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The Supreme Court of Norway - Judgment - HR-2018-1258-A

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Keywords	Public administrative law. Petroleum law. Validity of Tariff Regulation.
Summary	On 26 June 2013, the Ministry of Petroleum and Energy decided to amend Regulations of 20 December 2002 no. 1724 on tariffs etc. for certain facilities (the «Tariff Regulations»). The amendment entailed a reduction of the price of gas transport through the gas pipe system owned by the joint venture Gassled. In the question whether the amendment had legal basis, the Supreme Court held that the Tariff Regulations originally had legal basis in section 10-18 subsection 1 and section 4-8 subsection 1 third sentence of the Petroleum Act and in section 70 of the Petroleum Regulations. The capital element in the tariff had been established in accordance with section 63 subsection 4 of the Petroleum Regulations with the purpose of continuing the established goal to obtain a real return on the invested capital of around seven percent. The Supreme Court found that the Ministry could amend the Tariff Regulations within the scope of their original legal basis, and that section 4-8 did not entail independent limitations of significance in the Ministry's right to make the relevant adjustments. The amendment of the Regulations was within the legal basis provided in the Petroleum Act and in the Petroleum Regulations. The Supreme Court did not consider whether the amendment was an interference with the right to protection of property in ECHR P1-1, as it was not under any circumstances a disproportionate measure. Hence, there was no basis for declaring the amendment invalid.
Proceedings	The Supreme Court HR-2018-1258-A, (case no. 2017/1891), civil case, appeal against judgment.
Parties	CapeOmega AS (Counsel Thomas G. Michelet) (Assisting counsel: Kyrre Eggen), Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS (Counsel Jan B. Jansen Counsel Thomas K. Svensen) (Assisting counsel: Kyrre Eggen) v. The state represented by the Ministry of Petroleum and Energy (The Attorney-General represented Tolle Stabell and Christian Fredrik Michelet) (Assisting counsel: Håvard H. Holdø).
Author	Justices: Bårdsen, Kallerud, Falch, Ringnes, Endresen.
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Translation provided by the Supreme Court of Norway.

(1) Justice **Bårdsen:** The case concerns the validity of the Ministry of Petroleum and Energy's Regulations 26 June 2013 no. 792 relating to amendment of the Regulations relating to the stipulation of tariffs etc. for certain facilities (the Tariff Regulations), adopted under section 4-8 of the Petroleum Act, among others.

(2) The Tariff Regulations 20 December 2002 no. 1724 regulate the tariffs that third parties must pay for shipment of gas in the pipelines owned by the joint venture *Gassled*. The joint venture was established in 2003, and tariffs were stipulated in the Tariff Regulations for the various areas of the pipeline network. This network is the world's biggest offshore system for transport and processing of gas, consisting of a number of gas pipelines on the seabed of the North Sea and the Norwegian Sea, some onshore processing plants in Norway and six receiving facilities in the UK, France, Belgium and Germany. The system is subject to licences from the Ministry of Petroleum and Energy pursuant to section 4-3 of the Petroleum Act. Upon the expiry of the licence period in 2028, the state will be entitled to take over most of the facilities free of charge under section 5-6 of the Petroleum Act.

(3) With the amendment of the Tariff Regulations from 1 July 2013, the tariffs for using Gassled's pipeline network were reduced, with effect for new agreements for shipment of gas after 1 October 2016. This entailed lower future revenues for the owners than what they could have received had the tariffs from the establishment of Gassled in 2003 remained unchanged throughout the licence period.

(4) Four Norwegian companies, with a total ownership in Gassled of approximately 45 percent, claim that the amendment of the Tariff Regulations in 2013 is invalid and that the state is liable for the loss of revenues they have incurred. The relevant owners are CapeOmega AS (CapeOmega), Solveig Gas Norway AS (Solveig), Silex Gas Norway AS (Silex) and Infragas Norge AS (Infragas). CapeOmega AS was founded as Njord Gas Infrastructure AS (Njord), but changed its name in December 2017. Before the Supreme Court, the companies contend that the amendment of the Tariff Regulations goes beyond the scope of its legal basis and that it, in any case, interferes with the owners' right to enjoy their possessions under the European Convention on Human Rights (ECHR) Protocol 1 Article 1 (P1-1).

(5) *Background*

(6) The Court of Appeal's judgment contains a detailed presentation of the facts of the case and the events giving rise to the dispute, which I refer to and use as a basis for my opinion. As the case now stands, I will confine myself to pointing out some main elements.

(7) The costs of establishing gas pipelines on the seabed are so substantial that the owners obtain a natural monopoly. In connection with the development of oil and gas fields in the North Sea and in the Norwegian Sea in the 1970s and 80s, the Norwegian authorities saw a need to regulate the transport system to ensure maximum exploitation of the Norwegian petroleum resources.

