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EFTA SURVEILLANCE AUTHORITY DECISION  
of 4 December 2002

to propose appropriate measures to Norway with regard to State aid in the form of guarantees under the Act on State Enterprises (“*Lov om statsforetak*”) (NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area<sup>1</sup>, in particular to Articles 61 to 63 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice<sup>2</sup>, in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid<sup>3</sup>, and in particular Chapters 7 and 17 thereof,

WHEREAS:

## I. FACTS

### 1. Procedure

Following the adoption of new guidelines outlining the EFTA Surveillance Authority’s position with respect to State aid in the form of guarantees<sup>4</sup>, the Authority invited the Norwegian Government, by letter dated 3 July 2000 (Doc. No. 00-4763-D), to communicate to it within four months all State guarantees falling within the scope of Article 61 (1) of the EEA Agreement.

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<sup>1</sup> Hereinafter referred to as the ‘EEA Agreement’.

<sup>2</sup> Hereinafter referred to as the ‘Surveillance and Court Agreement’.

<sup>3</sup> Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority’s Decision No. 145/02/COL of 26 July 2002, not yet published; hereafter referred to as the ‘Authority’s State Aid Guidelines’.

<sup>4</sup> Authority’s Decision of 12 April 2001, Dec. No. 78/00/COL, introducing a new Chapter 17 of the Authority’s State Aid Guidelines; published in OJ No L 274, 26.10.2000 and in the EEA Supplement No 48.

By letter from The Ministry of Trade and Industry dated 3 November 2000, received and registered by the Authority on 10 November 2000 (Doc. No. 00-8039-A), the Authority was informed that no aid in the form of guarantees had been identified that had not already been reported to the Authority. The Norwegian authorities promised to inform the Authority about any implicit guarantees that certain undertakings might enjoy due to their organisational form. However, no such information was submitted to the Authority.

To the Authority's knowledge, State enterprises organised according to the Act on State Enterprises ("*Lov om statsforetak*") were exempted from the national legislation on bankruptcy and other insolvency procedures. Under the provisions of that Act, the State would cover the losses in the case of dissolution of such undertakings. The Competition and State Aid Directorate considered that these provisions might confer a financial benefit to State enterprises falling within the scope of Article 61 (1) of the EEA Agreement.

Consequently, by letter dated 11 April 2001 (Doc. No. 01-2757-D), the Authority initiated the review regarding existing aid in the form of guarantees conferred under the Act on State Enterprises and asked the Norwegian Government to submit information as well as any comments on the matter.

By letter from the Ministry of Trade and Industry dated 21 May 2001, received and registered by the Authority on 28 May 2001 (Doc. No. 01-3962-A), the Norwegian Government submitted information regarding the Act on State Enterprises and argued that enterprises organised under that Act would not receive any State aid.

In the Authority's letter dated 19 June 2001 (Doc. No. 01-4490-D), the Authority came to the conclusion that several provisions of the Act on State Enterprises (in particular the implicit guarantee resulting from Sections 4, 51 and 53 of the Act) implied State aid within the meaning of Article 61 (1) of the EEA Agreement. The Authority also informed the Norwegian Government that, if the Norwegian authorities would not abolish, or make the necessary changes to the provisions concerning the State's responsibility for the State enterprises' financial obligations in the case of dissolution, the Authority would feel obliged to propose appropriate measures.

The issue of State guarantees under the Act on State Enterprises was discussed by the Authority and the Norwegian authorities at a meeting on 18 September 2001 in Oslo. At that meeting, the Authority asked the Norwegian Government to reply to the Authority's letter of 19 June 2001 at the latest before the end of November 2001.

By fax from the Ministry of Trade and Industry dated 4 December 2001, received and registered by the Authority on that same day (Doc. No. 01-9751-A), the Norwegian Government informed the Authority that the issue would be dealt with by mid-December 2001 and that the Norwegian authorities would reply to the Authority as

soon as possible afterwards. By letter from the Ministry of Trade and Industry dated 21 December 2001, received and registered by the Authority on 7 January 2002 (Doc. No. 02-146-A), the Norwegian Government promised to respond to the Authority's letter of 19 June 2001 by the end of January 2002. By letter from the Ministry of Trade and Industry dated 31 January 2002, received and registered by the Authority on 5 February 2002 (Doc. No. 02-1003-A), the Norwegian Government informed the Authority that it was in the process of finalising an answer to the Authority, which would reach the Authority before the end of February 2002.

By letter dated 12 February 2002 (Doc. No. 02-1110-D), the Authority asked the Norwegian Government again to submit proposals to ensure that State enterprises would no longer benefit from State aid in the form of guarantees. It was emphasised that in the absence of a satisfactory answer by 28 February 2002, the Authority would propose appropriate measures consisting of the abolition of the current guarantee scheme.

By letter from the Ministry of Labour and Government Administration dated 1 March 2002, received and registered by the Authority on 6 March 2002 (Doc. No. 02-1694-A), the Authority was informed that the Norwegian Government had decided to start a process towards amending the Act by repealing the sections of the Act that implied State guarantees. The Norwegian Government also indicated that it would propose "...transitional arrangements for existing State enterprises". In this respect, the Norwegian Government requested a meeting to discuss suitable solutions for carrying out the amendments as well as transitional arrangements.

