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# *EFTA SURVEILLANCE AUTHORITY*

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## EFTA SURVEILLANCE AUTHORITY DECISION

OF 10 JULY 1996

ON CLOSURE OF A COMPLAINT ON ALLEGED STATE AID TO STATKRAFT ANLEGG AS  
AND THE PROCUREMENT PRACTICE OF STATKRAFT SF

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area<sup>1</sup>, in particular to Articles 61 to 63, Article 65 and Protocols 26 and 27 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 Article 1 of Protocol 3 thereof,

WHEREAS:

### **I. FACTS**

#### **1. The complaint**

By letter dated 29 June 1994 received on 30 June 1994 (ref. 94-9772 A) the EFTA Surveillance Authority received a complaint from the Norwegian law firm Thommessen Krefting Greve Lund on behalf of client<sup>3</sup> requesting the Authority to examine whether the Norwegian state owned construction company Statkraft Anlegg AS was receiving financial support in violation of Article 61 EEA. The complainant was informed by letter of 16 August 1994 (ref. 95-12058 D) that the complaint had been registered and that it was being examined by the Authority's Competition and State Aid Directorate. The complainant later supplied further background information to the Authority

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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>The client has informed the Authority that he wishes to remain anonymous.

The Authority requested by letter of 25 September 1995 (ref. 95-4889 D) the Norwegian authorities to comment on the complainant's allegations, and to submit certain other information concerning i.a. the financial relations between the parent company, Statkraft SF, and Statkraft Anlegg AS. The requested information was submitted from the Norwegian authorities by letter of 23 October 1995 received on 24 October 1995 (ref. 95-6153 A).

The complainant considers that certain low contract prices offered by Statkraft Anlegg AS are due to intra group financing between Statkraft Anlegg AS and the parent company - Statkraft SF - which may constitute State Aid in violation of Article 61 EEA.

The complainant is, in addition, concerned whether Statkraft SF is awarding construction contracts to Statkraft Anlegg AS without any competition.

## **2. Statkraft Anlegg AS**

Statkraft Anlegg AS was established in July 1993 as a fully-owned subsidiary of Statkraft SF. Prior to July 1993, Statkraft SF carried out construction activities under its own management. According to Statkraft SF, Statkraft Anlegg AS was established in order to make construction operations more efficient, and to exploit considerable hydropower know-how commercially, particularly in the international market.

The parent company - Statkraft SF - is wholly owned by the Norwegian Government and is organised as a state-owned enterprise ("*statsforetak*"), represented by the Ministry of Industry and Energy, but run as an ordinary company with administrative and financial freedom<sup>4</sup>. Under the Act on State-owned Enterprises, liquidation proceedings cannot be instituted in relation to Statkraft SF, nor can petitions be filed for debt settlement proceedings. The State is liable to the company's creditors. A state enterprise can only be owned by the Central Government.

Statkraft SF is Norway's largest and the Nordic countries' second largest producer of electricity. It runs 48 power stations with a total production capacity of 8,600 MW and has ownership stakes in a further 38 power stations. The average annual production is 33 TWh, which is nearly a third of Norway's electricity production. Other subsidiaries to Statkraft SF are Statkraft Engineering AS and Finnmark Energiverk AS. The latter was acquired in 1994.

Statkraft Anlegg AS was established as a limited liability company with NOK 25 million in share capital, and NOK 25 million in loan capital (subordinated loan) from Statkraft SF. According to the Norwegian authorities, Statkraft Anlegg AS

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<sup>4</sup> Statkraft Annual Report 1994

purchased when the company was formed, construction machinery and stocks from Statkraft SF at prices based on external evaluation<sup>5</sup>.

The annual report of Statkraft Anlegg AS shows that by 31 December 1994 the company had an equity capital of NOK 51.2 million and approximately NOK 195 million in total assets. The parent company did not take out any dividend in the years 1993 and 1994. Strengthening Statkraft Anlegg AS' capital base was, according to Statkraft SF, justified with reference to the company's strategic objective of competing for large assignments.

