EFTA SURVEILLANCE AUTHORITY

COLLEGE

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**REASONED OPINION**
**delivered in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice regarding the acquisition of concessions on waterfalls in Norway**

## I. Introduction, Relevant Norwegian Legislation and Procedure

1. 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).

2. 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".

3. According to the Norwegian Act, which has been amended on several occasions, 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.

4. 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.

5. 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 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.

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6. 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.

7. 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 to reach 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.

8. 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% are conceded to private undertakings.

9. 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 its Section 4.

10. 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 indicated 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 stressed 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 indicated that there is no difference in treatment between private and public establishments.

11. On 27 June 2001 the Authority sent a letter of formal notice to Norway (Doc. 01-4509-D).

12. By that letter, the Authority concluded 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 infringed Articles 31 and 40 of the EEA Agreement.

13. On 18 December 2001 the Authority received Norway's reply to the letter of formal notice (ref. OED 00/2622 EV AT/KrJ).

14. In that letter Norway disputed the Authority's assessment with two arguments. First, Norway indicated that waterfalls being natural resources, it was common understanding that the management of natural resources fell outside the scope of the EEA Agreement. Second, Norway stressed that, in any case, State ownership of waterfalls would be allowed by Article 125 EEA which states that the EEA Agreement "shall in no way prejudice the rules of the Contracting Parties

governing the system of property ownership". Finally, Norway mentioned that the State has no need to request reversion for waterfalls whose concessions are owned by publicly-owned undertakings since those waterfalls are managed on behalf of the State.

## II. Relevant EEA Law

15. 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.

16. 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.

17. 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.

18. 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.

## III. Assessment

### III.1. Application of the EEA Agreement to the case at issue

19. As a preliminary remark, it should be recalled that, 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, 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. These facts have not been disputed by Norway in its reply to the letter of formal notice.

20. In its reply to the letter of formal notice Norway solely disputed the application of EEA Agreement to the case at issue. As mentioned above, Norway

considered that the management of natural resources falls outside the scope of the EEA Agreement and that Article 125 EEA allows State ownership of waterfalls.

21. As demonstrated below, the Authority considers that these two arguments cannot be accepted. The Authority will therefore assess the two arguments put forward by Norway before embarking on the breach of both the freedom of establishment and the free movement of capital.

*a) The management of natural resources and the scope of the EEA Agreement*

22. In its reply to the letter of formal notice Norway argues that the management and control of natural resources lie within the State's full and permanent sovereignty to be developed at its discretion. On that premise, Norway disputes that the EEA Agreement would be applicable to the management of natural resources in general.

23. The Authority does *not* dispute the right for a State to have *sovereignty* over natural resources. A State is obviously free to decide whether its natural resources should be exploited or not. However, it is the Authority's opinion that this competence shall be conducted in a manner compatible with international obligations of the State concerned, in particular, in the case of Norway, with its obligations deriving from the EEA Agreement.

24. There is nothing in the EEA Agreement which excludes the management of natural resources in general, or the management of waterfalls in particular, from the application of the Agreement. To the contrary, natural resources are mentioned by the EEA Agreement.[1] This demonstrates that if Contracting Parties to the EEA Agreement (among which the European Community as such) are competent to manage natural resources, this competence shall nevertheless be exercised in full compliance with the rules of the Agreement, in particular those concerning the fundamental freedoms of the EEA Agreement.

25. This is also supported by the fact that several secondary Community acts relating to the management of natural resources for the production of energy have been incorporated into the EEA Agreement.[2] It suffices to recall that these acts are based on the fundamental freedoms of the EC Treaty as well as of the EEA Agreement.

26. In these circumstances, the Authority considers that the *management* of natural resources and, in particular, the management of waterfalls in Norway, falls within the scope of the EEA Agreement. Finally, the Authority finds it relevant to observe that this understanding seemingly also prevailed in Norway, when entering into the EEA Agreement. Indeed, at that time, provisions discriminating directly against nationals of other EEA States were removed from the legislation at issue. Such removal would have been unnecessary if the legislation did not fall within the scope of the EEA Agreement.

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[1] Cf. e.g. Article 73 (1) c) of the EEA Agreement.

[2] Cf. Annex IV to the EEA Agreement which refers, in particular, at point 12, to Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons, *OJ* [1994] L 164, p. 3 and at point 14, to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ* [1997] L 27, p. 20.

*b) Article 125 EEA does not allow discriminatory exercise of State ownership rights*

27. In its reply to the Authority's letter of formal notice, Norway stressed that public ownership of waterfalls is in accordance with the EEA Agreement. This is due to the application of Article 125 EEA which provides that the EEA Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.

28. The Authority does *not* dispute the right for the State to own waterfalls. A State is obviously free to decide whether there should be public ownership of waterfalls or not. However, the Authority disputes that State ownership rights over waterfalls would be exercised regardless of the principles of the EEA Agreement.