Against this background, the Authority's services agreed to await the outcome of the further discussions within the Norwegian Government before proposing appropriate measures.

In preparation of the meeting between the Authority and the Norwegian Government on 25 April 2002 in Oslo, additional information was submitted by the Ministry of Trade and Industry in a letter dated 19 April 2002, sent by fax and received and registered by the Authority on that same day (Doc. No. 02-2949-A). In this letter, the Authority was informed that the envisaged changes should come into force as from 1 January 2003. The Authority was further informed that State enterprises could continue taking up loans with State guarantees until the amendments to the Act would enter into force<sup>5</sup>. According to the Norwegian Government, elements of aid in these guarantees would be neutralised through a guarantee premium that would be determined individually on each loan. In this respect, the Authority was informed that "market based guarantee premiums" would be introduced as from 1 July 2002.

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<sup>5</sup> As regards one of the State enterprises, Statkraft, the Norwegian Government stated that it had proposed to transform the company into a limited company as from 1 January 2003. Therefore, Statkraft could take up loans under the present framework until the amendments of the Act entered into force or until it was transformed into a limited liability company.

The methods and proceedings regarding the introduction of the guarantee premiums were to be presented at the meeting in Oslo on 25 April 2002.

Based on the discussions between representatives from the Authority and the Norwegian Government at the meeting on 25 April 2002 in Oslo, the Authority asked the Norwegian authorities to submit exhaustive information on the proposed measures and to submit a justification as regards the proposed maintenance of guarantees with respect to existing loans.

By letter from the Ministry of Trade and Industry dated 14 June 2002, received and registered by the Authority on 25 June 2002 (Doc. No. 02-4800-A), the Norwegian Government submitted additional information, in particular regarding the Government's proposal to Parliament to introduce a guarantee premium (proposal for a revised State budget 2002). In this context, it was promised that the Authority would be provided with the Parliament's decision as soon as the budget was approved.

At a meeting between representatives from the Norwegian Government and the Authority on 22 October 2002 in Oslo, the Authority drew attention to the fact that the Norwegian Government had still not submitted the information as requested by the Authority at the meeting in April 2002. In the absence of all relevant background material regarding the determination of the guarantee premium, the Authority was not in a position to conclude that the aid elements contained in the relevant provisions of the Act on State enterprises were eliminated through the introduction of a guarantee premium. Furthermore, given the lack of a satisfactory justification of the envisaged maintenance of guarantees for existing loans the Authority was not in a position to evaluate a possible justification of the envisaged transitional arrangements. The Authority would therefore proceed by adopting appropriate measures based on the information available to it.

Subsequently, the Norwegian Government submitted additional information by letter from the Ministry of Trade and Industry dated 24 October 2002, received and registered by the Authority on 31 October 2002 (Doc. No. 02-7904-A).

By letter from the Ministry of Labour and Government Administration dated 5 November 2002, received by fax and registered by the Authority on that same day (Doc. No. 02-7948-A), the Norwegian Government submitted further clarifications regarding the Government's proposal to amend the Act on State Enterprises. The concrete proposal for amendments to the Act on State Enterprises was received by the Authority on 8 November 2002 (Doc. No. 02-8069-A).

By letter dated 19 November 2002 (Doc. No. 02-8293-D), the Authority acknowledged receipt of both letters. The Norwegian Government was also informed that, in the Competition and State Aid Directorate's view, the additional information submitted by the Norwegian Government had not altered its assessment of the

compatibility of the Act on State Enterprises with the EEA State aid rules. Consequently, the Competition and State Aid Directorate would present a proposal to the Authority for a decision on appropriate measures.

## 2. Act on State Enterprises

The Act on State Enterprises (Norwegian Act No. 71 of 30 August 1991 on State Enterprises; “*Lov om statsforetak*”) was adopted in 1991.

Pursuant to Section 1 of the Act on State Enterprises, “*the Act applies to enterprises of which the state is sole owner, and to which the King has decided that the Act shall apply...*”. Enterprises currently organised under the Act are:

- Statnett: operation and development of Norway’s power transmission network;
- Statkraft: Norway’s largest electricity producer;
- Statskog: administration, operation and development of the State’s property of wood and fell/forest and mountains;
- Selskap for industrivekst, SIVA: Industrial Development Corporation of Norway;
- Enova: agency for promoting energy savings, renewable energy and environmentally friendly gas solutions;
- Medinnova: research agency in the health sector.

