

Case No: 70848
Event No: 616840
Dec. No: 393/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 14 December 2011

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale of Narvik municipality's entitlement to concession power to Narvik Energi AS

(Norway)

The EFTA Surveillance Authority ("the Authority"),

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Article 61 and Protocol 26 thereof,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3 SCA"), in particular to Article 1(2) of Part I and Articles 4(4) and 13(1) of Part II,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3¹.

Whereas:

I. FACTS

1. Procedure

- (1) By letter dated 7 January 2009, a complaint was filed against Narvik municipality ("the municipality") regarding the sale of Narvik municipality's entitlement to concession power to Narvik Energi AS ("NEAS"). The letter was received and registered by the Authority on 14 January 2009 (Event No 504391).
- (2) By letter dated 16 July 2009 (Event No 519710), the Authority requested additional information from the Norwegian authorities. By letter dated 2 October 2009 (Event No 532247), the Norwegian authorities replied to the information request.

¹ Decision 195/04/COL, 14.7.2004 published in OJ C 139, 25.5.2006, p. 57 and EEA Supplement No 26, 25.5.2006, p. 1 as amended by Decision 319/05/COL, 14.12.2005 published in OJ C 286, 23.11.2006, p. 9 and EEA Supplement No 57, 23.11.2006, p. 31.

2. The complaint

- (3) According to the complaint, on 16 October 2000 the municipality entered into a contract with NEAS for the sale of 128 GWh of annual concession power for a period of 50,5 years. For this, NEAS paid the municipality one upfront lump sum of NOK 126 million. The contract, that was entered into after negotiation between the contracting parties and without a competitive tender procedure, contained no index adjustment or other price adjustment clauses.
- (4) The complainant further alleges that the decision to enter into the contract was adopted by Narvik Municipal Council on the basis of incorrect and/or incomplete information. Allegedly expert reports critical of the duration of the contract and the inherent difficulty in establishing a market price for electricity were not disclosed to the Municipal Council prior to taking the decision to enter into the contract.
- (5) The complainant argues that the market price for the concession power over the contract period is significantly higher than NOK 126 million. Therefore the contract involves state aid.
- (6) The contract that forms the subject of the complaint is entitled "*Lease of concession power for a period of 50,5 years...*".² However, throughout this Decision the Authority will refer to the contract as a contract of sale of Narvik municipality's entitlement to concession power. The Authority will, in its preliminary assessment, assess not only the contract but also all supplementary agreements to it, as well as any other circumstances surrounding and related to the sale.

3. Background

3.1 Concession power regime

- (7) Any municipality which has hydropower production within its borders is entitled to receive an annual amount of concession power from concessionaires for waterfall exploitation.
- (8) The system of concession power is laid down in Section 2(12) of the Industrial Licensing Act³ and Section 12(15) of the Waterfalls Regulation Act.⁴
- (9) Each municipality's entitlement to concession power is decided on the basis of its "*general electric power supply needs*"⁵ and can be up to ten per cent of a plant's yearly production. The legal basis for the municipalities' right to concession power, referred to above, states that municipalities may dispose of the concession power as they see fit (irrespective of the fact that the amount to which they are entitled is calculated on the basis of their "*general electric power supply needs*").

² Event No. 532254, Enclosure to the Norwegian authorities' letter of 2.10.2009, p. 1: "*Avtale mellom Narvik kommune og Narvik Energi AS om leie av konsesjonskraft for en periode av 50,5 år og om at konsesjonskraften anvendes som tinginnskudd ved aksjekapitalutvidelse i Narvik Energi AS.*"

³ http://www.regjeringen.no/Upload/OED/Vedlegg/Lover%20og%20reglement/Act_No_16_of_14_-_December_1917.pdf

⁴ http://www.regjeringen.no/Upload/OED/Vedlegg/Lover%20og%20reglement/Act_No_17%20of_14_-_December_1917.pdf

⁵ According to the Norwegian Water Resources and Energy Directorate, this includes electric power for industry, agriculture and households, but not power for power intensive industries and wood conversion.

- (10) The price paid by the municipalities for the concession power is determined on an annual basis by the Ministry of Energy and Petroleum (MEP). The municipalities also carry the costs of feeding the concession power into the grid.
- (11) The majority of the municipality's concession power entitlements are due for assessment in 2019.

