EFTA SURVEILLANCE AUTHORITY

Brussels, 31 July 2006
Case No: 2029
Event No: 382834

CERTIFIED
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OF THE ORIGINAL

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

APPLICATION

Submitted, pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, by the

EFTA SURVEILLANCE AUTHORITY

represented by Niels Fenger, Director, Per Andreas Bjørgan and Arne T. Andersen, Senior Officers, in the Department of Legal & Executive Affairs, acting as Agents

AGAINST

THE KINGDOM OF NORWAY

Seeking an order from the EFTA Court that the Kingdom of Norway, by maintaining in force measures as laid down in Act No 16 of 14 December 1917 relating to acquisition of waterfalls, mines and other real property etc. which grant a time limited concession for the acquisition of waterfalls for energy production, with an obligation to surrender all installations to the Norwegian State without compensation at the expiry of the concession period, to private undertakings and all undertakings from other Contracting Parties to the EEA Agreement, to the exclusion of Norwegian public undertakings which benefit from concessions for an unlimited period of time, Norway has infringed Articles 31 and 40 of the EEA Agreement.

The EFTA Surveillance Authority has the honour of submitting the following Application to the Court.

I. INTRODUCTION

1. The Norwegian regulatory framework relating to the commercial exploitation of hydro power is built on a fundamental distinction as regards the ownership of the undertaking concerned. On the one hand, the Norwegian State, Norwegian county municipalities, Norwegian municipalities and companies in which such public entities own at least 2/3 of the shares are granted concessions for an unlimited period of time. On the other hand, all foreign undertakings and all Norwegian undertakings in which the Norwegian State, county municipalities and municipalities own less than 2/3 of the shares are granted concessions for a limited time only. Moreover, when the licence period expires, these undertakings are obliged to transfer to the Norwegian State: 1) the waterfall concerned; 2) the facilities through which the course and the bed of the water has been altered; 3) the parcels of land and the rights acquired for the development of the power plant; 4) the power stations including machinery and other equipment, as well as 5) housing built for workers and other buildings that belong to the power plant. The under-takings receive no compensation, and the obligation to surrender the said property applies regardless of whether the State previously held property rights in relation to the waterfall concerned. This latter rule is traditionally described as 'reversion' (hjemfall) in Norwegian law.

2. By the present Application, the Authority is not disputing the right of the Norwegian State to have a system of reversion. In the Authority's opinion, EEA law does not preclude a national legal provision whereby a time limited concession will only be granted on the condition that the physical assets will be passed over to the State at the end of the concession period. Nor does the Authority dispute that an EEA State can introduce different classes of concessions as long as the system regulating the concession is both designed and applied in a non-discriminatory manner. What the Authority is claiming in the present case, however, is that the *difference* in treatment of, on the one hand, Norwegian public undertakings as defined above and, on the other hand, all undertakings from other EEA States as well as all other Norwegian undertakings, is discriminatory and thus contrary to Articles 31 and 40 of the EEA Agreement. The Authority is also submitting that the difference in treatment is neither objectively justified, nor falling within the ambit of Article 125 of the Agreement.

II. HYDROPOWER PRODUCTION IN NORWAY

3. In Norway the supply of electricity is almost entirely (more than 99%) based on exploitation of waterfalls. The climatic and topographical conditions combined with the necessary political will for large scale exploitation of such natural resources has made Norway Europe's largest, and the world's sixth largest, producer of hydropower.[1] Electricity counts for almost 50 % of Norway's total energy consumption, which makes Norwegians among the biggest, if not the biggest, electricity consumers in the world.

4. Volume and head of water determine the potential energy of a waterfall. The head of water is the height difference between reservoir intake and power station outlet.

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[1] NOU 2004:26 Hjemfall (hereinafter "NOU 2004:26"), pages 12, 29 and 36, and NOU 1994:12, Lov om vassdrag og grunnvann, page 303. All the translations from NOU 2004:26 in this Application have been made by the Authority. The report in full with the original Norwegian texts may be found as **Annex 7**.

Water is directed into pressure shafts leading down to a power station, where it strikes the turbine runner at high pressure. The kinetic energy of the water is transmitted via the propeller shaft to a generator, which converts it into electrical energy.[2] The production is often measured in kWh (kilowatts per hour) which gives a unit for energy. One GWh (gigawatts per hour) is a million kWh and one TWh (terawatts per hour) is a thousand GWh.

5. The average annual production capacity of Norway's hydropower stations is estimated to be about 119 TWh.[3] The total hydropower potential in Norway's approximately 4 000 waterways is estimated to be 186 TWh. Hence, approximately 64% of the capacity has been developed. Of the remaining potential capacity, approximately 36,5 TWh is in watercourses which the Norwegian authorities have decided to protect against future exploitation. The total power production in Norway in 2004 was 110,4 TWh. Imports amounted to 15,3 TWh and exports to 3,8 TWh . The total gross consumption was 121,9 TWh.

III. NORWEGIAN LAW

1. Ownership of waterfalls

6. In contrast to the legal systems in most other European countries, waterways have, according to Norwegian law, always been subject to private ownership. This principle can, *inter alia*, be traced back to legislation as far back as the 11th century and has constantly been confirmed in subsequent legislation and case law.[4] Thus the right to utilise the energy in the waterfall for production of electricity belongs to the owner of the property. In order to build a hydro power station to produce electricity, the producer must, therefore, acquire or lease the waterfall unless he is already the owner.[5]

2. The different concessions

7. The exploitation of waterfalls is subject to an extensive regulatory framework based on a complicated system of concessions. In short, the Act No 16 of 14 December 1917 relating to acquisition of waterfalls, mines and other real property etc. (hereinafter referred to as the "Industrial Licensing Act") specifies that anyone (except the State) who acquires ownership or user rights to a waterfall must obtain a concession.[6]

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[2] Cf. fact sheet published by the Ministry of Petroleum and Energy at http://odin.dep.no/oed/english/bn.html.

[3] The data may be found on the web page of the Norwegian water and energy directorate: http://www.nve.no.

[4] Falkanger/Haagensen, *Vassdrags- og energirett*, Universitetsforlaget 2002, page 34, with further references, NOU 1994:12, Lov om vassdrag og grunnvann, pages 149-150, and NOU 2004:26, pages 30, 47 and 67. The judgment of the Norwegian Supreme Court in Rt. 1918, page 403, confirmed that waterfalls are subject to private ownership and, therefore, protected by Section 105 of the Norwegian Constitution against expropriation without compensation. However, the Supreme Court declared that it was within the legislator's discretion to introduce the waterfall concession system and thereby limit the exercise of the property ownership without triggering any entitlement to compensation. In this respect, the ownership rules on waterfalls are fundamentally different from those that apply in e.g. fields of oil and gas on the Norwegian continental shelf.

[5] Falkanger/Haagensen, page 274.

[6] See in more detail below in paragraphs 32-38.

8. In addition to the concession under the Industrial Licensing Act, a producer of hydropower must also be in possession of a licence pursuant to the Act No 17 of 14 December 1917 relating to the regulation of watercourses (hereinafter referred to as the "Watercourse Regulation Act") in order to change or divert water in a watercourse. This Act moreover gives the concessionaire the right to expropriate the necessary property rights in order to carry out measures that regulate a watercourse. Development of a waterfall and construction of a power station usually also require an additional concession pursuant to the Act No 82 of 25 November 2000 relating to river systems and ground water (hereinafter referred to as the "Water Resources Act").

9. Act No 50 of 29 June 1990 relating to the generation, conversion, transmission, trading, distribution and use of energy etc. (hereinafter referred to as the "Energy Act") requires that all undertakings operating installations to generate, transmit and distribute electricity, from power station to consumer are in possession of a concession. A concession pursuant to the Energy Act is also required to trade electricity.[7] Development of a waterfall may, moreover, have effects such as change in water temperature and increase of the nitrogen content in the water which requires an additional concession under the Pollution Act No 6 of 13 March 1981. Also other laws and regulations such as the Building and Planning Act No 77 of 14 June 1985 and the general Concession Act No 98 of 28 November 2003 may be applicable.

3. A historical overview

10. Before turning to a description of the current regime the Authority considers it useful to provide a historic overview of the legislation.[8]

11. Rivers and waterfalls in Norway have been utilised for different purposes for a very long time. Long before 1900, nearly all small villages and hamlets had a sawmill and a corn mill run by waterpower. Prior to waterfalls being used as a source of producing hydropower, the legislation mainly aimed at regulating the rights of the owner as opposed to those of the public. Fishing rights traditionally followed property rights, but the public could make use of waterfalls for boat transportation, floating logs etc. In the last half of the 19th century, the awareness of the potential of using waterfalls as a source of energy increased, and waterfalls became an object of investment and speculation. The combination of fjords and high waterfalls provided good infrastructure for e.g. chemical and smelting industries. In parallel with the discovery or development of new ways to make use of this natural resource, the legal framework governing waterfalls has undergone significant changes over the last 100 years.

12. Until 1888 there were no restrictions with regard to acquisition of real estate in Norway. Hence, both foreigners and Norwegians could acquire agricultural land, forests, mines, waterfalls and building plots without prior authorisation. The Act on the Right of Citizenship of 21 April 1888 introduced an obligation to obtain a concession for foreign persons and companies acquiring real estate, except mining rights. The Act did not, however, apply to Swedish citizens. Nor were companies

[7] For a description of the energy sector and water resources in Norway, including the legislative framework see http://odin.dep.no/filarkiv/224534/kap1-5_vassdrag04_eng.pdf

[8] A more detailed description of the historical development can be e.g. found in NOU 2004:26, pages 30-54, and Falkanger/Haagensen, pages 31-64.

and limited liability companies subject to the act if the company concerned had its corporate seat in Norway or Sweden and all the members of the board were Norwegian or Swedish citizens. It was, therefore, easy for foreigners to avoid the concession requirement by establishing Norwegian limited liability companies and appointing only Norwegian board members.

13. Over the years that followed, the number of cases concerning acquisition of waterfalls increased. At the same time, and as a result of the possibilities of avoiding the concession requirement by means of certain corporate organisational measures, foreigners acquired a number of Norwegian waterfalls.

14. This development lead the Norwegian Storting to adopt a new Act on 7 April 1906, which extended the requirement to obtain a concession for the acquisition of waterfalls to all foreign citizens and all companies where none of the members were personally liable, *i.e.* limited liability companies. The 1906 Act is sometimes referred to as the "Panic Act" as it was adopted to prevent specific impending acquisitions of large waterfalls by foreigners.[9]

15. The 1906 Act was replaced by a temporary Act on the acquisition of forests, mines or waterfalls of 12 June 1906 which upheld the concession requirements, also for limited liability companies. The Act did not contain any provisions concerning the conditions for obtaining a concession. Yet, an administrative practice developed whereby foreign owners were required to hand the waterfall together with dams, power stations and machinery, over to the State after 75 years without compensation. For Norwegian owners, the time period was 99 years and release of their property to the State at the end of that period was against full compensation.