Section 4 (2) states that “*[l]iquidation and debt settlement proceedings according to Act no. 58 of 8 June 1984, the Insolvency Act, cannot be instituted in respect of a state-owned enterprise.*”

Section 5 (1) stipulates that a “*State-owned enterprise can only raise loans or issue guarantees in so far as the value of its assets after the raising of the loan or issuing of the guarantee is sufficient to cover the total loan debt and guarantee liabilities of the enterprise. ...*” Pursuant to Section 5 (4), “*[c]ontracts concluded in contravention of the first paragraph are not binding on the enterprise and are not taken into consideration in the calculation of the government's funding obligation according to the second paragraph of Section 51 and government liabilities according to Section 53, unless it is shown that the other contracting party acted with due care and in good faith when the contract was concluded....*”

Under Chapter 4 regarding the State’s contribution to the enterprises organised under the Act, Section 12 (1) provides that “*[w]hen the enterprise is dissolved, the state is obliged to contribute sufficient funds to the enterprise to meet the claims of its creditors, cf. the second paragraph of Section 51.*”

Sections 47 and 48 enumerate the circumstances under which State enterprises shall be dissolved (e.g. either following notification by the management board, where there are reasons to believe that the enterprise is unable to meet its obligations or demanded

by a creditor, when there is reason to believe that the enterprise cannot meet its obligations).

After the decision to dissolve the State enterprise has been taken, the competent Ministry will call an enterprise general meeting to elect a liquidation committee and to adopt more detailed rules concerning the liquidation procedure.

Pursuant to Section 51 (1), “[t]he liquidation committee shall see that the claims of all known creditors are met in so far as any creditor does not waive his or her claim or accept another debtor instead. This does not apply, however, to creditors with disputed or uncertain claims. Such claims are settled with the state after the dissolution, cf. Section 53.” Section 51 (2) states that “[i]n so far as there are not enough funds in the enterprise to satisfy the creditors whose claims shall be met according to the first paragraph, the state shall contribute to the enterprise the funds needed to satisfy the creditors.”

Section 53 (1) provides that “[a]fter the enterprise has been dissolved, the State settles with creditors whose claims have not been met according to Section 51.”

### **3. Measures taken by Norway in relation to the Act on State Enterprises**

#### ***a) Introduction of the obligation to pay a guarantee premium (since 1 July 2002)***

In the revised State budget 2002, the Norwegian Government proposed the introduction of a guarantee premium with a view to neutralising the benefits resulting from the State guarantee contained in the Act on State Enterprises.

Prior to the introduction of a guarantee premium, the Norwegian authorities examined the possibility of re-negotiating the State enterprises’ loan portfolios in accordance with normal market terms based on an assessment of the enterprises’ creditworthiness without State guarantees. However, this option was discarded as impracticable for a number of reasons, including the difficulty of re-negotiating syndicated loans involving a large number of partners, the terms of the current loans which would not allow State enterprises to re-negotiate the loans before they fall due as well as provisions in the Constitution prescribing that statutory amendments shall not be given retroactive effect.

Faced with these difficulties, the Norwegian Government decided to charge a premium on loans which should counterbalance the difference between existing loan terms and what was estimated that comparable companies would have achieved without State guarantees. In the Norwegian Government’s view, this would neutralise the aid element contained in the Act on State Enterprises. In this exercise, the focus was on Statkraft which was expected to experience the greatest change in interest rates in a situation where the guarantees would have been abolished.



According to the Norwegian Government, several sources were used in making an estimate of a market premium. The Norwegian Government recognised that none of the sources gave an exact figure of the benefit received by Statkraft, but pointed out that the findings and analyses of the various sources coincided. In this respect, the Norwegian Government made reference to the spread between government bonds and private bonds in Norway for the period January 2000 until March 2002. The result was an average spread of 59 basic points for three years, 76 basic points for five years and 87 basic points for ten years maturity. Utility companies had an average credit spread on the European credit market of 45 basic points in relation to AAA rated companies (figures from 10 April 2002). Furthermore, a review of the loans raised by Statkraft on the Norwegian loan market was conducted for the period 1996-2001. The spread between Statkraft's loan terms and those of the State was compared with a corresponding spread for other Norwegian energy companies, Agder, Trondheim and Hafslund. The review showed that there was a spread of 35-45 basic points for the three-year segment, 50-60 basic points for the five-year segment and 55-75 basic points for the ten-year segment. On the basis of an average loan to Statkraft, it was estimated that the benefit received in relation to that of a Norwegian utility company without a State guarantee was 52 basic points.

As a result, a guarantee premium of 0.6% was introduced for existing loans and new loans for a period of up to 7 years. For new loans with a maturity exceeding 7 years, the premium was fixed at 1%. The guarantee premium, introduced as from 1 July 2002, is to be paid by three State enterprises, namely Statkraft, Statnett and SIVA. The premium was fixed at the same level for all three enterprises, even though, according to the Norwegian authorities, the benefit resulting from the State guarantee was estimated to be higher for Statkraft than for the other State enterprises. According to the Norwegian authorities, there was no need to introduce any guarantee premium for the other State enterprises Statskog, Enova and Medinnova.<sup>6</sup>

Initially, the Norwegian authorities envisaged revising the guarantee premium applicable as from 1 January 2003, based on more detailed calculations. However, according to the Norwegian Government's budgetary proposal for 2003, the same premium as for 2002 will also be applied for the fiscal year 2003.