3.2 Narvik municipality and the contract with Narvik Energi AS

- (12) Narvik municipality is located in the county of Nordland. NEAS is a company that is active in the production and sale of electricity. NEAS was 100 per cent owned by the municipality until 2001, when the municipality reduced its ownership stake in the company to 50,01 per cent.
- (13) In 1999, Narvik municipality had the right to purchase approximately 128 GWh of concession power annually. Approximately 10 per cent of this concession power was generated by NEAS, while the remaining 90 per cent was generated by other hydropower companies within the municipality (in which Narvik municipality had no stake).
- (14) Historically, the municipality had sold its concession power to NEAS under short- or longer-term contracts.
- (15) After the expiry of a three-year contract on 31 December 1998, the parties could not reach an agreement as to the prolongation of the contract. Until the concession power price for 1999 was published on 26 March 1999, the municipality therefore sold its concession power on a power exchange at spot prices.
- (16) In March 1999, with knowledge of the concession power price for that year, the municipality arranged a tender procedure for the sale of its concession power for the remainder of 1999. On 30 March 1999, the Municipal Council sold this concession power to the highest bidder, Kraftinor, for a price of NOK 109,50/MWh. Since the municipality itself paid NOK 111,10/MWh plus feeding costs of NOK 20/MWh for the concession power, the municipality incurred a loss of approximately NOK 2,3 million under this contract (compared to a budgeted surplus of NOK 3,5 million).
- (17) According to the Norwegian authorities, electricity prices had been falling for several years and had reached their lowest point in 1998, but had picked up again in 1999. In 1999, the difference between concession power price and market price was, however, relatively small.
- (18) Due to the volatile and relatively low electricity spot prices, it was decided in a Municipal Council meeting held on 30 March 1999 that a long-term strategy for the future handling of the municipality's concession power was to be developed and presented to the Municipal Council in August 1999.
- (19) On 15 October 1999, the municipal administration proposed a strategy for the future handling of the concession power to the Municipal Council executive committee ("Executive Committee").
- (20) On 19 October 1999, the Executive Committee confirmed the proposal of the administration and recommended to the Municipal Council that the overall goal for handling the municipality's concession power should be *"to maximize return on a long-term basis in order to obtain a stable planning horizon with less uncertainty"*

*from year to year.*⁶ The proposed strategy for achieving this goal had four elements:

- 1) Concession power is sold to the highest bidder on long-term contracts with a fixed return, however with adjustment clauses that give additional returns if the prices are substantially higher than the projected prices in the contract period;
 - 2) Concession power is sold under different contracts of different lengths to diversify risk;
 - 3) The mayor is granted power of attorney to enter into agreements according to the strategy decided by the Municipal Council; and
 - 4) Profits from the sale of the concession power is deposited into a fund to be dispersed according to decisions by the Municipal Council.
- (21) The strategy proposal was discussed on 25 November 1999 as Municipal Council Case 99/52 (“*Strategy for handling of concession power*”).
- (22) The Municipal Council confirmed the recommendation of the Executive Committee with one adjustment, suggested by the mayor and confirmed by way of an amendment to the strategy: instead of the mayor being explicitly “*granted power of attorney to enter into agreements according to the strategy decided by the Municipal Council*”, the final decision stated that “*as a first step in executing this strategy, NEAS is invited to discuss their interest in the matter as outlined in their letter to the municipality dated 9 November.*”⁷
- (23) The letter from NEAS dated 9 November questioned the proposed strategy of selling the concession power under different contracts of different lengths to spread risk. Instead, NEAS suggested one long-term contract (“*for example 50 years*”⁸) and was open to including a price adjustment clause in the contract with Narvik Municipality.
- (24) According to the documentation provided by the Norwegian authorities, NEAS had also proposed this type of contract earlier in the process. In a letter dated 15 April 1999, NEAS had approached the municipality stating its interest in entering into a long-term contract regarding the concession power, primarily through a purchase with an upfront lump sum payment, or alternatively as a long-term lease - suggested initially at 60 years - with annual payments to Narvik Municipality.⁹
- (25) Aside from the issue of the concession power, there were also discussions about NEAS’ future role in the market, and the municipality’s role as the owner of NEAS.¹⁰

⁶ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 13: “*Narvik kommunens konsesjonskraft håndteres ut fra hva som gir størst mulig avkastning på lang sikt. Målet er samtidig å gi kommunen en mer stabil planleggingshorisont gjennom å redusere usikkerheten fra år til år.*”

⁷ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 6.

⁸ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 12.

⁹ Event No. 532249, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 7.

¹⁰ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 12.