(8) Prior to 2003, there was a number of gas pipe systems in operation with various owners. Shippers had to enter into several transport agreements; they had to deal with various owners with different terms and tariffs. Therefore, in a letter of 25 June 2001, the Ministry of Petroleum and Energy requested the owners of the different transport systems to initiate negotiations to establish a joint venture.

(9) After an extensive process involving consultations with the Ministry of Petroleum and Energy and where the Ministry worked simultaneously to determine the future transport regime for Norwegian gas, the participants presented on 17 December 2002 an agreement on the establishment of Gassled and a partnership agreement for the Ministry's approval. As part of the agreement, applications were made for prolongation of existing operating licences until 31 December 2028 to obtain a joint licence

period for the entire pipeline system. Consent was given on 20 December 2002 under section 10-12 of the Petroleum and Energy Act, and the Tariff Regulations were adopted on the same day. A standard agreement on transport of gas in Gassled was also presented, setting out in clause 5.1 that the tariffs are to be calculated as regulated by the Ministry.

(10) Against this background, Gassled was established with effect from 1 January 2003, and several new pipeline systems have since been included. Today, nearly all Norwegian gas that is sold to the United Kingdom and Central Europe is transported through Gassled.

(11) The establishment of Gassled is a result of the proposal, during the partial privatisation of Statoil and the transfer of the management of the state's direct economic interest to Petoro in 2001, to establish an independent company for the operation of pipelines and associated gas processing facilities. This led to the establishment of Gassco AS (Gassco). Gassco is owned by the state and appointed to operate Gassled under section 4-9 of the Petroleum Act, and to be responsible for the administration, technical operations and development of the pipeline network. In addition, Gassco supervises the entire infrastructure for Norwegian gas.

(12) The development of the transport regime for Norwegian gas must be seen in the light of the incorporation of EU's Gas Market Directive (Directive 98/30/EC) into the EEA Agreement in 2001. The Directive permitted third parties to access the gas transport systems. As a result, section 4-8 subsection 1 of the Petroleum Act was amended in 2002 to include a new second and third sentence giving undertakings operating with natural gas and eligible customers domiciled in an EEA State the right of access to upstream pipeline networks. The Ministry also worked out an EEA-adjusted access regime for gas transport by adding a new chapter 9 to Regulations 27 June, no. 653 to the Petroleum Act (the Petroleum Regulations).

(13) Pursuant to section 61 subsection 1 of the Petroleum Regulations, the Gassled owners are to make spare capacity available to Gassco, which in turn will make it available to potential shippers. Shipment agreements in the primary market are entered into by Gassco on behalf of Gassled by the shippers booking capacity under section 61 subsection 3. The agreements are entered into on conditions stipulated in regulations and a standard agreement approved by the Ministry. Individual shipment agreements are no longer subject to the Ministry's approval, see section 65 of the Petroleum Regulations.

(14) In 2007, ExxonMobile Exploration and Production Norway AS initiated a process with the intent to sell their ownership interest of 9.48 percent in Gassled. The Ministry became involved early in the process. There were several potential buyers, but negotiations were completed with UBS International Infrastructure Fund and Caisse des Dépôts, which later formed Njord Gas Infrastructure AS. Both parties engaged legal, financial and commercial advisors. Extensive reports were made and meetings were held, including meetings with the Ministry.

(15) A purchase agreement was signed on 13 April 2010, on the same date as Njord submitted an application to the Ministry for approval of the transfer and the mortgaging of the licence under sections 10-12 and 6-2 of the Petroleum Act. Both were approved by the Ministry on 1 February 2011. In connection therewith, the Ministry assessed Njord's financial position and made certain conditions to ensure that the technical security system would not be weakened because of the sale.

(16) Following the transfer to Njord, several other Gassled owners initiated similar sales processes, most of which were finalised by the end of 2011. Statoil sold its ownership interest of 23.58 percent to Allianz Capital Partners, Canada Pension Plan Investment Board and Infinity Investments SA, which for this purpose established Solveig Gas Norway AS. In 2012, Solveig bought a small ownership interest of 1.27 percent from Eni Norge AS. Total E&P Norge AS sold its ownership interest of 6.1 percent to Allianz Capital Partners, which established Silex Gas Norway AS as a holding company. A/S Norske Shell sold an ownership interest of 5 percent to Infragas Norge AS.

(17) These transfers of ownership interests meant abandoning the governing principle of a *balanced ownership* where the Gassled owners were also shippers. The new financial owners from 2010–2011, on the other hand, had no shipment interests.

