translated from Legal memorandum, p.7*.'.

The Scope a Guidance basically allows two different methods for determining the greenhouse gas emissions of the electricity consumed: the location-based and the *market-based* approach. The location-based approach uses the electricity mix that exists locally in a regional or national grid.The market-based approach, on the other hand, uses supplier- or product-specific data on the electricity purchased by the respective company. This also includes electricity purchases on the basis of HKN.**

The Scope z Guidance does not directly specify whether the market-based or the location-based approach should generally be preferred. The background for the establishment of the location-based approach is probably that it should "enable a balancing method even where suppliers cannot acquire specific electricity products, especially in non-liberalized electricity markets. For companies that have product- or supplier-specific data due to a contractual electricity purchase, however, only the obligation to determine the greenhouse gas emissions in two ways is established, namely on the basis of the location-based and - insofar as relevant "data are available - on the basis of the market-based "approach: "This does not exclude an accounting on the basis of the location-based approach. However, if market-specific data are available, the market-based approach should at least be used. This means that the characteristics of the electricity purchased are relevant if market-specific data are available, which should be the case in Norway.

As we understand the GHG Protocol, the market-based approach, and thus the electricity quality to be shown in the electricity label, is also relevant with regard to Norway. However, according to our understanding of the GHG Protocol, it remains unclear how to deal with a double expansion according to both the location-based approach and the market-based approach. It is also unclear what the consequences of such a violation are.

'* See on the or}s-based and market-based approach in detail GHG Protocol, Scope. z Guidance, p. -s**-

'° Cf. UBA, Marktanalyse Ökostrom II, p. 337-.

* GHG Protocol Scope z Guidance, p. 8.

According to UBA, Marktanalyse **Ökostrom,** p. $64, Norsk Hydro has only chosen the location-based approach for determining scope z emissions and has not used the market-based approach. In our understanding, this practice violates but probably against the GHG-Protokoll.

g) Violation **of HkRNDV**

Even if the electricity labeling for electricity suppliers does not allow a designation based on the location-based approach, a designation by final consumers according to the location-based approach - which is probably not foreseen by the GHG Protocol with regard to Norway - can in fact lead to an impermissible double designation of the green electricity property in Norway. This is because, on the one hand, HKNs can be issued for electricity from RES and exported abroad, and, on the other hand, a company could use the location-based approach for electricity quantities generated in Norway and thus report these as green electricity without taking into account the export of HKNs, and thus the "outflow" of the green property, for these electricity quantities.It should be examined whether the reporting of RES on the basis of the
location-based approach in Norway to a breach of s 36(z) HkRNDV.
or Art-*s para. g EE-RL aoog.

According to § 36 para. z HkRNDV, the UBA recognizes a HKN, among others, from contracting states of the EEA, if there are no reasonable doubts about the **accuracy,** reliability or truthfulness of the HKN. ä 36 para. z sentence z **HkRNDV** lists examples of rules where there are no reasonable doubts. According to § y6 para. z
In general, there are no reasonable doubts with regard to the second sentence z no. g of the HkRNDV if it can be ruled out that the quantity of electricity in the country of generation and the exporting country is reported to end consumers as electricity from renewable sources. It is questionable whether the designation of green electricity by end consumers when **using** the location-based approach leads to a violation of § 36 para. zsatz z
i. V. m. Satz z Nr. g **HkRNDV.**

a) Arguments against a violation of § g6 para. z Hk¿tNDV

According to the wording of s 36 para. z clause z no. 4 HkRNDV, it only has to be excluded that the amount of electricity in the state of generation and in the exported state is declared as electricity from renewable sources "*via end consumers".* One
could take the position that in Norway there is a double reporting of electricity "by" final consumers, but in any case there is no reporting of electricity from renewable energies "to final consumers" for which HKNs are issued. In any case, utilities that report electricity to end consumers take the exported HKNs into account in their electricity labeling by using the mix of NVEs reduced by the exported HKNs or by acquiring HKNs for green electricity quantities themselves. The double reporting of electricity from renewables, on the other hand, is only carried out by the end consumers or companies on the basis of the results of the legal review submitted by them.

© BBH, 2021

b) Arguments for a violation of § $6 Ab.s. z HkRNDV.

