REPORT FOR THE HEARING

in Case E-2/06[1]

APPLICATION to the Court 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 in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway

supported by **the Republic of Iceland**, as intervener,

seeking a declaration that the Kingdom of Norway (hereinafter "the Defendant") has 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. (the Industrial Licensing Act), 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.

I Introduction

1. Under the current Norwegian regulatory framework on acquisitions of waterfalls for energy production a distinction is made on the basis of the ownership of the undertaking concerned. Fully State-owned undertakings, Norwegian county municipalities, Norwegian municipalities and undertakings in which such public entities own at least 2/3 of the shares (hereinafter "public undertakings") may be granted concessions for an unlimited period of time. All other entities, including all foreign undertakings and all Norwegian undertakings in which fully State-owned undertakings, county municipalities and muni-

[1] Revised in paragraphs 1, 6, 24, 47, 52 and 58.

cipalities own less than 2/3 of the shares are granted concessions for a limited time only. Moreover, when the concession period expires, these undertakings are obliged to transfer to the Norwegian State: 1) the waterfall concerned; 2) the facilities through which the course and bed of the water has been altered; 3) the parcels of land and the rights acquired for the development and the power plant; 4) the power stations including machinery and other equipment, as well as housing built for workers and other buildings that belong to the power plant. The undertakings receive no pecuniary compensation from the State, 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 obligation is traditionally described as "reversion" (*hjemfall*) in Norwegian law.

2. Under Norwegian law, waterfalls are subject to private ownership rights. The private ownership rights are, however, limited by public law which *inter alia* subjects the exploitation of waterfalls to an extensive system of concessions. The case at hand concerns concessions for the acquisition of waterfalls for energy production, including the above described rules on reversion. Rules on concessions for the acquisition of waterfalls for energy production were first introduced early in the 20th century. At that time, Norway was experiencing rapid increase in investment in waterfalls for energy production. That increase was related to Norway's industrialisation which started in the 1890s. The main rivers and waterfalls in Norway were then in private ownership. Due to lack of financial resources in Norway interested investors were primarily foreign and despite general rules restricting foreign investment in real estate in Norway many waterfalls were acquired by foreign undertakings.

3. In 1906, in order to control foreign investment in waterfalls, Stortinget (the Norwegian Parliament) adopted two Acts which subjected all foreign private investors and all limited liability companies, both foreign and Norwegian, to a concession requirement. In 1909, Stortinget introduced further limitations to the acquisition of waterfalls by Act No 4 of 18 September 1909 Relating to Acquisition of Waterfalls, Mines and Other Real Property which introduced the reversion system into law. According to the explanatory notes to the relevant bill, it was considered important to limit "*the foreign capital's future rights over … waterfalls*" and ensure that the rules prevented "*foreign capital's … unlimited acquisition of … natural resources.*" According to the explanatory notes, the aim was also to assert the "*interest of the general public, the state and the local government in this natural wealth".* In light of the general public interests involved, it was regarded desirable for the State to obtain a share in and "*full control over the major waterfalls that are acquired with Norwegian capital as well.*" Under the 1909 Act, the reversion system applied to foreign individuals and foreign and Norwegian undertakings, but not to Norwegian individuals. This distinction between foreign and Norwegian individuals was eliminated by the contested Act No 16 of 14 December 1917 Relating to Acquisition of Waterfalls,

Mines and Other Real Property etc. (hereinafter "the Industrial Licensing Act"[2]), which replaced the 1909 Act.

4. Over the years the Industrial Licensing Act has been subject to several amendments, most of which were aimed at ensuring continued strong Norwegian public ownership of waterfalls. In relation to Norway's accession to the EEA Agreement the legislation was amended, with the aim, *inter alia*, of ensuring that the same legal conditions would apply for foreign companies as for private Norwegian companies.

5. In Norway, more than 99% of the electricity supply is based on hydropower, and electricity makes up nearly half of the total energy consumption. The average production capacity of Norway's hydropower stations today is approximately 119 TWh. In 2004, the total power production in Norway was 110.4 TWh, while total gross consumption was 121.9 TWh. In principle, the total hydropower potential from Norway's waterways is estimated to be approximately 186 TWh, with 67 TWh still undeveloped, but due to environmental and other concerns only a relatively small part of this is likely to be exploited in the foreseeable future.

6. The majority of waterfalls in Norway is presently in public ownership. More than 45% is owned by the State itself through Statkraft AS, and more than 42% is owned by municipalities and county municipalities. The remaining 12% of the hydropower resources are owned by private operators (national and foreign). Some of these private waterfalls were harnessed before the introduction of the reversion system and are therefore not subject to it. However, these waterfalls become subject to the reversion system if they are sold to a non-public entity. Today, the rules on reversion apply to approximately 7% of the existing production capacity. In total, there are 175 undertakings involved in hydropower production in Norway. Out of these, 115 are organized as limited undertakings. Most power producing undertakings are owned by county municipalities and municipalities. When public ownership to hydropower originally started, it was organised as part of the administration, as public entities under administrative law. In recent years this has changed, and public hydropower ownership is now almost entirely organised along company lines, as separate undertakings. Most of these are 100% publicly owned, often by several municipalities or county municipalities, but some of them also have private minority owners.

[2] The English translation of the Act uses the term "licence", whereas both the parties use the term "concession". In the written observations, the term "concession" is also used. In the Report the Court uses the terminology used in the documents submitted to it.

II Legal background

EEA law

7. Article 31 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions 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 or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment.*

8. Article 33 EEA reads:

> *The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

9. Article 40 EEA reads:

> *Within the framework of the provisions of this 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. Annex XII contains the provisions necessary to implement this Article.*

10. Article 125 EEA reads:

> *This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.*

11. Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), referred to at point 1 of Annex XII to the EEA Agreement, as adapted by Protocol 1 thereto, (hereinafter "Directive 88/361") reads:

> *1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.*

12. Heading III A (1) and (3) of the Annex I to Directive 88/361/EEC reads:

> *A - Transactions in securities on the capital market*
>
> *1. Acquisition by non-residents of domestic securities dealt in on a stock exchange (…).*
>
> *2. …*
>
> *3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange (…).*
>
> *4. ….*

National law

13. Section 1 of Act No 16 of 14 December 1917 Relating to Acquisition of Waterfalls, Mines and Other Real Property etc. (the Industrial Licensing Act) reads:

> *Without the permission of the King (hereinafter referred to as licence) no one other than the State may with full legal effect acquire the right of ownership or of use to waterfalls (falls or rapids) that, when harnessed, can be expected to produce more than 4,000 natural horsepower 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.