***b) Proposal to repeal the implicit guarantee resulting from Sections 4, 51 and 53 of the Act on State Enterprises (with effect from 1 January 2003)***

According to the information submitted to the Authority, the Norwegian Government proposed to Parliament to repeal the unlimited State guarantee as provided for in Sections 4 (2), 51 and 53 of the Act on State Enterprises. In this respect, the Authority notes in particular that, based on the proposal for an amendment of the Act on State

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<sup>6</sup> In this respect, the Norwegian authorities referred, on one occasion, to insignificant debt levels (cf. letter dated 14 June 2002) and, on another occasion, to the fact that these enterprises did not take up loans (cf. letter dated 24 October 2002).

Enterprises (cf. *Ot. Prp. nr. 13 (2002-2003)*), Section 4 (2) of the Act, stating that the Bankruptcy Act is not applicable to State enterprises, shall be abolished. The Authority understands that the proposed amendments seek to abolish the Norwegian State's unlimited responsibility for the State enterprises' obligations. Furthermore, the unlimited State guarantee as resulting from Sections 51 and 53 of the Act shall be abolished and replaced by provisions similar to those laid down in the Norwegian Limited Liability Companies Act ("*Aksjeloven*"). In particular, Section 53 of the Act is proposed to limit the State's responsibility up to the amount the State would receive in the course of the liquidation of the State enterprise. The amendments were proposed to enter into force as from 1 January 2003.

According to the Norwegian Government, the amendments would apply to all new loans raised by State-owned enterprises after the date of entry into force of the amendments to the Act on State Enterprises. The Norwegian Government stated that, according to Norwegian law, the amendments would not have retroactive effect on existing loan contracts, i.e. those contracts that had already been concluded at the date of entry into force of the amendments.

***c) Proposal for transitional arrangements (applicable as from 1 January 2003)***

As regards existing loans (i.e. those loan agreements entered into before the entry into force of the new regime), the Norwegian Government explained in the revised budget for 2002 that "*...it will be necessary to provide a State guarantee in connection with specific loans that were raised prior to the date on which the amendments enter into force or the conversion takes effect. The reason for this is that the Norwegian State must honour its indirect obligations to the State-owned enterprises' creditors.*"<sup>7</sup>

According to the Norwegian Government's proposal to amend the Act on State Enterprises (cf. *Ot. Prp. nr. 13 (2002-2003)*), the State's liability for all the State enterprises' obligations, entered into before the entry into force of the amended Act, shall not be limited pursuant to the amended Section 53. However, as regards obligations not related to specific loan agreements, the State's unlimited liability would seem to be limited to ten years from the entry into force of the amended Act. Finally, the proposal contains an explicit obligation for State enterprises benefiting from the transitional arrangements to pay an annual guarantee premium that would be fixed by the Norwegian Parliament.<sup>8</sup>

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<sup>7</sup> English translation provided by the Norwegian Government in the letter dated 24 October 2002.

<sup>8</sup> It should be recalled that the level of the premium was proposed by the Norwegian Government to be the same as the one applicable since 1 July 2002 (cf. Norwegian Government's proposal for State budget 2003).



## II. APPRECIATION

### 1. Review procedure regarding Act on State Enterprises pursuant to Chapter 7 of the Authority's State Aid Guidelines

Given that the Act on State Enterprises was adopted in 1991, and thus before the entry into force of the EEA Agreement, any aid contained in that Act must be regarded as 'existing aid' within the meaning of Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement, as well as point 7.2. (1), first indent, of Chapter 7 of the Authority's State Aid Guidelines.

The Authority initiated the procedure regarding existing aid by informing the Norwegian Government of its decision to initiate the review procedure and by asking the Norwegian Government to submit all relevant information (cf. the Authority's letter dated 11 April 2001). Furthermore, the Authority informed the Norwegian Government that it took the view that the provisions in the Act on State Enterprises implying an implicit State guarantee constituted incompatible aid (cf. the Authority's letter dated 19 June 2001). In that letter, the Authority gave the Norwegian Government the opportunity to submit its comments. Finally, the Competition and State Aid Directorate warned the Norwegian Government on several occasions that – in the absence of a satisfactory response to its requests for information, it would propose to the Authority to adopt appropriate measures (cf. the Authority's letters dated 19 June 2001 and 12 February 2002 and repeated at the meeting on 22 October 2002 in Oslo). The Competition and State Aid Directorate also informed the Norwegian Government that the measures adopted so far would not alter its view as regards the necessity to propose appropriate measures (cf. Authority's letter dated 19 November 2001).

Against this background, the Authority concludes that the procedure regarding the review of 'existing aid' was carried out in accordance with Chapter 7 of the Authority's State Aid Guidelines.

As regards the scope of assessment of possible aid under the Act on State Enterprises, the Authority would like to emphasise that the assessment of possible aid contained in the Act on State Enterprises is carried out by reference to the terms of the scheme itself, and not by reference to the application of the scheme to individual undertakings.