However, there are a number of reasons why the double declaration by companies or final consumers should also be classified as a case that falls under ś 36 para. z sentence z no. *k* HkRNDV. First of all, it can be argued that the declaration of an electricity mix "by" final consumers and companies can also be a declaration "to final consumers", since other final consumers - e.g. those who purchase the product made from the electricity - perceive this declaration and possibly use it as a basis for purchasing decisions for the company's products.

In addition, final consumers in Norway can also have an account with the HKN register and in this way acquire HKNs for green electricity labeling themselves. This means that in Norway, companies and final consumers are on an equal footing with electricity suppliers with regard to electricity labeling with HKNs. This role of final consumers in the use of HKNs and electricity labeling would be contradicted if electricity labeling by companies were less relevant for double declaration or double marketing than electricity labeling by "EVUs".

Finally, the sense and purpose of ś 36 para. 1HkRNDV also decisively speak for a consideration of double marketing by enterprises or final consumers. The essential background for the rule in å 36HkRNDV, which is based on Art. zç EE-RL aoog, is the creation of a reliable HKN system. This serves wîederum on the central idea of consumer protection. However, in order to ensure consumer protection, a comprehensive avoidance of
This also includes the declaration of green electricity by companies or final consumers up to the user of the electricity and its use, for example, in its production. This becomes particularly clear if the end consumer of the electricity uses the green characteristic of the electricity in production to promote his company or his products under the aspect of sustainability.

Finally, it should be borne in mind that s 36(z)(z) of the HMNDV only specifies examples of rules whose non-fulfillment is not subject to reasonable doubt. This means
However, this does not mean that "there may not be reasonable doubt as to the correctness, reliability or reliability of the imported HCNs under other conditions as well.

Furthermore, s 36 para. z HkRNDV must also be interpreted in consideration of the requirements of European law, on which the requirements of the HkRNDV are based. The explanatory memorandum to Section g6 (z) sentence z No. HkRNDV expressly states that this provision implements A<--s (a) (a) of Directive aoo9la8iEG. According to this ha-
Member States shall ensure that the same unit of energy from renewable sources is accounted for only once. According to recital ça of the RES Directive, it shall be ensured that a unit of electricity produced from renewable energy sources can only be accounted once to a consumer. Therefore, double counting and double reporting of HCNs should be avoided. This makes clear that, according to the purpose of the RES-E Directive, double counting and double reporting of HCNs should be avoided. No reference is made to designation by RUs, so that other types of double designation should also be covered. Furthermore
In addition, A--'sAbs.2. UA a EE-RL zoog regulates that the Member States shall ensure that that the same unit of energy from renewable sources is only taken into account once. This refers directly only to the issuance of the HKN for producers. However, it is not stated that only one HKN may be issued for the same quantity of electricity, but that the quantity of electricity may only be *taken into account once.* This means a comprehensive prohibition of double marketing, which also includes the declaration by final consumers.

c) **State requirements for the exclusion of double utilization**

If one considers the double designation by final consumers as a violation of the requirements of the RES Directive and the HkRNDV, one could still ask to what extent it can be excluded by state law that such a double designation takes place. In particular, the - non-state - rules of the GHG Protocol, which allow or at least do not explicitly prohibit such a double designation, cannot be changed by a state. Since electricity labeling by end consumers is not obligatory, it is also not sufficient to **directly** implement the state rules on electricity labeling.

In principle, however, it would be possible to impose a general obligation on end consumers, for example under competition law (unfair competition), to always use the values from the electricity label when stating their electricity mix or their carbon footprint for the electricity purchased from a utility. This could ensure that the same values are used as a basis for the declaration of the electricity mix by the end consumer as for the declaration by the utility supplying the end consumer. If this is not the case, the system of the

electricity labeling and the FIKN, on the other hand, cannot be classified as reliable.

It should also be borne in mind that the prohibition of misrepresentation in the pricing of goods or services is an integral part of European competition law regulations that aim to protect customers from unfair competition. At the European level, this results in particular from Directive 2OOslzg/EC concerning unfair business-to-consumer commercial practices in the internal market.** It is therefore obvious that the Norwegian legislator or the Norwegian competition authorities, if they are aware of such a practice, are also obliged by general obligations under European law to protect unfair competition to provide for appropriate regulations or to exercise appropriate administrative action in order to prevent systematic violations of competition law.

d) Interim result

As a result, in our opinion, double reporting of electricity from RES by final consumers can also lead to a violation of 436 para. z sentence z no. g HkRNDV. The wording of ä 36 par. z sentence z *NF-k* HkRNDV is indeed not unambiguous. However, this result is supported firstly by an interpretation of the HkRNDV in line with European law, since the RES Directive also aims to prevent the double designation of electricity by final consumers. Secondly, the purpose of the rules on HKN, namely consumer protection, requires a comprehensive prevention of double marketing also by designation vis-à-vis final consumers. In the case of a violation of § $6 para. z HkRNDV, the HKNs from Nor- due would, as a rule, no longer be recognized by the UBA. In addition, it may also be appropriate for Norway to prohibit the dual designation of green electricity for reasons of competition law.

