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EFTA SURVEILLANCE
AUTHORITY

By email only, to: [REDACTED]

Subject: Fosen Wind Farm and green certificates to pre-existing hydro power (complaint)

- *Preliminary assessment under paragraph 48 (b) of the Authority's Guidelines on Best Practice for the conduct of state aid control procedures*

1. General

Reference is made to your complaint dated 16 March 2016 to the Competition and State Aid Directorate of the EFTA Surveillance Authority ("the Authority") regarding alleged state aid in favour of the Fosen wind project, as well as alleged state aid in the form of the allocation of green certificates to pre-existing hydroelectric projects.

In your complaint, you referred to the following measures:

1. granting of aid to existing hydroelectric projects in breach of the incentive effect requirement, and
2. potential state aid to the Fosen project, which may consist of:
 - a. exerting political and financial pressure on Statkraft AS to invest government supplied funds to the Fosen project;
 - b. pressuring Statnett SF to construct a grid connection allowing the Fosen project to operate, and charging the project for the grid connection and usage below market rates; and
 - c. pressuring Agder Energi AS to enter into a long term power sales agreement with the Fosen project, with a back to back sales agreement with Norsk Hydro AS.

On 16 December 2016, the Authority sent you a letter informing you that there were insufficient grounds for taking a view on the case as regards measures 2.a and 2.c. Since you did not provide further relevant information to the Authority by 20 January 2017, the case was closed as regards measures 2.a and 2.c. In the letter of 16 December 2016, the Authority also informed you that it would continue to assess your correspondence with regard to the alleged granting of aid to existing hydroelectric projects (measure 1) and the allegations concerning grid construction and tariffs applied by Statnett SF (measure 2.b)

Since receiving your complaint, the Authority has gathered information from the Norwegian authorities and conducted a preliminary examination as regards measure 1 (alleged granting of aid to existing hydroelectric projects in breach of the incentive effect requirement).

Following a preliminary examination of the submission and considering the specific characteristics of this case, the Authority is of the preliminary view that measure 1 does not involve state aid within the meaning of Article 61(l) of the EEA Agreement that would breach the incentive effect requirement.

2. Measure 1: alleged aid granted retroactively to hydroelectric projects

According to section 4 b) of your state aid complaint (“Complaint”) and part I of the Addendum to the Complaint (“Addendum”), hydroelectric projects receive state aid in the form of “Elsertifikat”. In your view, the hydroelectric projects built between 2004 and 2012 were allowed to join the Elsertifikat system retroactively, in breach of the incentive effect requirement. Therefore, these hydroelectric projects receive incompatible aid (sections 4 b) and 5 of the Complaint and part 3 of the Addendum).

The Authority would first like to point out that Norway and Sweden established a joint renewable energy support system on 1 January 2012. The joint system is based on the Swedish green certificates model, applicable in Sweden since 2003. The European Commission has assessed the presence of aid in the Swedish system, and found that offering green certificates by the state to producers does not constitute state aid.¹ The Norwegian authorities have explained that their state aid assessment in introducing the joint scheme was based on the Commission’s decision. Also, it is likely that the Authority would have taken a similar position had the Norwegian authorities notified their participation in the joint system to the Authority.

However, even if assuming that the green certificates system as applied in Norway constitutes state aid, such aid would not breach the incentive effect requirement.

According to the case law of the EU Court of Justice, political undertakings, even if not legally binding, can create an incentive effect.² Furthermore, the Commission has accepted in the field of renewable energy that a political promise in the form of a governmental strategy document, without being legally binding, can be relied on by market participants in making investment decisions.³

It appears that Norway has systematically promised to include hydroelectric projects built after 1 January 2004 in the Elsertifikat system once established.

According to the information provided by the Norwegian authorities, Norway has promised the creation of a green certificates scheme since 2002, and undertook as early as 2003 to include hydroelectric projects built after 1 January 2004 in the Elsertifikat system:

- In November 2002, the Government approved and presented to Parliament the proposal of the Ministry of Petroleum and Energy to introduce a joint green certificates scheme.⁴

¹ State aid N 789/2002 – Sweden – Green certificates C(2003) 382 final, point 3.1.1

² Judgment in *Graphischer Maschinenbau*, T-126/99, EU:T:2002:116, para 54

³ State aid SA.32125 – UK – Renewable Heat Incentive (RHI) scheme C(2011) 7074 final, para 62

⁴ St.meld. nr. 9 (2002-2003) Om innenlandsk bruk av naturgass mv, page 108.

- In March 2003, Parliament endorsed that proposal and asked the Government to present concrete proposals for creating a joint Swedish/Norwegian scheme as soon as possible.⁵
- In December 2003, the Minister of Petroleum and Energy announced that installations constructed after 1 January 2004 would be eligible for the green certificates scheme, even if the scheme would formally be established at a later date.⁶ That promise of the minister was supported both by the Government⁷ and Parliament.^{8, 9}
- In September 2009, the Ministry of Petroleum and Energy re-assured the market by signing an agreement of further co-operation with Sweden that a joint green certificates scheme would be introduced by January 2012.¹⁰
- In November 2009, the Minister of Petroleum and Energy reconfirmed that hydroelectric installations constructed after 1 January 2004 would be included in the green certificates scheme to be established by 1 January 2012.¹¹

Norway thus appears to have systematically induced at the highest political level investments in hydroelectric projects by promising to include installations built after 1 January 2004 in the Elsertifikat system. We also note that, according to your submission, small hydro projects were built in anticipation of the green certificates scheme (para 37, 40 and 41 of the Addendum, and the submissions of [REDACTED] attached as Annex 1 to the Addendum).

3. Preliminary view

On the basis of the above, and with reference to paragraph 48(b) of the Authority's Guidelines on Best Practice for the conduct of state control procedures, and based on the information available, it is the Authority's preliminary view that the hydroelectric projects built between 2004 and 2012 have not received any aid in breach of the incentive effect requirement.¹²

If you have any additional information you would like to submit that might change this preliminary view, please do so **by 17 March 2017**. Otherwise the case will be closed without further notice as regards your allegations concerning existing hydroelectric projects (measure 1).

⁵ Innst. S. nr. 167 (2002-2003) til St. meld. Nr. 9 (2002-2003), page 19

⁶ Investeringer i fornybar elektrisitet. Olje- og energidepartementet. Pressemelding No 138/03, December 2003.

⁷ St. meld. Nr. 47 (2003-2004) Om innovasjonsverksemda for miljøvennlige gasskraftteknologiar mv., page 62

⁸ Innst. S. nr. 181 (2003-2004) til St.meld. nr. 18 (2003-2004), page 15

⁹ Innst. S. nr. 135 (2004-2005) til St. meld. Nr. 47 (2003-2004), page 15

¹⁰ Overenskomst om prinsipper for videre utvikling av et felles marked for elsertifikater, 7 September 2009 https://www.regjeringen.no/globalassets/upload/oed/pdf_filer/elsertifikat_7sep09.pdf

¹¹ Overgangsordning for elsertifikatmarkedet på plass. Olje- og energidepartementet. Pressemelding No 143, November 2003

¹² Available at <http://www.eftasurv.int/media/state-aid-guidelines/Part-II---Guidelines-on-Best-Practice-for-the-conduct-of-state-aid-control-procedures-DOC.pdf>

Please note that the present letter concerns measure 1 only. It does not affect any other ongoing cases or dealings you have with the Authority. In particular, the current letter does not concern your correspondence with regard to grid construction and tariffs applied by Statnett SF (measure 2.b), which the Authority continues to assess.

Yours sincerely,

Gjermund Mathisen
Director
Competition and State aid