In this respect, the Authority points out that any aid resulting from the application of the Act on State Enterprises is to be regarded as aid under an 'aid scheme'. The qualification as an 'aid scheme' is based on the following considerations: the benefits resulting from the guarantee provided for in the Act on State Enterprises are open to all undertakings with public ownership and established as State Enterprises (cf. Section 1 of the Act on State Enterprises). Furthermore, the benefits resulting from the

guarantee are not linked to a specific project and are enjoyed by the undertakings in question for an indefinite period of time.<sup>9</sup>

Consequently, the measures necessary to bring the scheme in line with the EEA State aid rules must be determined by reference to the scheme as a whole (the Act on State Enterprises), and not by reference to specific undertakings. To the extent that the scheme under review potentially admits incompatible State aid, the scheme as a whole is not in line with the requirements of the EEA State aid rules. In such a case, appropriate measures are necessary in order to ensure that the scheme as a whole is modified so as to eliminate any possibility of incompatible State aid.

## **2. State aid within the meaning of Article 61(1) of the EEA Agreement in combination with Chapter 17 of the Authority's State Aid Guidelines**

Article 61(1) of the EEA Agreement provides that “*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*”.

Chapter 17 of the Authority's State Aid Guidelines outlines the Authority's approach to State aid granted in the form of guarantees. Reference is made to point 17.2.1(2) and (3), which reads as follows:

*“(2) The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. This carrying of a risk by the State should normally be remunerated by an appropriate premium. Where the State foregoes such a premium, there is both a benefit for the undertaking and a drain on resources of the State. Thus, even if no payments are ever made by the State under a guarantee, there may nevertheless be a State aid under Article 61(1) of the EEA Agreement. The aid is granted at the moment at which the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of State aid may be, must be assessed at the moment the guarantee is given.*

*(3) The EFTA Surveillance Authority also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability.”*

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<sup>9</sup> The elements referred to in this context are similar to those mentioned in Article 1 (d) of the EC “Procedural Regulation”, concerning the definition of ‘aid schemes’ (Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, published in the Official Journal L 83, 27.03.1999, p. 1-9).

Pursuant to point 17.4 (3) of Chapter 17 “*The EFTA Surveillance Authority considers that the fulfilment of all the following conditions ensures that a State guarantee scheme does not constitute State aid under Article 61(1) of the EEA Agreement:*

- (a) *the scheme does not allow guarantees to be granted to borrowers who are in **financial difficulty**;*
- (b) *the borrowers would in principle be **able to obtain a loan on market conditions** from the financial markets without any intervention by the State;*
- (c) *the guarantees are **linked to a specific financial transaction**, are for a fixed maximum amount, **do not cover more than 80% of each outstanding loan** or other financial obligation (except for bonds and similar instruments) and are **not open-ended**;*
- (d) *the terms of the scheme are based on **a realistic assessment of the risk** so that the **premiums paid** by the beneficiary enterprises make it, in all probability, self-financing;*
- (e) *the scheme provides for the terms on which future guarantees are granted and the overall financing of the scheme to be reviewed at least once a year;*
- (f) *the **premiums cover both the normal risks associated with granting the guarantee and the administrative costs of the scheme**, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.” (highlighted here)*

Point 17.4. (4) of Chapter 17 of the Authority's State Aid Guidelines clarifies that “*Failure to comply with any one of the above conditions set out in paragraphs 17.4.(2)-(3) does not mean that such guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or scheme does constitute State aid, it should be notified.*”

It is in light of these provisions that the Authority has assessed the Act on State Enterprises in its current form as well as the measures adopted and envisaged by the Norwegian Government in this context.<sup>10</sup>

**a) Act on State Enterprises (current guarantee regime)**

*(1) Effects of the guarantee conferred under Sections 4, 51 and 53 of the Act on State Enterprises on the State enterprises*

Pursuant to Sections 4, 51 and 53 of the Act on State Enterprises, the Norwegian State is – in the case of a dissolution of a State enterprise - under an obligation to cover losses incurred by State enterprises which cannot be covered by these enterprises’

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<sup>10</sup> The Authority would like to point out that the following assessment is mainly based on the information submitted by the Norwegian Government prior to 8 November 2002. This means that the concrete proposals for an amendment of the Act, as submitted by the Norwegian Government on 8 November 2002, could not be assessed in detail.

own funds. The State's obligation to satisfy all the State enterprise's outstanding claims provides creditors (financial institutions and other business partners) with an effective protection of its financial interests. This has consequences for the terms under which credit institutions are willing to provide the State enterprises with financial funds and under which other business partners are willing to deal with State enterprises. On the one hand, the State guarantee improves the creditworthiness of the State enterprises. The favourable credit rating results in enterprises organised under the Act benefiting from more favourable funding terms than they would have obtained otherwise. On the other hand, the guarantees may also provide State enterprises with a benefit in their commercial relations with other business partners.