…

When special considerations exist, the Ministry concerned may in individual cases make exceptions from the licence obligation and right of pre-emption.

…

14. Section 2 of the Industrial Licensing Act sets out the conditions on which a licence may be granted. It reads:

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 specified person, company, corporation or foundation.

Companies shall be obliged to keep a list of all participants and their citizenship.

…

17. The licence shall be granted for a specified period of time of up to sixty years reckoned 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 dames, 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 the 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.

22. 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 1 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 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 paragraphs.

…

15. Section 4 of the Industrial Licensing Act lays down conditions for licences when public undertakings are concerned. It reads:

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 votes are held by enterprises organised pursuant to 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. 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.

…

The licence may be granted for an indefinite period.

…

16. Section 5 of the Industrial Licensing Act concerns licences to individuals and private undertakings. It reads:

> *Norwegian citizens and citizens of other states party to the EEA Agreement, other foreign nationals and legal persons, may, under special circumstances, be granted a licence to acquire the right to use or long-term disposition rights to waterfalls belonging to the State, enterprises organised pursuant to the Act relating to State-owned Enterprises, Norwegian municipalities or counties according to further 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.*
>
> …

17. Section 41 of the Industrial Licensing Act provides for so called "early reversion" and reads:

> *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, 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.

…

III Procedure

Pre-litigation procedure

18. By a letter dated 8 March 2001, the EFTA Surveillance Authority (hereinafter "the Applicant") requested information from the Norwegian Government on certain aspects of the Industrial Licensing Act, including the reasons behind granting Norwegian public undertakings concessions for an unlimited period of time.

19. The Defendant replied by a letter of 20 April 2001. It stated *inter alia* that public legal bodies were entrusted with the management of waterfalls on behalf of the State and that such public management could not be required from private operators. 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 in question should be allowed to continue to manage the waterfalls. The Defendant did not find the Act to be in conflict with either Article 31 or 40 EEA.

20. On 27 June 2001, the Applicant issued a letter of formal notice concluding that the Industrial Licensing Act infringed Articles 31 and 40 of the EEA Agreement. The Applicant emphasised that, according to the Industrial Licensing Act, undertakings from other EEA States, whether public or private, were never able to benefit from a concession for an unlimited period of time and were subject to the requirement of reversion. Conversely, a concession could be granted for an unlimited period of time to undertakings controlled by Norwegian public bodies and without any reversion requirement. In addition, the Applicant pointed out that the State holds pre-emptive rights of shares in public undertakings and that Norwegian rules differentiate between public undertakings and other undertakings in respect of the conditions under which concessions are granted. This, in the Applicant's view, constituted a discrimination based on nationality which could not be justified.

21. The Defendant replied to the letter of formal notice by letter of 29 November 2001. It stated that the system of reversion had been introduced in order to achieve State ownership over waterfalls while at the same time providing the private sector with incentives to develop natural resources in the interests of society as a whole. The contested measures were an integral part of 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. In any event, the Norwegian Government found that the contested rules were covered by Article 125 EEA and stated that Article 125 took precedence over conflicting provisions of the EEA Agreement.

22. Disagreeing with the arguments of the Defendant, the Applicant delivered a reasoned opinion on 20 February 2002 concluding that Article 31 and 40 EEA had been infringed.

23. The Defendant 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 letter of formal notice. The Defendant, nevertheless, stated that it had decided to harmonise the provisions on right of reversion between public and non-public actors. On 29 November 2002, the Ministry of Oil and Energy sent out a hearing paper proposing such changes to the Industrial Licensing Act. Due to fierce opposition to the hearing paper, 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.

24. The Committee delivered its report to the Ministry of Oil and Energy on 30 November 2004, NOU 2004:26. In its conclusions, the Committee found, on the one hand, that "*the system has provided for the maintenance and development of a comprehensive public ownership",* whilst noting that "*different conditions for public and private actors limit the possibilities to redistribute ownership in the power supply sector, something which reduces the dynamics of the power sector".* 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.*" 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.

25. 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.

Procedure before the Court

26. Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed an application commencing this action, which was registered at the Court on 1 August 2006.

IV Forms of order sought by the parties

27. The Applicant claims that the Court should:

(i) 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;

(ii) order the Kingdom of Norway to bear the costs.

28. The Defendant claims that the Court should:

(i) dismiss the application as unfounded;

(ii) order the EFTA Surveillance Authority to bear the costs.

29. The Republic of Iceland, as intervener, contends that the Court should:

(i) dismiss the application; and,

(ii) order the Applicant to bear the costs of the proceedings.

V Written procedure

30. Written arguments have been received from the parties:

- the EFTA Surveillance Authority represented by Niels Fenger, Director, and Per Andreas Bjørgan and Arne T. Andersen, Senior Officers, in the Department of Legal & Executive Affairs, acting as agents;

- the Government of Norway, represented by Fredrik Sejersted, advocate, Attorney General for Civil Affairs and Ingeborg Djupvik, adviser, Department of Legal Affairs, Ministry of Foreign Affairs, acting as agents.

31. Pursuant to Article 36 of the Statute of the EFTA Court, a statement in intervention has been received from:

- the Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry of Foreign Affairs, acting as agent.

32. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Republic of Poland, represented by Ewa Ośniecka-Tamecka, Secretary of the Committee for European Integration, acting as an agent.

- the Commission of the European Communities, represented by Hans Stovlbaek and Michael Shotter, members of its Legal Service, acting as agents.

VI Summary of the pleas in law and arguments

The Applicant

33. The Applicant claims that the difference in treatment of, on the one hand, Norwegian public undertakings and, on the other hand, all undertakings from other EEA States as well as all other Norwegian undertakings, entailed in the Industrial Licensing Act, constitutes discrimination contrary to Articles 31 and 40 of the EEA Agreement. It disputes the submissions of the Defendant that the contested measures do not fall under the scope of the EEA Agreement and that they must be regarded as legitimate under Article 125 EEA or justified on overriding reasons in the public interest.

