

Case No: 62230
Event No: 452970
Dec. No: 718/07 COL

EFTA SURVEILLANCE AUTHORITY DECISION
OF 19 DECEMBER 2007
ON THE SALE OF POWER FROM TINFOS POWER PLANT BY THE
MUNICIPALITY OF NOTODDEN TO BECROMAL NORWAY AS
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 thereof and Article 1 (2) and (3) in Part I and Articles 4(4) and 6(1) in Part II of Protocol 3 thereof,

Whereas:

I. FACTS

1 Procedure

According to an article published in the regional Norwegian newspaper named Telen on 26 March 2007, the municipality of Notodden in Southern Norway had a power sales agreement, which was about to expire, with Becromal, an aluminium manufacturing company having a plant at Notodden. According to the article, in order to safeguard Becromal's establishment at Notodden, the prices under the expiring agreement were set equal to the municipality's own costs in purchasing certain amounts of power, see further below. However, the municipality was considering selling the power volumes on the open market. On the basis of that article, the EFTA Surveillance Authority (hereinafter "the Authority"), on 30 May this year, sent a letter to Norway requesting additional information on the municipality's sale of power to Becromal, (Event No.: 422613).

By letter dated 19 July 2007, received and registered by the Authority on 10 July 2007 (Event No: 428860), the Norwegian authorities replied to the request.

By letter dated 21 September 2007 (Event No 442519), the Authority requested additional information.

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

By letter dated 30 October 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on the same day (Event No 449660), Norway replied to the information request.

2 Description of the measures

Notodden is a municipality in the County of Telemark in South-Eastern Norway. Located where two rivers flow into the lake Heddalsvatnet, the municipality has significant hydropower resources within its borders.

In that capacity, the municipality is entitled to receive a certain amount of so-called “concession power” from concessionaires for waterfall exploitation every year. The system of concession power is laid down in Section 2(12) of the Industrial Licensing Act and Section 12(15) of the Waterfalls Regulation Act.³ According to these provisions, which are identical in wording, counties and municipalities in which a power plant is located are entitled to receive up to 10 per cent of a plant’s yearly production at a price determined by the State. With respect to concessions granted prior to 1959, such as the concession in the case at hand, the price is based on the so-called “individual costs” of the plant, unless a lower price is agreed on.⁴ Thus, the price of concession power will normally be lower than the market price.

Each municipality’s entitlement to concession power is decided on the basis of its “general electric power supply needs”. 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.⁵ From 1988 Notodden municipality had been entitled to approximately 3.9 GWh from the Tinfos power plant located in Notodden, which appears to have been raised to 7.114 GWh in 2002.⁶

In addition to the concession power volumes that the municipality was entitled to under the regulations on concession power, Notodden municipality appears to have had rights of use of the waterfall Sagafoss in Notodden. This right of use was, however, exploited by Tinfos AS and not by the municipality itself. In return, the municipality was entitled to additional volumes of electric power from the plant. The commercial relationship between

³ These provisions read: “*The licence shall stipulate that the licensee shall surrender to the counties and municipalities in which the power plant is located up to ten per cent of the increase in water power obtained for each waterfall, calculated according to the rules in section 11, subsection 1, cf. section 2, third paragraph. The amount surrendered and its distribution shall be decided by the Ministry concerned on the basis of the county’s or municipality’s general electric power supply needs. The county or municipality may use the power provided as it sees fit. [...] The price of power [for the municipality] shall be set on the basis of the average cost for a representative sample of hydroelectric power stations throughout the country. Taxes calculated on the profit from power generation in excess of a normal rate of return are not included in the calculation of this cost. Each year the Ministry shall set the price of power supplied at the power station’s transmission substation. The provisions of the first and third sentences do not apply to licences valid prior to the entry into force of Act No. 2 of 10 April 1959.*” (Translation by the Norwegian Ministry of Petroleum and Energy.)

⁴ The “individual costs” of the plant are calculated in accordance with the legal provisions applicable until 1959. Under these provisions, the individual cost price would be calculated as the plant’s production costs including 6 per cent interest on the initial costs, plus a mark-up of 20 per cent, divided by average yearly production in the period 1970 – 1999. See the so-called KTV-Notat nr 53/2001 of 24 August 2001, Event No 455241.

⁵ KTV-Notat nr 53/2001, cited above.

