Case No: 62922
Event No: 569026
Dec. No: 376/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of

29 September 2010

to close an own-initiative case against Norway commenced following the EFTA Court's judgment in Case E-2/06

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area, in particular, Articles 31, 40, 109 and 125 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,

Whereas:

By judgment of 26 June 2007, the EFTA Court declared that the Kingdom of Norway had infringed Articles 31 and 40 of the EEA Agreement 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. (hereafter referred to as the "*Industrial Licensing Act*" or "*ILA*"), which grant to private undertakings and all undertakings from other Contracting Parties to the EEA Agreement, 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, whereas Norwegian public undertakings benefit from concessions for an unlimited period of time.

In its judgment, the EFTA Court recognised the right for EEA States to establish a system of public ownership for hydropower resources on the basis of Article 125 EEA, provided that the objective of public ownership is pursued in consistent and non-discriminatory manner. However, the EFTA Court found that under the Industrial Licensing Act both public and private operators could obtain concessions, that public operators may resell reverted rights to private undertakings and that the Industrial Licensing Act does not preclude private investors from obtaining more than 1/3 of the shares in a public concession holder. Moreover, the EFTA Court found that the system of early reversion gave the Norwegian authorities a wide margin of discretion to prolong private ownership over properties that are subject to the reversion system. On the basis thereof, the EFTA Court concluded that the Industrial Licensing Act was inconsistent with the objective of public ownership and, therefore, that the discriminatory treatment between private and public concession holders was an unjustified restriction to the freedom of establishment and the free movement of capital.

On 10 August 2007, the Norwegian Government adopted a provisional decree concerning public ownership on hydropower. The Provisional Decree of 10 August 2007 laid down the basic principle of public ownership for hydropower resources (referred to as the "consolidation model") and precluded that new concessions for the ownership or long term use of waterfalls could be granted to private operators. The Provisional Decree further provided that agreements which lead to a public ownership of less than 2/3 of the power infrastructure would be considered null and void.

By Act No. 78 of 26 September 2008, the Norwegian Parliament adopted amendments to the Industrial Licensing Act and, at the same time, to Act No. 17 of 14 December 1917 relating to River Systems, thereby repealing the Provisional Decree. The main changes introduced by the Provisional Decree were, however, consolidated in Act No. 78; *i.e.* concessions for the ownership of waterfalls may only be granted to public entities or entities which are at least for 2/3 owned by public entities (new Section 2, paragraph 1 ILA). The requirement of 2/3 ownership applies both with regard to share capital and voting rights and for both direct and indirect ownership (holding companies). Section 5 of the Industrial Licensing Act, which previously provided the possibility for granting concessions to private undertakings, was repealed. As a result, it is no longer possible for public authorities to resell reverted rights to private undertakings following a normal reversion. By providing that new ownership concessions can only be granted to public entities, that private operators cannot own more than 1/3 of the share capital and the voting rights of public entities holding an ownership concession and by ensuring that public authorities can no longer resell reverted rights to private undertakings following a normal reversion, the Norwegian Government remedied three of the four inconsistencies identified by the EFTA Court.

Act No. 78 further repealed the system of early reversion, laid down in Section 41 of the Industrial Licensing Act. This system provided concession holders subject to reversion the opportunity to agree with the State on an early reversion in return for a new 50 years concession against market value, provided that 25 years of the original concession had lapsed. This opportunity was created to avoid reduced investments at the end of a concession period for concessions subject to reversion. By repealing the provision on early reversion, the Norwegian Government remedied the fourth inconsistency identified by the EFTA Court.

It is further provided in the new Section 5(a) and Section 27 of the Industrial Licensing Act that, for existing concessions, requests for changes in the conditions concerning time-limitation and reversion shall only be granted provided that the conditions for public ownership are fulfilled. This means that private holders of existing concessions have the opportunity to either hold their concessions until they expire or to sell these concessions time-unlimited and free of reversion, provided that they are sold to public entities. Sales of existing concessions to private entities are, in any case, no longer allowed under the amended Industrial Licensing Act. The possibility for private concession holders to sell existing concessions time-unlimited and free of reversion to public entities does not seem to be contradictory to the objective of public ownership.

Act No. 78 further abolished the possibility for acquiring user rights (*bruksrett*) and long-term disposal rights (*langsiktig disposisjonsrett*) on waterfalls and installations. A user rights concession normally involves that the concession holder develops and operates the power station, whereby he acquires the ownership over the power station and the installations, which cannot be considered in line with the consolidation model and the

objective of public ownership. Nevertheless, in order to avoid difficulties with the transfer of existing rights, the Norwegian Government created the possibility for current holders of user rights concessions to continue to rent the waterfalls from the waterfall concession holder for a period of 30 years at the time, upon approval by the government (new Section 4 of the Industrial Licensing Act). This opportunity is open to both public and private concession holders and must be seen as a transitional arrangement from the old regime to the new one. Since the arrangement merely safeguards existing rights and does not allow the allocation of new user rights concessions, the new Section 4 of the Industrial Licensing Act may be considered in line with the objective of public ownership. Moreover, it appears that of all current user rights concession holders, only five are private entities, of which two acquired their rights prior to the introduction of reversion in 1909.

By Act No. 106 of 19 June 2009, the Norwegian Government created the possibility for concession holders of developed waterfalls to rent out the power station and the installations for a period of maximum 15 years (new Section 5-2 of the Industrial Licensing Act). Both public and private entities may rent such power stations and installations. Detailed rules on the conditions for rental are laid down in Regulation No. 939 of 25 June 2010. However, the possibilities for rental for private laid down in these instruments are not so extensive as to undermine the objective of public ownership. These instruments entered into force on respectively 1 January 2010 and 1 July 2010.

In light of the above, there is no ground to pursue this case further.

HAS ADOPTED THIS DECISION:

The own-initiative case against Norway commenced following the EFTA Court's judgment of 26 June 2007 in Case E-2/06 on the acquisition of waterfalls is hereby closed.

Done at Brussels, 29 September 2010

For the EFTA Surveillance Authority

Per Sanderud
President

Sabine Monauni-Tömördy
College Member

Signed version