- (26) According to the Norwegian authorities, NEAS was at the time observing extensive regional consolidation amongst power companies and the entry of national/international operators into local markets. NEAS needed to strengthen its equity base in order to acquire shares in other electricity companies, particularly Nordkraft AS. NEAS had also signed letters of intent with Hålogaland Kraft AS and Vesterålskraft AS, two local power companies, to form a regional production company and a regional energy transportation company. These changes were planned to take effect as of 1 January 2001. In order for NEAS to be able to complete these transactions with a combination of equity and borrowed capital, Narvik Municipality - NEAS' sole owner - was expected to inject additional equity into NEAS.
- (27) On 16 December 1999, the Municipal Council discussed Case 99/65 (*"Sale of equity positions"*).
- (28) In this meeting, the Municipal Council assessed both its ownership position in NEAS and the above-mentioned capital needs of NEAS. It was decided that the municipality's ownership stake in NEAS, the capital needs of NEAS and the handling of concession power, should be assessed jointly by a negotiation team consisting of the mayor, the deputy mayor, the leader of the opposition, as well as the director, the deputy director and the head of procurement of the municipal administration (*"the negotiation team"*). The negotiation team was given the responsibility of implementing the decisions in Cases 99/52 and 99/65, and to make a recommendation to the Executive Committee.
- (29) During the winter and spring of 2000, both the municipality and NEAS sought external advice concerning the valuation of the concession power, the implications of the municipality injecting capital into NEAS, as well as the municipality reducing its ownership position in NEAS.
- (30) NEAS engaged Arthur Andersen (*"AA"*) to make an assessment of the value of the concession power. AA's report was delivered on 20 May 1999. It estimated a net present value (*"NPV"*) of the concession power transferred for 50 years to be in the range of NOK 71,4 – 117,4 million with a base case value of NOK 87,7 million.¹¹
- (31) NEAS also commissioned a value assessment from Deloitte & Touche (*"DT"*). In its report dated 3 May 2000, DT estimated the NPV of the concession power, again for 50 years, to be approximately NOK 110 - 130 million.¹²
- (32) Narvik Municipality, on the other hand, initially asked Danske Securities (*"DS"*) to assess whether Narvik Municipality should transfer its concession power to NEAS as a part of a restructuring process in NEAS, or if Narvik Municipality should sell the power independently. DS concluded, in a report dated 14 February 2000, that there were no economic or strategic reasons for transferring the concession power to NEAS. DS also - *"on its own initiative"*¹³ - made a value assessment of a 50-year contract, and concluded that such a contract had a value in the range of NOK 80-145 million.
- (33) DS was subsequently commissioned to perform a second assessment of the value of the concession power. In order to do so, it contacted three market participants - Statkraft SF, CBF Kraftmegling AS, and Norwegian Energy Brokers AS - and asked how they would value a 50-year concession power contract. Based on the

¹¹ Event No. 532252, Enclosure to the Norwegian authorities' letter of 2.10.2009, p. 1 onwards.

¹² Event No. 532252, Enclosure to the Norwegian authorities' letter of 2.10.2009, p. 38 onwards.

¹³ Event No. 532252, Enclosure to the Norwegian authorities' letter of 2.10.2009, p. 28.

- responses, DS concluded, in a report dated 23 February 2000, that the NPV of the concession power was in the range of NOK 100-140 million.¹⁴
- (34) In addition to external advice, there were also internal assessments made by the head of procurement at the municipality.
- (35) In the first assessment presented to the Executive Committee in October 1999, he concluded that the overall risk for the municipality was high for long-term contracts defined as contracts between 10 and 40 years.¹⁵
- (36) In his second assessment, presented to the negotiation team on 16 March 2000, various options for handling the concession power were discussed. By this time, however, the negotiation team had narrowed the scope of his mandate¹⁶.
- (37) Notwithstanding this, in his second assessment, the head of procurement continued to focus on the importance of the length of the contract. His assessment of the marginal value of the entitlement to concession power over time was that “...to enter into a very long contract such as 50 years gives very little additional value for us as sellers compared to a shorter contract (for example 20 years with NOK 83 million).¹⁷” After internal discussions regarding the advantages and disadvantages of a long-term contract, the negotiation team made its recommendation to the Municipal Council: it recommended a contract with a duration of 50,5 years as appropriate to reduce the municipality’s risk and to provide a long-term planning horizon.
- (38) On 22 May 2000, the Municipal Council decided that the municipality should sell its entitlement to concession power to NEAS for 50,5 years and reduce its ownership in NEAS by as much as 49 percent by the end of 2000.¹⁸ From the information presented by the Norwegian Authorities, the above-mentioned independent expert reports were referred to in the memorandum distributed to the council members prior to taking the decision, but copies of the reports appear not to have been distributed.¹⁹
- (39) The contract was entered into on 16 October 2000. The municipality sold its entitlement to annual concession power to NEAS for 50,5 years for the price of NOK 126 million with all attached rights and obligations.²⁰ No price adjustment mechanism was included in the contract, and the price was to be paid as one upfront lump sum.
- (40) By a supplementary agreement dated 29 November 2000, the parties agreed that NOK 60 million would be paid to the municipality in cash, whereas the remaining NOK 66 million was to be injected into NEAS (at the time 100% owned by the Municipality) as an equity contribution in kind.
- (41) In 2001, the municipality reduced its ownership in NEAS to 50,01 per cent.