34. At the outset, the Applicant clarifies that it does not dispute the right of the Defendant to have a system of reversion or to introduce different classes of concessions, as long as such systems are designed and applied in a non-discriminatory manner. It states that the theme of the case is not whether public ownership may be maintained, but whether Norway may apply different provisions to competing undertakings in order to achieve the aim of public ownership.

35. As concerns the scope of the EEA Agreement, the Applicant argues that the contested measures clearly fall within the ambit of the Agreement, including Articles 31 and 40. In this regard, the Applicant points out that the commercial exploitation of hydro power constitutes economic activity within the meaning of the EEA Agreement. The fundamental rules of the Agreement apply irrespective

of whether the sector concerned is subject to harmonised EEA law or not.[3] What matters is that no legal sources which, in its view, are binding under EEA law exclude such economic activity from the EEA Agreement or its Article 31 and 40. On the contrary, specific provisions of the EEA Agreement refer to natural resources, cf. Annex IV to the EEA Agreement which contains rules on the regulation of energy[4] and Article 73(1)(c) EEA.

36. As concern the discriminatory nature of the contested measure, the Applicant maintains that the Industrial Licensing Act entails discrimination based on nationality,[5] and stresses in that regard that it differentiates on the basis of *Norwegian* public ownership.[6] The Applicant points out that this distinction is made despite private and foreign undertakings being in a comparable situation as Norwegian public undertakings, performing the same type of economic activity and competing on an open market.

37. In relation to Article 31 EEA, the Applicant points out that the Industrial Licensing Act sets up different conditions as to whether or not a concession is time limited, and as to whether or not the waterfall and installations pertaining thereto shall be surrendered to the State without compensation at the end of the concession period. Both aspects are, in the Applicant's view, important in relation to the overall return on investment that the concession holder can expect to obtain from running a hydro power plant. For a private buyer, the value of the power plant is linked to the income until reversion, whereas for public undertakings it is linked to the income for an unlimited time period. The Applicant explains that the difference has negative economic effect even at the start of the concession period, and that it will increase the older the concession to a waterfall becomes. The Applicant also points out several other aspects of the Industrial Licensing Act which in its view reinforces the discriminatory nature of the Act, such as the conditions under which a concession is to be granted pursuant to Section 2 and Section 4 of the Act, the condition under which a waterfall may be rented out and leased, cf. section 4 and 5, and the pre-emptive rights of the State, laid down in Section 4 of the Act. In its view, the discriminatory nature of the contested measures is moreover strengthened by the

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[3] The Applicant refers *inter alia* to Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Court Report 143, at paragraph 26 and Case E-1/01 *Hörður Einarsson* [2002] EFTA Court Report, 1.

[4] The Applicant refers *inter alia* to Directives 2003/54/EC and 2003/55/EC, replacing Directive 96/92 and Directive 98/30 (OJ 2003 L 176, p. 37), incorporated into the EEA Agreement by Joint Committee Decision no 146/2005 of 2 December 2005, but have not yet entered into force within the EEA.

[5] On the concept of discrimination based on nationality the Applicant refers *inter alia* to Case E-3/05 *EFTA Surveillance Authority* v *Norway* [2006] EFTA Court Report 102, at paragraph 56 and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721. On differentiation between private and public undertakings it refers *inter alia* to Case C-3/88 *Commission v Italy* [1989] ECR I-4035, at paragraphs 6-9 and Case C-174/04 *Commission v Italy* [2005] ECR I-4933, at paragraph 32. The Applicant also refers to Commission Decision 85/276/EEC of 24 April 1985 (OJ 1985 L 152, p. 25).

[6] The Applicant refers to the Opinion of Advocate General Mischo in Case C-3/88 *Commission* v *Italy*, at paragraphs 16-20.

fact that Norwegian public undertakings constitute the vast majority of all undertakings engaged in hydropower production on the Norwegian market.

38. As concerns Article 40 EEA on the free movement of capital, the Applicant refers to Heading III A (1) and (2) of the nomenclature annexed to Directive 88/631/EEC which, in its view, confirms that 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.[7] In the opinion of the Applicant, the differential treatment described in relation to Article 31 EEA makes it less attractive for investors to acquire shares in the latter group of undertakings. This is due to the difference in the value of the investment also explained in relation to Article 31 EEA and the uncertainty the reversion system creates for investors. The Applicant claims also that Norwegian Public undertakings have an advantage when bidding for shares in both private and public Norwegian undertakings. It explains that this is because the nature of the buyer of a holding may lead to a conversion of the undertaking from public to private or vice versa, and that thereby the contested measures create incentives to maintain or modify the ownership structure in the undertakings towards undertakings with a predominantly Norwegian public ownership. Moreover, in the view of the Applicant, the pre-emptive rights conferred on the State by Section 4 of the Industrial Licensing Act reinforce the obstacles to investments.

39. The Applicant submits that Article 125 EEA corresponds to Article 295 EC. It infers from the case law of the ECJ on Article 295 EEA that, although the Contracting States have the power under Article 125 EEA to define the rules governing the system of property ownership, the system and the exercise of the property rights remain subject to the fundamental rules of the Treaty.[8] In that regard it is irrelevant, in the view of the Applicant, that the case at hand concerns natural resources as opposed to any other economic activity.[9] In the Applicant's view a concession system, including rules on reversion, might as such be covered by Article 125. However, such a system must not, as the contested measures, result in discrimination based on the origin of the undertaking or investor concerned. It argues that Article 125 does not encompass preferential rights to

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[7] As concerns case law of free movement of capital, the Applicant refers *inter alia* to Case E-1/00 *Islandsbanki-FBA* [2000-2001] EFTA Court Report 8, at paragraph 17 and to Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, at paragraphs 44-46, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, at paragraphs 40-42, Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, at paragraph 47 and Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, at paragraph 61, (hereinafter the "*Golden Shares*" cases).

[8] The Applicant refers *inter alia* to joined Cases T-116/01 and T-118/01 *P & O European Ferries* [2003] ECR II-2957, at paragraph 151 and Case 182/83 *Fearon* [1984] ECR 3677, at paragraph 7 and Case C-302/97 *Konle* [1999] ECR I-3099, at paragraph 38, C-463/00 *Commission* v *Spain*, at paragraph 66 and Case C-235/89 *Commission* v *Italy* [1992] ECR I-777.