** Directive zoo /x9iEGof the European Parliament and of the Council of zz. May zooy concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 8 'so/EEC, Directives 97/7/EC,g /*7/ECand zooa/6siEGof the European Parliament and of the Council and Regulation (EC) No. zoo6/zoog of the European Parliament and of the Council (Unfair Commercial Practices Directive), available at https://eur-lex.eu- ropa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:3* osLoozg&from=DE.

g) **Violation** of **EE-RL zoz8**

a) General rules in the EE-RL zoz8

It is questionable **whether the double** designation **by** final consumers **leads to** a **violation of the new RES Directive 2018. In principle, the RES Directive** zoz8 **contains** identical provisions on double reporting as **the RES Directive zoog,** in particular **the** formulas from recital **s' RES** Directive **(now** recital **ss RES Directive aoz8)**
and that the wording **from Art-*5(a) UA z** EE-RLaoog(**now** Art-*9**(a)**
UA z RES Directive zo18). In **addition, AFt^9 (z) of the RES Directive requires Member** States **to ensure that the origin of taxable** energy **is guaranteed in accordance with objective, transparent and non-discriminatory** criteria.
can. This **could** additionally **speak for the fact that double designations have** to be **avoided in general, so that the origin from** renewable energies **can be** guaranteed. **In this respect, according to the RES-E Directive zoz8 it can** be assumed **that** a **double** designation **by final consumers can lead to a loss of eligibility.**

b) Obligation to use HKN according to the new EE-RL

Furthermore, it must be examined to what extent the new regulation in the RES-E Directive aoz8 on the obligation to use HKNs in electricity labeling has an effect on the assessment of the above questions. According to Article zg (8) of the RES-E Directive aoz8, electricity supply companies are obliged to use HKNs when reporting renewable energies in the electricity label. Exceptions to this only apply if the electricity share corresponds to non-traceable commercial offers or if electricity quantities are reported for which no HKNs are issued because the producer receives financial support from a support scheme.

If utilities can report electricity from RES without using HKNs for this purpose, as is the case in Norway under the current legal situation when using the electricity mix published by NVE, this would be a violation of the RES Directive zoz8. It is questionable, however, whether this could also lead to a loss of recognition of the HCN from Norway in general. This would only be the case if all HKNs were no longer correct, reliable or true.

In any case, the accuracy, reliability and truthfulness of HKNs would no longer be given if EVUs were able to report electricity from RES that could not be substantiated by HKNs. However, this would not be the case if the mix of RES is determined correctly and double counting is excluded. On the other hand, the mere fact that EVUs have to use HKNs and do not do so is probably

not lead to double counting of EE or HKN. Therefore, a violation of the obligation to use HCNs does not always and necessarily have to lead to the exclusion of the correctness, reliability and truthfulness of HCNs. This should apply all the more to the reporting of renewable energies by final consumers, especially since final consumers are not obliged to label their electricity.

On the other hand, it has to be taken into account that the system of obligatory use of HKNs is designed to ensure reliable proof of the dispatch of electricity from RES.** If a state does not implement the system of obligatory use, double counting will become much more likely. Against this backdrop, a violation of the mandatory use of HCNs by EVUs could still lead to the ineligibility of NKT if a state does not implement the mandatory use of HCNs. Competition law considerations, according to which a state is obligated to prevent unfair methods that can lead to a double and thus false designation of green power, may also speak in favor of this.

c) Interim result

As a result, a double designation by final consumers is more indicative of a violation of the EŞ-RL zoz8 than of the EE-RL zoog. In contrast, the new obligation to use Ńr HCNs by EVUs introduced by the RES Directive zoz8 has no direct impact on the classification of a double designation by final consumers. However, if a country does not implement the obligation of use, there are considerable arguments for not recognizing the HKN from this country. However, recognition could be refused at the earliest from the transposition deadline of the RES Directive zoz8 to oz.oy.aozz.