¹⁴ Enclosure to the Norwegian authorities’ letter of 2.10.2009, Event No. 532252, p. 16 onwards.

¹⁵ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 14 onwards.

¹⁶ His mandate was narrowed to only assessing, *inter alia*, risk, time to settlement, tax implications and profit maximization for three scenarios (all involving Narvik Municipality transferring the concession power right to NEAS for a 50-year period and Narvik Municipality reducing its ownership stake in NEAS from 100 per cent to 51 per cent).

¹⁷ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 27.

¹⁸ Event No. 532252, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 1 onwards.

¹⁹ Event No. 532252, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 6.

²⁰ Event No. 532254, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 1 onwards.

3.3 Comments by the Norwegian authorities

- (42) The Norwegian Authorities are of the opinion that the contract with NEAS was concluded at market terms and that only the final arrangement regarding how the consideration was to be structured, as reflected in supplementary agreement of 29 November 2000, was influenced by the municipality's ownership interest in NEAS. The Norwegian Authorities point out that according to the decision of the Municipal Council dated 25 November 1999, it was an absolute precondition for the conclusion of any agreement with NEAS that the power would be sold on market terms.²¹
- (43) Since there was considerable uncertainty associated with price developments on both the revenue and cost side, and since there was also certain political uncertainty associated with the concession power regime in general, a long-term contract was deemed to offer the best stability in relation to future revenues.
- (44) The Norwegian Authorities further argue that it was appropriate for no price adjustment clause to be included, since the purchase price was paid as one lump sum, and not on an ongoing basis.

II. ASSESSMENT

1. The presence of state aid

- (45) Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

- (46) In the following, the Authority will assess the likelihood of whether the municipality has granted state aid to NEAS in connection with the sale of its entitlement to 128 GWh of annual concession power for a period of 50,5 years and at the price of NOK 126 million.

1.1 Economic advantage

- (47) When governments make financial transactions and investments, the European Court of Justice has stated that in order to confirm whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage, which it would not have obtained under normal market conditions.²² In order to assess the presence of an economic advantage, the Commission has developed the principle of a (hypothetical) market economy investor.²³
- (48) If the transaction in question was carried out in accordance with the market economy investor principle, i.e., if the municipality sold the entitlement to concession power for its market value, and the price and terms of the transaction

²¹ Event No. 532250, Enclosure to the Norwegian authorities' letter of 2 October 2009, p 22.

²² Case C-39/94 *SFEI v La Poste* [2006] ECR I-3547, para. 60.

²³ The market economy investor principle is described in more depth in the Authority's guidelines for state aid to public enterprises in the manufacturing sector and public authorities holdings.

would have been acceptable for a prudent private investor operating in a market economy, the transaction would not confer an economic advantage on NEAS and thus not involve the grant of state aid. On the contrary, state aid could be involved if the transaction was not carried out at market price.

- (49) In making this assessment, the Authority cannot replace the municipality's commercial judgement with its own, which implies that the municipality, as the owner of the concession power right, must enjoy a wide margin of discretion. However, while the Authority fully recognises the right for public authorities to operate in the market on commercial terms, it should be assessed whether a similar agreement would have been concluded by a private market investor.
- (50) An assessment of the price and terms of the contract between the municipality and NEAS should be based on the information available to the municipality at the time of the conclusion of the contract. Generally, an informed *ex ante* assessment would be sufficient to exclude the presence of state aid, even if the assumptions used in the assessment prove to be wrong with hindsight.
- (51) In the following, the Authority will therefore assess whether a private investor would have entered into a contract to sell the entitlement to 128 GWh of concession power, every year for 50,5 years, for one upfront lump sum payment of NOK 126 million, and without a competitive tender procedure and without including any price adjustment clauses in the contract.
- (52) Throughout the preliminary assessment, the Authority will be mindful of the context in which the transaction was entered into. From the information provided by the Norwegian Authorities, the Authority understands that at the time the contract was entered into the municipality was in a situation where it needed both access to liquidity (in order to meet its loan obligations), as well as capital to inject into NEAS.