(18) On 15 January 2013, the Ministry presented proposed amendments of the Tariff Regulations for consultation. The following is taken from the consultation memorandum:

> «Developments on the Norwegian continental shelf indicate that, in the time ahead, the Gassled tariffs will be increasingly important in our resource management. The most profitable resources in a petroleum province are usually recovered at an early stage. Hence, low costs in pipelines and processing plants become more important on a mature continental shelf where several of the projects are economically less robust. This is important if the companies are to see exploration, development of discoveries and further measures on existing fields as an interesting proposition. In order to achieve good resource management, it is essential that the companies take an interest in exploiting socio-economically profitable resources. Lower tariffs for pipelines and processing facilities are also important for the establishment and correct choice of transport solutions. This is discussed and highlighted in a report submitted by Gassco in January 2012 (NCS 2020 – A study of future gas infrastructure).
>
> In letter of 24 August 2012 to all owners and users of Gassled, the Ministry announced that it had initiated work on assessing the tariff level in Gassled, as stipulated in the Tariff Regulations.
>
> As a part of this work, Gassco has, as instructed by the Ministry, calculated the return on the capital invested in the facilities currently constituting Gassled from the start of the investments in Norpipe until 2028. The analysis shows that by 2028, a real return before tax of 10.5% will be obtained based on historical tariff revenues and future capital tariff revenues from transport agreements entered into. Moreover, the analysis shows that the present value of net cash flows from the transport agreements entered into exceed the level assumed when the Tariff Regulations were adopted in connection with the establishment of Gassled in 2003.
>
> Based on the above, the Ministry submits a proposal to amend the Tariff Regulations for consultation for the purpose of facilitating good resource management. The Ministry proposes to stipulate a new fixed part of the capital element per unit in the tariffs for future agreements on transport and management of natural gas for the greater part of the existing Gassled facilities. The Ministry does not suggest any amendments to the capital element in the tariffs for transport agreements entered into prior to the implementation of the proposed amendment of the Tariff Regulations. Accordingly, the proposal will not involve a reduction in the payment obligation of the users of the Gassled facilities or the income the owners of Gassled will receive from transport agreements already entered into.»

(19) A number of consultation responses were given, among others from the appellants in the case at hand.

(20) The Ministry adopted the amendment of the Tariff Regulations on 26 June 2013. The amendment was mainly in accordance with the consultation memorandum, which meant that the capital element in the tariff formula was substantially reduced for large parts of Gassled. However, the amendment was implemented a little later than originally proposed. The Ministry's arguments in favour of amending the Tariff Regulations are included in an extensive decision memorandum to which I will revert to some extent.

(21) Based on the figures presented before the Supreme Court, the tariff reduction entailed a likely future cost reduction for shippers in the order of NOK 30 billion. Based on prospective future bookings, the appellants have estimated reduced revenues of approximately NOK 15 billion due to the tariff adjustments.

(…)

(29) The appellants – **CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS** – contend the following:

(…)

(38) *ECHR P1-1*

(39) The tariff adjustments are an interference with the protection of property under ECHR P1-1. The provision comprises any interference with ownership rights to existing property, including the right to a return on the possession in question. The joint venture Gassled's ownership rights to the gas pipeline network include a Convention right to receive the return this system might yield and consideration for a third party's use. The Gassled owners have a duty to contract and may not demand higher tariffs than those stipulated in the Tariff Regulations.

(40) As it appears from extensive case law from the European Court of Human Rights (ECtHR), various forms of price control are regarded as interference. This applies regardless of whether adjustments have been implemented before or after the relevant acquisition of the property or the right. The value of Gassled ownership interests corresponds to the current value of future shipper agreements. The amendment constitutes stricter government price control reducing the future cash flow and, with that, the value of the Gassled ownership interests.

(41) The tariff adjustments in 2013 were thus an interference with the protection of property under P1-1. This must, to be legitimate, meet the Convention's requirements of a legal basis in national law, of a legitimate purpose, of a predictable application of the law and of proportionality. The tariff adjustments may have had a legitimate purpose, but they do not fulfil the other conditions that justify the interference.

(42) The requirement of predictability entails not only an abstract assessment of the level of accuracy in the relevant legal basis, but there must also be a genuine possibility to predict the specific interference. According to the ECtHR, the national legal bases must be «foreseeable in their application». The appellants acquired their Gassled ownership interests in the belief that the tariffs would remain stable throughout the licence period. Nowhere is it stated that the Ministry had a right to reduce the capital element from the moment the investment value of Gassled had been earned, and there is no clear definition of «prospective return». No system was made for measuring of the current return in Gassled against the investment value. The owners had thus no realistic chance of predicting if or when the tariffs would be adjusted, or how large any such adjustments would be.

(43) Moreover, the tariff adjustments were disproportionate, as they subjected the Gassled owners to an individual and disproportionate burden. The adjustments involved a transfer of substantial values from the Gassled owners to the shippers, including Statoil with the state as its majority shareholder. Since the appellants are the only Gassled owners with no shipper interests, they incur a substantial loss from the tariff reduction instead of enjoying the benefits. The appellants as a group are in fact bearing the entire burden of the tariff adjustments. The Ministry of Petroleum and Energy knew already when approving the transfers that an adjustment of the capital element in the tariff would affect the new owners severely. Yet, the Ministry did not adequately analyse the need for adjustment and the effect such adjustment would have on the appellants. The appellants' unique position as owners without shipper interests was deemed irrelevant. The state's conduct and the nature of the interference suggest that the appellants have been subjected to a burden that cannot be justified in the light of any demonstrated effect in terms of resource management.