16. As already mentioned, this requirement to hand over the waterfall and its facilities to the State without compensation has since, in Norwegian legislation, been described as '*hjemfall*' (reversion). Strictly speaking, the term is somewhat misleading because the State has, in the large majority of cases, never previously owned the waterfall. It is, therefore, confusing to talk about the assets "reverting" to the State. When the concept was introduced in Norwegian law, Professor Bredo Morgenstierne, criticised the use of the term 'reversion' with the following words:

"*To call it reversion or fall-back rights when the State says to its citizens: These parts of your property, that I have never owned before, I will have; that is a most peculiar use of language. This was not reversion or fall-back, this was taking possession of someone else's goods.*" The Professor continued that the word reversion was a "*magnificent choice with the view to using the well known 'power of the word over the mind'*".[10]

17. The 1906 Act was adopted on the condition that issues which had been raised in the legislative process, subsequently should be subjected to a more thorough assessment. An inter-ministerial committee was, therefore, established. In 1907 the committee delivered a legislative proposal. For the committee, reversion presented a sound compromise between, on the one hand, the need for a then relatively poor Norway to attract foreign capital in order to be able to build hydro power plants,

[9] NOU 2004:26, pages 12 and 47-48.
[10] Norsk Rettstidende, 1914, page 208 (the Authority's translation).

and, on the other hand, a wish to make sure that this foreign capital did not imply long term foreign ownership of the hydro power plants:

"It can ...be argued, and has been argued, that it would be a lesser evil that our waterfalls were left undeveloped and unused for some time rather than that they fall into foreign hands. However, in the opinion of the committee, the situation is somewhat different when such a transfer will not be permanent but will only take place on certain conditions and with certain safeguards, so that the dangers and inconveniences connected to the foreign use of our waterfalls are reduced as much as possible and when, as a compensatory measure for the concession, the waterfall is surrendered to the State at the end of the concession period."[11]

18. Following the committee's proposal, the 1906 Act was replaced by Act No 4 of 18 September 1909 concerning the acquisition of waterfalls, mines and other real estate. Acquisition of waterfalls that could provide an output exceeding 1 000 natural horsepower by anyone other than the State, municipalities or Norwegian citizens, required a concession. Conditions concerning time limitation and reversion became obligatory, and reversion could also include power stations and machinery. A concession could be granted for a time period of between 60 and 80 years. The Act, moreover, introduced mandatory provisions regarding the sale of power at cost to the Norwegian municipalities. According to the explanatory report to the underlying bill, the requirement that the ownership rights should be surrendered to the State at the end of the concession period was "*built on the consideration of limiting the foreign capital's future rights over our waterfalls*" and the premise that the rules should prevent "*foreign capital's ... unlimited acquisition of our natural resources*".[12] The new Act only applied to acquisitions of waterfalls in the future. Hence, all waterfalls which were already developed prior to the Act stayed untouched by the concession regime, and still are if the ownership has not changed.

19. In addition to governing investments made by foreign undertakings, the Industrial Licensing Act of 14 December 1917 introduced reversion (as opposed to the previous arrangement with release against full compensation) also for Norwegian private owners. Moreover, new and stricter concession conditions as well as an obligation to pay concession fees to the State and to municipalities were introduced. The concession period was reduced to 50 years or, with the Storting's consent, 60 years. Furthermore, reversion should include power stations and machinery, in all cases.

20. The Industrial Licensing Act has since been subject to a number of amendments. For instance, in 1959, provisions were introduced that enabled publicly controlled undertakings to obtain a time unlimited concession provided the waterfall would be used for common power supply in the area. In 1969, provisions were introduced to the effect that municipalities and counties also had to obtain a concession to acquire waterfalls. Concessions could, however, still be granted on a time unlimited basis, and the Storting saw no reason to introduce reversion for public owners. Unlimited concessions could be granted as long as the ownership was predominantly public, the reasoning being that this would ensure that the waterfalls were

[11] Proposal from the Concession Committee of 4 May 1907, page 35, the Authority's translation. The original Norwegian text can be found in **Annex 8**.

[12] Ot.prp. no 1 (1909), page 44, the Authority's translation. The original Norwegian text can be found in **Annex 9**.

still under public control. According to practice, "predominantly" was understood to imply 2/3 public ownership, something which was later codified in the Act.[13] For private owners the standard concession period was fixed at 60 years. Moreover, pre-emptive rights were introduced for the State and the counties. Another new provision granted the State the option to enter into agreements on the right of use of the waterfall and installations for a period of 60 years after reversion. Such agreements, also called early reversion, could be made during the last 25 years of the concession period.

21. The entry into force in 1991 of the Energy Act liberalised the energy market in Norway. Prior to that Act, electricity prices were controlled by the State and each producer had a regional monopoly in the end user market. Moreover, the producers were obliged at all times to cover consumer demand for electricity in their respective areas. These provisions were abolished and a competition based model was introduced, entailing that the permanent structures for delivery of electricity were dismantled and that prices were regulated by market forces. The background for the change was explained as follows in the preparatory works:

"*In a market-based transaction regime for power there is no need for a delivery obligation in order to regulate the supply of power. The necessary supply will follow from the commercial relationship between the power stations and the customer.*"[14]

22. Hence, following the amendments introduced by the Energy Act, producers can sell electricity anywhere and to anyone they wish.[15] They have no obligation to deliver a certain amount of electricity to the Norwegian market.

23. In 1992,[16] the Industrial Licensing Act was amended and a new provision was introduced in Article 5a, according to which the State could revise the terms and conditions in the concession after 30 years. Although the intention behind the revision provision was to update those concession conditions which not longer corresponded to the actual market conditions, the State was free to revise all conditions in a concession.

24. In Act No 99 of 6 November 1993, which entered into force on the same date as the EEA Agreement, the concept of early reversion, which as already indicated had been applied in administrative practice since the 1960s, was written into the Industrial Licensing Act.[17]

25. During the Storting's handling of the bill, a question was directed to the Ministry of Energy as to the extent to which the Ministry had assessed the provision on time unlimited concession for companies with more than 2/3 Norwegian public ownership in relation to the EEA Agreement. The Ministry replied that:

"*The rules on 2/3 public ownership as a condition for time unlimited concession is, as the law stands, connected to Norwegian public ownership. This is connected with resource management being a national matter for the public authorities.*

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[13] Page 12 of Ot.prp. no 82 (1991-92) to the Amending Act of 21 November 1992 no 119.
[14] Ot.prp. no 43 (1989-90), pages 53-54. The original Norwegian text can be found in **Annex 11**.
[15] NOU 2004: 26, pages 13, 32-33 and 51.
[16] Page 47 of Ot.prp. no 50 (1991-92) to the Amending Act of 19 June 1992 no 62.
[17] See, in more detail, below in paragraphs 39-41.

Questions concerning public ownership were considered in the EEA process. The provision will be applied in line with the obligations we assume in the EEA Agreement, based on an individual assessment in a potential case."[18]

The bill was later adopted by the Storting without amendments.

4. Changes made in connection with Norway's accession to the EEA Agreement

26. Prior to the Storting's ratification of the EEA Agreement, the Norwegian Government put forward St.prp. no 100 (1991-92). This document contains a general description of the Agreement and, briefly, the Government's opinion as to the consequences of the Agreement for Norwegian legislation in a number of different areas. With regard to waterfalls and the concession system the document states the following:

"*The parts of the concession system for waterfalls governing resource management are not affected by the EEA Agreement. The strong public ownership in the waterfall sector is compatible with the principles in the EEA Agreement. The same applies to the State's pre-emptive rights for acquisitions of waterfalls, reversion to the State at the expiry of the concession period and the provisions regarding pre-emptive rights for the State and reversion connected to acquisition of shares. This means that the main features of the concession legislation for waterfalls can be maintained also after entering into the EEA Agreement. In the Industrial Licensing Act there are, however, provisions that entail a difference in treatment on the basis of nationality and which, therefore, are contrary to the EEA Agreement. ...*

The prohibition on difference in treatment based on nationality entails that parties in other EEA States will be considered on an equal basis with Norwegian private interests when acquiring waterfall rights, rights of use and developed waterfalls in Norway. The access to such acquisitions will, however, be strictly limited, inter alia, by the State's pre-emptive and reversion rights and by the general requirements for management of the waterfall resources."[19]

27. As foreseen in St.prp. no 100 (1991-92), a number of Acts needed to be amended as a consequence of Norway's signing of the EEA Agreement. The Ministry, therefore, put forward a bill to the Storting presenting amendments in the energy legislation, covering the Industrial Licensing Act, the Petroleum Act and the Energy Act. According to the Ministry, the energy sector did not have a dominant role in the EEA negotiations and the central aspects of Norwegian energy policy would not be affected by the EEA Agreement. It was, however, stated that several of the general provisions of the EEA Agreement could find application to the energy sector:

"*The Treaty of Rome does not cover energy policy. Nor does it have separate rules for the energy sector. However, several of the Treaty provisions incorporated in the EEA Agreement may be applicable to the energy sector: First and foremost Article 4 of the EEA Agreement containing a general prohibition on nationality*

[18] The Authority's translation. The letter is attached to Innst.O. no 133 (1992-93) from the Energy and Industry Committee. The original Norwegian text is attached in **Annex 12**.

[19] St.prp. no 100 (1991-92). The Authority's translation. The original Norwegian text is attached in **Annex 13**.

based difference in treatment, Articles 11, 12 and 13 prohibiting quantitative restrictions on import and export and all measures with equivalent effect, Article 16 which entails that state monopolies cannot differentiate their treatment of EC and EFTA nationals regarding conditions for sale and purchase, Articles 31, 34, 40 and 124 with provisions on freedom of establishment and free movement of capital and the principle of national treatment for company investments, antitrust and competition rules in Articles 53-60 and the provisions on state aid in Article 61...".[20]

28. On that basis, the bill concluded that difference in treatment directly on the basis of nationality would not be in compliance with the EEA Agreement.[21] This implied that several provisions in the Industrial Licensing Act had to be changed. Accordingly, the Storting expanded the exemptions from concession requirements for Norwegian nationals inheriting waterfalls to also cover citizens of other EEA States just as it abolished the requirements concerning location of the company seat in Norway and board members of Norwegian nationality[22] and a provision aimed at securing electricity on special terms for Norwegian agriculture. Finally, Section 5 of the Industrial licensing Act concerning right of use of waterfalls was changed so that also foreigners from now on could obtain a concession.

29. The amendments made in order to comply with the EEA Agreement only concerned provisions that explicitly gave foreigners a less advantageous treatment than Norwegians. The Storting did not consider that the EEA Agreement would prevent the existence and introduction of new legislative measures aimed at ensuring continued strong Norwegian public ownership of waterfalls.

30. The amendments also introduced pre-emptive rights for the State in case municipal or county municipal undertakings would sell shares or parts to such an extent that private or foreign ownership would exceed 1/3 of the capital of the company. It was explained that the pre-emptive rights would also ensure swift control of this production capacity in the period before reversion could take place.[23] A sale of shares in a public company to Norwegian private or foreign owners, to an extent that the 1/3 threshold was exceeded, would convert a time unlimited concession to a time limited one with reversion. Yet, such reversion would not take place before 2030 as the oldest unlimited concessions only dated back from the introduction of concession requirements for municipalities and county municipalities in 1969. Thus, it was seen as an advantage to have, by way of pre-emption, the option of transferring the ownership to the State prior to the end of the concession period, should the public ownership ratio fall below 2/3.

31. In other words, the State's pre-emptive rights were introduced in Section 4 of the Industrial Licensing Act as a measure to guarantee a continued strong Norwegian public ownership of waterfalls. This was done at the same time as the Norwegian Government found it necessary to make the above-mentioned amendments to the Act in order to comply with the EEA Agreement.

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[20] Ot.prp. no 82 (1991-92) Om endringer i energilovgivningen som følge av en EØS-avtale, page 7. The Authority's translation. The original Norwegian text can be found in **Annex 10**.

[21] Point 8.2 of Ot.prp. no 82 (1991-92).

[22] According to Ot.prp. no 82 (1991-92), pages 10 and 14, the aim of Norwegian control of the hydro power resources had by then already been achieved. The abolished rule had, therefore, no longer any significant practical importance.

[23] Ot.prp.no 82 (1991-92), page 16.

5. The current rules in the Industrial Licensing Act

5.1. The concession rules

32. Article 1 of the Industrial Licensing Act states that:

> *"Without the permission of the King ... no one other than the State may with full legal effect acquire the right of ownership or use to waterfalls (falls or rapids) that, when harnessed, can be expected to produce more than 4,000 natural horse-power either alone, or in conjunction with other waterfalls that the acquirer owns or uses when it can be appropriate to develop them jointly. The licence obligation also applies to agreements relating to acquisition of long-term disposition rights to hydropower resources."*[24]

33. Thus, the requirement of a concession in order to acquire waterfalls applies, in principle, both to privately and publicly as well as domestically and foreign owned undertakings. Only the State itself is exempted from this requirement. This exception is of no practical significance since the State's ownership of waterfalls today is exercised via the fully state owned Statkraft AS, which, as a public limited company, is subject to the concession regime.