⁶ See Norway’s reply to question 4 in the second request for information, Event No 449660

Notodden and Tinfos is currently governed by a contract entered into on 15 August 2001.⁷ This contract stipulates that, until 31 March 2006, the municipality was entitled to buy 30 GWh per year, including 3.9 GWh concession power, from Tinfos AS. The price was set at 0.135 NOK/kWh for concession power and the additional volume alike. After 31 March 2006, the municipality has only be entitled to buy the volume constituting the concession power, and the prices established for the municipalities' purchase of such power has been applicable since then.

The relevant legal basis for the municipalities' right to concession power, referred to above, expressly 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". Thus, there is nothing to prevent municipalities from selling this power to power intensive industries, or any other industry, established within the municipality.

Against this background, the municipality, on 10 May 2002, entered into an agreement⁸ with the aluminium foil producer Becromal concerning the resale of the power volumes to which it was entitled under the agreement with Tinfos. The agreement takes retroactive effect and, therefore, also governs the power volumes sold to Becromal from 14 May 2001 until the date of signature of the contract. The volumes covered appear to correspond to the volumes under the municipality's contract with Tinfos until 31 March 2007: i.e., 14.4794 GWh from 14 May 2001 to 31 December 2001, 30 GWh per year from 2002 to 2005, 7.397 GWh from 1 January 2006 to 31 March 2006, and, finally, an option for Becromal to buy the municipality's concession power from 1 April 2006 to 31 March 2007. The prices also mirror those laid down in the municipality's contract with Tinfos, i.e. 0.135 NOK per kWh until 31 March 2006, and, from 1 April 2006 to 31 March 2007, "*the conditions at which Notodden municipality may, at that time, buy the power in question*". It appears that Becromal did choose to buy the concession power on these conditions in the period from 1 April 2006 to 31 March 2007.⁹

By letter dated 4 March 2007,¹⁰ Becromal requested a prolongation of the power purchase agreement. It also asked whether higher volumes could be included in the contract. On 30 April, the municipality replied to the request, offering Becromal to buy the municipality's concession power at 0.2 NOK per kWh (which is said to correspond to the spot price at NordPool, the Nordic power exchange, for May 2007) for the period from 1 April to 31 December 2007, and thereafter a three-year agreement at the price of 0.264 NOK per kWh from 1 January 2008 to 31 December 2010. It is also stated that the concession power volume, from 1 April 2007, is 7.113 GWh.

The municipality also explained the background for the significantly higher prices offered by the municipality in 2007 compared to the previous agreement. In this respect, it pointed to the Municipal Executive Committee's requirement that "*the agreement to be entered into between Becromal AS and the municipality must not infringe competition legislation*

⁷ Annex to Event No 449660

⁸ Annex to Norway's reply of 9 July 2007, Event No 428860

⁹ The Authority is not in possession of a copy of any such prolongation agreement. However, by letter dated 4 March 2007 (annex to Event No 428860), Becromal requested the prolongation of the agreement and referred in that respect to "*the agreement which Becromal has with Notodden municipality concerning the purchase of the municipality's concession power expires on 31.03.07.*" Thus, it appears that the option to buy concession power for the period 1 April 2006 – 31 March 2007 was exercised.

¹⁰ Annex to Norway's reply of 9 July 2007, Event No 428860.

or other legislation pertaining to competition or State aid.” The letter then goes on to state:

“During the years of application of the previous agreement, Becromal AS has obtained power at prices which have saved the company for, in total, NOK 17.5 million compared to the market price. The power price laid down in the previous agreement cannot be upheld as it would as it involves a subsidy in breach of EEA rules.”

On 30 June this year, Becromal replied that it accepted the prices offered for the last nine months of 2007. By contrast, it declined the offer for the period 2008 – 2010, as it was considered to be too high. The municipality replied, by letter dated 4 July, that in light of Becromal’s letter, it considered that an agreement had been reached concerning power volumes for 2007. Hence, it would come back soon with a draft agreement. In respect of the period from 2008 to 2010, it upheld its previous position that the contract must be on market terms.¹¹ The municipality has later confirmed that no formal agreement has yet been entered into. Nor have negotiations been held with respect to the period after 1 January 2008.¹²

II. ASSESSMENT

1 The presence of State aid

State aid within the meaning of Article 61(1) EEA

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.”