The loan from Statkraft SF to Statkraft Anlegg AS of NOK 25 million referred to above is subordinate to other loans. The loan has a duration of 10 years and carries an agreed interest rate based on Statkraft SF's average borrowing costs plus 3 per cent (1993: 10.00 per cent and 1994: 9.25 per cent). It is convertible into share capital.

Statkraft Anlegg AS is located at the head office of the parent company, from which it rents space and buys special services on commercial terms. Statkraft Anlegg AS is according to the Norwegian authorities fully charged for the provision of such services.

According to the Norwegian authorities, Statkraft Anlegg AS' lines of guarantees and credit<sup>6</sup> are established with Norwegian and international banks, and insurance companies on commercial terms.

Statkraft Anlegg AS aims at being a medium-sized construction firm specialized in hydro-power construction. Other target areas are infrastructure development, industry, oil, gas, water supply and defence structures. In 1995 the company employed 300 persons of whom 90 were staff.

The total Norwegian market for construction work is NOK 18 billion<sup>7</sup>, of which energy projects constitute approximately NOK 2 billion. Statkraft Anlegg AS' domestic market shares have been estimated to respectively 2 % of the total market and 15 % of the market for energy construction projects.

The table below gives an overview of the 1994 sales figures (in NOK millions) by the major Norwegian construction companies ranked according to their sales volumes<sup>8</sup>.

Company	Sales 1994
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<sup>5</sup> Letter from Statkraft SF to the Ministry of Industry and Energy of 13 October 1995.

<sup>6</sup> Apart from certain contractor guarantees from Statkraft SF, which according to information provided by the Norwegian authorities are granted in accordance with normal practice in the construction sector.

<sup>7</sup> According to estimates from the Ministry of Industry and Energy provided in October 1995.

<sup>8</sup> Source: Ministry of Industry and Energy

Selmer	3'447
Veidekke	3'161
Norwegian Contractors	2'859
Eeg-Henriksen	2'035
KCC	1'286
Nodest	618
A/S Anlegg	409
Statkraft Anlegg AS	290

## II. APPRECIATION

### State aid

The complainant has requested the Authority to examine whether the financial relations between Statkraft Anlegg AS and the parent company, Statkraft SF, constitute a breach of Article 61(1) EEA. The Authority is therefore obliged to examine whether State aid in the meaning of Article 61(1) has been involved.

It emerges clearly from the information provided by the Norwegian authorities that the formation of the Statkraft Anlegg AS, whereby Statkraft SF awarded NOK 25 million in equity capital and a further NOK 25 million in the form of a subordinate convertible loan, took place on 1 July 1993, i.e. before the entry into force of the EEA Agreement.

Neither the EEA Agreement nor the Surveillance and Court Agreement confer any competence to the Authority to decide on State aid which is deemed to have been granted before the entry into force of the EEA Agreement.

The question whether State aid was involved and the possible compatibility of any possible State aid related to the financial transfers between Statkraft SF and Statkraft Anlegg AS when Statkraft Anlegg AS was formed, may consequently not be decided upon by the EFTA Surveillance Authority.

The Authority has noted that the parent company did not take out any dividend from Statkraft Anlegg AS for the years 1993 and 1994.

The relevant rules for assessment are to be found in Chapters 19 and 20 of the Procedural and Substantive Rules in the Field of State Aid adopted by the Authority on 19 January 1994 (State Aid Guidelines). These rules clarify under which circumstances the financial relations between the State and public enterprises may be considered to involve aid, in accordance with the so-called "market economy investor principle". According to this principle, State aid is considered to be involved when the State provides finance to a company in circumstances that would not be acceptable to an investor operating under normal market conditions. It must be emphasized that, for capital injections, the assessment of whether or not State aid is involved must be made with reference to information available at the time when an investment decision is made.