[9] The Applicant refers in that respect to the *Golden shares* cases and to Case 174/04 *Commission* v *Italy*.

public undertakings competing on an open market,[10] and states that under such circumstances public undertakings have to be distinguished from the State.[11]

40. The Applicant maintains that the contested rules of the Industrial Licensing Act neither regulate who may own property nor restrict the exploitation of waterfalls to only Norwegian public undertakings. In its view, the Industrial Licensing Act only regulates ownership rights 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.[12] Finally in relation to Article 125, the Applicant maintains that even if Article 125 EEA permitted discrimination with regard to reversion, the time limit on concessions held by non-public operators cannot be considered a regulation of property ownership.

41. As concerns possible justification, the Applicant claims that the contested measures are directly discriminatory and therefore only justifiable under Article 33 EEA.[13] In the view of the Applicant, the only ground that needs to be assessed under that Article is public security. However, in case the Court finds that other overriding reasons of public interest may be referred to, the Applicant addresses the public interests advanced by the Defendant. First, whether public ownership is an imperative requirement in itself and second, the aims public ownership are meant to achieve, namely security of supply, management and control over natural resources, environmental concerns, taxation of economic rent and the competitive structure of the market.

42. The Applicant argues that it is for the Defendant to demonstrate the public interest aim pursued and the suitability and necessity of the measures.[14] In that regard, the Applicant argues that the original protectionist purpose of the Industrial Licensing Act calls for close scrutiny. It stresses that the relevant assessment is not of the reversion system as such, but of the difference in treatment between Norwegian public undertakings, on the one hand, and foreign and private undertakings, on the other.

43. The Applicant refutes that public ownership can serve as an imperative requirement in itself, regardless of why it is sought. In the view of the Applicant,

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[10] With regard to the principle that public and private undertakings should be treated alike, the Applicant refers *inter alia* to Advocate General Jacobs in Case C-482/99 *France* v *Commission* [2002] ECR I-4400, at paragraph 47, and Joined Cases 188 to 190/80 *France, Italy and UK* v *Commission* [1982] ECR I-2545, at paragraphs 20-21. The Applicant also refers to Article 59(1) in support of this understanding.

[11] The Applicant refers to Case C-202/88 *Commission* v *France* [1991] ECR I-1223, at paragraph 5.

[12] In its view, the differential treatment entailed in the contested rules of the Industrial Licensing Act is comparable to the discriminatory measures dealt with by the ECJ in the *Golden shares* cases.

[13] The Applicant refers *inter alia* to Case C-451/03 *Servizi Ausiliaria Dottori Commercialisti* [2006] ECR I-2941, at paragraphs 36-37.

[14] In that regard the Applicant refers *inter alia* to Case E-1/03 *EFTA Surveillance Authority* v *Iceland*, paragraphs 34-35.

that would mean that any EEA State could, without any closer assessment of the real need for a particular measure, exclude the application of the fundamental freedoms concerning establishment and capital movements in a whole economic sector. [15]

44. As concerns the aims that public ownership is meant to achieve, the Applicant claims at the outset that all the aims can be achieved as well or better if the discriminatory elements of the contested measures were abolished,[16] such as by introducing a concession model with reversion for all operators. In that respect, the Applicant rejects that it is relevant whether or not the State needs, in light of the objective of public ownership, to require reversion of publicly owned waterfalls, and reiterates that a firm distinction must be drawn between the State as a regulator and as an economic operator. The Applicant also rejects the relevance of the argument that the abolishment of the discriminatory elements may lead public undertakings to sell their ownership rights. It points out that it is entirely for the public authorities themselves to weigh the interests at stake and, based on that, decide whether to sell or not. From this, the Applicant concludes that the differential treatment is not justifiable, regardless of whether public ownership is suitable and necessary to achieve these aims.

45. The Applicant adds that in any event, the considerations pertaining to public ownership do not justify the contested differential measures. As concerns public security,[17] the Applicant maintains that the reversion system is not suitable for obtaining security of supply of energy on a day-to-day basis. Furthermore, the Applicant contests that public ownership allows for better management and control and better protection of security of supply and environmental concerns than steering via regulatory methods alone. The Applicant points out *inter alia* that Norwegian public undertakings have neither been entrusted with any special obligations relating to electricity supply and environmental concerns nor are such undertakings subject to any more control in these fields than foreign or private undertakings. The Applicant also argues that it would run contrary to EEA law to presume that national public undertakings will behave differently and more reliably than private and foreign operators.[18] Moreover, the Applicant contests that Norwegian public undertakings operating on a liberalised electricity market are more inclined than other operators on the market to take decisions that run counter to their commercial interests in order to secure national security supplies or environmental concerns. In relation to the argument that public ownership allows for easier and more flexible control, the Applicant argues that advantages

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[15] The Applicant refers to the *Golden Shares* cases in this regard.

[16] In relation to the aims of management and control over natural resources, the Applicant refers to NOU 2004:26, pages 16, 77, 81 and 109.

[17] As to the legal test to be applied, the applicant argues that it follows from the case law of the ECJ in the field of energy, that derogations from the fundamental freedoms, including those based on Article 33 EEA, should be interpreted narrowly and refers in that regard *inter alia* to Case C-463/00 *Commission v Spain*, and Case C-174/04 *Commission* v *Italy*, at paragraph 40.

[18] The Applicant refers in this respect to case 3/88 *Commission* v *Italy,* at paragraph 11.

of purely administrative nature are not sufficient to justify a restriction on the freedom to provide services.[19]

46. Finally, as concerns the aims of effective collection of economic rent and the competitive structure of the market, the Applicant contests that those aims can serve as justificatory grounds and that they are suitable and necessary.[20]

The Defendant

47. The Defendant pleads that the application is unfounded. In support of its plea it advances four main submissions. Firstly, that the contested measures fall outside the scope of the EEA Agreement. Secondly, that the contested measures do not constitute a restriction under Articles 31 and 40 EEA read together with Article 125 EEA. Thirdly, that the aim of maintaining and acquiring public ownership over essential energy resources is a legitimate justification under the EEA Agreement, and that the contested rules are suitable and necessary to this end. Fourthly, that the aim of maintaining and acquiring public ownership is a means of achieving other legitimate aims, such as public security, security of supply, environmental protection, and that the contested rules are suitable and necessary to achieve these objectives.