(44) In connection with its approval of the transfer of the Gassled ownership interests in 2010–2011, the Ministry should have informed the parties of its interpretation of the rules and of the prospects of tariff adjustments. The Ministry knew that the return in Gassled was approaching the investment value. The

Ministry also knew that the parties acquired their Gassled ownership interests in the belief that the tariffs would remain stable throughout the licence period. It was thus contrary to «good governance» when the Ministry started working on the tariffs shortly after having approved the acquisition, without first informing the new owners of its view on the risk of adjustment.

(…)

(46) The respondent – **the state represented by the Ministry of Petroleum and Energy** – contends the following:

(…)

(55) *ECHR P1-1*

(56) The amendment of the Regulations does not interfere with the appellants' protection of property under ECHR P1-1.

(57) As correctly assumed by the Court of Appeal, whether or not interference has occurred at all must be determined in the light of the nature of the possession. The state owns the petroleum resources. All activities by private parties are subject to Ministry's approval, including installation and operation of gas transport facilities. The ownership right is positively limited, as the ownership right under the licences is to receive a «reasonable return» on invested capital. It follows from the original approvals that this constitutes a real return of around 7 percent before tax on the invested capital. With the amendment in 2013, the tariffs were adjusted so that the aggregate return corresponds to what follows from the licences, the set of rules and the prospective return.

(58) The establishment of Gassled and the stipulation of the tariffs in 2003 were not based on any assumption of fixed tariffs or on a fixed capital element. The appellants had no legitimate expectation that the tariffs would remain unchanged throughout the entire licence period, i.e. until the end of 2028. The risk of changes was also considered by the appellants during the purchase processes, and the risk of adjustments was explicitly mentioned by the Ministry when approving the transfers.

(59) Should the Supreme Court find that the tariff adjustments are to be regarded as an interference with the protection of property under ECHR P1-1, such interference is legitimate.

(60) The assessment of proportionality must be based on the actual area in which one operates, and the applicable regulatory framework. The Gassled tariffs are stipulated with the main purpose of securing optimum exploitation of Norwegian petroleum resources. The tariff adjustments had no retroactive effect. They were not arbitrary, but in accordance with what the parties could reasonably expect. The parties took a risk when investing in Gassled; they were familiar with the state's established policy that the profit from petroleum activities was to be earned from the fields. They also knew that the Ministry was free to adjust the tariffs, and that the aim was a real return of around 7 percent of the invested capital – which has in fact been obtained for the aggregate investments in Gassled.

(61) It cannot be so that the state ought to have made accurate analyses of the effects on the appellants. The Ministry was not familiar with the commercial assessments forming the basis for the appellants' investments or with the return they expected to obtain when acquiring their ownership interests in Gassled in 2010–2011.

(…)

(63) **I have concluded** that the appeal must be dismissed.

(…)

(106) *ECHR P1-1*

(107) The heading of ECHR P1-1 is «Protection of property». The article reads:

> «Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.»

(108) Pursuant to section 2 of the Human Rights Act, P1-1 applies as Norwegian law. In the event of conflict, it even prevails over other legislation, see Article 92 of the Constitution and section 3 of the Human Rights Act, cf. the Grand Chamber judgment Rt-2015-421 paragraph 53 (*Grimstvedt*).

(109) The Supreme Court has dealt with the protection of property under P1-1 in several rulings. I will base myself on the general account by the justice delivering the leading opinion in the Grand Chamber judgment HR-2016-304-S paragraphs 40-46 (*Guldberg*), cf. HR-2016-389-A paragraphs 119-120 (*Hagen*).

(110) The ECtHR has, since its plenary judgment 23 September 1982 *Sporrong and Lönnroth v. Sweden*, stressed that P1-1 contains «three distinct rules» – see paragraph 61: The «principle rule» is of a general nature, and states that everyone is entitled to peaceful enjoyment of property, see subsection 1 first sentence. The «deprivation rule» subjects deprivation of possessions to certain conditions, see subsection 1 second sentence. The «control rule» recognises the states' need and right to control the use of property in accordance with the general interest of the community, see subsection 2.

(111) In ECtHR case law, it has often been repeated that the three rules expressed in P1-1 are intertwined; the deprivation rule and the control rule concern different forms of interference with the owner's enjoyment of his rights and must therefore be interpreted and applied in the light of the principle rule. I mention as an example judgment 14 April 2015 *Chinnici v. Italy (no. 2)* paragraph 29, with further references to previous case law. In a number of cases, the ECtHR has also expressed that interference with the owner's enjoyment of his rights, to avoid conflict with P1-1, must be in *accordance with the law*, pursue a *legitimate purpose* and be *proportionate*. This applies even if the deprivation rule or control rule becomes applicable, see judgment 16 November 2010 *Perdigão v. Portugal* paragraph 67. In the case at hand, it is clear that the control rule is the relevant one.

