Generaldirektøren

HYDRO

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Høringsuttalelse angående NOU 2004:26 om hjemfall.

1 Bakgrunn

Hydro viser til hjemfallsutvalgets innstilling og invitasjon til høring av 1.desember 2004. Vi ønsker i det følgende å redegjøre for våre synspunkter knyttet til hjemfall og våre merknader til utvalgets innstilling.

Hydro berøres i betydelig grad av dagens hjemfallslovgivning ettersom ca 5,6 TWh av vår produksjon er påheftet vilkår om hjemfall. I tillegg har flere av Hydros kraftverk tidligere hjemfalt til staten. Hydro har derfor førstehånds erfaring med de problemstillinger hjemfallsordningen reiser for en kraftverkseier.

Utgangspunktet for at hjemfallsordningen er under revurdering er todelt.

Energiloven innførte et marked for produksjon og omsetning av kraft. Regjeringen har lagt til grunn at under slike forhold er ulike rammevilkår på eiersiden uheldig i forhold til effektiv ressursbruk og konkurranse i sektoren. Hydro er enig i dette.

Videre har ESA kommet til den konklusjon at EØS-avtalen forutsetter like vilkår for offentlige og private konsesjonærer som konkurrerer i samme bransje. Hydro støtter denne vurderingen.

2 Hydros syn på forslagene - Oppsummering

For Hydro som største private kraftprodusent og største industrielle kraftbruker i Norge, er følgende tre kriterier viktige ved utformingen av en ny hjemfallslovgivning:

- Diskrimineringen av eksisterende private konsesjonærer må opphøre. Offentlige og private konsesjonærer må behandles likt i det nye regimet. Dette er en forutsetning for at regimet skal være i samsvar med EØS-avtalen.
- Industrien må kunne legge langsiktig eierskap til egen kraftproduksjon til grunn for videreutviklingen av kraftforedlende industri i Norge.
- Det må legges til rette for en mest mulig effektiv utnyttelse av norske vannkraftressurser.

Hydro støtter hovedpunktene i forslaget fra hjemfallsutvalgets flertall. Flertallets forslag innebærer klare forbedringer i forhold til dagens ordning ved at de uheldige virkningene av dagens hjemfallsordning delvis blir redusert. De ulike forslag som er fremmet av varierende mindretall i utvalget har alle klare svakheter i forhold til de ovennevnte kriterier.

Hydro beklager at utvalgets mandat ikke omfattet avvikling av hjemfallsregimet som et mulig alternativ til de modeller som ble utredet av utvalget. Hydros oppfatning er at avvikling av hjemfallsregimet på en bedre måte ville ha oppfylt de ovennevnte kriterier uten at dette ville svekket de hensyn som tradisjonelt anføres til støtte for hjemfall. Det offentliges legitime behov for kontroll med bruken av ressursene kan like godt tilfredsstilles ved konsesjonsbetingelser knyttet til driften av kraftanleggene og bruk av andre virkemidler, i stedet for hjemfall der eiendomsretten går over til staten. Vi slutter oss til fellesmerknad fra utvalgsmedlemmene Martinsen og Ryssdal i avsnitt 8.2 i utredningen.

Hydros subsidiære støtte til flertallsforslaget bygger på en erkjennelse av at en avvikling av hjemfallsordningen for tiden ikke synes å være noen aktuell politisk løsning. Dersom det, mot formodning, skulle vise seg ikke å være politisk grunnlag for å gjennomføre konkrete lovendringer for å imøtekomme ESAs innvendinger mot dagens hjemfallsregime, kan det likevel vise seg at ordningen faller bort fordi den ikke kan håndheves juridisk overfor private eiere.

Selv om vi støtter hovedpunktene i flertallets forslag har vi enkelte kommentarer og innvendinger til de foreslåtte lovendringer. Disse er samlet i punkt 9.

3 EØS-avtalen

3.1 Likebehandling av offentlige og private konsesjonærer

Ved innføringen av et nytt hjemfallsregime er staten i henhold til EØS-avtalen rettslig forpliktet til å likebehandle private og offentlige konsesjonærer. Et eventuelt nytt hjemfallsregime må utformes slik at det effektivt avskaffer eksisterende restriksjoner i forhold til retten til fri bevegelse av kapital og den frie etableringsrett og ikke innfører nye slike restriksjoner. Det er viktig at det nye regimet er robust i forhold til EØS-avtalen slik at det i fremtiden ikke hersker usikkerhet om lovligheten av det nye regimet. Den pågående revisjon av hjemfallsinstituttet har allerede tatt lang tid og det er viktig for bransjens utvikling at det nå innføres stabile rammevilkår på eiersiden.

Likebehandling både av eksisterende og fremtidige konsesjonærer må være et hovedprinsipp ved utformingen av et nytt regime. Dette gjelder med hensyn til konsesjonsperiodens lengde, så vel som innholdet i eventuelle hjemfallsvilkår og tidspunktet for innføring av vilkår om tidsbegrensning og hjemfall.