1.1.1 Contract for the sale of the municipality's entitlement to annual concession power to NEAS

- (53) As described in section 3.1 of Part I above, the concession power regime gives the municipality the right to purchase 128 GWh of concession power annually, at a price determined by the Ministry of Energy and Petroleum. This price is meant to reflect the long-term costs of a representative power plant, and is presumed in the long run to be lower than the average market prices.
- (54) Municipalities may dispose of this concession power as they see fit, including using it for its own needs or selling the electricity in the market. Furthermore, the municipality can choose to sell the electricity in the spot market²⁴, or on the basis of short- or longer-term contracts. If the municipality decides to sell the electricity on short- or longer-term contracts it is necessary, in order to exclude state aid, to sell the electricity at market terms.
- (55) A point of departure would therefore be to identify any possible market prices ("benchmark prices") to which the contract in question could have been compared. Any benchmark price should, ideally, be based on contracts of similar type and duration.²⁵ In this regard, the Authority observes that financial derivatives

²⁴ Spot market transactions through an electricity exchange are presumed not to include state aid because the market price is determined efficiently in a competitive market.

²⁵ Namely, bilateral wholesale concession power contracts entered into prior to or around the same time.

contracts²⁶ for the Nordic power markets, as offered by NASDAQ OMX Commodities Europe, are limited to a maximum duration of six years.²⁷

- (56) Reference can also be made to long-term power contracts entered into between electricity companies and energy intensive companies. These contracts are different from financial contracts and thus are not immediately comparable, but it is important to note that the duration of these contracts normally does not exceed 25-30 years, and they usually include price adjustment mechanisms.
- (57) It is not clear from the information provided by the Norwegian authorities whether or not there is a market - and thus benchmark prices - for contracts of similar type and duration as the contract in the present case. If there are no benchmark prices, and thus no well-functioning market for contracts of comparable type and duration, this may be an indication that buyers and/or sellers of concession power find the risk of entering into contracts of this duration too high. However, the long duration of the contract is in itself insufficient to establish that the transaction was not in line with the market economy investor principle.
- (58) Therefore, the Authority must assess the risks and uncertainties involved in the contract in the present case, and ask whether or not these risks have been assessed by the municipality in a manner presumed acceptable to a market investor. In order to do so, it is appropriate to assess at least two sources of uncertainty/risk that affect the market price of the concession power entitlements: *regulatory risks* and *market risks*.

1.1.1.1 Regulatory risks

- (59) According to information provided by the Norwegian authorities, the majority of the municipality's concession power entitlements are due for assessment in 2019. *A priori*, it is not possible for the Authority to determine what, if any, changes may be made to the regime. However, it is evident that any changes that are made to the entitlements - such as increasing or decreasing the volume of the municipality's concession power entitlements, changing how the concession power price is calculated or changing the structure of the right to concession power - may affect the market price of concession power entitlements.
- (60) This regulatory risk was identified by two external advisors consulted in the process leading up to the signing of the contract. The municipality instructed law firm Hjort DA ("Hjort") to assess inter alia the tax implications of selling the concession power entitlements. Hjort suggested that 50-year contracts are highly unusual, even for the energy sector, and argued that "*there is therefore reason to be critical about the value judgments that are/will be made, will be able to capture the long period as is suggested.*"²⁸ Hjort also stated that the actual volume of the concession power entitlement may change over time, and pointed to the regulatory risk involved in the review of the concessions.
- (61) The same risks were also reflected in a report from Danske Securities AS ("DS"), which was commissioned by the municipality to perform a value assessment of the concession power entitlements (the second assessment referred to in section 3.2 of Part I above). DS asked three market participants to put a value on a 50-year concession power contract. It follows from the report that questions could be raised whether Statkraft SF would enter into an agreement longer than until 2019, when

²⁶ Futures, forward, option and CfD.

²⁷ <http://www.nasdaqomxcommodities.com/about/>.

²⁸ Event No. 532252, Enclosure to the Norwegian authorities' letter of 2 October 2009, p 32.

the majority of the municipality's concession power entitlements were due for assessment, because of the risk inherent in this process.²⁹

- (62) Given that 60 per cent of the contract period in the present case is beyond 2019, the market price of a long-term contract such as the one between the municipality and NEAS is exposed to regulatory risk. It is the Authority's preliminary view that the effects of this risk are ambiguous, ultimately depending on whether or not the changes may be favourable to the beneficiaries of the concession power entitlements.

1.1.1.2 Market risks

- (63) In order to establish a market value of an entitlement to 128 GWh of annual concession power, with revenue and costs occurring 50 years into the future, a market investor would normally apply a discounted cash flow analysis ("DCF") method. This method projects future cash flows (revenues and costs) and discounts them, using a weighted average cost of capital ("WACC") as a discount factor, to arrive at a net present value ("NPV") of the future cash flows. Under normal circumstances, this NPV would reflect the market price of the underlying asset.
- (64) In the current case, there are in particular five variables that affect the NPV of the concession power entitlement: (i) the annual concession power cost, (ii) the cost of feeding electricity into the grid, (iii) the total volume of concession power, (iv) the market price of electricity, and (v) the discount factor.