(112) In *Chinnici v. Italy* paragraph 32 it is emphasised that the proportionality principle, which is central in the Convention as a whole, aims to ensure a fair balance between the general interest of the community making basis for the measure on one side and the anticipation of protection of basic rights on the other. The interference will be disproportionate and thus contrary to the Convention, if the owner must bear «an individual and excessive burden»:

> «A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden...»

(113) The criterion «an individual and excessive burden» used in *Chinnici v. Italy* has been used in several earlier plenary and Grand Chamber cases. I highlight judgment 23 September 1982 *Sporrong and Lönnroth v. Sweden* paragraph 73, judgment 21 February 1986 *James and others v. the United Kingdom* paragraph 50, judgment 16 November 2010 *Perdigão v. Portugal* paragraph 67 and judgment 29 March 2010 *Depalle v. France* paragraph 83. In the French versions of the these judgments, the wording «une charge spéciale et exorbitante» is used. In Norwegian, the expression *«en individuell og overdreven byrde»* might cover it, cf. page 27 of Norwegian Official Report NOU 2013:11, where *«en individuell og urimelig byrde*» is used.

(114) It has been set out in case law of both the ECtHR and the Supreme Court, as part of the proportionality assessment, that interference with the protection of property, must be *neither arbitrary nor unforeseeable*, see the ECtHR Grand Chamber judgment 19 June 2006 *Hutten-Czapska v. Poland* paragraph 168, and the Supreme Court Grand Chamber judgment Rt-2015-421 paragraph 57 (*Grimstvedt*). The ECtHR has in several recent judgments summarised certain aspects of this protection against arbitrary and unforeseeable interference in a «good governance» condition. The most recent example for the time being is judgment 12 June 2018 *Beinarovič and others v. Litauen* paragraph 139, presenting this as a demand that the authorities – when an issue in the general interest of the community affects fundamental human rights, including those involving property – act in good time and in an appropriate and above all consistent manner.

> «The Court has on many occasions emphasised the particular importance of the principle of 'good governance'. It requires that where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner»

(115) P1-1 provides protection against inference with *possessions* («biens»). In the grand chamber judgment 29 March 2010 *Brosset-Triboulet and others v. France* paragraph 65-66, the ECtHR states the following on the contents of this expression:

> «65. The Court reiterates that the concept of 'possessions' referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 ...
>
> 66. The concept of 'possessions' is not limited to 'existing possessions' but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right ... A legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a 'sufficient basis in national law ...»

(116) According to this and other judgments, the protection of what the ECtHR refers to as a «legitimate expectation» («l'espérance légitime») does not concern the very wish, hope or expectation of future income, see judgment 24 September 2012 *Malik v. the United Kingdom* paragraph 89-93. If this expectation of enjoyment of a possession is to be comprised by P1-1, it must have a sufficient basis in national law («une base suffisante en droit interne»). Here, I refer to the Grand Chamber judgment 28 September 2004 *Kopecký v. Slovakia* paragraphs 47-52 and to the Supreme Court plenary judgment Rt-2013-1345 paragraphs 143-144 (*structure quota*).

(117) Case law shows that the protection under P1-1 may, depending on the circumstances, concern the economic interest relating to current commercial activities, including the expectation of continued operation pursuant to licences or permissions granted under public law. Relevant in this regard are judgment 7 July 1989 *Tre Traktörer AB v. Sweden* paragraph 53, judgment 18 February 1991 *Fredin v. Sweden* (No. 1) paragraph 40, judgment 29 November 1991 *Pine Valley Developments Ltd and*

others v. Ireland paragraph 51, judgment 19 January 2017 *Werra Naturstein GmbH & Co. KG v. Germany* paragraph 37 and judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland* paragraphs 85-89, with further references.

(118) The case at hand raises two issues under P1-1: whether the tariff adjustment is an *interference with protected possessions* and whether, in that case, the interference is *disproportionate*.

(119) *Is the tariff reduction an «interference» with «possessions» protected under EMK P1-1?*

(120) The appellants have, through the joint venture Gassled, undivided ownership interests in the upstream gas pipeline network with associated processing facilities constituting Gassled. Although the state has ownership rights to the petroleum resources, and an exclusive right to manage the resources and regulate the extraction and transport of Norwegian petroleum, the appellants' ownership interests in Gassled are possessions of such a nature that they are comprised by P1-1.

(121) The economic motivation of owning interests in Gassled is not primarily related to the facility itself. The value lies in the licences granted to Gassled under section 1-3 and section 4-3 of the Petroleum Act to operate the physical facilities during the entire licence period throughout 2028, and which – with the approval of the Ministry of Petroleum and Energy under section 10-12 – were transferred from the original owners to the current owners in 2010–2011. The positive economic current value of the ownership in Gassled lies in fact in the expectations that the licences will generate future shipment revenues. I take it that these licences are possessions within the meaning expressed in P1-1, cf. the Supreme Court plenary judgment Rt-2013-1345 paragraph 145 (*structure quota*).