34. The conditions on which a concession may be granted are set out in Section 2:

> *"Norwegian citizens and citizens in other states party to the EEA Agreement, other foreign nationals and legal persons, may under special circumstances be granted a licence to acquire ownership rights to waterfalls on specified conditions stipulated by the King.*
>
> *The provision also applies to legal persons described in Article 34 of the EEA Agreement, which were formed in accordance with the law of one of these states, and have their registered office, central administration or principal place of business in such a state.*
>
> *Should the acquisition concern a waterfall that, when harnessed, can be expected to produce more than 20,000 natural horsepower, or there is a conflict of vital interests, the matter shall be submitted to the Storting before a licence is granted, unless the Ministry deems this unnecessary.*
>
> *In granting a licence and stipulating conditions, the following basic rules shall be adhered to:*
>
> *1. The licence shall be granted to a specific person, company, corporation or foundation.*
> *Companies shall be obliged to keep a list of all participants and their citizenship,*
> *2. The licence permits the utilisation of the waterfall as a source of power in accordance with licence conditions and the legislation in force at any given time respecting such activities ...".*

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[24] A translation of the Act is available at the Ministry of Petroleum and Energy's web page at http://odin.dep.no/filarkiv/278566/Act_relating_to_energy_and_water_resources.pdf. The translation refers to "licence" whereas the Authority as well as the Ministry through the course of the present proceedings has utilised the term "concession". Both terms refer to the same, *i.e.* that the acquisition of a waterfall is made conditional upon a permit granted by the state.

35. Section 2 also lays down more detailed provisions concerning, *inter alia*, compensation for expenditure connected to wildlife and fish monitoring, maintenance and repair of public infrastructure, sale at cost of up to 10% of the amount of power produced to the municipalities and counties where the power plant is located, payment of annual fees to the State, counties and municipalities, etc.

36. In accordance with Section 2-17, the concession is normally granted for a limited duration of 60 years after which reversion shall take place:

"*The licence shall be granted for a specific period of time of up to sixty years calculated from the date the licence is granted. When the licence period expires, the waterfall and all the facilities through which the course and bed of the water have been altered, such as dams, canals, tunnels, reservoirs, pipelines etc., the parcels of land and the rights acquired for the development and power plant, the power stations and appurtenant machinery and other equipment, as well as housing built for workers and other buildings that belong to the power plant, shall revert to the State with full ownership rights and without any compensation. The State may redeem whatever property does not revert to it at a price appraised at its expense or order its removal within a time limit set by the Ministry.*"

37. The aim and purpose of this provision has been summarised by the Norwegian Government as follows:

"*Reversion gives the state the possibility to consider whether existing use should be continued, changed or whether the energy should be managed differently. Moreover, with the reversion the state and the municipalities are supplied with economic resources. This must be viewed in connection with waterfalls being a limited natural resource where investments made to utilise the resource provide profits that exceed normal profits, so called economic rent. The reversion system contributes to ensure that parts of these large sums fall back to the community.*"[25]

38. According to Section 1(4) of the Industrial Licensing Act, the Ministry may in individual cases, when special considerations exist, make an exception as regards the licence obligation and the right of pre-emption. Following liberalisation in 1991, there has been substantial restructuring within the publicly owned part of the power sector. Since 1990, the Ministry has granted nearly 150 exceptions where such restructurings resulted in, *inter alia*, transformations into new company forms, mergers and de-mergers. Moreover, exceptions from the licence obligation have been granted where the public owners have taken over private falls or bought the private interests in order to reach the 2/3 threshold.[26]

5.2. Early reversion and lease

39. Reversion at the end of the concession period should be seen in connection with Section 41 on so-called early reversion:

"*When less than twenty-five years remain of the licence period for a waterfall that pursuant to licence shall revert to the State, the King, with the Storting's consent,*

[25] Ot.prp. no 70 (1992-93), pages 6-7. Translation by the Authority. The original Norwegian text can be found in **Annex 14**.
[26] NOU 2004:26, pages 62-63.

has the power to enter into an agreement with the licensee to the effect that the waterfall and its installations shall revert to the State immediately. At the same time, the licensee is permitted to acquire ownership rights to the rights that have reverted to the State for a new period of fifty years.

When less than twenty-five years remain of the licence period for a waterfall that, according to the licence, shall revert to the State, the King, with the consent of the Storting, has the power to enter into an agreement with the licensee on the acquisition of the right of use to the relevant waterfall with appurtenant installations at the expiry of the licence period, or, if applicable, leasing of electric power from the State, and issue an undertaking that the necessary licences will be granted, cf. sections 5 and 13.

The licensee should normally have the right to enter into such agreements on the right to use waterfalls with appurtenant installations as described above. Such agreements should be signed, or an undertaking given, no later than three years after the licensee has raised questions in this regard."

40. Hence, the State and the owner of a waterfall can agree on immediate reversion so that the owner buys the waterfall with all installations back from the State. The consequence of the time limited concession and the reversion is, in these instances, none other than economic in the sense that the concessionaire is subject to a payment to the State in order to continue the same economic activity for a longer period than that set forward in the original concession. Alternatively, the owner can enter into an agreement on the right of use of the waterfall and the installations under Section 5 of the Act, thereby continuing the activities he had carried out hitherto with the substantial difference that the waterfall and the installations are no longer his, but leased from the State.

41. As far as the Authority is aware, a little less than half of all reversions to date have been early reversions. However, this does mean that the Norwegian State itself has taken over the operation of the power plant nor that the plant has been entrusted to Statkraft AS. On the contrary, in nearly all the cases of reversion, the State has either sold the plant back to the original owner or to another operator or given an operator the right to exploit the plant as a non-owner under Section 5 of the Act.[27]

5.3. The preferential rules for undertakings predominantly owned by Norwegian public bodies

42. Pursuant to paragraph 1 of Section 4, a concession may be granted for an unlimited period of time to undertakings controlled by Norwegian public owners:

"Enterprises organised according to the Act relating to State-owned Enterprises, Norwegian municipalities and counties may, when public interest does not weigh against it, be granted a licence to acquire ownership rights, rights of use or long-term disposition rights to waterfalls according to further conditions stipulated by the King. The same applies to limited liability companies, public limited liability companies, co-operative societies or other associations in which at least two-thirds of the capital and the votes are held by enterprises organised pursuant to

[27] Reference is made to the figures presented in NOU 2004:26, pages 59-62. According to Ot.prp. no 69 (1966-67), pages 78-79, it should be the main rule that concession holders who have taken good care of the waterfall will be given the option to continue the running of the plant.

the Act relating to State-owned Enterprises, one or more municipalities or counties, provided the waterfall in question is to be utilised primarily for supplying electricity to the general public …".

43. Pursuant to paragraph 2 of section 4:

"The licence may be granted for an indefinite period."

44. According to settled administrative practice, public owners are as a rule granted concessions for an indefinite period. This entails that waterfalls owned by public owners will not be subject to reversion as regulated in Section 2-17.

45. Section 4 has immense practical importance as it applies to approximately 88% of the existing production capacity in Norwegian waterfalls. Today, more than 45% of the production capacity is owned by the Norwegian State via Statkraft AS and more than 42% is owned by Norwegian municipalities and county municipalities, some directly, but most via ownership in public companies.[28] Only the remaining 12 % are in the hands of other owners. If one subtracts the operators that had commenced exploitation before the introduction of the licensing system and, therefore, are not subject to the main rule concerning time limited concessions and reversion, the affected foreign and private operators account for a mere 5 % of the production capacity.[29]

46. The net effect of Section 4's different treatment of undertakings forming part of or controlled by Norwegian public bodies has been summarised as follows in NOU 2004:26:

"*For a private buyer, the value of the power station would be linked to the expected income until reversion, whereas the value for the public owner would be linked to the income from an unlimited time period. The private investor will therefore, all else being equal, not set as a high a value on the power station as the public owner or other public players.*"[30]

47. The NOU 2004:26 also describes how the difference in value of a hydro power plant, with and without reversion, increases closer to the end of the concession period. In this respect the report contains a table showing how the value of a hydro-power plant with a time-limited concession compares relative to a similar plant with infinite concession depending on the number of remaining years to reversion and the discount factor. From the table, the following figures can be adduced:

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[28] According to Urquita, *Industrikonsesjonsloven: Offentlig Styring av fallrettigheter og EØS-rettslige skranker*, Marlus 2003, page 7, approximately 70 % of all plants are now organised as public limited companies. On page 56 Urquita also refers to administrative practice accepting the public limited undertaking not being directly owned by a Norwegian public body, but only indirectly via a public body's ownership of a parent company of the concession holder.

[29] NOR 2004:26, pages 33 and 131.

[30] NOU 2004:26, page 13.

Time Horizon	Real interest rate after taxes	
	3 %	6 %
Infinite	100	100
60 years	89	97
30 years	59	83
10 years	26	44

48. Already at the outset of the concession period, a time-limited concession would be worth 97 % of an infinite concession with 6 % real discount rate after taxes. If the discount rate is 3 %, the value would be only 89 %. Halfway through the concession period, the relative value of a time-limited plant would be worth 83 % and 59 %, respectively, for the corresponding discount factors. With ten years left of the concession period, a plant subject to reversion would be worth 44 % of a non-reversion plant with 6 % discount factor and only 26 % if the discount factor is set at 3 %. As the concession period approaches the end, the value of plants under such a regime converges towards zero.[31] The Committee Report concludes that the contested rules have had the following effect on the Norwegian market for hydro power:

"*Foreign entities have to a certain degree established themselves in Norway but the current regulatory framework for concessions must be regarded as having limited foreign investment in Norwegian power production. The same goes for Norwegian private investments*".[32]

49. According to Section 5 of the Act, a Norwegian public undertaking is allowed to rent out a hydro power plant to another commercial operator. In contrast, the provision does not allow a foreign or private owner to rent out a waterfall, unless the 'tenant' operator is either a Norwegian public body or an undertaking in which a Norwegian public body owns at least 2/3 of the shares. The purpose of the provision is to prevent circumvention of the general rules of reversion by the use of long term lease arrangements instead of sale of the waterfall.

5.4. Transfer of ownerships rights during a concession

50. According to Section 2-22 of the Act, if a private undertaking purchases a waterfall within the period of 60 years after the concession has been granted, the conditions of the original concession apply to the new owner. This means that the new owner will only run the concession for the remaining time to reach the limit of 60 years maximum. However, if the new owner is the State or a Norwegian public undertaking the concession will be granted for an unlimited period:

"*A licence is required for further transfer of the waterfall to parties other than the State or parties described in section 1, second paragraph. In any case the acquirer must abide by the conditions stipulated in the original licence (cf. however, section 27). In addition, the conditions described above under subsection 12 and such other conditions that otherwise may not be deviated from pursuant to the legislation in force at the time the new licence was granted may be stipulated in the*

[31] NOU 2004:26, pages 94-95.
[32] NOU 2004:26, page 33. See similarly Carlos Urquieta, op.cit., pages 16 and 119.

licence. If the acquirer is a Norwegian municipality or county, the King may waive all or parts of the conditions that are not mandatory pursuant to section 4, third and fourth paragraph."[33]

51. Conversely, if a private investor buys a waterfall owned by a Norwegian public body, the hitherto time unlimited concession will be converted into a 60 year concession running retroactively from the time the original concession was granted (or where no such concession period applied, from the date of construction).[34] The same will apply if trade in shares implies that less than 2/3 of the ownership and voting rights to the waterfall will be in the hands of a Norwegian public body. Depending on how long the concession has run before the shares are transferred, the change of owner from a Norwegian public body to a foreign or private owner might imply that the new owner will only have a few years to make a return on his investment. In principle, it might even imply that the waterfall and its installations will immediately revert to the State.