Variables (i) – (iii) affecting the NPV of the concession power

- (65) The first three variables - the annual concession power cost, the cost of feeding electricity into the grid and the total volume of concession power - are all exposed to the regulatory risk described above.
- (66) As regards the first variable (the price of the concession power), it appears from the information provided by the Norwegian authorities that this price is reasonably predictable. It is assumed that there will be limited, if any, real increases in the concession power price over the duration of the contract.³⁰
- (67) Concerning the second variable (the cost of feeding the electricity into the grid), it is the Authority's understanding that this cost has been relatively constant over time and is predicted to remain steady in real terms over time. In addition, this cost amounts to approximately NOK 0,02 per KWh, and is thus of lesser importance relative to the other variables when calculating the net present value.
- (68) As for the third variable (the total volume of concession power available to the municipality), the municipality anticipates a continued right to 128 GWh annually for the foreseeable future, and a constant amount of electricity is also assumed in the valuation models developed by the external advisors. Concerning the volume of electricity, however, the Authority raises two specific questions:

²⁹ Event No. 532252, Enclosure to the Norwegian authorities' letter of 2 October 2009, p 17.

³⁰ Price is only adjusted for expected inflation (CPI) To illustrate this point, in their valuation model DT adjusted the concession power price with 75 per cent of CPI over the life of the contract in their base case, and simulated results at 50 and 100 per cent of CPI respectively, to assess the sensitivity of the value assessment to changes in this assumption.

- (i) whether the contract in question was entered into on the basis of valuations of 128 GWh or 116 GWh (the latter being only the volume of concession power *not* generated by NEAS itself), and
 - (ii) what volume was contractually sold by the municipality to NEAS.
- (69) As regards the first question, both the AA report and the first DT value assessment used 116 GWh, being the concession power generated by electricity companies *other* than NEAS. The value assessment by DS also used 116 GWh, and they explicitly stated in their final report that
- “...[w]e have assumed a volume of 116 GWh, though we cannot understand the reason why concession power delivered by NEAS itself should not be included in the calculations.”*³¹
- (70) To illustrate this point, on 4 October 2000 (and thus just prior to signing the contract), NEAS had the value of the concession power reassessed by DT. By this point, DT had concluded that the value of the contract was NOK 150-170 million and not 110-130 million, as stated earlier in May 2000.³² It appears that this change was partly due to the minor adjustment of some of the assumptions used in the NPV calculation (amongst others the discount factor and the electricity prices), but it was also updated to reflect the value of 128 GWh of concession power and not 116 GWh. This second report was not disclosed to the municipality prior to it entering into the contract.
- (71) If incorrect assumptions about the volume have been used when determining the price of the contract, approximately 12 GWh of concession power generated each year by NEAS appear to have been transferred to NEAS without any apparent remuneration to the municipality. An economic advantage could thus have been conferred upon NEAS.
- (72) As regards the second question, the Authority finds reason to point out an apparent uncertainty as regards how the risk of future changes in the volume of concession power would be handled between the contracting parties.
- (73) Concession power is defined in the contract as the *total volume* of concession power to which the municipality is entitled from the three current concessionaires (Article 1).³³ This suggests that the risk of any changes in the volume is transferred to NEAS. However, it is stipulated in Article 2 that in total the concession power is 128 GWh annually, which leaves open the question of what happens if that volume of the concession power entitlement is increased or decreased in the future.
- (74) The two remaining variables - i.e. the market price of electricity and the discount factor - greatly impact the net present value of the concession power entitlement. These two variables were identified by DT as the factors to which the value estimates of the entitlement were especially sensitive to marginal adjustments.

Variables (iv) – (v) affecting the NPV of the concession power

- (75) The fourth variable (the market price of electricity) is considered to be highly volatile, resulting in uncertainty about future price developments, in particular over time. This is reflected in the fact that the expert reports referred to above only

³¹ Event No. 532252, Enclosure to the Norwegian authorities' letter of 2 October 2009, p 28.

³² Event No. 532253, Enclosure to the Norwegian authorities' letter of 2.10.2009, p. 1 onwards.

³³ Statkraft SF, Nordkraft AS and NEAS.

project future electricity prices approximately ten years forward, beyond which electricity prices are assumed constant in real terms.³⁴ This uncertainty of future electricity prices is, as mentioned previously, also reflected in the fact that financial contracts on the Nordic power markets are limited to a maximum duration of six years.