'* Bea. on this recital RES Directive zoz8: It is important to provide information on how the supported electricity is allocated to final customers. To improve the cluality of this information provided to consumers, Member States should ensure that guarantees of origin are issued for all units of renewable energy produced, unless they decide not to issue guarantees of origin to producers who also receive financial support."

III. Drifter objection: issuance of HKN for funded facilities.

z) Presentation of the **objection**

As a drifter objection, it was raised that the operators of state-subsidized renewable energy plants in Norway receive HKNs. These HKNs could be exported abroad directly or indirectly through other intermediaries and additional revenues could be generated through this. However, the revenues from the HKNs are not priced into the government **subsidy.**

z) Legal assessment according to EE-RL aoog

The issuance of HKNs for electricity from plants that receive state subsidies practically leads to a kind of double subsidy and also to unequal treatment with HKNs from countries in which the issuance of HKNs for electricity from subsidized plants is not possible (e.g. Germany) or the export of such HKNs is not permitted (e.g. Austria). However, according to the provisions of the RES Directive zoog as well as the HkRNDV, the issuance of HKNs for electricity from subsidized plants should not be inadmissible. According to Art. zç para. z UA3 RES Directive 2009, Member States may provide that no support is granted to a producer who receives a HKN for the same energy generated from renewable sources. Since this provision is a "may" provision, it follows by implication that Member States may grant support to electricity producers to whom HKNs are issued. The RES Directive zoog does not provide that state support and the issuance of HKNs are mutually exclusive. This is also clear from the fact that the certificate must state whether the installation has benefited from a national support scheme (Art. zç para. 6.d RES Directive aoog). In fact, it is common practice in many countries to issue HKNs for electricity from subsidized plants.

$) **Legal assessment** according to **EE-RL** zoz8

However, the RES Directive oz8 now explicitly provides that the market value of HCNs MUST be duly taken into account in the context of support schemes (Art-*9 para. z UA 3 RES Directive aoz8). At the latest as of o--^7-zozz, when the RES Directive zoz8 is to be transposed into national law, the requirements for due consideration are to be met.
The aim is to take account of HKN in support schemes under Norwegian law. From this point on, the requirements of the new RES Directive must either be implemented directly in German law or at least taken into account in the interpretation and application of § 36 HkRNDV.

It is questionable whether the issuance of HKNs for subsidized electricity in Norway would result in HKNs from Norway no longer being allowed to be recognized if, as of oz.O7.aoaz,themarketvalueofthe HKNswerenottakenintoaccountinthe subsidy scheme.

According to Art. zg (g) of the RES Directive, Member States shall recognize guarantees of origin issued by other Member States in accordance with this Directive. A member state may only refuse to recognize a guarantee of origin from another state if it has reasonable doubts as to its accuracy, reliability or veracity. According to ä 36 Abs. z Satz a HkRNDV there are in
as a rule, there are no reasonable doubts if

> *z. the calendar month in which the end of the generation period of the quantity of electricity shown in the guarantee of origin falls is not more than two months in arrears at the time of application,*
>
> *a. the proof of origin has* not yet *been* cancelled *or* used,
>
> *g. a secure* vnd *zreliable system is in place for the issuance/fvnp*, transfer*, cancellation and use of guarantees of origin in the outgoing and* exporting *stant,*
>
> *q. it is excluded that the quantity of electricity in the* state of *generation and in the exporting state is reported to final consumers as electricity from renewable energies, and*
>
> *s- +the proof of origin in the exporting state and in the exporting state* serves *only* the power identification*.*

The lack of consideration in a support scheme does not directly affect the correctness, reliability or truthfulness of the HKN as long as all contents of the HKN are correct and, in particular, it is stated that the electricity for which the HKN was issued has received support. This is because the content of the HKN is not directly affected by the lack of consideration in the support scheme.

However, according to the RES Directive aoz8, the obligation to recognize HKNs from other countries exists only for "guarantees of origin issued in accordance with this Directive". It could be argued that an issuance according to the RES Directive aoz8 also requires that the member states take the market value of the HKN into account in the support scheme. For only then is it ensured that the system of HKNs is fully implemented. If, on the other hand, this is not the case, the HKNs would not be issued in accordance with the Directive and would therefore not have to be recognized.