52. According to Section 4 of the Industrial Licensing Act, the Norwegian State will have pre-emptive rights to shares or interests where public ownership falls below the 2/3 threshold:

"*The State has pre-emption rights to shares or interests pursuant to this provision should two-thirds of the capital and votes in limited liability companies, public limited liability companies, co-operative societies or other associations no longer be owned by one or more municipalities or counties. The State's right to exercise pre-emption arises as soon as the Ministry has been notified that the conditions for the licence are no longer being met. The decision to exercise the State's right of pre-emption must be taken within one year. When the right of pre-emption is exercised, the State is subrogated into the purchaser's rights and obligations.*"

53. The effect of these two provisions, Section 2-22 and Section 4, has been described as follows in NOU 2004:26:

"*In connection with restructuring or change of owner, the regulations give public players incentives not to create limited concessions and reversion which could prevent effective owner/undertaking structuring. ... Rules which force time limited concessions where private ownership increases beyond a certain level, limit the possibility for Norwegian power undertakings to take part in mergers or capital expansion. Within most of the transactions regarding waterfalls and power stations in the last few years, Statkraft has been on the purchasing side.*"[35]

"*It is the opinion of the Committee that perhaps the most important effect of reversion from 1991 until today has been that is has precluded the transfer of ownership rights from public owners not subject to reversion to owners that will be subject to reversion.*"[36]

54. As indicated in the quote, sale from Norwegian public to foreign and private owners has been limited and hitherto it has apparently not occurred that public

[33] It is the Authority's understanding that the competent Norwegian authorities as a rule make use of this possibility to convert the time limited concession into an infinite concession.
[34] Ot.prp. no 70 (1992-93), page 4.
[35] NOU 2004:26, pages 16 and 78. See also page 124 of the Report.
[36] NOU 2004:26, page 80.

ownership has been reduced to under 2/3 for any undertaking with a waterfall requiring concession.[37] In contrast, public Norwegian owners have several times in recent years acquired waterfalls from private owners with the effect that the time limited concessions have become infinite. The over all effect seems to be a strengthening of Norwegian public ownership.[38] In addition, a substantial trade in ownership rights has taken place between various Norwegian public owners. Most of these have been sales from municipalities and counties to Statkraft AS.[39] The consequence is that Statkraft AS's relative market share has risen substantially from the approximate 30 % it held for many years, to now approximately 45 %.[40]

55. The practical importance of the rules concerning the effects of trade in ownership rights to companies that have already been granted concessions is underlined by the fact that the Norwegian authorities grant concessions for the building of new plants only to a limited extent. Therefore, new operators in the hydro power sector will almost always have to establish themselves by acquiring already developed waterfalls.

IV. RELEVANT EEA LAW

56. According to Article 31 EEA, there shall, within the framework of the EEA Agreement, be no restriction on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches, subsidiaries by a national of any EC Member State or EFTA State established in the territory of any of these States. Freedom of establishment shall, *inter alia*, include the right to manage companies or firms under the conditions laid down for its own nationals of the country where such establishment is effected.

57. Article 40 EEA provides that, within the framework of the provisions of the Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. The EFTA Court has held that Article 40 EEA encompasses all restrictions on the free movement of capital between the Contracting Parties.[41]

58. Article 125 states that the EEA Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.

59. Article 1 of the Act referred to at point 1 of Annex XII to the EEA Agreement, as adapted by Protocol 1 thereto (Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty; hereinafter Directive 88/361/EEC), which implements Article 40 EEA, obliges the EEA States to abolish restrictions on movements of capital taking place between persons resident in the EEA States.

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[37] NOU 2004:26, pages 13 and 79, as well as Urquieta, op.cit., page 7.

[38] Henrik Bjørnebye, *Overdragelse av fallrettigheter – EØS-rettslige rammer for statens styringskompetanse,* IUSEF no 36, Senter for Europarett, page 19.

[39] NOU 2004:26, pages 63 and 69.

[40] Falkanger/Haagensen, op.cit., page 266.

[41] Case E-1/00 *Íslandsbanki-FBA hf.* [2000-2001] EFTA Court Report 10, paragraphs 25-28. See for a similar reasoning in respect of the EC Treaty, Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 18.

Article 1 of Directive 88/361/EEC refers to a non-exhaustive nomenclature in Annex I to the Directive, in which capital movements operations are classified.

60. The acquisition of shares by non-residents, regardless of whether this is done on a stock exchange or not, constitutes a capital movement within the meaning of Article 40 EEA. These operations are explicitly mentioned in Heading III A (1) and (3) of the non-exhaustive list in Annex I to Directive 88/631/EEC.

V. THE ADMINISTRATIVE PROCEDURE

1. Correspondence prior to the letter of formal notice

61. By a letter dated 8 March 2001[42], the Authority requested information from the Norwegian Government on certain aspects of the Industrial Licensing Act, including the reasons behind granting Norwegian public undertakings time unlimited concessions for waterfalls.

62. The Norwegian Government replied by letter of 20 April 2001.[43] It stated that the reason why certain legal persons were defined as public, and granted concessions for an unlimited period of time, was that those legal persons managed and took care of waterfalls on behalf of the State. Such public management could not be required from private legal persons. The rules concerning time limitation and reversion were necessary for the authorities to have the opportunity to make a further consideration of the non-public concessionaire as to whether or not the entity should be allowed to continue to manage the waterfalls. The Government did not find the Act to be in conflict with Article 31 EEA as it could not see that it resulted in difference of treatment between public and private establishments and since every participant from another EEA country was granted a concession under the same conditions as private Norwegian nationals or legal persons. Concerning Article 40 EEA, the Norwegian authorities considered that the rules in question did not restrict the actual movement of capital between the Contracting Parties.

2. The Authority's letter of formal notice

63. On 27 June 2001, the Authority issued a letter of formal notice concluding that the Industrial Licensing Act infringed Articles 31 and 40 of the EEA Agreement.[44]

64. The Authority emphasised that, according to the Industrial Licensing Act, companies from other EEA States, whether public or private, were never able to benefit from an unlimited concession. Conversely, a concession could be granted for an unlimited period of time to undertakings controlled by Norwegian public bodies. In the opinion of the Authority, this difference of treatment was contrary to the freedom of establishment in Article 31 EEA, since undertakings from other EEA States were precluded from participating on a stable and continuous basis in Norwegian economic life under the same conditions as those applicable to Norwegian public undertakings. In the absence of public service obligations for the operation of services in the general interest, the difference in treatment could not

[42] **Annex 1,** letter from the Authority of 8 March 2001.
[43] **Annex 2**, letter from the Norwegian Government of 20 April 2001.
[44] **Annex 3**, letter of formal notice dated 27 June 2001.

be justified by the argument that a Norwegian publicly controlled undertaking managed waterfalls on behalf of the State.

65. With regard to Article 40 EEA concerning the free movement of capital, the Authority found that investors willing to acquire shares in private or foreign undertakings intending to buy waterfalls for the production of energy could be deterred from so doing solely by the fact that Norwegian rules treated those undertakings unfavourably compared to Norwegian public undertakings. In particular, investors would be unwilling to invest in private undertakings or foreign owned undertakings wishing to acquire concessions which had been running for several years and which would only be carried on for the limited period of time left until the 60 year maximum was reached. Compared to investment in Norwegian public undertakings, investments in these private and foreign undertakings were less attractive. The rules in the Industrial Licensing Act also created incentives to modify the structure of ownership of private and foreign undertakings to the benefit of Norwegian public undertakings willing to invest in or buy waterfalls and their corresponding concessions. The fact that the Norwegian State held pre-emptive rights to shares in Norwegian public undertakings merely reinforced the obstacles met by private investors wishing to invest in this sector.

3. The Norwegian Government's reply to the letter of formal notice

66. The Norwegian Government replied to the letter of formal notice by letter of 29 November 2001.[45] The Government stated that it had been the long standing position of the Storting that ownership of developed waterfalls should pass from the concessionaire to the State at the end of the concession period. The system had, therefore, been designed in order to achieve State ownership after 60 years while at the same time providing the private sector with incentives to develop natural resources in the interests of society as a whole.

67. In the Government's opinion, the requirement that a concession to exploit waterfalls be obtained by all but the Norwegian State related to the management of natural resources. As the management and control of natural resources were not part of the EEA Agreement, the contested legislative measures fell outside the scope of the Agreement. This basic premise reflected a common understanding of the Contracting Parties to the EEA Agreement and had never been contested by any of the Contracting Parties. The same view had been reflected in a number of Norwegian Parliamentary reports.[46]

68. Furthermore, the Government referred to the aims of the EEA Agreement as defined in Article 1(1) of the Agreement as well as Article 1(2) which lay down how the objectives were to be achieved, primarily through the four freedoms. Management of natural resources was not listed among these means. Hence, regardless of whether decisions relating to the management of natural resources had an economic impact, any restriction relating to the granting of a concession to exploit a waterfall formed part of a natural resources management policy, designed in particular to ensure State ownership and control in furtherance of Norway's sovereign rights, and fell outside the scope of the EEA Agreement.

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[45] **Annex 4**, letter from the Norwegian Government of 29 November 2001.
[46] Reference was made notably to St.prp. no 100 (1991-92), cited above in paragraph 26.

69. In any event, the Norwegian Government found that the contested rules were covered by Article 125 EEA. The right to exploit waterfalls on private property was considered to be part of private rights, which could be bought on the open market. The rapid and uncontrollable development of waterfalls had led to the adoption of the Industrial Licensing Act, which prescribed that the rights to develop waterfalls were limited for all others than the Norwegian State and that all other operators needed a concession. As all privately owned and all foreign concessions were time limited with reversion at the end of the period, the installations would ultimately pass into the hands of the Norwegian State. In contrast, the State had no need to require passing over of the ownership rights to the State in relation to publicly owned waterfalls. Norwegian public ownership of natural resources, particularly waterfalls, had been considered to be an important way of ensuring that they were developed and used for the benefit of the population as a whole.

4. The Authority's reasoned opinion

70. Disagreeing with the arguments of the Norwegian Government, the Authority delivered a reasoned opinion on 20 February 2002.[47] As regards the management of natural resources and the scope of the EEA Agreement, the Authority underlined that no provision in the EEA Agreement excluded the management of natural resources in general, or the management of waterfalls in particular, from the scope of the Agreement. On the contrary, natural resources were mentioned in the EEA Agreement. For the Authority, this demonstrated that even if each Contracting Party to the EEA Agreement was competent to manage its own natural resources, this competence nevertheless had to be exercised in full compliance with the rules of the Agreement.

71. Concerning Article 125 EEA, the Authority referred to established case law of the Court of Justice according to which the Court had held that although the system of property ownership continued to be a matter for each State under the parallel provision in Article 295 EC, that provision did not have the effect of exempting such a system from the fundamental rules of the EC Treaty.

72. With regard to the Government's argument that the State and the public undertakings were one and the same, the Authority observed that it followed from Norwegian law, including the contested Act itself, that public entities were considered to be legally independent from the State. Norwegian public undertakings, operating on a commercial basis in the market and in competition with other undertakings, had to be distinguished from the State and its exercise of regulatory power.

73. Since the Norwegian Government had not provided any legal assessment as regards Articles 31 and 40 EEA in its reply to the letter of formal notice, the Authority repeated the reasons previously given and concluded that these Articles had been infringed.

5. Discussions and steps after the Authority's reasoned opinion

74. The Norwegian Government replied to the reasoned opinion by a letter dated 19 April 2002 in which it upheld the view previously expressed in its reply to the

[47] **Annex 5**, reasoned opinion dated 20 February 2002.

letter of formal notice.[48] The Government, nevertheless, stated that it had decided to harmonise the provisions on right of reversion between public and non-public actors. According to a press release from the Ministry of Oil and Energy of 19 April 2002, a system of reversion applicable to all operators would strengthen the Norwegian authorities' long term room for manoeuvre with regard to management of water resources, ownership and public income. Moreover, it would pave the way for increased efficiency and growth in the sector.

75. On 29 November 2002, the Ministry of Oil and Energy sent out a hearing paper proposing such changes to the Act. The hearing paper was, however, met with fierce opposition from different operators and several political interests groups. Some argued for abolition of reversion in general, while others characterised the proposal as a "robbery" of municipal hydro power plants. On that basis, the Government decided, in April 2003, to convene an independent committee with a mandate to review the system of reversion as regards waterfalls and how it should be designed.