48. At the outset, the Defendant stresses that the contested legislation can only be understood and evaluated within its historical and factual context – taking into account how the legislation functions today. In that regard, the Defendant states that the system is very old and unique in nature and thus difficult to evaluate under the ordinary categories of EEA law. It points out that the basic premise for the reversion rules was the fact that waterways were regarded as private property – unlike the legal situation in most other European countries, where they were seen as public property. The rules are based on the fundamental view that hydropower resources belonged to society as such, and thus society should reap the benefits of the resources. As a consequence of the contested measures, hydropower resources are now mainly in public ownership. The Defendant also stresses that the importance of hydropower is unique to Norway and that hydropower is a perpetual and completely renewable energy resource, while at the same time limited to the amount of exploitable waterways in the country. The Defendant also stresses that the case concerns the energy sector, which is subject to specific concerns and sensitivities, both on the European and national level, and thus a certain caution when reviewing the contested rules under EEA law is called for. Finally, it points out that even though the contested rules do not

[19] The Applicant refers to Case C-334/02 *Commission* v *France* [2004] ECR I-2229, at paragraphs 27-29.

[20] In relation to economic rent, the Applicant refers *inter alia* Case E-1/04 *Fokus Bank* [2004] EFTA Court Report 11, at paragraph 33, and in relation to the competitive structure of the market it refers *inter alia* to Case C-367/98 *Commission* v *Portugal,* at paragraph 58.

concern trade in electricity, they have contributed to the competitive structure of the market.

49. The Defendant puts forward three main arguments in relation to its first main submission on the scope of the EEA Agreement. The Defendant argues firstly that the measures are a part of the basic ownership structure in the hydropower sector and as such fall under Article 125 EEA. In the Defendant's view, Article 125 EEA must be understood to the effect that a State has sovereign rights to regulate the property rights over natural resources,[21] and has the discretion to keep its undertakings nationalized or to privatize them.[22] It submits that Article 125 EEA need not necessarily be interpreted in the same way as Article 295 EC, as the EEA Agreement has legal and political characteristics differing from those of the EC Treaty. [23] Secondly, the Defendant argues that it must be taken into account, when assessing whether the contested measures fall under the EEA Agreement, that the measures govern ownership of essential natural energy resources. Thirdly, the Defendant argues that it is an internal public affair how the States choose to regulate and organise ownership within the public sphere, which is not subject to EEA law. Moreover, the Defendant considers it of importance when interpreting the outer limits of the EEA Agreement that Norway has been clear on the matter of the applicability of the EEA Agreement with respect to the contested measures ever since the EEA negotiations and has expressed this understanding as a precondition for the parliamentary ratification of the Agreement.[24]

50. In the event the Court should not agree that the contested measures fall outside the scope of the EEA Agreement, the Defendant submits that the contested measures do not constitute a restriction contrary to Article 31 or 40 EEA. In the view of the Defendant, it follows from the wording of Article 125 and case law of the ECJ that obstacles inherent to the regulation of property ownership do not constitute infringements of Article 31 and 40 EEA.[25] However,

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[21] The Defendant refers to Case C-491/01 *British American Tobacco* [2002] ECR I-11453, at paragraph 147, for support of the assertion that States have sovereign rights to regulate the property rights over natural resources. It also refers to secondary legislation in the field of energy, cf. preamble 3 to Directive 94/22, OJ 1994 L 164 p. 3, and Article 6(3) of the same Directive, and point 10 to the preamble to Directive 2003/54 OJ 2003 L 176 p. 36, not yet in force in the EEA.

[22] The Defendant refers to several Commission Communications, including the 1993 Communication on Articles 87 and 88, OJ 1993 C 307 p. 3, paragraph 4. In its view the *Golden Shares* cases do not affect the case at hand since they neither address the Member State's discretionary choice as whether to privatize public undertakings or not, nor the right to confer privileges on public undertakings which have not been privatized.

[23] The Defendant refers to ECJ Opinion 1/91 of 14.12.1991 [1991] ECR I-6079.

[24] The Defendant refers *inter alia* to the presentation of the Agreement to Stortinget in St.prp. nr. 100 (1991-1992) pp. 161-67 and 200-202 and to Ot. Prp. Nr. 82 (1991-1992).

[25] The Defendant refers *inter alia* to Case 6/64 *Costa* v *Enel* [1964] ECR 585, Case C-189/95 *Franzén* [1997] ECR I-5909, at paragraph 35 and Case C-438/02 *Hanner* [2005] ECR I-4551, at paragraph 39. It also support its argument by referring to Article 16 and 59 EEA which in its view show that that the EEA Agreement itself explicitly recognises that the Contracting States can be directly involved through publicly owned undertakings in the EEA economy.

in the event the Court should find that the contested measures entail a restriction, the Defendant claims that the measures are not discriminatory. In that regard, the Defendant maintains that the contested measures do not differentiate on the basis of nationality, but build on the legitimate distinction between national public undertakings and all other undertakings and that the different undertakings are not in a comparable situation.[26] The aims pursued are legitimate and justify the difference in treatment.[27] The Defendant stresses that the legal form of the public undertaking or whether the undertaking is owned directly by the State or other public entities does not matter in this respect.[28]

51. In the event the Court should find the contested measures directly discriminatory, the Defendant maintains that they are justified under express provision of the EEA Agreement and refers in that regard both to Article 125 EEA and to Article 33 EEA. In its view the wording of Article 125 supports the conclusion that public ownership of essential natural energy resources is a legitimate objective. As concerns Article 33, the Defendant maintains that public ownership is intended to ensure security of electricity supply, which in its view must be considered a public security ground.[29] Finally, the Defendant maintains that in a situation such as in the case at hand, where a distinction on the basis of nationality is inherent and necessary to the achievement of legitimate aims, the Court should follow the example of ECJ and consider mandatory requirements not stipulated in the EEA Agreement.[30]

52. Should the Court find that the contested measures constitute a non-discriminatory or indirectly discriminatory restriction, the Defendant maintains that, in addition to the express provisions of the EEA Agreement, they are justified on the basis of mandatory requirements. Firstly, the general aim of maintaining and securing public ownership over essential energy resources is in the view of the Defendant, in itself a mandatory requirement. The Defendant submits that this is the necessary corollary of the discretion conferred on each Contracting State under Article 125 EEA to regulate its system of property ownership.[31] Secondly, it argues that public residual control embedded in direct ownership will serve as an important guarantee for political flexibility and democratic control in case of crisis or unexpected future developments. The

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[26] The Defendant refers *inter alia* to Case C-442/00 *Caballero* [2002] ECR I-11915, at paragraph 32.