- (76) The fifth variable (the discount rate) used in the present value calculations is the weighted average cost of capital, which is meant to capture the riskiness of the cash flows. The discount rate reflects both the time value of money (investors normally have a time preference and would rather have cash up front than having to wait, therefore they must be compensated for this delay), as well as a risk premium. Moreover, and similarly to the fourth variable (the market price of electricity), it may be difficult to accurately predict, for example, inflation and interest rates 50 years into the future.³⁵

Preliminary conclusion on market risks

- (77) To illustrate the importance of the above variables in the valuation process, DT estimated that a one per cent *increase* in the return on capital requirement (WACC) would *reduce* the value of the concession power entitlement by NOK 22 million, while a one per cent *reduction* in the return on capital requirement would *increase* the value by NOK 29 million.³⁶ The value was also very sensitive to changes in electricity spot prices: a NOK 0,01 change in real spot prices over a ten-year period relative to the estimated prices in the model would change the value by NOK 16 million.³⁷
- (78) As a result, the value estimates by the external advisors ranged from approximately NOK 70 million to NOK 145 million.³⁸ The relatively large range indicates uncertainty about the actual market value of the concession power entitlement over a period of 50 years.

1.1.1.3 Competitive tender *ex ante* and/or price adjustment clauses *ex post* (“safety valves”)

- (79) In the absence of benchmark prices against which the contract in question could be compared, and in light of the uncertainty concerning key variables/assumptions in the valuation models used to assess the value of the concession power entitlement, the Authority questions whether a market investor would have taken further steps to establish the market value.
- (80) One way to increase the likelihood that the municipality sold the concession power at market prices would have been to use a competitive and unconditional tender procedure. A competitive bidding process would have allowed the market value of the concession power entitlement to be determined *ex ante*. Moreover, if the municipality allowed interested parties to make bids without stipulating a fixed duration, this would more likely have revealed the true market price of the underlying assets over the lifetime of the asset, which may have revealed whether a

³⁴ Price only adjusted for expected inflation (CPI).

³⁵ This is reflected in the fact that both SSB and the Norwegian Central Bank only make predictions on economic indicators such as inflation and interest rates approximately 5-10 years forward, see for example: http://www.norgesbank.no/pages/87289/Figurer_foredrag_reg_net_11_11_2011.pdf

³⁶ Event No. 532252, Enclosure to the Norwegian authorities’ letter of 2 October 2009, p 41.

³⁷ Event No. 532253, Enclosure to the Norwegian authorities’ letter of 2 October 2009, p. 1 onwards.

³⁸ Excluding the last study by DT, which estimated a value in the range of NOK 150-170 million.

50-year contract was the optimal length in order to “*maximize return on a long-term basis.*”³⁹

- (81) The Authority has, in that regard, taken note of the decision by the Municipal Council of 25 November 1999, in which a competitive tender procedure was expected to be part of the strategy when selling the concession power rights:

“Concession power is sold to the highest bidder on long term contracts with a fixed return... Concession power is sold under different contracts with different length to diversify risk.” (underlining by the Authority)

- (82) If the municipality had sold the entitlement to the highest bidder, potentially to a company other than NEAS, it would seem that the municipality would subsequently still have capital available to inject into NEAS, which was part of the reason for selling it in the first place.
- (83) In addition to using a competitive tender process, another way to safeguard that the transaction was carried out at market terms would have been to require some form of price adjustment clause in the contract *ex-post*, to provide for potential fluctuations in electricity prices resulting in them deviating significantly from the forecasted prices used in the valuation models. This would also have been in line with the decision of 25 November 1999, that was the foundation of the transaction, in which it was stated that

“Concession power is sold... with adjustment clauses that gives additional returns if the prices are substantially higher than the projected prices in the contract period.” (underlining by the Authority)

- (84) Accordingly, it is the Authority’s preliminary view that the lack of competitive tender procedure and/or the insertion of price adjustment clauses in the contract entails that we cannot exclude that the transaction involved state aid.

1.1.1.4 Conclusion

- (85) In light of the information provided by the Norwegian authorities, the Authority is in doubt whether the terms of the contract between the municipality and NEAS concerning the sale of the entitlement to annual concession power for 50,5 years for the sum of NOK 126 million can be considered in line with the market economy investor principle. Therefore, the Authority cannot rule out that an advantage was granted to NEAS as a result of this transaction. If the entitlement was sold for a price below its market value, an economic advantage was granted to NEAS.

1.2 Presence of state resources

- (86) The Authority understands that the price of NOK 126 million was paid by NEAS to the Municipality of Narvik by way of NOK 60 million paid to the municipality in cash, and NOK 66 million injected into NEAS (at the time 100% owned by the Municipality) as an equity contribution in kind.
- (87) If the price NEAS paid for the entitlement was lower than the actual market price of the asset, the difference would represent foregone revenue for the municipality.