76. The Committee delivered its report to the Ministry of Oil and Energy on 30 November 2004, NOU 2004:26. It was the conclusion of the Committee that "*a continuation of the current regulatory framework is not an attractive alternative either from a socio-economic or a legal viewpoint.*"[49] As far as the legal conclusions were concerned, the majority of the Committee attached importance to a legal note from dr.juris Olav Kolstad, University of Oslo, that was annexed to the Report. The note concluded that the present system was incompatible with Articles 31 and 40 EEA and that it could not escape the ambit of the EEA Agreement by recourse to Article 125 EEA and arguments concerning the management of natural resources.[50] The Committee could not agree on a common suggestion for a new legal regime, but presented different models that were built upon similar treatment of public and private undertakings, but with different transitional solutions.

77. On the basis, *inter alia*, of the Report and the former Norwegian Government's publicly stated intentions to change the disputed provisions, the Authority decided to postpone any decision as to whether its should commence the infringement procedure before the EFTA Court. However, in April 2006, the present Norwegian Government informed the Authority that it had decided not to propose changes to the Industrial Licensing Act. On that basis, the Authority decided, on 26 April 2006, to bring the matter before the EFTA Court.

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[48] **Annex 6**, letter of the Norwegian Government dated 19 April 2002.

[49] NOU 2004:26, page 16.

[50] The question of the legality of the contested Norwegian rules has, moreover, been discussed in a number of Norwegian books, articles and legal notes. According to Finn Arnesen, *EØS-retten og Hjemfallsretten*, Lov og Rett 2006, page 238, and http://www.kraftnytt.no/default.asp?page=21869&article=29036, the contested rules infringe Article 31 and 40 EEA. The same result has been reached by Bjørnebye and Urquieta, op.cit. In contrast, Peter Ørebech claims in Lov & Rett 2006, page 26, that the Norwegian rules are in conformity with the EEA Agreement. In support of this position he notably advances the argument that Article 125 EEA should be interpreted differently than Article 295 EC, as he does not find the interpretative style in the EC applicable to EEA law and as he believes that an interpretation according to the principles laid down by the Vienna Convention implies that the other Contracting Parties cannot object to the Norwegian rules. Also Per H. Høisveen, Lov & Rett 1996, page 614 (618), finds the current legislation compatible with the EEA Agreement.

VI. THE POSITION OF THE AUTHORITY

1. The scope of the EEA Agreement

1.1. The EEA Agreement and natural resources

78. As is apparent from paragraphs 67-68 and 70 above, the parties are in disagreement as to whether the contested rules fall within the ambit of the EEA Agreement. Whereas the Authority finds that the EEA Agreement is indeed applicable to the case at hand, the Norwegian Government has argued that the management and control of natural resources lies within the State's full sovereignty to be developed at its discretion.

79. In the Authority's opinion, the Norwegian Government's statement that management of natural resources falls within its exclusive competence is too absolute. It is correct that EEA law does not purport to regulate this policy area of the EEA States. Moreover, the decision whether a natural resource such as a waterfall should at all be open to commercial exploitation and, if so to what extent, is not regulated by EEA law.

80. However, a distinction must be drawn between, on the one hand, the fact that an area of law has not been subject of harmonisation and, on the other hand, explicit exemptions from the scope of EEA law. That harmonised EEA rules do not exist for a specific economic sector does not imply that it is entirely immune from the effect of the EEA Agreement. On the contrary, settled case law demonstrates that, even in the fields which fall outside the scope of application of the EEA Agreement, EEA States must exercise their powers consistently with EEA law.[51] In this respect, national legislation being part of an overall policy concerning the management of national resources is no different from e.g. tax law, family law or criminal law. All national laws have to comply with the fundamental freedoms and basic provisions of the EEA Agreement, unless the Agreement itself specifically exempts sectors of national legislation from its ambit.

81. Consequently, the fact that the EEA Agreement does not contain a common policy concerning the management of natural resources does not imply that national rules that are part of such a policy escape the requirement to respect the principles of equal treatment and free movement laid down in the EEA Agreement. These provisions do not become inapplicable simply because the sector of the economy is not subject to harmonised EEA law.

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[51] Cf. with regard to taxation systems which, as a general rule, are not covered by the EEA Agreement, Case E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Court Report page 143, where the EFTA Court, in paragraph 26, states that *"as a general rule, the tax system of an EEA/EFTA State is not covered by the EEA Agreement. The EEA/EFTA States must, however, exercise their taxation power consistently with EEA law."* See in the same vein, Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report page 76, paragraph 34, and Case E-1/05 *Fokus Bank* [2004] EFTA Court Report page 11, paragraph 20. Similarly, although the so-called VAT-directives, harmonising the levying of VAT within the EU, have not been made part of the EEA Agreement, rules on VAT still have to be in compliance with Article 14 EEA, cf. Case E-1/01 *Einarsson* [2002] EFTA Court Report page 3. The same principle has with regard to the EC Treaty, *inter alia*, been applied in the field of criminal law, cf. Case 299/86 *Drexl* [1988] ECR 1213, paragraph 17. See also Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585, paragraph 12, with regard to registration of ships and Case 127/87 *Commission v Greece* [1988] ECR 3333, paragraph 7, with regard to monetary matters.

82. In the Authority's opinion, it is plain that the contested provision in the Industrial Licensing Act falls within the ambit of the EEA agreement, including its Articles 31 and 40:

83. First, it cannot be disputed that the commercial exploitation of hydro power constitutes an economic activity in the sense of the EEA Agreement. Access to this commercial activity is regulated by the Industrial Licensing Act, which lays down conditions for the granting of concessions, including duration and whether the ownership of the physical assets will be surrendered to the State at the end of the concession period. The regulation of the conditions for obtaining a licence, therefore, falls squarely within the regulation of commercial activities and thereby within one of the main fields of the EEA Agreement.

84. Second, Annex IV to the Agreement contains an entire chapter on the regulation of energy, including energy from national resources, which even goes so far as to lay down common rules for the internal market in electricity and gas.[52] Natural resources are also mentioned in Article 73 (1)(c) EEA.[53]

85. Third, it is undisputed that no provision in the EEA Agreement excludes national legislation pertaining to the management of natural resources from all effects of EEA law. Nor does any provision preclude the application of Articles 31 and 40 EEA to economic activities related to the management of hydro power. On the contrary, that the EEA Agreement applies to electricity generated from hydro power is corroborated by the insertions of special clauses in the EEA Agreement exempting other types of economic activities from the ambit of Articles 31 and 40 EEA even if these activities also relate to the management of national resources.[54] These provisions would not have been necessary if the application of the Agreement was excluded simply because the economic activity concerned had a bearing on the national management of natural resources.

1.2. The Norwegian Government's indications to the Storting about the relationship between EEA law and the Industrial Licensing Act

86. As stated above in paragraph 67, the Norwegian Government has supported its argument that the contested rules in the Industrial Licensing Act fall outside the EEA Agreement by referring to the preparatory works to the Act that provides for Norway's accession to the EEA Agreement and the incorporation of the EEA Agreement into Norwegian law.

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[52] Directives 2003/54/EC and 2003/55/EC, replacing Directive 96/92 and Directive 98/30, were incorporated into the EEA Agreement by Joint Committee Decision no 146/2005 of 2 December 2005. Due to constitutional requirements they have not yet entered into force within the EEA. Joined Cases C-128/03 and C-129/03 *AEM SpA* [2005] ECR I-2861 demonstrate that this secondary legislation includes electricity generated by hydro power and covers the building of new production capacity. Electricity, furthermore, constitutes "goods" in the sense of Article 28 EC and there is no reason why the same should not be the case in relation to Article 11 EEA. See in this respect, Case C-158/94 *Commission v Italy* [1997] ECR I-5789. See also Regulation 1228/2003 on cross-border trade in electricity and Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

[53] Other examples of rules on the managing of natural resources can be seen in Directive 94/22 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydro-carbons and Directive 2000/60 establishing a framework for Community action in the field of water policy.

[54] Cf. e.g. point 10 of Annex VIII and point 1h of Annex XII to the EEA Agreement which exempt the fishery sector from the rules on free movement of establishment and capital.

87. As a matter of principle, the Authority would submit that the Government's indications to the Storting as to the legality of the Industrial Licensing Act are without relevance for the *interpretation* of the EEA Agreement.[55] An interpretation by a national body to other organs of the same State concerning the interpretation of the EEA Agreement is not a binding source of interpretation of EEA law. Such effect is conferred solely on judgments from the EFTA Court and the Court of Justice of the European Communities (hereinafter "the Court of Justice"). Indeed, the Norwegian Government has previously conceded that the EEA Agreement has made it necessary to change several laws that the Government in the accession proposition assessed as compatible with EEA law.[56]

88. Nor can a Government's indications to other organs of the same State about its own understanding of the EEA Agreement constitute a valid *reservation* to the Agreement. This is also the case if the understanding is built on a particular reading of Community law. An interpretation of Community law as a basis for the understanding of EEA law could only validly constitute a derogation from the Agreement if it had been accepted by all the Contracting Parties. No such agreement exists in the present case. One of the main objectives of the Agreement is to create a homogeneous European Economic Area based on common rules and equal conditions of competition. It must, therefore, require strong and convincing proof to conclude that the Contracting Parties had a *common* will to establish a different and narrower delimitation of the fundamental provisions relating to the freedom of establishment and the free movement of capital than that which generally follows from EC law.[57]

89. In any event, the Authority submits that the changes made to the Industrial Licensing Act in connection with Norway's accession to the EEA themselves are based on the explicit consideration that the EEA Agreement does indeed apply to conditions for obtaining a concession to run a hydro power plant. The Government's own statements concerning the effect of the EEA Agreement on its policy with regard to natural resources in general and hydro power in particular presupposes that this area is not immune to the requirements of the EEA Agreement. As far as the Authority can see from the quotes given above in paragraphs 26-27, the Government merely seemed to be of the opinion that only rules that gave preferential treatment to Norwegians had to be abolished in order to comply with the Agreement.

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[55] Case 14/70 *Deutsche Bakels* [1970] ECR 191, paragraphs 4-5.

[56] For instance, Act no 79 of 23 December 1994 on business acquisition (Lov om erverv av næringsvirksomhet) requiring notification of acquisitions of holdings over certain thresholds in Norwegian companies was later abolished in 2002 following the initiation of proceedings by the Authority. The proposition also found that different ownership restrictions in banks and financial institutions, often referred to as the 10% rule, were compatible with the EEA Agreement. Yet, the 10 % rule was later abolished following a reasoned opinion from the Authority in 2001. Another example is to be found at page 211 of St.prp. no 100 (1991-92) where the Government with reference to the Case 204/90 *Bachmann* [1992] ECR I-249 considered that the tax provisions concerning life assurance could be maintained. Yet, the Norwegian rules were later amended following an infringement proceeding initiated by the Authority and the judgment in Case C-422/01 *Skandia* [2003] ECR I-6817.

[57] Case C-471/04 *Keller Holding*, judgment of 23 February 2006, paragraph 48, where it is reiterated that both the Court of Justice and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly.

2. Article 31 and the right of establishment

2.1. Delimitation between the rules on establishment and capital

90. As mentioned above in paragraphs 5 and 55, the vast majority of Norwegian waterfalls that can be utilised for hydro power production have already been developed. Few new concessions to acquire and develop waterfalls will, therefore, be granted in the future. This means that for a foreign operator wishing to establish himself as an electricity producer in the Norwegian market, acquisition of shares in existing Norwegian hydro power companies is by far the most practical way of entering the market.

91. It follows from the case law of the Court of Justice that direct investment in the form of participation in an undertaking by means of shareholding is a capital movement within the meaning of Article 40 EEA. Acquisition of shares sufficient to give the investor a controlling holding in a company constitutes an exercise of freedom of establishment within the meaning of Article 31 EEA.[58] Whether a given national measure is considered under Article 40 EEA or Article 31 EEA will often have limited practical importance since both provisions prohibit discriminatory as well as indistinctly applicable restrictions.