Initially, the Norwegian Government had argued that in order to decide whether or not a certain State enterprise received benefits, which fell within the scope of Article 61(1) of the EEA Agreement, closer consideration must be given to whether the company effectively enjoyed advantageous financial conditions in contradiction to the market economy investor principle. The Norwegian Government maintained that, if a State enterprise was in a sound financial position and its earnings were satisfactory from a market economy investor point of view, the enterprise's legal form would, in general, have a negligible effect on its ability to obtain financing on terms comparable to those enjoyed by other commercial enterprises in a similar economic situation. The Norwegian Government submitted information which, in its view, demonstrated that all State enterprises were in a satisfactory economic situation (cf. letter dated 21 May 2001).

As regards these arguments, the Authority notes that the State's responsibility for the financial obligations of State enterprises in the case of dissolution pursuant to Sections 4, 51 and 53 of the Act covers all enterprises organised according to the Act, irrespective of the individual enterprise's financial situation. It follows from the general remarks above regarding the scope of the assessment as well as Chapter 17 of the Authority's State Aid Guidelines on State guarantees that guarantee schemes must be assessed with reference to the provisions of the scheme, since the specific circumstances of the individual cases are not known at the time the guarantee scheme is to be assessed (cf. point 17.3. (6) of Chapter 17 of the Authority's State Aid Guidelines). Consequently, the financial situation of each individual State enterprise at a given moment in time is irrelevant for the assessment of the scheme as such.

*(2) Assessment of the relevant provisions in the Act on State Enterprises in light of the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines*

The assessment of whether the guarantee provided for under the Act on State Enterprises contains aid within the meaning of Article 61 (1) of the EEA Agreement must be based on the provisions of the Act. It is with respect to the relevant provisions of the Act that the Authority has to assess whether the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines are fulfilled.

As already mentioned above, the Act on State Enterprises is applicable to all enterprises organised under that Act, irrespective of the financial situation of the individual State enterprise. Furthermore, it is noted that the Act on State Enterprises does not contain provisions which would ensure that undertakings in financial difficulties would not benefit from State guarantees or which would exclude that State guarantees would be granted in cases where the undertaking in question would not be able to obtain a loan on market conditions without the State guarantee.

In addition, the Authority observes that the guarantees as contained in the relevant sections of the Act on State Enterprises are not linked to a specific financial transaction and are not limited to 80% of each outstanding loan.<sup>11</sup> The Authority observes that the amount of loans covered by the Act on State Enterprises is limited in accordance with Section 5. Hence, the scope of the guarantee could be regarded as limited. However, this limitation applies only to loans taken and guarantees issued by the State enterprises. Other financial obligations entered into by the State enterprises are not subject to any limitations. In addition, the guarantee contained in the Act on State Enterprises is not limited in time. Consequently, the Authority regards the guarantee as open-ended. These circumstances are in contradiction with the conditions excluding the existence of aid, as laid down in the guidelines on State guarantees (cf. point 17.4 of Chapter 17 of the Authority's State Aid Guidelines as quoted above).

The Authority also notes that the Act on State Enterprises does not contain provisions requiring the State enterprises that benefit from the State guarantee to pay a market premium.

In light of the foregoing considerations, the Authority considers that the guarantee provided for under the Act on State Enterprises is not in conformity with the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines.

*(3) Assessment of the guarantee regime established under the Act on State Enterprises, including the introduction of a guarantee premium as from 1 July 2002 under Chapter 17 of the Authority's State Aid Guidelines*

The Norwegian Government claimed that, with the introduction of the guarantee premium, the State aid element contained in the Act and State Enterprises had been eliminated.

The guidelines require, in Chapter 17, that the State receive a market premium for the guarantee in question. In this respect, the Authority has doubts whether a guarantee covering the totality of a company's financial obligations, such as the guarantee provided for under the Act on State Enterprises, exists on the market. Consequently, the Authority has doubts as to whether it is possible at all to establish a guarantee

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<sup>11</sup> The 80%-requirement does not apply to bonds and similar instruments. However, given that the guarantee scheme is not limited to bonds, this requirement cannot be regarded as satisfied.

premium for the guarantee in question which could be regarded as the “market premium” as required by the provisions in Chapter 17 of the Authority's State Aid Guidelines.

In this context it should be mentioned that the Norwegian Government's efforts to eliminate elements of aid by removing the benefit from those undertakings benefiting from the implicit guarantee as reflected in the favourable lending terms, do not take into consideration the possible beneficial effects of the guarantee as regards the State enterprises' financial obligations other than those related to specific loan agreements. The premium determined by the Norwegian authorities, therefore, does not reflect the risks taken by the Norwegian Government with respect to other financial obligations entered into by the State enterprises.

Furthermore, the Authority observes that the level of premiums was established without a proper risk assessment related to individual loans.<sup>12</sup> The efforts undertaken by the Norwegian authorities were limited to obtaining estimates on the general creditworthiness and lending terms of other utility undertakings without a State guarantee compared to that of Statkraft. This analysis clearly gives an indication of the range of benefit enjoyed by the undertaking in question. This approach does not, however, exclude aid provided for under the Act in relation to individual loans.