Retten til likebehandling følger både av reglene om fri bevegelighet av kapital jf EØS art. 40, etableringsretten jf EØS art. 31 og forbudet mot statsstøtte jf EØS art. 61. I det følgende vil vi angi hovedpunktene i de føringer EØS-avtalen legger for et nytt regime. For en nærmere utredning av de

aktuelle rettslige spørsmål saken reiser i forhold til EØS-avtalen, viser vi til betenkning utarbeidet av professor Leigh Hancher[1] som vedlegges denne høringsuttalelse.

3.2 Nærmere om anvendelsen av EØS-retten

3.2.1 Fri bevegelse av kapital

ESA har i Reasoned Opinion av 20. februar 2002 konkludert med at gjeldende hjemfallsregime er i strid med EØS-avtalens regler om fri bevegelighet av kapital. Hydro slutter seg til denne konklusjonen.

Som det fremgår av ESA's Reasoned Opinion, henføres restriksjonene til to forhold; Industrikonsesjonslovens bestemmelser som forskjellsbehandler offentlig og privat virksomhet, og de vilkår om hjemfall og tidsbegrensning som er pålagt de private konsesjonærer. Også de enkelte konsesjonene er således "bærere" av restriksjoner på den frie bevegelighet av kapital.

Ettersom de EØS-stridige restriksjoner også er nedfelt i eksisterende konsesjoner meddelt private, vil det i forhold til EØS-avtalen ikke være tilstrekkelig å likestille *fremtidige* offentlige og private erververe. De restriksjoner som er nedfelt i de private konsesjoner, må også fjernes. Dette kan bare gjennomføres ved at dagens konsesjonærer – private og offentlige – blir behandlet likt. Dette gjelder både innenfor eksisterende hjemfallsregime og i et fremtidig nytt regime.

Det er utforming av et nytt regime som har hatt fokus i hjemfallsutvalgets innstilling. Før man vurderer hvorledes et nytt regime kan utformes, er det imidlertid hensiktsmessig å vurdere hvilken effekt de eksisterende restriksjoner har i forhold til dagens konsesjoner.

EØS-avtalens hoveddel er inkorporert i norsk lov med forrang i forhold til motstridende lovgivning jf EØS-lovens §§ 1 og 2. Den pågående forskjellsbehandling utgjør en restriksjon i strid med art. 40. Konsekvensen av forrangsprinsippet må være at konsesjonsvilkår ikke lenger kan håndheves på en diskriminerende måte. Det er i dag ikke hjemmel for å pålegge offentlige konsesjonærer vilkår om tidsbegrensning og hjemfall tilsvarende det som gjelder for private konsesjonærer. For å avbøte restriksjonene i gjeldende regime, synes derfor den eneste løsning å være at diskriminerende konsesjonsvilkår ikke kan håndheves overfor private konsesjonærer. Dette har også den betydning at de eksisterende konsesjonsvilkårene ikke kan videreføres som ledd i et nytt hjemfallsregime.

Ved innføringen av et nytt regime må offentlige og private konsesjonærer likebehandles. Dersom det innføres et regime med hjemfall 75 år etter lovens ikrafttredelse for offentlige konsesjonærer, må private konsesjonærer også ha konsesjonsperiode på 75 år fra lovens

[1] Leigh Hancher har vært professor i europeisk rett siden 1991, tilknyttet universitetet i Tilburg fra 1997. Hun har et omfattende forfatterskap og er bl.a. forfatter av det ledende verk om statsstøtte (E.C State Aids). Hun arbeider også som advokat med særlig vekt på EU-rett og energirett.

ikrafttreden. Dersom de private konsesjonærer ikke gis samme konsesjonsperiode som de offentlige konsesjonærer, vil eksisterende restriksjon i forhold til fri bevegelse av kapital bli videreført i det nye system i strid med art. 40.

På samme måte som konsesjonstidens lengde må være lik for offentlige og private konsesjonærer fra lovendringstidspunktet, må innholdet i hjemfallsvilkåret være likt. For eksempel vil en modell med partielt hjemfall eller tilbakeføring av verdier fra staten til konsesjonær, måtte gjennomføres likt for private og offentlige konsesjonærer.

Dersom resultatet skulle bli at vilkår om hjemfall og tidsbegrensning først innføres fra et annet tidspunkt enn lovendringstidspunktet, for eksempel i tilknytning til en fremtidig transaksjon, må dette gjennomføres på samme måte for private konsesjonærer. Private konsesjonærer må da likestilles med offentlige aktører slik at vilkår om hjemfall og tidsbegrensning fjernes fra konsesjonene og eventuelt innføres ved en fremtidig transaksjon på samme måte som for offentlige konsesjonærer.