It is questionable whether in this case recognition would also be precluded under Section 36 (z) HkRNDV. Failure to take the market value into account in a subsidy scheme is not directly covered by the standard examples in Section g6 (z) sentence a of the HONDV, which preclude recognition. However, it could be argued that if the market value of HKNs is not taken into account in a promotion scheme, contrary to f 36 (z) sentence a no. 3 HkRNDV, there is no certainty that the HKN will be recognized.
reliable system for the issuance of HKN is given. Moreover, one could argue that a lack of consideration of the HKN in a support scheme leads to double support and that this acts like a double designation of renewable energies contrary to ä 36 Abs. z Saa z *Nr-k* HkRNDV.

g) **Result**

The objection of a double promotion does not speak in our estimation per se against éa recognizability of HKN according to s 36 Abs. z HkRNDV in the *ab:tu-* ellen version and under consideration of the EE-RL 2009. According to the EE-RL aoz8, which is to be implemented from oz.07.*°az, there are however considerable indications for it, That HKNs no longer need to be recognized if the value of the HKN is not sufficiently taken into account in a Norwegian funding scheme.

IV. Fourth **objection: Incorrect** information **in the certificate of origin**

z) **Presentation of** the **objection**

The fourth objection raised was that the information on Norwegian HKNs is incorrect or misleading. Firstly, it is explained that HKNs are issued with the statement "without subsidy" for plants that actually receive a subsidy later. The background is that plants have a trial year in which no subsidy is paid out. In fact, however, the plants received subsidies later and could be built economically because of the later subsidies. The second objection relates to misleading information regarding the start of operation date. There are no clear legal regulations under which circumstances a plant receives a new start-up date.

z) Legal **assessment**

In this regard, we refer in full to the statements in the legal memorandum of * Thereafter.there are no legal indications that the

'* egalMemorandum (Ankang z), para. a.g., p. g f.

HKN has made false statements regarding the claiming of subsidies or the date of commissioning. With regard to the subsequent payment of subsidies, it is stated that Norwegian law does not provide for the subsequent payment of subsidies. With regard to the commissioning date, it is stated that the commissioning date to be indicated on the HKN is defined as the date on which the plant first supplies electricity to the grid. There are no points of reference for incorrect commissioning dates.

V. Other objection: Designation of the electricity mix by NVE and designation of RES without use of HKNs

Another objection that has been raised against the system of electricity labeling and LCN in Norway for many years is the fact that electricity labeling is only done by publishing the national electricity mix in Norway and not individually by the electricity suppliers.*[6] The accusation here is that electricity consumers do not perceive this type of electricity labeling and instead assume that the electricity mix consists entirely of renewable energies due to the generation mix in No egen. However, it is very questionable whether this is actually sufficient to violate the requirements of the RES Directive zoog and the HkRNDV. Moreover, the UBA is aware of this issue and has not seen any reason to deviate from the recognition practice of Norwegian HKNs.

According to the requirements of the RES Directive zoz8, according to which HKNs are to be used in principle for the designation of renewable energies, the method of electricity designation via publication of the national mix by NVE should no longer be sufficient in any case. This is because, according to this, a designation of renewable energies is only permissible if the electricity supplier uses HKN. At the latest as of oz.O7.* -z, when the RES Directive zoz8 is to be implemented, it would be a change in the practice of electricity labeling in Norway is therefore probably necessary. As stated in*!-4)b) above, the lack of implementation of theobligatory use of HKNs for renewable energy designation may result in HKNs no longer having to be recognized.

" See the BBH/Öko-institut assessment commissioned by UBA and BMWi, Summary of the assessment of national guarantees of origin for electricity produced from renewable sources (GO) and disclosure systems for the purpose of decisions about the recognition of imported GO, Norway, p. z.

O. Overall result

I. Double reporting by energy supply companies in electricity labeling

The assumption of a legally inadmissible double marketing, in which electricity suppliers report electricity from renewable sources without using HKNs, has not been confirmed by an analysis of Norwegian law. This does not exclude the possibility that electricity suppliers in fact report electricity as renewable without devaluing HKNs. However, we have no concrete evidence of this. Moreover, a purely factual possibility of double marketing should not alone mean that the HKNs from Norway are not eligible for recognition under s 36 (z) HkRNDV, unless they are included in
legal violations are documented on a larger scale.