³⁹ Event No. 532250, Enclosure to the Norwegian authorities’ letter of 2.10.2009, p. 13. This would be important because the independent advisers involved in the valuation process only assessed the value of the concession power for a period of 50 years, and did not necessarily assess how to “*maximize return on a long-term basis.*”

1.3 Favouring certain undertakings or the production of certain goods

(88) A selective economic advantage is considered to exist when it is found that a measure does not apply generally to all the undertakings in an EEA State⁴⁰. In the present case, the aid measure appears to be selective in that it favours NEAS in comparison to other undertakings as only NEAS signed the contract with the municipality. The contract was the result of individual negotiations between the municipality and NEAS.

1.4 Distortion of competition and effect on trade between Contracting Parties

(89) The measure must distort competition and affect trade between the Contracting Parties of the EEA Agreement in order to be state aid.

(90) A support measure granted by the State would strengthen the position of NEAS vis-à-vis other undertakings that are competitors active in the same business areas of production and sale of electricity. Any grant of aid strengthens the position of the beneficiary vis-à-vis its competitors and accordingly distorts competition within the meaning of Article 61(1) EEA. To the extent that the company is active in areas subject to intra-EEA trade, the requirements of Article 61(1) EEA for a measure to constitute state aid are fulfilled.

(91) According to a report by the power exchange Nord Pool,⁴¹ by the year 2000 there was a well-functioning Nordic power market. An effect on trade between the Contracting Parties as a result of the aid measure cannot, therefore, be excluded.

2. Procedural requirements

(92) Pursuant to Article 1(3) of Part I of Protocol 3 SCA, “*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ... The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*”.

(93) The Norwegian authorities did not notify the contract between the municipality of Narvik and NEAS to the Authority. Therefore, the Authority concludes that if the measure constitutes state aid, the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 SCA.

3. Compatibility of the aid

(94) Measures caught by Article 61(1) EEA are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) EEA.

(95) Article 61(2) EEA is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or Article 61(3)(b) EEA apply to the present case. Furthermore, the aid does not appear to facilitate the development of certain economic activities or certain economic areas, further to Article 61(3)(c) EEA.

(96) The Authority has so far not received any information that would indicate that the sale of concession power to NEAS is compatible with Article 61(1) of the EEA Agreement. The Authority therefore doubts that the transaction under assessment can be justified under the state aid provisions of the EEA Agreement.

⁴⁰ Case C-256/97 *DM Transport SA* [1999] ECR I-3913, para. 27.

⁴¹ Nord Pool, “*Trade at Nord Pool ASA’s financial market*”, 8 March 2010, http://www.nasdaqomxcommodities.com/digitalAssets/69/69445_tradenordpoolfinancialmarket.pdf

4. Conclusion

- (97) On the basis of the facts and assessment above, the Authority cannot exclude the possibility that the contract relating to the sale by Narvik municipality of its entitlement to annual concession power for 50,5 years to Narvik Energi AS, for the sum of NOK 126 million, constitutes state aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that this measure can be regarded as complying with Article 61(2) or (3) of the EEA Agreement. The Authority thus doubts that the measure is compatible with the functioning of the EEA Agreement.
- (98) Consequently, and in accordance Article 4(4) of Part II of Protocol 3 SCA, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3 SCA. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measure in question is compatible with the functioning of the EEA Agreement.
- (99) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 SCA, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision. The Authority specifically asks the Norwegian Authorities to reply to the two questions raised in paragraphs 68 to 73 of this Decision.
- (100) In light of the foregoing considerations, the Authority requests the Norwegian authorities, within one month of receipt of this Decision, to provide all documents, information and data needed for the assessment of the compatibility of the sale of Narvik municipality's entitlement to concession power to NEAS.
- (101) The Authority invites the Norwegian authorities to forward a copy of this Decision to the potential recipient of the aid immediately.
- (102) The Authority would like to remind the Norwegian authorities that, according to the provisions of Protocol 3 SCA, any incompatible aid unlawfully put at the disposal of the beneficiary will have to be recovered, unless this recovery would be contrary to a general principle of law.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure, provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, is initiated against Norway regarding the sale of Narvik municipality's entitlement to annual concession power for 50,5 years to Narvik Energi AS, for the sum of NOK 126 million.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month of the notification of this Decision.

Article 3

The Norwegian authorities are requested to provide, within one month of the notification of this Decision, all documents, information and data needed for the assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version of this Decision is authentic.

Done at Brussels, 14 December 2011

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member