(122) In the rather unique and thoroughly regulated field we are dealing with, there is a close connection between the physical facilities and the revenue flow rendered possible by the licences. The ownership of the pipeline network is a prerequisite for the licences and the shipment revenues they in turn generate. Moreover, revenues are required for the owners to fulfil their responsibilities as owners of the physical facilities – with regard to operational risk, liability in the case of damage to surroundings and obligations at the expiry of the licence period.

(123) The ownership of the physical facilities and the right to control and operate them with regard to shipment revenues generated by the licences granted under the Petroleum Act, must be considered in context under P1-1. The question is which legitimate expectations the Gassled owners had to the future economic exploitation of their ownership, given the overall regulatory set of rules that applied, cf. judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland paragraphs* 86-89 and 104.

(124) The Gassled owners had a legitimate expectation to be able to demand fixed tariffs for *volumes already booked*. This was also fully recognised through the transition rules provided when the tariffs were reduced in 2013. As I have previously said regarding the regulatory set of rules, the Gassled owners had no legitimate expectation that the tariffs for *future agreements*, which is the case here, would remain unchanged. Moreover, it appears from the Court of Appeal's findings of fact, which has not been appealed, that the companies knew that the tariffs were based on return and that they could be adjusted. Hence, the appellants had no legitimate expectation of receiving the tariffs stipulated in the Tariff Regulations throughout the entire licence period. However, thanks to a well-established regulatory regime, the owners did have a legitimate expectation of receiving the original tariffs *until the return suggested otherwise,* cf. judgment 6 February 2018 *Kristiana Ltd v. Lithuania paragraphs* 90-91.

(125) The *general principles* in the tariff regime based on return had been implemented already when Gassled was established in 2003. They were known to both the previous and the new owners. And with the clarity obtained at this point, the Court of Appeal's statement that the tariff adjustments in 2013 were a «direct consequence of the applicable regulatory regime» was indeed to the point. It is

also natural to suggest, as done by the state before the Supreme Court, that this is in fact what governs what the owners could reasonably expect with regard to future shipment revenues: Since the owners could not expect revenues exceeding the scope of the return regime on which the Tariff Regulations were based, a future tariff adjustment consistent with this regime is not an interference with a legitimate expectation that can be asserted under P1-1.

(126) I support this argument to a large extent, cf. the ECtHR dismissal order 17 December 2013 *Crash 2000 OOD v. Bulgaria* paragraph 57 and judgment 30 January 2018 *Cassar v. Malta* paragraph 44. I am, however, somewhat reluctant. My doubt is based on the following:

(127) Already from the establishment of Gassled in 2003 and until the amendment of the Tariff Regulations in 2013, it was uncertain *how* the Ministry specifically would fix the individual components in the tariff regime based on return, in order to determine the need for adjustments. And it had not been clarified – or communicated to the owners – what was the precise basis for the calculation of the prospective total return, neither in figures nor in method. There was also no system for measuring the return to determine when tariff adjustments should be considered and how substantial they should be, or for communicating any of this to the owners. The Ministry itself, as I understand, did not have full insight until in 2012. According to information presented, it was not until 2003 that the Ministry started using Gassled's investment value to measure whether the prospective return had been obtained. I refer to what I have said about this connection in my examination of the basis for stipulating the original Gassled tariffs in 2003.

(128) The Court of Appeal has found reason to «to criticise the authorities for not having established a system for measurement and registration of the return in Gassled, and for not having clarified earlier that the investment value could be used as a basis for estimating the return». My point is not to clarify whether there is reason to criticise the Ministry. Prior to the acquisition of the Gassled ownership interests in 2010–2011, all owners had also been shippers, and such balanced ownership limited the need for supervision and follow-up. The system was practically self-regulating as the owners, because they also were shippers, had no interest in high tariffs. The transition to an unbalanced ownership in 2010–2011 created a new situation.

(129) When I mention the regulatory drawbacks with regard to predictability and transparency, it is because these may help determining what the appellants could reasonably have expected with regard to continuing to demand the tariffs stipulated in the Tariff Regulations. I refer in particular to the appellants' limited possibilities of perceiving that the prospective return had in fact already been obtained when they acquired their ownership interests and that they had to be prepared for a swift and substantial reduction of the capital element, with tariffs reduced accordingly for new agreements. In that sense, I agree with the court of appeal that it was «difficult to know when to expect a tariff adjustment, especially for the new owners entering in 2010–2011», and «which adjustments, in that case, would be made».

(130) From this perspective, it seems problematic to use the amended Tariff Regulations from 2013 to measure what the owners – during the period prior to the amendment – could reasonably expect with regard to revenues under future contracts, and let this determine the applicability of P1-1. That is in fact what one does if concluding that any expectation of revenues under future contracts beyond the scope of the amended Tariff Regulations was only a loose hope of future revenues without protection under P1-1.