II. Double expulsion by companies

When companies report their electricity mix, there is no energy law prohibition in Norway to use the location-based method. The location-based approach is based on where the electricity physically comes from in the state (or other defined area) where it is consumed. In contrast to electricity suppliers, end consumers in Norway are therefore not required by energy law to use the electricity mix calculated by NVE. In fact, according to Bowie's analysis of electricity labels in a study by *Oslo* Economics, many companies also use the so-called location-based approach for reporting the amount of electricity used. In practice, this leads to double reporting of electricity from renewable sources, as the companies using it report electricity from renewable sources, even though the green characteristic of this electricity has already been exported via the HKN.

As a result, we believe that double reporting of electricity from renewable sources by final consumers can lead to a violation of s 36 (z) sentence a no. g HkRNDV. The wording of s 36 (1) sentence a no. ç HkRNDV is not
completely unambiguous. However, this result is supported, firstly, by the fact that the
The second reason is that the purpose of the RES-E Directive, namely consumer protection, requires a comprehensive prevention of double marketing, also by designating electricity to end-users. Secondly, the purpose of the rules on HCNs, namely consumer protection, requires a comprehensive prevention of double marketing also by designation to final consumers. If in Norwegian law as well as in the administrative practice there the market behavior of a double designation by companies is tolerated, this also speaks in our view generally against the reliability of the Norwegian HKN system. In the event of a violation of s 36 para. z HkRNDV, the

BECKER BÜTTNER HELD

HKNs from Norway are generally no longer recognized by the UBA. Furthermore, this practice could also be in conflict with legal regulations against unfair competition.

III. Promotion for electricity for which HKNs are issued

The objection of a statutory subsidy for electricity for which HKNs are also issued and exported does not, in our opinion, per se argue against the eligibility of HKNs for recognition under § 36Abs. z HkRNDV in its current version and taking into account the EE-RL 2 9. However, under the EE-RL zoi8, which is to be implemented as of 01.07.zoz, there is considerable evidence that HKNs no longer need to be recognized if the value of the HKN in a norwe-
The new funding regulations do not take sufficient account of the current situation.

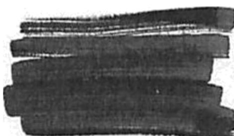
IV. Incorrect information on the HKN

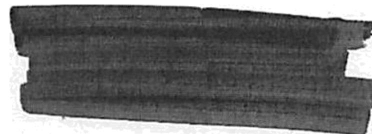
After examination of the Norwegian legal situation bys, there are no legal indications that false information on the claiming of subsidies or the commissioning date is given on the HKN.

V. Electricity labeling through publication of the electricity mix by NVE

According to the requirements of the RES Directive zoi8, according to which HKNs are to be used in principle for the designation of renewable energies, the way of electricity designation in Norway solely via publication of the national mix by NVE should no longer be sufficient. Thus, at the latest from oz-°7.20zz, when the RES Directive zo18 is to be implemented, a change in electricity labeling practice in Norway would probably be necessary. There are not insignificant legal indications that a lack of implementation of the mandatory use of LCNs for the designation of RES in Norway may lead to a situation where Norwegian LCNs no longer have to be recognized.

Berlin, o$-°3-2021





E. Annexes

Appendix z

morandum on certain aspects of the use of guarantees of origin in Norway

Appendix aa

Forskrift om opprinnelsesgarantier for produksjon av elektrisk energi (Regulations on guarantees of origin for the production of electrical energy), FOR-2 7-**-+€-i6$z, presented in English translation by

Appendix e.g.

Forskrift om opprinnelsesgarantier for produksjon av elektrisk energi (Regulation on Guarantees of Origin for the Production of Electric Energy), submitted in certified translation

Annex 3

Comments on the provision on guarantees of origin, presented in certified form Translation

Appendix g

Forskrift om maling, avregning, fakturering av nettjenester og elektrisk energi, nett- selskapets naytralitet mv. (Regulations on metering, billing, invoicing of grid ser- vices and electrical energy, the grid company's neutrality, etc.), FOR-+999-03-++-.

3 1, presented in English translation before

Appendix

Lov om produksjon, omforming, overfaring, omsétning, fordeling og bruk av energi

m.m. (energiloven) (Act on generation, conversion, transmission, trading, distribu- tion and use of energy etc. (Energy Act)), LOV-+99°-o6--9-$o, presented in English translation by