92. In the following the Authority will address both freedom of establishment and free movement of capital. The difference in treatment with respect to granting of concessions will be discussed under the freedom of establishment and the difference in treatment triggered by acquisition of shares in existing Norwegian companies will be dealt with under the free movement of capital. The discrimination addressed under capital movements will also constitute discrimination in relation to the freedom of establishment provided the acquired holding is sufficient to obtain control over the company.

2.2. The concept of discrimination based on nationality as laid down in the case law

93. The freedom of establishment prohibits national measures which entail direct or indirect discrimination on the basis of nationality. According to settled case law, a national rule is discriminatory if, in practice, it affects a substantially higher proportion of foreign entities. In this regard, it is not necessary for the rule to have the effect of putting at an advantage all the nationals of the State in question, or of putting at a disadvantage only nationals of other Member States. The fact that a national measure, which is unfavourable for all nationals of other EEA States is also unfavourable for some domestic economic operators, does not remove the discriminatory element of the provision.[59]

94. On that basis, the Court of Justice has concluded that national rules that apply without distinction to all companies, whether of the nationality of the EEA State

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[58] Case C-251/98 *Baars* [2000] ECR I-2805, paragraph 22.

[59] Case E-3/05 *EFTA Surveillance Authority v Norway*, judgment of 3 May 2006, paragraph 56, Case C-388/01 *Commission v Italy* [2003] ECR-721, paragraph 14, Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraphs 11-15, Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni* [1993] ECR 1-6621, paragraph 37, Case C-353/91 *Commission v the Netherlands* [1991] ECR I-4069, paragraphs 23-25, and Case C-274/96 *Bickel and Franz* [1998] ECR 1-7637, paragraphs 22 *et seq.*

concerned or of foreign nationality, are incompatible with the freedom of establishment when they essentially favour public companies of the EEA State concerned.[60]

95. An example of the same approach can be found in Commission Decision 85/276/EEC of 24 April 1985 concerning the insurance of public property in Greece and loans granted by Greek State-owned banks (OJ 1985 L 152, p. 25). In that case, Greek law stated that all public property, including the assets of Greek public undertakings, had to be insured exclusively with Greek public-sector insurance companies. It also stated that the Greek state-owned banks were required to recommend their customers to take out insurance with a state-owned insurance company. The Commission held that the Greek provisions were incompatible with (now) Articles 86(1), 43, 10(2) and 3 EC. As regards the infringement of the rules on establishment, the Commission noted the following:

"*... this measure makes it impossible for insurance companies from other Member States to set up business in Greece as public property insurers while Greek public-sector insurers can continue to insure such risks and at the same time acquire new business previously underwritten by private companies. The Greek public property insurance market accounts for approximately 25% of annual premium income in Greece, which is a large proportion of the total. The loans made by Greek State-owned credit banks account for some 80% of the credit market in Greece. By requiring the staff of State-owned credit banks to recommend their customers to take out insurance with a public-sector insurance company, Greece favours the latter to the detriment of non-public-sector insurance companies and hence also of insurance companies from the other Member States*".

96. That a difference in treatment between private and public undertakings can fall foul of the rules on free movement, even if national undertakings are also hit by the less favourable treatment is further illustrated by the recent judgment in *Commission v Italy*.[61] In that case voting rights were suspended for holdings by public undertakings exceeding 2 % in privatised gas and electricity companies. The Italian Government argued that the Italian law was not discriminatory since it concerned acquisitions made by Italian public undertakings in the same way as acquisitions made by public undertakings of other Member States. To this the Court replied that:

"The fact that the legislation at issue is addressed only to a category of public undertakings holding a dominant position in their domestic markets does not detract from that finding. The Treaty provisions on the free moment of capital do not draw a distinction between private undertakings and public undertakings".[62]

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[60] Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraphs 6-9. For a similar line of argumentation as regards public procurement see the Commission's interpretative communication on concessions under Community law, OJ 2000 C 121/2 (3 and 7) where it is stated that "*[t]he following should therefore be considered to contravene the above mentioned rules of the Treaty and the principle of equality of treatment: provisions reserving public contracts only to companies of which the State or the public sector, whether directly or indirectly, is a major or the sole, shareholder.*"

[61] Case C-174/04 *Commission v Italy* [2005] ECR I-4933.

[62] Op. cit. paragraph 32.

2.3. The discriminatory nature of the Industrial Licensing Act

97. Article 31 EEA entails that undertakings from other EEA States shall be allowed to establish themselves in any domestic market under the same conditions as those applicable to national undertakings. However, the Industrial Licensing Act sets up different conditions for, on the one hand, publicly controlled Norwegian undertakings and, on the other hand, other undertakings, including all undertakings from other EEA States. The conditions differ notably with regard to 1) whether the concession is time-limited or not and 2) whether the waterfall and installations pertaining thereto shall be surrendered to the State at the end of the concession period. Both aspects are important in relation to the overall return that the concession holder can expect to obtain from running the hydro power plant.[63]

98. The difference in treatment has negative economic effects in relation to the value attributed to acquisition of a waterfall even at the start of the concession period. The difference in treatment will continue to increase the older the concession to a waterfall becomes. The economic disadvantage for the foreign or private operator is particularly strong when such operators seek to establish themselves on the Norwegian market by acquiring a waterfall which is subject to a concession that has already been running for several years.

99. To give an example: If a hydro power plant that was granted a time limited concession in 1960 is acquired today, a private or foreign buyer will only be allowed to operate the plant for another 14 years, whereas acquisition by a Norwegian public buyer will convert the concession to a time unlimited concession. Private and foreign buyers will, therefore, have to set a lower valuation on the plant compared to the value for a Norwegian public buyer. In fact, if reversion will take place within only a few years, the possibility to make a profit on an acquisition or to be able to make an acquisition at all in competition with Norwegian public undertakings might be so limited as to exercise a *de facto* prohibitive effect.

100. That these rules have the effect of precluding the establishment of private and foreign operators is illustrated by the fact that all publicly owned waterfalls that have been sold in recent years have been acquired by other Norwegian public entities, in particular the State owned company Statkraft AS, but also by companies controlled by counties and municipalities.[64]

101. Hence, as also stated in NOU 2004:26, a new system entailing equality of treatment of the market operators:

> "*... will probably lead to private and foreign companies being more interested in buying waterfalls with hydro plants in Norway.*"[65]

102. The difference of treatment is, moreover, reinforced by the following other aspects of the Industrial Licensing Act:

- While concessions to foreign and private undertakings shall, according to Section 2 of the Act, only be awarded under special circumstances, Norwegian

[63] Paragraphs 46-47 above.
[64] Paragraph 54 above.
[65] NOU 2004:26, page 83. See also page 124 of the Report.

public operators shall, according to Section 4 of the Act, be granted a concession unless it would be contrary to public interest considerations to do so.

- It follows from Sections 4 and 5 of the Act that foreign and private owners are precluded from renting out a waterfall to an operator that is not a Norwegian public body or an undertaking in which a Norwegian public body owns at least 2/3 of the shares. In contrast, no similar restriction is placed on Norwegian public owners. The provision also precludes foreign and private undertakings from establishing themselves as operators of hydro power plants by leasing waterfalls from a non-public owner. Again, there is no corresponding rule that precludes a Norwegian public undertaking from obtaining a concession to lease a waterfall from non-public owners.

- Section 4 lays down pre-emptive rights for the State in the case of acquisition of holdings in publicly controlled waterfalls by private and foreign undertakings. By themselves, these rules make it more difficult for an operator from another EEA State to enter the Norwegian hydro power market than for a Norwegian public operator. The pre-emptive rights for the State are not connected to objective criteria concerning the individual suitability of the buyer, but triggered solely by the fact that the buyer is a non-public buyer. Their purpose, therefore, seems to be to restrict private and foreign establishments in Norway.

103. In the Authority's opinion, the difference in treatment provided for in the Industrial Licensing Act constitutes discrimination on the basis of nationality contrary to Article 31 EEA. A foreign undertaking can never be granted the more favourable type of concession, whether or not it is publicly owned, since the decisive criterion is that of *Norwegian* public ownership. Hence, *all* undertakings from other EEA States are treated less favourably than all Norwegian public undertakings.[66] That not all Norwegian undertakings are treated more favourably than foreign companies, does not remove the discriminatory character of the provisions. It follows unequivocally from Section 4 of the Industrial Licensing Act that *all* companies receiving favourable treatment under the Industrial Licensing Act are Norwegian.

104. As a matter of fact, the discriminatory element is strengthened by the fact that the Norwegian public companies constitute the vast majority of all Norwegian undertakings involved in the economic exploitation of hydro power on the Norwegian market. The result under the Industrial Licensing Act is that close to 88 % of all the involved concession-holders are undertakings controlled by Norwegian public (majority) owners and, therefore, receive better treatment than operators from other EEA States.[67]

105. In conclusion, the Authority respectfully submits that the contested provisions in the Industrial Licensing Act are contrary to the freedom of establishment.

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[66] Cf. similarly Advocate General Mischo in paragraphs 16-20 of his opinion in Case C-3/88 *Commission v Italy*, cited above, at page 4048.

[67] For the sake of being exhaustive, the Authority would like to add that even an indistinctly applicable difference in treatment between public and private companies would, unless justified by mandatory requirements, fall foul of the rules on free movement, cf. Case C-174/04 *Commission v Italy*, cited above.

3. Article 40 and free movement of capital

106. The acquisition of shares by non-residents whether dealt on a stock exchange or not is an operation which constitutes a capital movement within the meaning of Article 40 EEA. Indeed, and although the list of the operations within the nomenclature annexed to Directive 88/631/EEC is not exhaustive, these operations are specifically referred to in Heading III A (1) and (2) of the nomenclature and, consequently, fall within the scope of application of Article 40 EEA.

107. According to the case law of this Court and the Court of Justice, the fundamental principle of free movement of capital encompasses a general prohibition on restrictions on cross border movement of capital. It covers unequal treatment on the grounds of nationality between operators on the financial markets and all other rules which are liable to impede the acquisition of shares in undertakings and to dissuade investors in other States from investing in the capital of those undertakings.[68]

108. In the Authority's opinion, the difference in treatment between, on the one hand, undertakings controlled by Norwegian public bodies and, on the other hand, private and foreign undertakings makes it less attractive for investors to acquire shares in the latter group of companies. This is so since, as explained above in paragraphs 46-47, the value of the investment for a shareholder in a public undertaking is linked to the income generated by the waterfall for an unlimited time period whereas the value of investment in a foreign or privately owned company is limited by the expected income until reversion. Not only does the disincentive increase as the date for reversion approaches, the fact that reversion will take place creates uncertainty for the company, particularly in relation to early reversion or buy- or lease-back opportunities.

109. Private and foreign investors also suffer from a competitive disadvantage as compared to Norwegian public undertakings when bidding for shares in both private and public Norwegian undertakings. This is because of the definition of, and legal consequences connected to, what constitutes a Norwegian public company. As explained above in paragraphs 50-51, the nature of the buyer of a holding may imply a conversion of the company from public to private or vice versa. The disputed provisions thereby create incentives to maintain or modify the ownership structure in the companies towards companies with a predominantly Norwegian public ownership.