29. In respect of the difference between the existence and the exercise of ownerhip rights, the Court of Justice of the European Communities has recalled on several occasions that "although the system of property ownership continues to be a matter for each Member State under Article 222 of the EC Treaty (now Article 295 EC), that provision does not have the effect of exempting such a system from the fundamental rules of the EC Treaty".[3]

30. In the Authority's opinion, a similar principle applies to the EEA Agreement. Therefore, Norway shall respect the fundamental rules of the EEA Agreement when exercising ownership rights over waterfalls.

**III.2. A breach of the freedom of establishment**

31. 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.[4] This may include national, regional or municipal authorities provided they exercise an economic activity.[5]

32. 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.

33. 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.[6]

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[3] See, *inter alia*, Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677, paragraph 7; Case C-302/97 *Klaus Konle* v *Republik Österreich* [1999] ECR I-3099, paragraph 38.

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

[5] 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.

[6] 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.

34. 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.[7]

35. 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.[8]

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

37. In its letter of formal notice, the Authority came to the conclusion that 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.

38. 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.

39. Norway has not disputed the Authority's assessment made in the letter of formal notice in respect of the freedom of establishment. To the contrary, Norway acknowledged the difference in treatment which favours public undertakings referred to in Section 4 of the Norwegian Act.

40. According to Norway's reply to the letter of formal notice, unlimited concessions would logically be granted to public undertakings because they form a single legal entity with the Norwegian State.

41. The Authority fails to understand Norway's statement considering, on the one hand, the Norwegian State, and, on the other hand, public undertakings referred to in Section 4 of the Norwegian Act, as one single legal entity.

42. In this respect it suffices to note that, it follows from the Norwegian Act itself that public entities referred to in Section 4 of the Norwegian Act are

[7] See Case C-3/88 *Commission* v *Italian Republic* [1989] ECR 4035, paragraphs 6-9.
[8] Case T-266/97 *Vlaamse Televisie Maatschapij NV* v *Commission* [1999] ECR II-2329, paragraph 113.

considered as independent legal persons from the State. Indeed, the Norwegian Act provides that only the State can own or use a waterfall without a concession. As the Norwegian Act requires public undertakings referred to in Section 4 of the Norwegian Act to possess a concession to own or use waterfalls, this sole element clearly indicates that the State and the public entities referred to in Section 4 of the Norwegian Act cannot be considered as one single legal person. In addition, Sections 3 and 4 of the Norwegian Law No. 71 of 30 August 1991 relating to state-owned enterprises make it clear that those public undertakings are legal persons independent from the State. Public undertakings, operating on a commercial basis in a market, in competition with other undertakings, have to be distinguished from the State and its exercise of regulatory power.[9]

43. Since Norway has not put forward any objective justification for maintaining the Norwegian rules at issue, the Authority concludes that these rules are incompatible with Article 31 of the EEA Agreement.

## III.3. A breach of the free movement of capital

44. As the Authority indicated in its letter of formal notice, without being disputed by Norway, 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.

45. Article 40 of the EEA Agreement encompasses all restrictions to the free movement of capital.[10]

46. In the Authority's opinion, investors willing to acquire shares of private undertakings intending to buy, or possessing, 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 Norwegian 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.

47. 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. Private investors will also suffer from a clear competitive disadvantage as compared to

[9] See e.g. Case 202/88 *Commission* v *France* [1991] ECR I-1259, paragraph 51.
[10] 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.

investments from Norwegian public undertakings when bidding for waterfalls or for shares in private, or even other public undertakings possessing a concession on waterfalls. For instance, in the case of investments in public undertakings, private investors, unlike Norwegian public undertakings, may be faced both with the transformation of a previously unlimited concession into a limited concession and with the obligation to revert the waterfall and all the installations to the State.

48. Furthermore, the fact that, according to Section 4 of the Norwegian Act, 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.

49. 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.

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

51. In its reply to the letter of formal notice, Norway failed to make any observations on the Authority's assessment in relation to the free movement of capital.

52. In these circumstances, the Authority concludes that the Norwegian rules are contrary to the free movement of capital.

## IV. Conclusion

FOR THE ABOVE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

Pursuant to the first paragraph of Article 31 of the Surveillance and Court Agreement and after having given Norway the opportunity of submitting its observations,

DECLARES AS ITS REASONED OPINION

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 Contracting Parties to the EEA Agreement 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.

Pursuant to the second paragraph of Article 31 of the Surveillance and Court Agreement, the EFTA Surveillance Authority requests Norway to take the necessary measures to comply with this Reasoned Opinion within *two months* following notification thereof.

Done at Brussels, 20 February 2002

For the EFTA Surveillance Authority

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