[27] The Defendant refers *inter alia* to Case C-224/00 *Commission* v *Italy* [2002] ECR I-2965, at paragraphs 18-20 and, Case E-1/04 *Fokus Bank*, at paragraph 28.

[28] The Defendant refers *inter alia* to Case C-188/89 *Foster* [1990] ECR I-3313.

[29] The Defendant refers to Case 72/83 *Campus Oil* [1984] ECR 2727, at paragraphs 34-35 in support of the assertion that securing energy supply is a public security consideration.

[30] The Defendant refers *inter alia* to Case C-379/98 *Preussen Elektra* [2001] ECR 1-2099, and Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871. It refers also the Opinion of Advocate General Jacobs in the former case, paragraphs 230-233, and the Opinion of Advocate General Geelhoed in the latter case, at paragraphs 105-107.

[31] The Defendant refers in this regard to Case C-40/05 *Lyyski* v *Umeå universitet*, Judgment of 11 January 2007, not yet reported, at paragraph 39.

Defendant argues also that public ownership over hydropower resources in Norway serves the public security consideration of ensuring security of the electricity supply (covered by Article 33 EEA), management and control over natural resources, environmental concerns[32] and taxation of economic rent which are in its view all mandatory requirements.[33]

53. As concerns the public security objective of ensuring security of the electricity supply, the Defendant stresses the importance of electricity for society and the fact that Norway is totally dependent on hydropower for its supply of electricity. It contests that public security may only justify national measures designed to remedy acute situations and submits that the relevant test to apply is whether the concern represents a "*genuine and sufficiently serious threat to a fundamental interest of society.*"[34] The Defendant argues that future challenges related to energy matters and environmental concerns are of such a nature.

54. In relation to effective public management, the Defendant argues that direct public ownership in combination with regulatory powers guarantee the authorities a level of actual and potential management and control which is not obtainable merely through public regulation. It states that important elements of this is public control of the "residual" competence which will always exist within a regulatory framework, the possibility of taking decisions which are not commercially beneficial without having to pay compensation, and the ability to exercise control in an efficient and effective way through channels which are only open to the owners and not to the regulatory authorities. As concerns environmental concerns, the Defendant refers to the control over limited resources as waterfalls making it possible to balance the need for energy supplies with future requirements for environmental protection, and states that it provides a framework for ensuring sustainable development.

55. The Defendant contests the claim of the Applicant that ensuring effective collection of economic rent cannot be regarded a legitimate objective in itself. In that regard it compares it with taxation, which inevitably serves economic aims, but may still be justified.[35] The Defendant further maintains that this objective is in any event not the primary objective of the contested measures.[36]

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[32] The Defendant refers *inter alia* to case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431 in support of the assertion that environmental protection is a legitimate mandatory requirement.

[33] The Defendant explains that "economic rent" is the extra profit which is generated beyond the normal rate of return on capital and labour when a limited natural resource is exploited.

[34] Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, at paragraph 47.

[35] The Defendant refers *inter alia* to Case C-204/90 *Bachman* [1992] ECR I-249, at paragraph 28 and to Case C-290/04 *Skorpio*, of 3 October 2006, not yet reported, at paragraphs 35-37. The Defendant refers moreover to Article 6(4) of Directive 94/22 on the conditions for granting and using authorization for the prospecting, exploration and production of hydrocarbons, OJ 1994 L 164 p.3.

[36] The Defendant refers to Case 72/83 *Campus Oil*, at paragraph 36, which in its view shows that economic aims do not make legislation illegitimate if it serves other legitimate objective.

56. The Defendant maintains that the contested measures are both suitable and necessary for the attainment of the objectives referred to above. In the view of the Defendant, it follows from the discretion that States have under Article 125 EEA on choice of ownership that the Contracting Parties enjoy a certain margin of appreciation as regards the appropriateness of the measures chosen to achieve the legitimate aims in the regulation of property rights which amounts to a "manifest error" test.[37] Moreover, as concerns the intensity of review of the measures chosen, the Defendant states that the ECJ has repeatedly held that national authorities should have a certain degree of discretion when the aims concern public security, corresponding to a less intense judicial review.[38] Finally, as concerns the intensity of the judicial review, the Defendant argues that the Court should take into account the fact that the case at hand concerns basic elements of the long-established ownership structure to essential energy resources.

57. The Defendant argues that in the assessment of the suitability of the contested measures, the combined effect of the rules on reversion, concessions and pre-emptive purchase rights, as well as the effects of the contested differentiation, must be taken into account. The contested measures ensure in a consistent manner both short and long term control, which is suitable to maintain strong public ownership and thereby also suitable for the achievement of the other aims referred to above. The Defendant describes that the contested measures have both direct and indirect effect in this respect. Direct, as it ensures that waterfalls are transferred to the State when the concession period expires, and indirect as power plants put up for sale are of higher value to public undertakings than others and as the State has pre-emptive rights if private acquisition brings more than 1/3 of the shares in a public undertaking onto private hands. In the view of the Defendant, the actual major public ownership over hydropower resources in Norway shows clearly that the contested measures are suitable to ensure public ownership. As concerns the question of whether the Government has any special control over public undertakings, in particular undertakings owned by municipalities, the Defendant notes that EC and EEA law does not distinguish between actions of the State and other public entities,[39] and reiterates the additional control and flexibility that flows from full or dominant ownership over hydropower undertakings.

