

## EFTA SURVEILLANCE AUTHORITY DECISION

of 23 September 2021

closing an own initiative case concerning the conditions for the award  
and renewal of hydropower authorisations in Norway

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), in particular Article 31 thereof,

Whereas:

#### **1 Introduction**

On 16 April 2019, the EFTA Surveillance Authority (“the Authority”) opened an own initiative case against Norway.

The case concerns the authorisation procedures set out in the Norwegian Act on Water Resources<sup>1</sup> (“the Water Resources Act”) and the Norwegian Act on regulation of watercourses<sup>2</sup> (“the Watercourse Regulation Act”). More particularly, it relates to the question whether the award and renewal of authorisations for the construction and operation of hydropower installations and the duration of such authorisations, are in accordance with Article 12 of Directive 2006/123/EC on services in the internal markets<sup>3</sup> (“the Services Directive”) and Article 31 of the Agreement on the European Economic Area (“the EEA Agreement”).

#### **2 Correspondence**

On 30 April 2019, the Internal Market Affairs Directorate of the Authority (“the Directorate”) sent a request for information to Norway (Doc No 1065981). In its request, the Directorate sought clarification on several issues related to applicable legislation concerning the award and renewal of hydropower authorisations in Norway.

The Norwegian Government replied on 4 June 2019 (Doc No 1073677), providing an overview of the concession system for acquisition, construction and operation of hydropower installations in Norway. The Norwegian Government further stated that it does not consider the Services Directive to be applicable to the energy production sector

<sup>1</sup> Lov 24. november 2000 nr. 82 om vassdrag og grunnvann (vannressursloven).

<sup>2</sup> Lov 14. desember 1917 nr. 17 om regulering og kraftutbygging i vassdrag (vassdragsreguleringsloven).

<sup>3</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), incorporated into the EEA Agreement at point 1 of Annex X to the Agreement by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009.

in Norway nor that hydropower concessions raise questions under Article 31 of the EEA Agreement.

### 3 The Authority's assessment

Article 5(1)(a) SCA confers on the Authority a mandate to ensure the fulfilment by the EEA EFTA States of their obligations under the EEA Agreement. To this end, Article 5(2) SCA empowers the Authority to adopt a range of measures.

According to the settled case law of the EFTA Court, the Authority enjoys a wide discretion in deciding whether and how to pursue proceedings against an EEA EFTA State. The Authority alone is competent to decide whether it is appropriate to bring proceedings under Article 31 SCA for failure to fulfil the obligations under the EEA Agreement.<sup>4</sup>

Furthermore, any infringement proceedings brought by the Authority under Article 31 SCA should be concentrated so as to ensure the greatest impact for the functioning of the EEA Agreement, bearing in mind the resources of the Authority and having regard to alternative enforcement mechanisms at national level.

At the outset, the Authority notes that this case, together with the similar cases against Iceland and Liechtenstein (Cases No 69674 and 83485), have been assessed in parallel with the infringement proceedings that the European Commission opened on 7 March 2019 against a number of Member States of the European Union in the hydropower sector on the basis of the Services Directive.<sup>5</sup>

Besides dealing with authorisation procedures, the Commission in its analysis also took into account the specific economic features of the hydropower sector. In particular, it found that the hydropower sector in Europe has been in a stagnant situation and is expected to remain so for the foreseeable future. The stagnation points to a lack of economic interest in this sector with respect to new installations requiring new authorisations, in particular in view of the investments required to cope with obligations under environmental legislation, both under the EU Treaties and in national implementing law.

As regards the EEA EFTA States, the Authority observes that the stagnation may not be as prevalent, due in particular to the willingness of publicly owned operators to invest in the sector to ensure a sufficient and stable energy supply. Still, even those operators seem to have limited their pursuit of establishing new facilities. In general, there appears to be a similar lack of economic interest in investing on a larger scale in new installations in the EEA EFTA States as is the case throughout Europe.

Furthermore, and as also emphasised by the Norwegian Government in its correspondence with the Authority, the process of entering the market to construct and operate hydropower installations for electricity production does not only require an authorisation for the construction and use of the facilities, which is the matter addressed by this case. In addition, new operators and installations require further authorisations, prescribed by legal requirements concerning electricity and energy production, user rights to the natural resources, and building regulations. Also, there are ownership rules limiting the possibility of private operators entering the hydropower market. The matter addressed

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<sup>4</sup> See, for example, Order of the EFTA Court of 23 October 2013 in Case E-2/13, *Bentzen Transport v EFTA Surveillance Authority*, EFTA Ct. Rep [2013] p. 802, point 40.

<sup>5</sup> Commission PR IP/19/1477 "Hydroelectric power concessions: Commission calls on 8 Member States to comply with EU law", available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1477](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1477).

by the current case therefore concerns but one stage of the process of producing hydropower energy.

Existing installations are also subject to increased environmental obligations, high investment costs, and a multitude of necessary authorisations and other requirements. The specificities of this sector appear in general to have led investment-willing and interested operators to opt for entering the market through the acquisition of existing facilities or investment in the share capital of operators holding or pursuing user and production rights, rather than through establishing new facilities. At the same time, operators of existing facilities who are unwilling to upgrade their installations because of the substantial investments required have an increased incentive to sell.

Overall, there appears to be limited scope for increased competition and efficiency gains in the hydropower sector in the EEA EFTA States. Continuing to pursue the current cases in this sector is unlikely to result in greater efficiency gains or to further opening up the market.

In that regard, the Authority also considers it to be significant that it has received no complaints in relation to the provisions on authorisation procedures for hydropower licences in the EEA EFTA States, such as those contained in the Norwegian provisions in the Water Resources Act and the Watercourse Regulation or the relevant provisions in Iceland and Liechtenstein. This in itself is indicative of the fact that the current provisions do not present any insuperable problems for the operators concerned.

In view of all these considerations, the Authority has decided to deprioritise and close the cases concerning hydropower licences and redirect its resources to areas where the Authority's actions will have a greater impact on the functioning of the EEA Agreement.

In taking this decision to deprioritise and close these cases on hydropower licences, the Authority is aligning its enforcement practice with that of the European Commission. On 23 September 2021, on the basis of reasoning analogous to that of the Authority, the European Commission used its discretionary powers to deprioritise and close its equivalent cases concerning hydropower authorisations within the European Union.

The Authority notes that this approach contributes to a uniform application and enforcement of EEA law throughout the whole of the EEA and thereby to the objective of the EEA Agreement of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition.<sup>6</sup>

## 4 Conclusion

In the exercise of its discretion under Article 31 SCA and taking into consideration the information above, the Authority finds that there is no reason to pursue this case further. This decision is without prejudice to any decision in the future to open a case on any element of the wider framework of authorisation procedures or any other related matter.

HAS ADOPTED THIS DECISION:

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<sup>6</sup> See the fourth recital in the preamble to the EEA Agreement.

The own initiative case concerning the conditions for the award and renewal of hydropower licenses in Norway is hereby closed.

For the EFTA Surveillance Authority

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