(131) The significance of this objection is nevertheless uncertain. The Ministry's solution entailed, as I have accounted for, that the original tariffs could be demanded for far larger volumes than those required to obtain the prospective return. It might be asked whether this, in any case, has been duly compensated.

(132) I will leave open the question whether an interference with an ownership interest protected under P1-1 has taken place, as in my view, such interference would under no circumstances be disproportionate, see the Supreme Court judgment Rt-2008-1747 paragraph 44 (*Hopen*).

(133) *Is the interference disproportionate?*

(134) Assuming that the tariff adjustment in 2013 is an interference with a legitimate expectation on the part of the appellants to be able to enter into new shipper agreements based on the original tariffs exceeding the period permitted, the question is whether such interference is *disproportionate*.

(135) This must be determined bearing in mind that the Ministry of Petroleum and Energy's decision to reduce the tariffs was based on a politically established principle for Norwegian petroleum management from the 1980s, i.e. that the concern for sound exploitation of the Norwegian oil and gas resources indicates that the majority of the profit is earned from the fields, and not from the transport infrastructure. This system fulfils legitimate societal needs which neither the Supreme Court nor the ECtHR has reason to review in a case like the one at hand, see the Supreme Court Grand Chamber judgment HR-2016-304-S paragraph 56 and the ECtHR judgment 22 May 2018 *Zelenchuk and Tsytsyura v. Ukraine* paragraph 100.

(136) Also, the assessment must include the fact that the tariff adjustment in 2013 was within the scope of an established and well-known regulatory regime, see judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland paragraphs* 90 and 104. The ratio between the original tariffs and the new and lower tariffs is thus a poor indication. The issue is, as I see it, primarily whether the tariff adjustment, given the systemic weaknesses I have addressed as concerns predictability and transparency, represented – within the meaning of the Convention – an individual and excessive burden to the appellants.

(137) My firm opinion that the tariff reduction in 2013 did not constitute such a disproportionate measure as P1-1 prohibits is due to the appellants' knowledge of the tariff regime and the risk of adjustments, of the Ministry of Petroleum and Energy's decision and of the fact that the adjustment has not affected the appellants particularly harshly. I will detail this in three points:

(138) *Firstly*: It is essential that the appellants, when acquiring their ownership interests in Gassled in 2010–2011, knew that the tariffs were based on return and that a regulatory risk was attached thereto, for instance with regard to the practical implications of the return assumption. This knowledge radically diminishes the protection under the Convention, see the Supreme Court judgment Rt-2008-1747 paragraph 70 (*Hopen*). Here, I refer to my comments on whether, at all, the tariff adjustment is an interference with the protection of property under P1-1.

(139) The assessment of the regulatory risk was, moreover, an important part of substantial *due diligence* work carried out both by the seller and the buyer prior to the transactions. Large resources were used on extensive external professional advice, in particular with regard to the legal aspects of the tariff regime. The agreed terms and tariffs have allowed the buyers to manage the regulatory risk, and any uncertainty associated with the lack of predictability and transparency. In this regard, the appellants also had to consider the increased exposure associated with not being shippers, as they would not – as opposed to the sellers and other owners – receive any compensatory benefits from reduced tariffs.

(140) I do not know whether the development after the transfer of ownership interests in Gassled became fundamentally different from what the appellants had pictured at the time of the acquisition. But if so: The fact that a well-known risk is realised for one of the parties to a contract cannot be given much weight in a proportionality assessment under P1-1. The parties themselves may consider the risk in their negotiations on price and other terms. I refer to judgment 2 July 2013 *Nobel and others v. the Netherlands* paragraph 39, judgment 15 December 2015 *Matczyński v. Poland* paragraph 106 and judgment 6 February 2018 *Kristiana Ltd v. Lithuania paragraph* 110.

(141) *Secondly:* Considering the values involved, and the authorities' view of the significance of a functioning adjustment system based on return, it was reasonable to expect – as I have already mentioned – that the Ministry of Petroleum and Energy, in cooperation with Gassco, had arranged for a more transparent and predictable system at the establishment of Gassled. But when the Ministry eventually learned that the prospective return had been obtained, the tariff issue was handled in a manner to which I have no objections. In this regard, it should be noted that the Ministry of Petroleum and Energy, as a regulatory authority, had and was bound to have a more detached role in the commercial transactions involving the ownership interests in Gassled.