58. Firstly, as concerns the necessity of the contested measures with regard to the aim of ensuring public ownership over hydropower resources, the Defendant

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[37] The Defendant refers to the Opinion of Advocate General Stix Hackl in Case C-370/05 *Festersen*, Judgment of 20 January 2007, not yet reported, at paragraph 47. It also refers to Case C-120/97 *Upjohn* [1999] ECR I-223, at paragraphs 34-35.

[38] The Defendant refers *inter alia* to Case C-83/94 *Leifer* [1995] ECR I-3231, at paragraph 35 and Case C-273/97 *Sirdar* [1999] ECR-7403, at paragraph 28.

[39] The Defendant refers in that respect *inter alia* to Case C-248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17, in the field of State aid. In the field of direct effect and infringement proceedings it refers *inter alia* to Case 8/81 *Becker* [1982] ECR 53 and Case C-103/88 *Costanzo* [1989] ECR 1839. Finally in the field of state liability it refers *inter alia* to Case C-302/97 *Konle*, at paragraphs 62-63.

expresses the view that there are no alternative regimes which will achieve this aim as effectively as the contested measures. In its view, all alternative models will, to greater or lesser extent, lead to a weakening of public ownership. It stresses that the system of reversion is completely based on predetermined, objective and transparent criteria, and that in practice the same criteria has been applied when a decision has been taken on whether to grant a concession to public and non-public undertakings.[40] Secondly, as concerns the aim of ensuring public security, security of supply, environmental protection and effective collection of economic rent, the Government expresses the view that there are no alternative regimes which will achieve these aims as effectively as the contested measures. The residual competence inherent in public ownership supplements the control that can be achieved through command and control regulation, and the combination ensures a higher degree of control than exclusive reliance on regulatory tools allows for. Furthermore, public ownership ensures a more efficient collection of economic rent than other alternatives, e.g. taxation.. The Court must conduct a general and overall necessity review in relation to all these public interest requirements at stake, assessed as a whole.

The Republic of Iceland

59. The Republic of Iceland contends that regulation of property ownership falls outside the scope of the EEA Agreement. In the view of the Government it must affect the interpretation of the scope and outer limits of the EEA Agreement, that it was a pre-condition for the Agreement, on behalf of both Iceland and the Defendant, that ownership over energy resources would remain unaffected by it.[41]

60. The Republic of Iceland also contends that Article 125 EEA protects the sovereign choice of each Contracting Party as to whether certain undertakings should be publicly owned or not. In its view, Article 125 should be interpreted, as the Defendant suggests, differently from Article 295 EC. It emphasises in that regard, the special nature of the EEA Agreement and especially the important difference between the EC Treaty and the EEA Agreement.[42] It also argues that property ownership and the management of natural resources comprise the core of State sovereignty. In the view of the Republic of Iceland, it is of vital importance, in that regard, to take note of the fact that the EEA Agreement does not entail transfer of sovereignty rights to its institutions.[43] However, even though

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[40] In the opinion of the Defendant the case at hand must thus be distinguished in this respect from the *Golden shares* cases as in those cases the authorities enjoyed significant discretion.

[41] The Government of Iceland refers in this regard to discussions in the Parliament (Althingi) that took place before the acceptance of the Agreement.

[42] It refers to Opinion 1/91, paragraphs 15-21 and to Case E-2/97 *Mag Instruments* [1997] EFTA Court Report 127, paragraphs 23 and 25.

[43] The Government of Iceland refers to Case E-9/97 *Erla Maria Sveinbjörnsdottir* [1998] EFTA Court Report, 95, at paragraph 63.

the Court should find that the case law of the ECJ is relevant, the Republic of Iceland maintains that it would not lead to a different conclusion.[44]

61. The Republic of Iceland also contends that the contested measures are an inherent part of the reversion system and merely constitute means to achieve the aim of maintaining public ownership of hydropower resources. Moreover, in its view it is irrelevant, in light of the objective of public ownership, to what kind of public body or what level of government the ownership rights appertain. On those issues the Government refers to arguments of both the Defendant and the Commission.

[44] In that regard, it refers *inter alia* to the *Golden Shares* cases. In its view, those cases do not at all deal with the political choice of public ownership.

The Republic of Poland

62. The Republic of Poland is of the opinion that the contested measures do not contradict Article 31 and 40 of the EEA Agreement. It emphasises that Norway is dependent on electricity from hydropower and that it is necessary for Norway to manage this resource, taking into account the interests of both present and future generations. In the view of the Republic, the priority obligation of the State in this context is to ensure security of energy supply, which is a public security matter justifying the contested measures.[45] The Republic of Poland maintains that States have a certain margin for independent assessment when adopting measures to protect public security.[46] The contested measures are in its view both suitable and necessary for the attainment of the legitimate objective of public security.[47]

63. As concerns the Applicant's claim that the contested measures are discriminatory, the Republic of Poland observes that the contested measures do not differentiate on the basis of the origin of capital and maintains that the differentiation entailed in the contested measures is justified by the objective pursued.[48]

64. In the opinion of the Republic of Poland, Article 125 essentially applies to the case. In its view it is evident that concession system combined with the reversion system has had the effect of transferring ownership over hydropower resources from private to public ownership. In the opinion of the Republic of Poland, this transfer of ownership rights is legitimate under Article 125 EEA.

65. Finally, the Republic of Poland expresses the opinion that it would be highly detrimental to the interests of the citizens of the European Community if the EFTA Court would consider the interests associated with the free movement of capital and the freedom of establishment more important than the energy security of a State.

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[45] The Republic of Poland maintains that the ECJ has recognised that securing energy supplies is a public security matter and refers in that respect to Case 72/83 *Campus Oil*, at paragraphs 34-36 and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, at paragraphs 48 and 58.

[46] The Republic of Poland refers *inter alia* to Case C-285/98 *Tanja Kreil* [2000] ECR I-69 and Case C-273/97 *Sirdar* [1999] ECR 1-7403, at paragraphs 27-28.

[47] The Republic of Poland refers to the *Golden Shares* cases and in particular Case C-503/99 *Commission* v *Belgium,* at paragraph 52.

[48] The Republic of Poland refers to case law of the ECJ on "public service obligations", cf. *inter alia* Case C-393/92 *Almelo* [1994] ECR I-1477 and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, Case C-159/94 *Commission* v *France* [1997] ECR I-5815, Case C-160/94 *Commission* v *Spain* [1997] ECR I-5851.