110. This difference is especially clear when the transfer of a holding in a Norwegian public undertaking to a private or foreign investor entails that the company will be re-classified as a private undertaking. Such a re-classification will occur where the acquired holding is larger than 1/3 of the total shares or, when shares are already in foreign or Norwegian private hands, the acquired holding is larger than the remaining amount of shares up to the 1/3 limit. Because of the possible re-classification of the company, which will make the concession time limited and the

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[68] Case E-1/00 *Islandsbanki-FBA hf.*, cited above, paragraph 17, Case E-1/04 *Fokus Bank*, cited above, paragraph 25, Case C-367/98 *Commission* v. *Portugal* [2002] ECR I-4731, paragraphs 44-46, Case C-483/99 *Commission* v. *France* [2002] ECR I-4781, paragraphs 40-42, Case C-98/01 *Commission* v. *United Kingdom* [2003] ECR I-4641, paragraph 47, Case C-463/00 *Commission* v. *Spain* [2003] ECR I-4581, paragraph 61, (the so-called "*Golden Shares*" cases) and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10.

waterfall subject to reversion, the value of that holding will be lower for a private or foreign investor than for a Norwegian public entity. For the same reason, the seller of a public holding will have a clear incentive only to sell to another Norwegian public body. Indeed, in public companies that have operated for close to or more than 60 years, the sale of even a minor holding that nevertheless triggers the re-classification, will imply that the waterfall with all installations will become subject to reversion, either immediately or after a limited number of years.[69] In such circumstances, it must be assumed that in practice these rules represent a nearly complete hindrance to foreign investment in Norwegian public companies.

111. The fact that, according to Section 4 of the Industrial Licensing Act, the State may invoke pre-emptive rights if a transfer of shares would result in private and foreign shareholdings exceeding the 1/3 limit further reinforces the obstacles to investment by such investors in this sector. Indeed, as can be inferred from the preparatory works referred to above in paragraphs 30-31, the pre-emptive rights were introduced precisely in order to give the State the opportunity of hindering the acquisition by non-public investors of more than 1/3 of the shares in a public company. Thus, the provision is aimed specifically at restricting such capital movements.

112. A similar discrimination occurs when a transfer of shares in a private or foreign owned company may result in the company changing status to become a public undertaking. If an acquisition by a Norwegian public undertaking or a group of Norwegian public undertakings[70] would imply that the 2/3 ownership threshold is passed, the value of the shares would be much higher for a public investor than for a private of foreign investor whose possible acquisition would not imply any re-classification.

113. Consequently, the Authority submits that the contested Norwegian rules are discriminatory and constitute a restriction according to Article 40 EEA.

4. Article 125 EEA

4.1. The position of the Norwegian Government

114. In the administrative proceedings, the Norwegian Government referred to Article 125 EEA according to which "*[t]his Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.*" The Government underlined that, according to Norwegian law, the right to develop waterfalls requires concession for all parties other than the Norwegian State. The system requires that privately (and foreign) owned waterfalls will ultimately be surrendered to the Norwegian State. In contrast, the State has no need to require the transfer of ownership rights in relation to publicly owned waterfalls. Consequently, the contested rules must, in the opinion of the Government, be deemed to fall within the scope of Article 125 EEA.

4.2. General remarks relating to the scope and effect of Article 125 EEA

115. Article 125 EEA corresponds to Article 295 EC. As stated by the Community Courts:

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[69] Paragraphs 51-52 above and NOU 2004:26, pages 16 and 78.

[70] Depending on the size of acquisition by the individual investor this might as well be a difference in treatment dealt with by the rules on freedom of establishment, see paragraph 91 above.

"[A]lthough the system of property ownership continues to be a matter for each Member State under Article 295, that provision does not have the effect of exempting the Member State's system of property ownership from the fundamental rules of the Treaty."[71]

116. Article 295 EC *"merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights"*.[72]

117. The *Fearon* case was concerned with the question whether, having regard to the freedom of establishment, a Member State may reserve the power to use compulsory acquisition of agricultural land for situations where the land was not owned by someone residing on or near the land. In that case the Commission had submitted that rules on compulsory acquisition formed part of the system of property ownership and that Article 222 of the Treaty (now Article 295 EC) served to justify the national rules. In the opinion of the Commission, such systems of property ownership were, because of Article 222, not prejudiced by the rules on free movement laid down in the EC Treaty. Advocate General Lenz disagreed and argued that Article 222 could not be interpreted as excluding national rules governing the system of property ownership from the field of application of the general principles of Community law. The Court agreed with its Advocate General and held that:

"*... although Article 222 of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment*".[73]

118. The Court has also stated that a Member State's concern to retain a degree of influence over undertakings active in fields involving the provision of services in the public interest that were initially public and subsequently privatised:

"*... cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. That article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty ... The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 58(1) EC or by overriding requirements of the general interest.*"[74]

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[71] Joined Cases T-116/01 & T-118/01 *P & O European Ferries* [2003] ECR II-2957, paragraph 151. See similarly Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38.

[72] Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paragraph 147.

[73] Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7, and see point 2 of the Advocate General's opinion at page 3689. See also Case C-452/01 *Ospelt* [2003] ECR I-9743, paragraph 24, and Case C-300/01 *Salzmann*, [2003] ECR I-4899, paragraph 39.

[74] Case C-463/00 *Commission v Spain*, cited above, paragraph 66. See similarly Case C-483/99 *Commission v France*, cited above, paragraphs 44-45, Case C-367/98 *Commission v Portugal*, cited above, paragraphs 48-49, and Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraphs 44-45.

119. In the same vein, the Court of Justice has held that, in relation to industrial and commercial property, Article 295 EC cannot be interpreted as reserving for the national legislature the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty.[75] As stated by Advocate General van Gerven, the Court of Justice has consistently refused arguments according to which a national rule which falls within the scope of Article 295 EC is automatically compatible with the rules on free movement.[76] Nor does Article 295 EC detract from the scope of Articles 81 and 82 EC[77] and Article 87 EC.[78]

120. In conclusion, the interpretation of Article 295 EC does *not* leave room for national laws which give rise to different conditions of competition between either public and private undertakings or national and non-national undertakings, all of which are allowed to perform the same economic activity.[79] The Authority submits that the same conclusion must apply to Article 125 EEA.

4.3. Application to the present case

121. By the present application the Authority is not disputing that a national rule whereby a time limited concession will only be granted on the condition that the physical assets are surrendered to the State at the end of the concession period might, as such, be covered by Article 125 EEA. Article 125 EEA may possibly be invoked to protect a policy choice by a State which deems such an instrument as appropriate to allow it to manage natural resources as it best sees fit.

122. The Authority does, however, claim that such a system must be designed in a way that complies with the fundamental freedoms and, hence, that it does not result in discrimination, either directly or indirectly, based on the origin of the undertaking or investor concerned. As demonstrated above, the Industrial Licensing Act does not fulfil this requirement.

123. The contested rules in the Industrial Licensing Act do not regulate who may own property. Nor do they restrict the exploitation of waterfalls for the purposes of producing electricity to only Norwegian public undertakings. On the contrary, the Industrial Licensing Act allows both privately owned, publicly owned and partly

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[75] Case C-235/89 *Commission v Italy* [1992] ECR I-777, paragraph 14. See also Case C-30/90 *Commission v UK* [1992] ECR I-829. According to the Commission in those cases, "*Article 222 protects national rules on who may own property and not the obligations which may be imposed on owners of property*", cf. op.cit. page 840.

[76] Joined opinions in Cases C-235/89 *Commission v Italy* and C-30/90 *Commission v United Kingdom* [1992] ECR I-777, paragraph 9.

[77] Case T-65/98 *Van den Berg Foods* [2003] II-4653, paragraphs 164-173, and Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraphs 58-59.

[78] Joined Cases T-116/01 & T-118/01 *P & O European Ferries*, cited above, paragraph 153.

[79] Cf. with regard to the principle that public and private undertakings should be treated alike: Advocate General Jacobs in Case C-482/99 *France v. Commission* [2002] ECR I-4397, paragraph 47, and Joined Cases 188 to 190/80 *France, Italy and UK v Commission* [1982] ECR I-2545, paragraphs 20-21. In Joined cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* [2003] ECR II-435, paragraphs 36, 196-197 and 266-267, a Commission decision setting aside an aid scheme as unlawful was challenged on the basis of Article 295 EC. The Court of First Instance held that Article 295 EC did not restrict the scope of Article 87 EC and that any justification should be assessed on the basis of Article 86(2) EC. It also stated that the competition rules apply without distinction to public and private undertakings, that Article 295 EC does not contradict that principle and that there existed a principle that the public and private sectors are to be treated equally.

private/partly publicly owned companies to perform such activities. It also allows private, foreign, as well as Norwegian public entities to invest in companies possessing waterfalls. In Norway the production and sale of electricity is subject to competition. Moreover, as already mentioned, despite the somewhat misleading term 'reversion', the Industrial Licensing Act is not aimed at regulating the particular situation where the State allows an economic operator to exploit property belonging to the State. According to Norwegian law, the ownership *remains* with the concession holder during the entire concession period.[80]

124. Hence, the Industrial Licensing Act regulates ownership rights only in a very broad sense by stipulating the obligations which may be imposed on a particular group of owners of property wishing to exercise a specific liberalised economic activity.

125. Both from an economic point of view and from the perspective of Article 125 EEA, these conditions are basically similar to a national system with different tax regimes for different concession-holders or different sizes of fees for obtaining a licence, dependent on whether the applicant is an undertaking controlled by a national public entity. This similarity is illustrated by the fact that the majority of non-public concession holders have been permitted to extend the concession period by so called early reversion or to continue their activities after the reversion has taken place by either buying the waterfall and hydro power plant back from the Norwegian State, or by continuing to run the hydro power plant as leaseholder under Section 5 of the Industrial Licensing Act (see paragraph 41 above). Hence, in these instances the same economic entity continues to operate the waterfall, but that entity has suffered the economic burden of having to repurchase or give up the installation it previously owned, while no similar burden has been put on a competing Norwegian publicly controlled operator.

126. Just as in the above-mentioned *Golden Shares* cases[81], the difference of treatment laid down in the Industrial Licensing Act is a privilege directly attached to the existence of a Norwegian public body as a shareholder or holder of other forms of ownership rights. The only difference is that the rights are contingent upon the public bodies having a certain percentage of the total amount of shares. Regardless of whether an undertaking originally received a time limited or an infinite concession, the length of the concession will automatically change if ownership rights are being traded to an extent that the ratio between Norwegian public shareholders and other shareholders falls below 2:1, *i.e.* other shareholders account for more than 1/3 of the shares.

127. In its reply to the Authority's letter of formal notice, the Norwegian Government argued that:

> "*How the State seeks to manage its own property is ... clearly unaffected by the EEA Agreement. All privately owned concessions are time-limited, ultimately leading to the reversion of the installations to the State. The State has no need to require reversion of the publicly owned waterfalls. This is why the condition of reversion only applies to non-public concessionaires.*"

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[80] Paragraphs 32-38 above.
[81] See footnote 68 above.

128. The Authority does not share that opinion. For the purposes of EEA law, public undertakings, operating on a commercial basis in the market and in competition with other undertakings, have to be distinguished from the State and its exercise of regulatory power.[82] Nothing precludes the Norwegian State from putting the same economic burden on State, county and municipality controlled undertakings as is today placed on foreign and private operators, thereby creating equal conditions of competition between the different operators of hydro power plants.

129. Finally, as explained above the Authority has identified as discriminatory measures both the reversion obligation and the time-limitation of the concession. Even if one took the untenable view that Article 125 EEA permitted discrimination with regard to reversion, it cannot be argued that to place a lime-limit only on concessions held by non-public operators is a regulation of property ownership.

5. Justification

130. In the administrative phase, the Norwegian Government did not put forward any explicit justification grounds for maintaining the Norwegian rules at issue. Instead it argued that the disputed provisions fell outside the scope of the EEA Agreement altogether. The Government did, however, emphasise *inter alia* the need to ensure management and control over waterfalls. In addition, as mentioned in paragraph 37 above, the Government has stated in preparatory works to the contested Act that reversion gives the state the possibility to consider whether existing use should be continued or changed just as it supplies the state and the municipalities with economic resources.

131. As these statements reflect views which could be relevant to an assessment of whether, despite constituting an infringement contrary to Articles 31 and 40 EEA, the rules can be justified, the Authority has chosen already at the present stage to deal briefly with the issue. However, the Authority must emphasise that the arguments presented below may have to be supplemented later in the proceedings.