(142) Prior to the tariff regulation in 2013, a consultation round was launched, at which also the appellants gave their views. Then, it was not asserted that the proposed adjustment would be inconsistent with P1-1. The appellants neither requested nor facilitated specific analyses of the effects for them. All comments the appellants had made to the proposal were quoted, assessed and commented by the Ministry. This includes the submission that the Ministry could not disregard the consideration the appellants had paid for their ownership interests in Gassled. The arguments read:

> «The commercial terms for the transfer of ownership interests in Gassled are a matter between buyers and sellers. New Gassled partners carry the risk of the assumptions they made when they acquired their ownership interests in Gassled.
>
> In the contact between the Ministry and the companies in connection with approval pursuant to section 10-12 of the Petroleum Act for the transfer of ownership interests in Gassled to Infragas, Njord, Silex and Solveig, the Ministry expressed on a general basis that the tariffs in Gassled could be changed.
>
> In the Ministry's transfer approvals, Gassled's importance to Norwegian resource management was expressly stated, and it was pointed out that the authorities place great emphasis on ensuring that regulation and ownership of Gassled serves resource management considerations at all times. In the above-mentioned approvals, the Ministry also referred to the important petroleum policy consideration that as much as possible of the profit from the petroleum activities shall be taken out on the fields and not in the infrastructure, and that the Ministry regulates the return in the system, based on resource management considerations and to ensure incentives for necessary investments. In this connection, the Ministry expressly stated that it could make changes to the tariffs as stipulated in the Tariff Regulations.
>
> When the transfers were approved in 2011, the Ministry had no concrete plans to change the tariffs.
>
> In a letter of 24 August 2012, the Ministry announced that it had initiated work assessing the tariff level in Gassled as set out in the Tariff Regulations. On 20 September, the Ministry approved the transfer of minor ownership interest to Solveig. It was then, as in connection with the previous approvals in 2011, stated that the Ministry would be able to adjust the tariffs in accordance with the Tariff Regulations. Furthermore, an explicit reference was made to the Ministry's letter of 24 August 2012.»

(143) The Ministry's explanation in favour of the tariff adjustments is exhaustive. It shows that the decision has been made in line with the legal basis, as I have presented earlier in my opinion. In this regard, it is of interest that section 63 subsection 4 of the Petroleum Regulations facilitates a balancing between the general interest of the community and ownership interests that is in fact related to the balancing under P1-1.

(144) Nothing in the Court of Appeal's findings of fact or in the material presented before the Supreme Court suggests that the Ministry has based its decision on illegitimate considerations, neither with regard to the time of the tariff adjustment nor with regard to its implications. Also, it appears that the consultation responses from the Gassled owners had a direct effect on the stipulation of the new tariffs: The Ministry decided to postpone the implementation to 1 October 2016, and it was decided

that the old tariffs were to be continued for the Gassled areas where the prospective return had not yet been secured.

(145) *Thirdly:* The tariff adjustments in 2013 were drafted so that the appellants were not particularly harshly affected. Here, I have noted the following four circumstances:

(146) Most of the capacity until the licence period expires at the end of 2028 had already been booked before 1 July 2013. These agreements are not affected at all by the tariff adjustments. The total tariff revenues for the shipper agreements already entered into are massive – approximately NOK 112 billion (2012). The exemption of the future agreements is the primary reason why the appellants, despite the tariff reduction, have stated that they will at least obtain a real return on their respective purchase prices of 4.5 – 5 percent before tax. The appellants have chosen not to present their own individual calculations.

(147) The new capital element was not adjusted to zero, although the prospective return had indeed been obtained. The owners will still have substantial income under new shipper agreements – previously estimated to almost NOK 10 billion (2012) throughout the remaining licence period.

(148) All operating costs during the licence period will be covered by separate components in the tariff formula, despite the reduced capital element, and the tariff formula will give a real return of around 7 percent on new integrity investments in accordance with the established prospective return. The information presented in the case indicates substantial amounts, and that this element will constitute an increasing part of the future tariffs.

(149) The Ministry postponed the implementation of the tariff regulation until shipments after 1 October 2016. This constituted, according to information presented, a compensatory value for the appellants of approximately NOK 5 billion (2012).

(150) Against this background, there is no basis for concluding that the tariff regulation in 2013 was a disproportionate interference with the appellants' right to protection of property under ECHR P1-1.

(…)

(157) I vote for the following

JUDGMENT:

1. The appeal is dismissed.
2. For the costs of the case before the Supreme Court, CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS are jointly and severally to pay to the state represented by the Ministry of Petroleum and Energy NOK 5 324 269 – fivemillionthreehundredandtwentyfourthousandtwohundredandsixtynine – within 2 – two weeks of the service of this judgment.

(158) Justice **Kallerud:** I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(159) Justice **Falch:** Likewise.

(160) Justice **Ringnes:** Likewise.

(161) Justice **Endresen:** Likewise.

(162) Following the voting the Supreme Court gave the following:

JUDGMENT:

1. *The appeal is dismissed.*
2. *For the costs of the case before the Supreme Court, CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS are jointly and severally to pay to the state represented by the Ministry of Petroleum and Energy NOK 5 324 269 – fivemillionthreehundredandtwentyfourthousandtwohundredandsixtynine – within 2 – two weeks of the service of this judgment.*