EFTA SURVEILLANCE AUTHORITY

COLLEGE

Brussels, 27 June 2001
Doc. No: 01-4509-D ✓
Dec. No. 227/01/COL
Ref. No: CFS.084.400.008

Dear Sir,

Subject: Letter of formal notice concerning the acquisition of waterfalls in Norway

1. Introduction – Relevant Norwegian Legislation

On 7 November 2000 the EFTA Surveillance Authority invited Norway to communicate to the Authority relevant information concerning national legislation on investment in Norway (Doc. No. 00-7887-D).

By letter received by the Authority on 15 January 2001 (Ref. 2000/4935 NR JU ABE), Norway transmitted, *inter alia*, a copy of the Act No. 16 of 14 December 1917 concerning the acquisition of waterfalls, mines and other real property (*Lov 14.12.1917 Nr. 16 om erverv av vannfall, bergverk og annen fast eiendom m.v.*), hereinafter "the Norwegian Act". The Norwegian Act has been amended on several occasions.

According to the Norwegian Act, the acquisition of rights of ownership or use of a waterfall by others than the State requires a concession (hereinafter referred to as "the concession"). This applies to both privately and publicly owned undertakings.

In accordance with Section 2-17 of the Norwegian Act, the concession is normally granted for a limited duration of 60 years. After that period, all installations should be returned to the Norwegian State without compensation.

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However, pursuant to Section 4 of the Norwegian Act, the concession may be granted for an unlimited period of time to enterprises organised according to the Law on State enterprises, Norwegian municipalities and municipal counties (*kommuner* and *fylkeskommuner*). The same goes for limited companies, co-operative societies and other associations where a minimum 2/3 of the capital and the votes are owned by companies organised according to the Law No. 71 of 30 August 1991 on State-owned enterprises (*Lov om statsforetak nr. 71 30.08.1991*), one or more local or regional authorities, in the case where the expansion of the waterfall in question is mainly used for normal power supply.

Section 4 also grants pre-emptive rights to the State when the transfer of shares or parts in a State-owned undertaking possessing waterfalls has the result that at least 2/3 of the company share capital or voting rights are no longer held by public authorities.

Finally, according to Section 2-22 of the Norwegian Act, if a private undertaking purchases a waterfall within the period of 60 years, the conditions of the original concession applies to the new owner. This means that the new owner will only run the concession for the remaining time of the concession until he reaches the limit of 60 years maximum. However, if the new owner is a Norwegian public undertaking the concession will be granted for an unlimited period.

It appears from official information in Norway (cf. St meld Nr. 29 (1998-99); Report to the Storting concerning the energy policy) that municipalities, counties and Statkraft SF own 87% of the electricity generation capacity in Norway. The remaining 13 per cent are conceded to private undertakings.

On 8 March 2001 (Doc. No. 01-1711-D), the Authority invited Norway to answer several questions concerning the Norwegian Act, in particular as regards Section 4 of the Act.

The Authority received Norway's reply on 23 April 2001 (Ref. 2000/4935 NR JU ABE). According to Norway's reply, the reason why certain legal persons are defined as public and can, according to Section 4 of the Act, be granted concessions for an unlimited period of time, is that these entities manage and take care of the waterfalls on behalf of the State. Norway indicates that such public management cannot be required from private legal persons. As regards non-public concessionaires, who are only granted a concession for a limited period of time, Norway stresses that it is necessary for the national authorities to make further consideration as to whether these entities shall be allowed to continue to manage waterfalls. Norway further indicates that there is no difference in treatment between private and public establishments.

2. Relevant EEA Law

According to the information available to the Authority, Norwegian public entities and undertakings having unlimited concession dispose of approximately 87% of the power production capacity in Norway, while the remaining capacity is generated by private Norwegian companies, having limited concessions. According to the Authority's information at present, the public entities and undertakings are not entrusted with the operation of services of general interest. It follows from the regime put in place by Norway that companies from other EEA States, whether public or private, may never benefit from an unlimited concession.

Pursuant to Article 31, paragraph 1, of the EEA Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC member State or an EFTA State in

the territory of any of these States. According to paragraph 2, freedom of establishment shall include the right to take up and pursue activities as self-employed and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, paragraph 2, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

According to Article 33 of the EEA Agreement, the provisions on right of establishment and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security, or public health.

Article 40 of the EEA Agreement provides that there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States. Moreover, discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested shall be prohibited. Annex XII to the EEA Agreement contains provisions necessary to implement Article 40 of the EEA Agreement.