It follows from this provision that, for State aid within the meaning of the EEA to be present, the following conditions must be met:

- The aid must be granted through *State resources*;
- The aid must favour certain undertakings or the production of certain goods, i.e. the measure must confer an *economic advantage* upon the recipient(s), which must be *selective*;
- The beneficiary must be an *undertaking* within the meaning of the EEA Agreement;
- The aid must be capable of *distorting competition* and *affect trade* between contracting parties

The fulfilment of these conditions will be considered further below.

¹¹ See annexes to Norway’s reply of 9 July 2007, Event No 428860

¹² See Norway’s reply to the Authority’s second request for information, Event No Event No 449660

2.1 Presence of State resources

The measure must be granted by the State or through State resources. Municipal resources are State resources for the purposes of Article 61(1).

In the case at hand, there is no transfer of money from the municipality to Becromal. However, it is settled case law that when a public entity does not fix an energy tariff in the manner of an ordinary economic agent but uses it to confer a pecuniary advantage on energy consumers, it thereby forgoes the profit which it could normally realise.¹³ Thus, if the price fixed in the contract is lower than the market price, State resources within the meaning of Article 61(1) EEA will be deemed to be involved. The Authority will assess this question below under point 2.2.

2.2 Favouring certain undertakings or the production of certain goods

In order for this condition to be fulfilled, the measures must confer on Becromal advantages that relieve it of charges that are normally borne from its budget. Secondly, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. In the case at hand, an advantage would be present if the power price in the contract between Becromal and Notodden municipality is lower than the market price. In that case, the measure would also be selective since it exclusively benefits Becromal.

There are several indications that the price laid down in the contract between Becromal and the municipality was below the market price for equivalent contracts at the time of conclusion of the agreement.

Firstly, the very method applied to arrive at the price of NOK 0.135, applicable from 14 May 2001 until 31 March 2006, indicates that aid is involved. As stated above, the price calculation methods for concession power entail that such power prices are generally considerably lower than the market price. Judging by the introduction to the agreement between Notodden and Tinfos, the remaining power volumes covered seem to be delivered in compensation for Tinfos’ exploitation of the municipality’s rights to Sagafoss. The prices in the contract between Notodden and Tinfos must, therefore, be presumed to be below the market price. Since the price charged from Becromal corresponds to the price payable by Notodden to Tinfos, the same presumption applies to the price laid down in the Becromal contract.

Secondly, the price seems low in comparison to the general price level at the time of conclusion of the contract. For example, the Authority’s Decision No. 142/00/COL of 26 July 2000, concluding that the contracts under which certain energy intensive undertakings leased power plants from Statkraft did not involve state aid, refers to 20-year contracts being obtainable in the open market at the time at a price of around 0.19 NOK per kWh. Furthermore, an article published in the regional newspaper Telen on 7 November 2001 seems to indicate that the municipality had estimated the price of an equivalent five-year contract in the open market to be around 0.1739 NOK per kWh.¹⁴

Thirdly and finally, the municipality seems to acknowledge that the price charged was lower than the market price. As referred to above, the municipality, by letter dated 30 April 2007, informed Becromal that a prolongation of the price in the 2002 agreement would be in breach of the State aid rules, and that the former agreement had already saved Becromal costs of NOK 17.5 million compared to the market price. In a presentation to

¹³ See Joined cases 67, 68 and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR 219, paragraph 28

¹⁴ <http://www.telen.no/article/20011107/NYHET/11106002>

the board of the administration of 28 November 2005, the head of administration refers to a legal opinion commissioned from Hjort Law Firm in 2001, i.e. prior to the conclusion of the agreement, concluding that the price agreed would constitute aid.

Against this background, the Authority has serious doubts that the prices applicable under the agreement of 10 May 2002 reflected the market price of equivalent contracts at the time.

2.3 Distortion of competition and effect on trade between Contracting Parties

The measures must distort competition and affect trade between the Contracting Parties. Under settled case law, the mere fact that an aid strengthens a firm's position compared with that of other firms competing in intra-EEA trade, is enough to conclude that the measure is likely to affect trade between the contracting parties and distort competition between undertakings established in other EEA States.¹⁵

Provided that it is established that the price paid by Becromal under the contract of May 2002 was below the market price for similar contracts at the time, Becromal has received an advantage which has strengthened its position compared with that of its competitors. Thus the measure threatens to distort competition. Neither does the amount of aid referred to (NOK 17.5 million) seem to be below the *de minimis* threshold applicable at the material time.¹⁶

According to Becromal's homepage, it is part of a group of companies based in Italy and exports 100 per cent of its production. The plant at Notodden therefore competes with undertakings established in other EEA States. Insofar as the measure is deemed to distort competition, it will, therefore, also be capable of affecting trade between the Contracting Parties.

