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EFTA SURVEILLANCE AUTHORITY DECISION

Of 9 April 2003

to amend the Authority's 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 Area¹, 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 Justice², in particular to Article 24 and Protocol 3³ thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid⁴, and in particular Chapter 17⁵ thereof,

WHEREAS:

I. FACTS

1. Procedure

On 4 December 2002, the Authority adopted a decision to propose appropriate measures to Norway with regard to State aid in the form of guarantees under the Act on State Enterprises (Dec. No. 236/02/COL).

¹ Hereinafter referred to as the 'EEA Agreement'.

² Hereinafter referred to as the 'Surveillance and Court Agreement'.

³ Protocol 3 to the Surveillance and Court Agreement was amended by Agreement amending Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, signed on 10 December 2001. The amendment entered into force on 1 February 2003.

⁴ 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. 264/02/COL of 18 December 2002, not yet published; hereinafter referred to as the 'Authority's State Aid Guidelines'.

⁵ Guidelines regarding the assessment of State guarantees.

This decision was communicated to the Norwegian Government by letter on that same day (Doc. No. 02-8603-D), which was also communicated to the Norwegian Mission to the European Union by fax on that same day. The Authority requested the Norwegian Government to 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 the decision. The Norwegian Government was further asked to agree to the proposal for appropriate measures and to provide the answer within six weeks from receipt of the decision (i.e. 16 January 2003).

At a meeting, which took place between representatives from the Norwegian Government and the Authority's Competition and State Aid Directorate on 9 January 2003 in Brussels, the Norwegian authorities outlined the envisaged measures to be taken in order to comply with the proposed appropriate measures.

By letter from the Ministry of Trade and Industry dated 16 January 2003, received by fax and registered by the Authority on that same day (Doc. No. 03-254-A), the Norwegian Government informed the Authority of the measures that it intended to take in order to implement the appropriate measures as proposed by the Authority. Since the process of establishing which measures needed to be taken was not yet finalised, the Norwegian Government asked the Authority for an extension of the deadline for communicating the relevant implementing measures as well as for signifying the Norwegian Government's agreement to the proposed appropriate measures until 16 February 2003.

The response from the Ministry of Trade and Industry dated 16 January 2003, including attachments, was received and registered by the Authority on 20 January 2003 (Doc. No. 03-343-A).

By letter dated 24 January 2003 (Doc. No. 03-478-D), the Authority acknowledged receipt of the information submitted. It also informed the Norwegian Government that, in light of the efforts undertaken by the Norwegian Government with a view to implementing the appropriate measures, the Authority agreed to an extension of the deadline until 16 February 2003.

By letter from the Ministry of Trade and Industry dated 19 February 2003, received and registered by the Authority on 21 February 2003 (Doc. No. 03-994-A), the Norwegian Government submitted supplementary information. In particular, it informed the Authority that the guarantees for existing financial obligations not linked to specific loans would be abolished as soon as possible. However, the removal of the guarantees would require a decision by the Norwegian Parliament which could not take effect as of 1 January 2003. Otherwise, the Norwegian Government signified its agreement to the proposed appropriate measures.

By letter dated 14 March 2003 (Doc. No. 03-1560-D), the Authority acknowledged receipt of this letter and informed the Norwegian Government that the Authority would proceed by amending the Authority's initial decision to propose appropriate measures in light of the information submitted by the Norwegian Government.

2. Authority's decision to propose appropriate measures

In its decision of 4 December 2002, the Authority concluded that the provisions in Sections 4, 51 and 53 of the Act on State Enterprises, which exempted State enterprises from the normal bankruptcy proceedings and resulted in the Norwegian State being ultimately liable for outstanding claims of State enterprises, provided undertakings organised under this Act with an unlimited State guarantee. Having found the State guarantee to constitute an exiting aid scheme which was regarded as being incompatible with the functioning of the EEA Agreement, the Authority proposed, as an appropriate measure, to abolish any such aid with effect from 1 January 2003.

The Authority took the view that, despite the introduction of a guarantee premium for certain State enterprises as of 1 July 2002, the conditions laid down in Chapter 17 of the Authority's State Aid Guidelines could not be regarded as being fulfilled with respect to the Act on State Enterprises as an aid scheme.

In this context the Authority observed, in particular, that the level of premiums was established without a proper risk assessment related to individual loans. In addition, the Authority noted that the method of determining a guarantee premium did not take into account possible beneficial effects of the guarantee as regards the State enterprises' financial obligations other than those related to specific loan agreements.