If the State forgoes dividend income from a public enterprise and the resultant retained profits do not earn a normal rate of return as defined in section 20.7.4. of State Aid Guidelines, then the company in question is effectively being subsidised by the State. It may well be that the State sees it as preferable for reasons not connected with commercial considerations to forgo dividends (or accept reduced dividend payments), rather than make regular capital injections into the company. The end result is the same, and this regular "funding" has to be

treated in the same way as new capital injections and evaluated in accordance with the principles set out in section 20.7.1 of the State Aid Guidelines.

The EFTA Surveillance Authority understands that a wide margin of judgement must come into investment decisions. The market economy investor principle has, however, to be applied by the EFTA Surveillance Authority when it is beyond reasonable doubt that there is no plausible explanation for the provision of public funds other than considering them as State aid. This principle must also be applied to any cross-subsidisation by a profitable part of a public group of enterprises to an unprofitable part. Such cross-subsidisation is seen as aid only where the EFTA Surveillance Authority considers that there is no alternative reasonable explanation for the flow of funds other than that they constituted aid.

The Authority has noted that the Statkraft Anlegg AS recorded a profit of respectively NOK 12 million and NOK 14 million in 1993 and 1994. The company does, therefore, not have any loss-making record. The Authority has, in addition, compared the solvency ratios<sup>9</sup> of Statkraft Anlegg for 1993 and 1994 with other major Norwegian construction enterprises. The comparison has shown that by retaining the operating profits for 1993 and 1994, the company attained a solvency ratio comparable to a number of its Norwegian competitors. The Authority considers, therefore, that there may be reasonable explanations for the provision of equity capital in the form of retained profits other than considering these retained profits as State aid, i.a. the one given by Statkraft SF referring to the need to strengthen the company's capital base in order to be in a position to compete for large assignments.

The Authority can, therefore, not conclude that Statkraft SF's decision not to take out dividend from Statkraft Anlegg AS in its first two years of operation and thus to strengthen Statkraft Anlegg AS' capital base constitutes State aid in the meaning of Article 61(1) EEA. The Authority has otherwise not found anything to indicate any awards of unlawful aid to Statkraft Anlegg AS.

### Public procurement

The complainant indicates that Statkraft SF on several occasions awarded works contracts directly to Statkraft Anlegg, i.e. without competition. However, the complaint is dated 5 July 1994, i.e. before the Act referred to in Point 4 of Annex XVI to the EEA Agreement ("Council Directive 93/38/EEC of 14 June 1993 co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.") entered into force with regard to Norway, on 1 January 1995. As of that date, Statkraft SF had to comply with the procedures of the Act when awarding, inter alia, works contracts above 5 million ECU.

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<sup>9</sup> Measured as the ratio between shareholders' funds and a company's total assets.

In the letter from the Norwegian Ministry of Industry and Energy received by the Surveillance Authority on 24 October 1995, the Ministry writes that "After 1 January 1995, Statkraft SF states that all purchasing at Statkraft has been in accordance with the EEA Agreement's rules for public procurement related to the utilities sector".

As the Surveillance Authority has no information indicating that the general procurement practise of Statkraft SF is not in compliance with the EEA rules on public procurement, the Authority has found no legal basis for pursuing the procurement part of the complaint.

### Conclusions

The EFTA Surveillance Authority's examination has not revealed anything to indicate any violation of Article 61(1) EEA or the EEA rules on public procurement. A decision may therefore be taken to conclude the examination of the complaint without proposing any further action.

### **HAS ADOPTED THIS DECISION:**

1. The EFTA Surveillance Authority has decided to close its investigation of the complaint lodged with the Authority on 30 June 1994 (ref. no. 94-9772 A) concerning alleged State aid to Statkraft Anlegg AS and the procurement practice of Statkraft SF without proposing any further action.
2. The complainant and the Norwegian Government are to be informed by letters stating the relevant findings of the EFTA Surveillance Authority's examination.
3. The European Commission is informed in accordance with Protocol 27 (d) of the EEA Agreement by means of a copy of the letter to the Norwegian Government.

Done at Brussels,

For the EFTA Surveillance Authority

Knut Almestad  
President

Björn Friðfinnsson  
College Member