2 Procedural requirements

Pursuant to Article 1 (3) in Part I of Protocol 3 to the Surveillance and Court Agreement, "*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*".

The Norwegian authorities neither notified the power contract of 10 May 2002, nor its prolongation in 2006, to the EFTA Surveillance Authority. The Authority therefore concludes that, should State aid be involved, the Norwegian Government has not respected its obligations pursuant to Article 1 (3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

3 Compatibility of the aid

Exemptions from the general prohibition on State aid as provided for in Article 61(1) may be granted if the conditions of 61(2) or (3) are fulfilled. The exemptions under Article 61(2) and 61(3)(a) and (b) seem to be applicable to the case at hand.

¹⁵ See Case 730/79 *Philip Morris Holland BV v Commission*, [1980] ECR 2671, paragraphs 11 – 12

¹⁶ 100 000 Euros over a three-year period, see Article 2(2) of Commission Regulation (EC) No 69/2001, incorporated into the EEA Agreement by Joint Committee Decision No 88/2002 (OJ No L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42), e.i.f. 1.2.2003, and Paragraphs 12.1(2) and (3) of the EFTA Surveillance Authority Decision No 54/96/COL of 15 May 1996 on the ninth amendment of the procedural and substantive rules in the field of State Aid, *Official Journal L 245*, 26/09/1996, pages 28 – 31.

Under Article 61(3)(c) EEA, State aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the EEA Agreement where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

As for the aid in question, it would seem to constitute operating aid. As such aid is particularly distortive, it may only in very limited circumstances be considered compatible with the functioning of the EEA Agreement. The Authority has not been presented with any elements indicating the existence of such circumstances in the case at hand.

Against this background, the Authority takes the preliminary view that the aid is not compatible with the functioning of the EEA Agreement.

4 Conclusion

Based on the information submitted by the Norwegian Government, the Authority cannot exclude the possibility that the contract between the Municipality of Notodden and Becromal of 10 May 2002, as well as its prolongation until 31 March 2007, involve State aid within the meaning of Article 61 (1) of the EEA Agreement. Furthermore, the Authority has doubts that these measures may be considered compatible with Article 61 (3)(c) of the EEA Agreement. Consequently, the Authority has doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance with Article 4 (4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

The Authority also draws the attention of the Norwegian authorities to the fact that Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement constitutes a standstill obligation and that Article 14 in Part III of that Protocol provides that, in the event of a negative decision, all unlawful aid may be recovered from the beneficiary, save in exceptional circumstances. At this stage, the Authority has not been presented with any facts indicating the existence of exceptional circumstances on the basis of which the beneficiary may legitimately have assumed the aid to be lawful.

In light of the foregoing considerations, the Authority requires, within one month of receipt of this decision, the Norwegian Government to provide all documents, information and data needed for assessment of the compatibility of the contract between Notodden municipality and Becromal of 10 May 2002, as well as the extension of the contract until 31 March 2007. It requests the Norwegian authorities to forward a copy of this Decision to the potential recipient of the aid immediately.

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1 (2) in Part I of Protocol 3 to the Surveillance and Court Agreement against Norway concerning the contract between Becromal AS and the Municipality of Notodden in force from 14 May 2001 to 31 March 2006 and its prolongation until 31 March 2007.
2. The Norwegian Government is requested, pursuant to Article 6 (1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within one month of the notification of this decision.
3. The Norwegian Government is required to provide, within one month from notification of this decision all documents, information and data needed for assessment of the compatibility of the aid measure, in particular
 - a. Any documents relating to the prolongation of the agreement until 31 March 2007;
 - b. The calculations underlying the assumption that the agreement had saved Becromal for NOK 17.5 million, set out in the municipality's letter to Becromal of 30 April 2007;
 - c. Any other information that would establish market prices for the type of contract in question at the time of the conclusion of the agreement.
4. The Norwegian Government is requested to forward a copy of this Decision to the potential recipient of aid immediately.
5. This Decision is addressed to the Kingdom of Norway.

Done at Brussels, 19 December 2007

For the EFTA Surveillance Authority

Per Sanderud
President

Kristján Andri Stefánsson
College Member