Council Directive 88/631/EEC of 24 June 1988 for the implementation of Article 67 of the EC Treaty, as adapted by way of Protocol 1 to the EEA Agreement and referred to in point 1 of Annex XII to the EEA Agreement, recalls the obligation of the EFTA States to abolish restrictions on movements of capital taking place between persons resident in the EEA States. Annex 1 to the Directive lays down a non-exhaustive nomenclature of operations which constitute capital movements.

3. The Authority's assessment

3.1. In respect of the freedom of establishment

According to well-established case law, the Court of Justice of the European Communities has ruled that the concept of undertaking, in the sense of the Treaty, applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[1] This may include national, regional or municipal authorities provided they exercise an economic activity.[2]

The freedom of establishment shall include the right to take up and pursue activities as self-employed and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

The freedom of establishment forbids national measures which entail direct or indirect discrimination on the basis of nationality. The fact that a national measure, which is unfavourable towards all nationals of other Member States, is also unfavourable towards some domestic economic operators, does not in itself render that measure compatible with the basic freedoms, enshrined by the EC Treaty.[3]

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[1] See, e.g. Case C-41/90 *Klaus Höfner and Fritz Elser* v *Macrotron GmbH* [1991] ECR I-1979, paragraph 21.

[2] See, for instance, Case 118/85 *Commission* v *Italian Republic* [1987] ECR 2599, paragraph 11 and in respect of the transfer of undertakings, Case C-175/99 *Didier Mayeur* v *Association Promotion de l'Information Messine (APIM)* [2000] ECR I-7755, paragraphs 37-57.

[3] Case C-351/88 *Laboratori Bruneau* v *Unità sanataria locale RM/24 di Monterotondo* [1991] ECR I-3641, paragraphs 11-15; joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni* v *Unità sanitaria locale XV di Genova* [1993] ECR I-6621, paragraph 37; Case C-353/91 *Commission* v *the Netherlands* [1991] ECR I-4069, paragraphs 23-25 and Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 22 et seq.

The Court of Justice of the European Communities has ruled, in particular, that national measures, even when applying without distinction to all companies, whether of the nationality of the Member State concerned or of foreign nationality, are incompatible with the freedom of establishment, when they essentially favour public companies of the nationality of the Member State concerned.[4]

The Court of First Instance of the European Communities has also stressed that the concept of establishment within the meaning of the Treaty is very broad, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and profit therefrom.[5]

In the Authority's opinion, the same applies within the EEA Agreement.

Pursuant to the Norwegian Act, private or public undertakings from other EEA States may only be granted a concession for a limited period of time and should, at the expiry of the concession, return all installations, including the power plant and land and rights acquired for the enlargement, to the State without compensation.

Conversely, according to Section 4 of the Norwegian Act concerning the acquisition of waterfalls, the concession may be granted for an unlimited period of time to enterprises organised according to the Law on State enterprises, Norwegian municipalities and municipal counties and to State-owned entities, as provided by this provision.

Moreover, it follows from Section 2-22 of the Norwegian Act that when private undertakings acquire a waterfall which has already been running for several years, the conditions of the original concession applies to the new owner. This implies that the new owner's concession will only run for the remaining time up to 60 years maximum. However, if the new owner is a Norwegian public undertaking the concession will be granted for an unlimited period.

In the Authority's opinion, the difference in treatment, provided by the Norwegian Act, between Norwegian public undertakings, on the one hand, and private undertakings, on the other, as regards the length of the concessions will only favour Norwegian undertakings. Indeed, only undertakings of Norwegian nationality will benefit from the exception to the principle that concessions are granted for a limited period of time up to 60 years maximum. This situation is contrary to the freedom of establishment since, in particular, undertakings from other EEA States will be precluded from participating on a stable and continuous basis in the Norwegian economic life in a similar way as that which is allowed for Norwegian public undertakings.

Furthermore, this difference would be liable to render less attractive the exercise by undertakings from other EEA States of their fundamental right to free establishment. These latter undertakings may be deterred from seeking a concession in Norway. This may be particularly the case in the situation where private undertakings are willing to acquire a concession which has already been running for several years. In such circumstances, a private undertaking will only be able to run the concession for the remaining time up to 60 years maximum which may, consequently, render the acquisition of such a concession less attractive and place it at disadvantage as compared to a Norwegian public undertaking.

Therefore, the Norwegian rules are incompatible with Article 31 of the EEA Agreement.

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[4] See Case C-3/88 *Commission* v *Italian Republic* [1989] ECR 4035, paragraphs 6-9.

[5] Case T-266/97 *Vlaamse Televisie Maatschapij NV* v *Commission* [1999] ECR II-2329, paragraph 113.