The Commission of the European Communities

66. At the outset, the Commission expresses the view that Article 125 EEA must be interpreted as having the same meaning as Article 295 of the EC Treaty. The Commission refers to the case law of the ECJ on Article 295 EC, according to which the mere fact that a national rule might govern the system of property ownership does not exempt such a rule from the fundamental rules of the Treaty.[49] Accordingly, the Commission maintains that Article 125 EEA cannot be interpreted to the effect that the contested measures are exempted from the scope of the fundamental rules of the EEA Agreement. Moreover, in the absence of any specific provision in the EEA Agreement excluding the hydropower sector from its scope, it must be regarded as covered by the Agreement.

67. The Commission contends that the purpose of the reversion system appears to be to bring into public ownership waterfalls that have been in private ownership and maintain them in public ownership for future generations. If that is the case, it finds that placing a time limit on any private ownership can be seen as an inherent part of this objective and that there is no reason to place a time limit on the public ownership. In its view, it is irrelevant in this regard how the Norwegian rules distinguish between private and public undertakings and how public ownership is diversified between different public bodies. According to the Commission, the time limit and the other contested measures should not be considered apart from the overall objective of increasing and maintaining public ownership. The Commission interprets Article 125 to the effect that States have the sovereign right to choose whether to privatise undertakings, nationalise or maintain such a status.[50] From the above, the Commission concludes that the Defendant is in principle fully entitled to pursue its public ownership objective, provided that it does so in a manner conforming to the fundamental rules underlying the EEA Agreement.

68. The Commission finds that the concession system of the contested legislation constitutes in itself a restriction within the meaning of Article 40 EEA on the free movement of capital[51] and indirectly on the freedom of establishment falling under Article 31 EEA. In this regard the Commission notes that it is not necessary that the restrictions are discriminatory.[52]

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[49] The Commission refers to Case 182/83 *Fearon*, at paragraph 7 and Case C-302/97 *Konle*, at paragraph 38.

[50] In the view of the Commission, the *Golden Shares* cases do not affect this finding as the cases must be seen within their specific context, i.e. in the situation where a State has exercised its sovereign right to privatise an undertaking.

[51] Case C-302/97 *Konle,* at paragraph 39 and Case C-452/01 *Ospelt* [2003] ECR I-9743, at paragraph 24 and joined cases C-515/99, C-519/99 to 524/99, C-526/99 and C-540/99 *Reisch and Others* [2002] ECR I-2157, at paragraph 32.

[52] Case C-483/99 *Commission* v *France*.

69. As concerns the question of whether the contested measures are discriminatory, the Commission argues that it must be ascertained whether the undertakings treated differently are in a comparable situation. It states that if the objective is expanding/maintaining public ownership, this will inevitably have as its consequence that Norwegian public undertakings benefit compared with non Norwegian undertakings. In the view of the Commission, the position of the Applicant on the discriminatory nature of the contested differentiation[53] would render the pursuit of public ownership as such as an untenable objective under the EEA Agreement. Given the public ownership objective being pursed by the contested measures, Norwegian public undertakings can, in the view of the Commission, be considered to fall into a separate category from private undertakings, since the former already satisfy that objective, whereas the latter do not. In this regard the Commission reiterates its view that in light of the objective of public ownership, imposing reversion on undertakings in public ownership makes little sense. Moreover, in light of the objective being pursued, the Commission does not support the Applicant's view that the distinction between the State and "public undertakings" is material.

70. Finally, the Commission examines whether the objective of expanding and maintaining public ownership is pursued in a proportionate manner. First, it considers the question of whether the contested rules operate to deprive undertakings of their property without compensation. In that regard, it finds that the choice made by the Defendant to apply a system of expropriation over time does not, without evidence to the contrary, seem disproportionate. Secondly, as to the question of whether it is proportionate to make the distinction between public and private undertakings, the Commission reiterates its position that such distinction is inherent in the objective being pursued. Thirdly, without reaching any particular conclusions, the Commission raises questions in relation to the "early reversion" system, which prolongs private ownership rights, and thus may weaken the effectiveness of the system. Finally, it raises questions in relation to the requirement in Section 2 of the Industrial Licensing Act, according to which concessions may be granted to private operators under "special circumstances," allowing national authorities undue discretion when applying the relevant rules.

The reply of the Applicant to the intervention of the Republic of Iceland

71. The Applicant contests the claim that management of natural resources is not covered by the EEA Agreement, and reiterates its view that no binding sources in law support such a conclusion.

[53] In this regard the Commission questions the relevance to this case of the case law on discrimination referred to by the Applicant.

72. As concerns Article 125 EEA, the Applicant argues that there is no valid reason for it to be interpreted differently from Article 295 EC. The Applicant also disputes Iceland's understanding of the *Golden Shares* cases. In its view, the relevance of those cases is not limited to situations where undertakings have been privatised. Moreover, those cases cannot be distinguished from the case at hand on the basis that they did not concern the choice of ownership.

73. The Applicant disputes that the contested measures relate to the sovereign right of States to decide whether certain undertakings should be publicly owned or not, and claims that they only concern the conditions under which an undertaking is permitted to engage in an economic activity. It argues that the contested measures create unequal conditions for competition and cannot be regarded as ownership rules within the meaning of Article 125 EEA.

74. Finally, the Applicant disputes that the contested measures are a natural consequence of the objective of the reversion system. It reiterates its view that the aim of public ownership cannot in itself justify restrictions and different treatment of competing operators. In its view, Case C-183/83 *Fearon*, referred to by the Commission in its observations, does not support such a conclusion and argues that in any event the situation in the case at hand is different.[54] It points out that this case does not relate to the question of expropriation of private property. It also points out that even if the reversion system could be regarded as expropriation it has to be implemented in a manner consistent with the EEA Agreement. In that regard it reiterates that the case at hand, unlike the *Fearon* case, concerns discriminatory treatment and that the undertakings are competing in a market open for private and public operators.

Thorgeir Örlygsson
Judge-Rapporteur

[54] In the Applicant´s view, Case C-483/99, *Commission* v *France* [2002] ECR I-4781, at paragraph 44, is relevant.