Based on the following considerations and as the Authority's services have pointed out on various occasions, the Authority takes the view that, even though the introduction of a guarantee premium has certainly reduced the aid element due to beneficial lending terms with respect to some of the enterprises organised under the Act on State Enterprises<sup>13</sup>, the obligation imposed on certain State enterprises to pay a guarantee premium cannot ensure that the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines are fulfilled with respect to the Act on State Enterprises as an aid scheme.

#### *(4) Conclusions – State aid within the meaning of Article 61 (1) of the EEA Agreement*

The Authority therefore has concluded that the implicit State guarantee contained in Sections 4, 51 and 53 of the Act on State Enterprises confers a financial benefit to those enterprises organised under that Act.

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<sup>12</sup> The Authority notes that, contrary to what the Norwegian Government stated in the fax from the Ministry of Trade and Industry dated 19 April 2002, the information submitted by the Norwegian authorities does not bear witness to a determination of the guarantee premium for each individual loan.

<sup>13</sup> The Authority would, however, like to point out that the obligation to pay a guarantee premium was introduced only for certain State enterprises and not with respect to all enterprises covered by and within the scope of the Act on State Enterprises. The Authority has not received verifiable information showing that other State enterprises did not benefit from favourable lending terms as a result of the guarantee.



The State guarantee pursuant to Sections 4, 51 and 53 is, in principle, open to all enterprises falling within the scope of the Act as defined in Section 1. The definition of the scope of the Act is not confined to enterprises which do not carry out economic activities or which do not operate in competition with other undertakings within the EEA. Consequently, the guarantee provided for under the Act on State Enterprises may favour certain undertakings and may distort or threaten to distort competition and affect trade between Contracting Parties.

In light of the foregoing considerations and the information submitted, the Authority is of the opinion that the Sections 4, 51 and 53 of the Act and State Enterprises imply State aid within the meaning of Article 61(1) of the EEA Agreement. As explained above, and given the absence of mechanisms ensuring compliance with the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines, the Authority is of the opinion that the aid element contained in these provisions has not been removed through the introduction of a guarantee premium for certain undertakings as from 1 July 2002.

***b) Proposed amendments to the Act on State Enterprises (i.e. abolishment of unlimited State guarantee for new obligations as from 1 January 2003)***

The Authority takes note of the Norwegian Government's proposal to repeal the guarantee resulting from Sections 4, 51 and 53 of the Act on State Enterprises with effect from 1 January 2003. This would, in the Authority's understanding, imply that the implicit guarantee covering the totality of the financial obligations of the State enterprises would, in principle, be abolished from that date. However, given that the Norwegian Government also proposed transitional arrangements for existing obligations entered into by the State enterprises prior to the entry into force of the amended Act, the proposal (including the transitional arrangements) implies in reality only that any new obligations would be entered into by the State Enterprises after the entry into force of the amended Act without State guarantee, whereas for existing obligations, the State guarantee in its current form would continue.<sup>14</sup>

In order to abolish all elements of aid resulting from the guarantee as laid down in Sections 4, 51 and 53 of the Act on State Enterprises, other amendments both in the Act itself and in other legal acts might be necessary. The Authority takes note that the Norwegian Government has proposed such additional amendments.

The Authority would like to point out that, due to the late submission of the text of the proposal (cf. letter dated 5 November 2002)<sup>15</sup>, it has not been possible for the Authority to assess the proposal in detail under the EEA State aid provisions.

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<sup>14</sup> For an assessment of the transitional arrangements regarding existing obligations, see next section.

<sup>15</sup> The Authority points out that even though it had asked the Norwegian authorities repeatedly to submit detailed information about the envisaged amendments, in particular since April 2002, the information was submitted as late as 8 November 2002, at a stage when the Authority's services had finalised its assessment of the Act on State Enterprises.

Therefore, the Authority cannot ascertain, at this stage, that the proposed amendments actually eliminate all elements of aid contained in the Act on State Enterprises in relation to the State guarantee.<sup>16</sup>

***c) Proposed transitional arrangements (i.e. maintenance of guarantee for existing loans and other obligations entered into before 1 January 2003)***

Initially, the Norwegian authorities had informed the Authority that after 1 January 2003 guarantees would be granted and guarantee premiums would be determined in relation to individual loans (cf. letter dated 19 April 2002 and statements in revised State budget 2002). However, the information submitted by the Norwegian Government in the subsequent course of the review procedure showed that this approach was not adopted when designing the transitional arrangements as eventually proposed to the Norwegian Parliament.

By letter dated 5 November 2002, the Norwegian Government informed the Authority of the proposal to introduce transitional arrangements regarding all the State enterprises' existing obligations, not only for those obligations linked to specific loan agreements. The Authority also notes that the calculation of the guarantee premium was not revised so as to ensure that premiums are determined in relation to individual loans.

Based on the proposal for transitional arrangements presented to the Norwegian Parliament on 25 October 2002 and on the Government budget proposal for 2003, it appears that for all existing obligations the current guarantee regime is maintained. Therefore, the Authority's concerns regarding incompatibility of the guarantee provided for under the current Act on State Enterprises are equally valid for the proposed transitional arrangements.