The situation would be different only if such measures pursued a legitimate objective compatible with the EEA Agreement and were justified on grounds acknowledged by EEA law.

According to its reply to the Authority's letter of 8 March 2001, Norway indicated that the reason for allocating an unlimited concession to public undertakings is the management of waterfalls on behalf of the State.

This argument cannot constitute an objective justification. In this respect, it suffices to note that Norway has not demonstrated the causal link between the necessity to grant an unlimited concession and the management of waterfalls on behalf of the State. Indeed, the Authority fails to see in which way the management on behalf of the State would be rendered impossible if, for example, the concessions to Norwegian public undertakings were only granted for a limited period of time.

Consequently, the Authority is of the opinion that by maintaining in force measures which grant a limited concession to undertakings from other EEA States and require them to return all installations to the State, without compensation, to the exclusion of Norwegian public undertakings which benefit of concessions for an unlimited period of time, Norway has infringed Article 31 of the EEA Agreement.

3.2. In respect of the free movement of capital

It should first be stressed that the acquisition of shares by non-residents either dealt on a stock exchange or not dealt on a stock exchange is an operation which constitutes capital movements within the meaning of Article 40 of the EEA Agreement. Indeed, and although the list of the operations within the nomenclature annexed to Directive 88/631/EEC is not exhaustive, these operations are specifically referred to in Heading III. A (1) and (2) of the nomenclature. It consequently falls within the scope of application of Article 40 of the EEA Agreement.

Article 40 of the EEA Agreement encompasses all restrictions to the free movement of capital.[6]

In the Authority's opinion, investors willing to acquire shares of private undertakings intending to buy waterfalls for the production of energy may be deterred from doing so only by the fact that Norwegian rules treat unfavourably those undertakings as compared to public undertakings. In particular, because of the very existence of the provisions of the Norwegian Act, investors may be unwilling to invest in private undertakings if the latter wish to become owners of concessions, which have been run previously for several years and which will only be carried on for a limited period of time up to 60 years maximum. In such cases, because all installations will have to be returned to the State, without compensation, after the concessions have elapsed, in accordance with the Act, and contrary to the rules applying to public undertakings, investments in those private undertakings will be less attractive, due, in particular, to the uncertainty of the investment to be made.

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[6] See Case E-1/00 *State Debt Management Agency and Íslandsbanki-FBA hf.* [2000] not yet reported, paragraphs 25-28. See also in respect of the EC Treaty, Case C-439/97 *Sandoz GmbH* v *Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-7041, paragraph 18.

In addition, such rules may also create incentives to modify the structure of ownership of private undertakings to the benefit of Norwegian public undertakings willing to invest in or buy waterfalls and their corresponding concessions.

Furthermore, the fact that, according to Section 4, the State holds pre-emptive rights of shares in public undertakings, as defined by the Norwegian Act, reinforces the situation that investments from private investors will be rendered more difficult in this sector.

Consequently, in the Authority's opinion, the Norwegian rules, making a difference in treatment between public undertakings and private undertakings in respect of the conditions under which concessions are granted, are incompatible with Article 40 of the EEA Agreement in so far as, in principle, they make less attractive investments in private undertakings as compared to investments in public undertakings.

An opposite conclusion would only be reached if Norway would demonstrate that these rules were justified for objective reasons.

In the reply received by the Authority on 23 April 2001, Norway did not provide any reason which would justify the existence of the Norwegian rules in respect to the breach of free movement of capital.

Against this background, the Authority must conclude that Norway has failed to justify the difference in treatment flowing from Sections 2-17, 2-22 and 4 of the Norwegian Act.

4. Conclusion

In these circumstances, the Authority must conclude that, by maintaining in force measures, as laid down in the Act No. 16 of 14 December 1917, which grant a limited concession on the acquisition of waterfalls for energy production to private and public undertakings from other EEA States and require them to return all installations to the State, without compensation, at the expiry of the concession, to the exclusion of Norwegian public undertakings which benefit from concessions for an unlimited period of time, Norway has infringed Articles 31 and 40 of the EEA Agreement.

Therefore, acting under Article 31 of the Surveillance and Court Agreement, the EFTA Surveillance Authority invites Norway to submit its observations on the content of this letter within *three months* following the receipt thereof.

After that time limit has expired, the EFTA Surveillance Authority will proceed to consider, in the light of any observations received from Norway, whether to deliver a reasoned opinion in accordance with Article 31 of the Surveillance and Court Agreement.

For the EFTA Surveillance Authority,

Yours faithfully,

Hannes Hafstein
College Member