The Authority took note of the Norwegian Government's proposal to repeal the unlimited State guarantee contained in Sections 4, 15 and 53 of the Act on State Enterprises with effect from 1 January 2003. However, the Authority observed that, given the late submission of the proposed amendments to the Act on State Enterprises, it could not assess in detail whether these amendments abolished in fact all elements of aid due to guarantees under the Act on State Enterprises.

As regards the proposed transitional arrangements which consisted in maintaining the guarantee regime with respect to the State enterprises' existing obligations (i.e. those obligations entered into before 1 January 2003), the Authority considered that a possible justification of such measures had not been sufficiently demonstrated by the Norwegian authorities.

The Norwegian Government was requested to communicate to the Authority, as soon as possible and in any event not later than six weeks from receipt of the decision, the relevant measures the Norwegian Government would take to discontinue the aid.

Furthermore, the Authority asked the Norwegian Government to agree to the proposal for appropriate measures and to provide the answer within six weeks from receipt of the Authority's proposal (i.e. not later than 16 January 2003).

3. Measures taken by Norway in order to implement the appropriate measures

It should be recalled that the Norwegian Government presented on 25 October 2002 a proposal to the Norwegian Parliament regarding an amendment of the Act on State Enterprises (*Ot.prp.nr. 13 (2002-2003)*). After the Authority adopted its decision to propose appropriate measures, the Norwegian Parliament adopted, on 16 December 2002, the amendments as proposed by the Norwegian Government (cf. *Besl.O.nr.43 (2002-2003)*).

a) 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)

The provisions in Sections 51 and 53 of the Act on State Enterprises, which stipulated that the Norwegian State was liable for obligations undertaken by State enterprises if the enterprise was dissolved and claims could not be honoured by the State enterprises' own funds, have been repealed. The new Section 51 is formulated in line with the provisions applicable to limited liability companies. The new Section 53 states that the State will be responsible for claims that are not met up to the value of what the State will receive from the dissolution of the enterprise. This is in line with the provisions under the Limited Liability Companies Act. The provision in Section 4, which exempted State enterprises from the normal bankruptcy proceedings, was also repealed. Thus, creditors have to protect their interests under the normal rules on liquidation and debt settlement proceedings in the Insolvency Act. A new Section 4 is inserted which states that the State bears no liability to the creditors for the company's obligations. The State undertakes not to contribute to the enterprise or, where applicable, its property in liquidation over and above that set in the memorandum of association or a resolution to increase the contributed capital. Thereby, the new provision in the Act on State Enterprises clarifies that the State assumed only limited liability.

In addition, other provisions in the Act on State Enterprises were amended as a consequence of the abolishment of the State's unlimited guarantee and the exemption from insolvency legislation.

These amendments entered into force on 1 January 2003.

b) Maintenance of guarantees for existing loan obligations and payment of guarantee premium

According to the transitional arrangements contained in the Act amending the Act on State Enterprises, the guarantee regime (i.e. the State's unlimited liability with respect to creditor's claims) will continue with respect to all obligations linked to specific loans taken up by State enterprises before 1 January 2003. This means that the State continues to be liable for obligations that have not been met through liquidation proceedings. Creditors will be able to petition for liquidation of the enterprise under the Insolvency Act. It is further stated that where the State meets such claims, the State becomes a party in the creditor's claim against the State enterprise.

The transitional arrangement also stipulates that the State enterprises are to pay an annual premium for the enterprises' benefits from the State's liability under the continued guarantee regime. This premium will be set by the Norwegian Parliament.

The Norwegian Government informed the Authority that new guarantee premiums for Statkraft and Statnett, two of the enterprises organised under the Act on State Enterprises, would be proposed by the Norwegian Government to the Parliament in the context of the Revised National Budget of 2003. The introduction of these new guarantee premiums would take retroactive effect as from 1 January 2003. The Norwegian Government informed the Authority that other State enterprises had not taken up bonds or bank loans on the market.

The Norwegian Government asked the Norwegian investment bank, First Securities, to calculate the guarantee premium for each existing loan taken up before 1 January 2003, expressed as the difference between the interest actually paid by Statkraft and Statnett on their loans and the estimated interest on loans these enterprises would have had to pay if they had not benefited from the implicit guarantee resulting from their organisational form as State enterprises at the time the loans were raised.