5.1. The test

132. As shown above in paragraph 103, the disputed provisions are directly discriminatory. The starting point is, therefore, that justification is only possible for the specific reasons mentioned in Article 33 EEA.[83]

133. One of the grounds listed in Article 33 EEA is that of public security. In this respect, the Authority understands the Norwegian Government not to argue that the reversion system is necessary in order to safeguard continuous day-to-day supply of electricity. It is in any event difficult to see how a system of waterfall concessions of 60 years duration for private and foreign operators could be a suitable means of obtaining e.g. sufficient production of energy in a situation of acute lack thereof. As they stand, the present rules on reversion do not give the State a remedy to act for a period of up to 60 years.

134. The Authority cannot see that there are any other grounds of justification that merit recourse to Article 33 EEA.

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[82] Cf. e.g. Case 202/88 *Commission v France* [1991] ECR I-1259, paragraph 51.
[83] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*, judgment of 30 March 2006, paragraphs 36-37.

135. However, on the basis that the factor which determines the applicable regime in the Industrial Licensing Act is not *only* linked to Norwegian nationality, and to the extent that arguments based on overriding reasons in the public interest might be put forward, the Authority will comment briefly on other possible justification grounds.

136. In order for a measure which constitutes a restriction under Articles 31 and 40 EEA to be compatible with these provisions, the measure needs to be justified by overriding reasons relating to the general interest and to apply equally to all undertakings pursuing an activity in the EEA State concerned. Moreover, the measure must be suitable for securing the attainment of the objective which it pursues and may not go beyond what is necessary in order to attain it.[84] In this respect, it is up to the EEA State concerned to demonstrate both the suitability and the necessity of the measure as well as the public interest aim pursued.[85] As these conditions are fundamentally similar under Articles 31 and 40 EEA, the Authority will, in the following, make one single assessment of the justification in relation to the two provisions.

137. Regardless of whether the justification test should be made on the basis of the above or of Article 33 EEA, the key to the assessment will not be the suitability and necessity of the reversion system as such, but rather whether the *difference* in treatment between Norwegian public undertakings, on the one hand, and foreign and private undertakings, on the other, goes beyond what is necessary to protect aims that are legitimate under the EEA Agreement. In this respect, it cannot be disputed that the Industrial Licensing Act originally had a protectionist purpose.[86] Later revisions of the Act have toned down the original purpose and placed Norwegian private undertakings on the same footing as undertakings from other EEA States. Still, the Authority submits that the original intentions of the Act call for a close scrutiny of any justification which the Government might invoke and of the necessity of the contested difference of treatment.

5.2. The economic aim behind reversion

138. As already indicated, one of the two aims behind reversion that were described in the preparatory works is of an economic nature:

> "*With the reversion the state and the municipalities are supplied with economic resources. This must be viewed in connection with waterfalls being a limited natural resource where investments made to utilise the resource provide profits that exceed normal profits, so called economic rent. The reversion system contributes to ensuring that parts of these large sums fall back to the community. ... The potential revenue that right of reversion provides for must, moreover, be seen in conjunction with the State's other possible sources of income. Taxes and duties*

[84] Case E-8/04 *EFTA Surveillance Authority v Liechtenstein* [2005] EFTA Court Report, page 46, paragraph 23, and Case E-2/01 *Pucher* [2002] EFTA Court Report, page 44, paragraph 31, (establishment) as well as Case E-10/04 *Piazza* [2005] EFTA Court Report, page 76, paragraph 39, and Case C-213/04 *Burtscher*, judgment of 1 December 2005, paragraph 44 (capital).

[85] Case E-1/03 *EFTA Surveillance Authority v Iceland*, cited above, paragraphs 34-35, Case E-1/94 *Restamark* [1994-1995] EFTA Court Report, page 15, paragraph 60, Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 22, Case C-414/97 *Commission v Spain* [1999] ECR I-5589, paragraph 22, and Case 324/82 *Commission v. Belgium* [1984] ECR 1861, paragraph 31.

[86] Cf. paragraph 14 and 17-18 above.

normally entail a loss of efficiency in the economy. Through a suitable shape and practice of the reversion system, a given amount collected through right of reversion will probably entail less loss of efficiency than if the same amount would be collected through taxes and duties other places in the economy."[87]

139. According to NOU 2004:26, the total present value of the existing conditions of reversion amounts to between 1.5 and 3 billion NOK.[88] It has also been emphasised that the Act's promotion of Norwegian public ownership in itself boosts the potential for public income.[89]

140. It follows, however, from settled case law that an economic aim can justify neither discrimination nor a restriction on the exercise of fundamental freedoms.[90] In any event, if the Norwegian Government wishes to continue to secure the economic rent by reversion, it merely has to expand the system of reversion (and time limited concessions) so as to also cover Norwegian public undertakings.

5.3. Management and control

141. The second aim behind reversion described in both the preparatory works and in the administrative proceedings is that of public management and control over the sector. In its reply to the letter of formal notice, the Norwegian Government stated that:

"*The need for management and control over the waterfalls is therefore vital, both to ensure the future electricity supplies in Norway and to ensure that socio-economic decisions on the use of waterfalls achieve an optimal balance between a number of often conflicting interests.*"

142. In the Government's opinion, that control can best be achieved by way of public ownership. Likewise it follows from the preparatory works that reversion gives the state the possibility to consider whether existing use should be continued, changed or whether the energy should be managed differently.[91] Moreover, in a letter of 23 April 2001 from Norway to the Authority, the Government explained that the public undertakings manage the waterfalls on behalf of the State and that it is necessary for the authorities to consider from time to time whether the private undertakings should be allowed to continue to manage waterfalls.[92]

143. The question is thus whether the provisions in the Industrial Licensing Act can be justified by the Norwegian Government's wish to exercise long term influence over how waterfall resources are used and exploited via direct ownership. In this respect, it is the opinion of the Authority that one has to distinguish between, on the one hand, the desire of an EEA State to be able to steer the long term development of an important economic sector and, on the other hand, the willingness to

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[87] Ot.prp. no 70 (1992-93) pages 6-7. The Authority's translation. The original Norwegian text can be found in **Annex 14**. See similarly NOU 2004:26, pages 12, 16, 37, 53, 67-68, 77, 94 and 110.

[88] NOU 2004:26, pages 81-82.

[89] St. meld. no 29 (1998-99) Om energipolitikken, page 69.

[90] Case E-1/04 *Fokus Bank*, cited above, paragraph 33, Case C-288/89 *Gouda* [1991] ECR I-407, paragraph 11, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 22, Case C-324/93, *Evans Medical* [1995] ECR I-563, paragraph 36, and Case C-367/98 *Commission v Portugal*, cited above, paragraph 52.

[91] Paragraph 37 above.

[92] The same view was brought forward in the mandate to the expert committee in NOU 2004:26. See also pages 16, 67-68, 77, 80, 92, 110 and 123 of the Report.

obtain this influence by way of provisions that imply a less favourable treatment of undertakings from other EEA States than that which is granted to the large majority of national undertakings. While the overall aim to safeguard the maintenance of an economic sector of such public importance as the energy sector is, as such, legitimate, the Authority submits it is not in conformity with the EEA Agreement to achieve that aim by discriminatory means.

144. No considerations relating to the Norwegian State's need to control the future development of the hydro power sector make it necessary to have different conditions for the two groups of undertakings. If the Norwegian Government finds that reversion is indeed necessary, then nothing precludes it from applying the rules on time limited concessions and reversion also to Norwegian public undertakings. Today less than 10 % of the total hydro power production capacity in Norway is subject to reversion and the inherent control that it purportedly brings the Norwegian Government.

As stated in NOU 2004:26:

"The present legislation in force, where only a minor part of the total production of electricity is subject to reversion, provides less possibility for a global assessment of the use of resources. Reversion in its present form might therefore be less satisfactory as a means to control" the exploitation of hydro power. [93]

145. Hence, it would only increase the control if the Norwegian Government were to abolish the preferential treatment for Norwegian public companies and subject *all* operators to identical rules. For that reason alone the Authority would submit that all arguments related to the general need to manage and control this natural resource, including the need to reassess at regular intervals whether the waterfall should continue to be exploited for commercial purposes, are incapable of justifying the difference in treatment of Norwegian public operators as compared to private and foreign operators. Applying equal economic conditions to all operators on the market would strengthen and not weaken the State's management and control.

146. In any event, it is the opinion of the Authority that the lack of reversion for Norwegian public undertakings is not reflected by any corresponding special control that the Government has over these undertakings. This is especially the case with regard to undertaking owned by the municipalities. To the extent the State is dissatisfied with the way a municipally controlled company is being operated, the Authority would assume that the State can only give the company instructions on how to operate the undertaking to the extent that this is specified in the legislation. The Authority also assumes that decisions to revoke the concession would have to be based on general principles of administrative law for breach of operating conditions as laid down in legislation and concessions. The means of steering the municipal undertaking are the same as those available in relation to companies in which foreign or private owners have more than 1/3 of the shares.[94]

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[93] NOU 2004:26, page 16, and see similarly pages 77, 81 and 109 of the Report.

[94] In any event, provided the State via public ownership could have and actually had undertaken regular assessments as to future use of waterfalls, the Authority would have failed to see a valid justification for why a private operator should be required to purchase or lease the waterfall with installations back from the State in those cases where the State decides that the operator nevertheless may continue the activity. In this respect the reversion is comparable to an extra tax that is only imposed on private operators.

147. To the Authority it, therefore, seems as if the Industrial Licensing Act rests upon a presumption that there is less need to manage and control commercial operators, directly or indirectly controlled by a Norwegian public body, than private and foreign operators. The Authority would, however, submit that such an automatic rule of presumption is not compatible with the EEA Agreement. Moreover, as already indicated, even if one could have assumed that Norwegian public undertakings behaved more responsibly than their competitors from other EEA States, this would not *necessitate* that the Norwegian State imposed different competitive conditions on the two groups.

ON THESE GROUNDS

Which it reserves to supplement or develop should this prove to be necessary; the EFTA Surveillance Authority respectfully requests that the EFTA Court declare that:

By maintaining in force measures, as laid down in the Act No 16 of 14 December 1917, which grant a time limited concession on the acquisition of waterfalls for energy production to private and all undertakings from other Contracting Parties to the EEA Agreement and require them to give all installations to the Norwegian State without compensation, at the expiry of the concession, to the exclusion of Norwegian public undertakings which benefit from concessions for an unlimited period of time, Norway has infringed Articles 31 and 40 of the EEA Agreement.

And

The Kingdom of Norway be ordered to bear the costs.

On behalf of the EFTA Surveillance Authority,

Niels Fenger Per Andreas Bjørgan Arne Torsten Andersen

EFTA SURVEILLANCE AUTHORITY

Brussels, 31 July 2006
Case No: 2029
Event No: 381865

EFTA SURVEILLANCE AUTHORITY

AGAINST

THE KINGDOM OF NORWAY

Annex 1	Letter to Norway from the EFTA Surveillance Authority, dated 8 March 2001
Annex 2	Letter to the EFTA Surveillance Authority from Norway, dated 20 April 2001
Annex 3	Letter of formal notice to Norway from the EFTA Surveillance Authority, dated 27 June 2001
Annex 4	Letter to the EFTA Surveillance Authority from Norway, dated 28 November 2001
Annex 5	Reasoned opinion delivered by the EFTA Surveillance Authority to Norway, dated 20 February 2002
Annex 6	Letter to the EFTA Surveillance Authority from Norway, dated 19 April 2002
Annex 7	NOU 2004:26 Hjemfall
Annex 8	Proposal from the Concession Committee of 4 May 1907, p. 35
Annex 9	Ot.prp. no 1 (1909), p. 45
Annex 10	Ot prp no 82 (1991-92), p. 7
Annex 11	Ot prp no 43 (1989-90), p. 53-54
Annex 12	Innst.O.nr.133 (1992-93) from the Energy and Industry Committee, Annex II, Letter from the Ministry of Trade and Energy to Høyre's Parliamentary Group
Annex 13	St.prp. no 100 (1991-92), p. 200-201

Annex 14 Ot.prp. no 70 (1992-93) p. 6-7