The Authority notes that the Norwegian authorities have not submitted information which would have demonstrated that the transitional arrangements as proposed by the Norwegian Government are necessary and justifiable.

In its submissions, the Norwegian Government referred to certain circumstances which could explain the reasons for discarding the possibility of re-negotiations of existing loans and for introducing transitional arrangements (cf. letter dated 24 October 2002). However, the Norwegian authorities have not provided sufficiently detailed explanations about the legal consequences of and possible restrictions under Norwegian law with respect to the abolishment of the State guarantee for existing loans which could have been relevant for the Authority's assessment of the necessity for transitional arrangements. The Authority also observes that it has not received any

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<sup>16</sup> A detailed assessment of the proposal presented to the Norwegian Parliament on 25 October 2002 will be carried out by the Authority after the adoption of appropriate measures.

information regarding the necessity for transitional arrangements for existing obligations other than those related to specific loan agreements.

Therefore and based on information in its possession, the Authority cannot conclude that the transitional arrangements envisaged by the Norwegian authorities are acceptable under the EEA State aid rules.

### **3. Compatibility of the aid with the functioning of the EEA Agreement**

The Norwegian Government has not submitted any arguments regarding a possible justification of any aid resulting from the State guarantee contained in Sections 4, 51 and 53 of the Act on State Enterprises under Article 59 (2) or 61 (2) or (3) of the EEA Agreement. The Authority considers such aid to constitute ‘operating aid’ not normally allowed under the EEA State aid rules. The Authority is not in possession of information which would have allowed it to conclude that any aid granted under the Act on State Enterprises could be regarded as compatible with the functioning of the EEA Agreement. The Authority therefore concludes that any aid contained in the Act on State Enterprises would be incompatible with the functioning of the EEA Agreement.

### **4. Conclusions**

In view of the foregoing considerations, the Authority deems that the State guarantee pursuant to Sections 4, 51 and 53 of the Act on State Enterprises constitutes existing aid which is regarded as being incompatible with the functioning of the EEA Agreement.

The Authority takes note of the Norwegian Government’s proposal to repeal the unlimited State guarantee contained in the above-mentioned Sections in the Act on State Enterprises with effect from 1 January 2003. However, the Authority observes that, given the late submission of the proposed amendments to the Act on State Enterprises, it could not assess in detail whether these amendments abolish all elements of aid due to guarantees under the Act on State Enterprises. Furthermore, the Norwegian Government has not submitted a proper justification of the proposed transitional arrangements with respect to the State enterprises’ existing obligations. Therefore, the Authority considers it necessary, pursuant to point 7.4.2. of Chapter 7 of the Authority’s State Aid Guidelines, to propose to the Norwegian Government appropriate measures consisting of the abolishment of any incompatible aid contained in the Act on State Enterprises.

Given that the Authority expressed its views regarding the incompatibility of the guarantees in question already in June 2001, the Authority considers that any incompatible aid contained in the Act on State Enterprises should be abolished with effect from 1 January 2003.

This implies that as from that date, undertakings organised under the Act on State Enterprises should no longer benefit from State guarantees which do not comply with the conditions established in Chapter 17 of the Authority's State Aid Guidelines. Given that the guarantee provided for under the Act on State Enterprises constitutes 'existing aid', the Authority's decision does not require the Norwegian State to recover benefits the State enterprises enjoyed in the past, but rather to abolish advantages resulting from the State guarantee for the future. On the other hand, the proposal to abolish incompatible aid for the future applies to both new and existing loans and other obligations entered into by State enterprises, unless the Norwegian government demonstrates any transitional arrangements for existing obligations are objectively necessary and justified.

The Norwegian Government is asked to inform the Authority of the measures taken to implement the proposal for appropriate measures.

Finally, the Authority draws the Norwegian Government's attention to point 7.4.3. (2) of Chapter 7 of the Authority's State Aid Guidelines. Pursuant to this provision, the Authority may require Norway to comply with the proposed appropriate measures through the procedure under Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement should the Norwegian Government decline to carry out the appropriate measures.

**HAS ADOPTED THIS DECISION:**

1. Pursuant to Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement, the Authority proposes to the Norwegian Government the following appropriate measures:
  - a) The Norwegian authorities shall take any legislative, administrative and other measures necessary to eliminate any incompatible aid resulting from Sections 4, 51 and 53 of the Act on State Enterprises. Any such aid should be abolished with effect from 1 January 2003, unless the Authority agrees to a later date, should that be considered objectively necessary and justified by the Authority.
  - b) The Norwegian Government shall communicate to the Authority the relevant measures it will take to discontinue the aid as soon as possible and in any event not later than six weeks from receipt of this proposal.
2. The Authority asks the Norwegian Government to agree to this proposal for appropriate measures, pursuant to point 7.4.2. (2) of Chapter 7 of the Authority's State Aid Guidelines, and to provide the answer within six weeks from receipt of this proposal.

Done at Brussels, 4 December 2002.

For the EFTA Surveillance Authority

Einar M. Bull  
President

Hannes Hafstein  
College Member