The method chosen by First Securities was to give both companies a credit rating which was believed to be appropriate in the absence of the State guarantee. Based on this credit rating, First Securities looked into trading statistics for the particular rating category in the relevant sector abroad. Where available, trading statistics for specific companies which were regarded as being comparable to the State enterprise in question were used.

Based on the findings of the assessment carried out by First Securities, a basic premium fixed as the calculated interest difference as described above would be established for each loan until maturity. The Norwegian Government also informed the Authority that extra premiums might be added to this basic premium.

c) Proposal to abolish guarantee for existing obligations other than loan obligations

In the Norwegian Government's proposal for an amendment of the Act on State Enterprises of October 2002 as adopted by the Norwegian Parliament in December 2002, the transitional arrangements also foresaw that for obligations that are not linked to actual loan agreements the State's liability would continue for a further ten years after the entry into force of the act (i.e. 1 January 2003).

Following the adoption of appropriate measures and a bilateral meeting between representatives from the Norwegian Government and the Authority's Competition and State Aid Directorate on 9 January 2003, the Norwegian Government informed the Authority of its decision to repeal the continued State guarantee for obligations that are not linked to specific loans. The Norwegian Government would, as soon as possible, submit to the Norwegian Parliament a proposal to amend the Act on State Enterprises. The Norwegian Government would request the Norwegian Parliament to handle the matter as soon as possible.

II. APPRECIATION

1. Measures taken by Norway in order to implement the appropriate measures

a) 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)

The Authority takes note that the amendments made to the Act on State Enterprises (cf. *Ot.prp.nr. 13 (2002-2003)* and *Besl.O.nr.43 (2002-2003)*) result in that the Norwegian State's liability for claims against State enterprises will correspond to the owner's liability with respect to claims of a limited liability company.

In this respect, the Authority takes particular note of the statement made by the Norwegian Government in the explanatory notes to new Section 12 of the Act on State Enterprises that any future increase of capital in the State enterprises would have to be in line with the behaviour of a market economy investor.

b) Maintenance of guarantees for existing loan obligations and payment of guarantee premium

The Authority takes note of the Norwegian Government's decision to introduce a revised premium as from 1 January 2003 with respect to the continued State guarantee on existing loan obligations to the benefit of Statkraft and Statnett, and to submit a proposal to the Norwegian Parliament in the context of the Revised National Budget for 2003.

In this context, the Authority notes in particular that the premium which will have to be paid by these enterprises was determined based on an assessment of the benefits resulting from the State guarantee with respect to each individual loan.

c) Proposal to abolish guarantee for existing obligations other than loan obligations

The Authority takes note of the Norwegian Government's decision to abolish the State guarantee for existing obligations of State enterprises not linked to specific loans and to submit a proposal to the Norwegian Parliament as soon as possible. With the abolishment of the State guarantee, any possible financial benefits resulting from these guarantees would be eliminated.

The Authority takes note of the Norwegian Government's explanation regarding the required legislative process. Given the time required to finalise this process with a view to abolishing the guarantees for existing non-loan obligations, the Authority accepts a postponement of the initial deadline of 1 January 2003.

2. Conclusions

Given that the abolishment of the guarantee for existing obligations other than obligations linked to specific loans requires a Parliamentary decision which could not take effect as from 1 January 2003, the Authority considers that the time limit set for complying with the appropriate measures as proposed in its decision of 4 December 2002 should be extended to the time necessary to terminate the legislative process.

HAS ADOPTED THIS DECISION:

1. Pursuant to Article 1 (1) of Part I as well as Article 18 of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority proposes to the Norwegian Government the following amended appropriate measures:
 - a) The Norwegian authorities shall take, without delay, 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, with the exception of the continued application of these provisions with respect to State enterprises' financial obligations not linked to specific loans and which existed prior to 1 January 2003. With respect to the latter, the abolishment of the State guarantee resulting from Sections 4, 51 and 53 of the Act on State Enterprises shall take effect as soon as the required legislative process concerning the abolishment of the State guarantee has been finalised, in any event not later than 31 July 2003.

- b) The Norwegian Government shall communicate to the Authority the legislative, administrative or other proposals regarding the abolishment of the aid referred to under point 1. a) of this decision as soon as possible and in any event not later than 30 June 2003.
2. The Authority asks the Norwegian Government to agree to this proposal for appropriate measures and to inform the Authority thereof, within one month from receipt of this proposal, pursuant to Article 19 (1) of Part II of Protocol 3 to the Surveillance and Court Agreement.

Done at Brussels, 9 April 2003.

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member