Også lovens bestemmelser utgjør som nevnt ulovlige restriksjoner. Selv om lovens diskriminerende bestemmelser i kraft av det EØS-rettslige forrangsprinsippet ikke kan håndheves pr. i dag, vil staten jf EØS-avtalen art 3, uansett være forpliktet til å endre de diskriminerende lovbestemmelser idet eksistensen av lovbestemmelsene vil skape en usikkerhet mht investeringer og utgjøre en ulovlig restriksjon i forhold til fri bevegelse av kapital. Likeledes må diskriminerende konsesjonsvilkår endres.

3.2.2 Etableringsretten

EØS-avtalens regler om etableringsrett jf EØS art. 31 legger føringer mht likebehandling av konsesjonærer ved erverv og tildeling av konsesjoner. For Hydros del er det ikke nødvendig å redegjøre nærmere for disse bestemmelser her idet kapitalreglene også fanger opp de aktuelle problemstillinger knyttet til erverv og tildeling. EØS art. 31 er imidlertid omhandlet i Professor Hanchers betenkning.

3.2.3 Statsstøtte

ESA har så langt vurdert hjemfallsregimet i forhold til kapital- og etableringsreglene, og har ikke innledet prosedyre under statsstøttereglene. Dersom ESA's konklusjon aksepteres, er det heller ikke behov for å vurdere dagens hjemfallsregime i forhold til reglene om statsstøtte. Ettersom vilkår om hjemfall og tidsbegrensning ikke kan håndheves pr i dag, oppstår heller ingen spørsmål i forhold til forbudet mot statsstøtte. Og dersom offentlige og private konsesjonærer likebehandles i et nytt regime, vil det heller ikke oppstå slike spørsmål i fremtiden.

Det er like fullt grunn til å påpeke at ESA ikke er forhindret fra å vurdere verken det eksisterende hjemfallsregime eller et eventuelt nytt hjemfallsregime i forhold til reglene om statsstøtte dersom forskjellsbehandlingen av private og offentlige konsesjonærer ikke opphører. Statsstøtte kan ikke tas inn i den pågående prosess mellom Norge og ESA, men ESA kan på et hvilket som helst tidspunkt innlede formell prosedyre under statsstøttereglene.

Statsstøttereglene vil legge føringer på hvordan et nytt hjemfallsregime kan utformes. Videre vil statsstøttereglene ha betydning for hvordan de eksisterende restriksjoner kan avbøtes. Det er derfor grunn til å si noe mer om hvordan dagens regime (uavhengig av kapitalreglene) forholder seg til statsstøttereglene.

Hydro slutter seg på dette punkt til Kolstads konklusjoner om at praktisering av dagens regime utgjør statsstøtte til offentlige konsesjonærer. Disse konklusjoner underbygges i professor Hanchers betenkning.

Den fordel offentlige konsesjonærer får ved å slippe vilkår om hjemfall i motsetning til private konsesjonærer som er pålagt hjemfall, utgjør statsstøtte til de offentlige konsesjonærer. Staten gir avkall på en inntekt fra offentlige konsesjonærer som staten oppebærer fra private konsesjonærer. Favorisering av én gruppe aktører på markedet utgjør en selektiv forskjellsbehandling i strid med statsstøttereglene.

Ved et eventuelt nytt hjemfallsregime må statsstøtteelementet opphøre. Som det fremgår av Kolstads og Hanchers betenkninger, oppnås dette bare dersom offentlige og private konsesjonærer gis konsesjonsperiode med samme lengde. Dersom offentlige konsesjonærer får 75 år fra lovens ikrafttreden, må private konsesjonærer gis tilsvarende periode.

De fordeler offentlige konsesjonærer oppebærer under det eksisterende regime, er sannsynligvis å betrakte som eksisterende støtte. Dette innebærer bl.a. at systemet kan fortsette inntil ESA har nedlagt forbud og at mottatt støtte ikke kan kreves tilbakebetalt.

Dersom man innfører et nytt hjemfallsregime som fortsatt favoriserer offentlige konsesjonærer ved at de får lenger konsesjonsperiode fra lovens ikrafttreden og/eller et hjemfallsvilkår med lempeligere innhold enn eksisterende private konsesjonærer, vil dette sannsynligvis utgjøre ny støtte.

Det er grunn til å fremheve at innføring av ny støtte vil innebære en stor usikkerhet for offentlige konsesjonærer. Det er forbudt å innføre nye støtteordninger, og offentlige konsesjonærer som mottar støtte, risikerer å måtte betale dette tilbake. For vannfall utbygget på 40- og 50-tallet, kan dette inntreffe allerede kort tid etter lovendringen. Innføring av like vilkår for offentlige og private konsesjonærer vil eliminere slik usikkerhet.

4 Industriens eierskap til egen kraftproduksjon

De kraftverk som i dag er underlagt vilkår om hjemfall, er bygget og drevet av private selskap med kraftforedlende industriell produksjon. Utbyggingen av disse kraftverkene har vært en forutsetning for etableringen av store deler av landets kraftforedlende industri, og kraftverkene er fortsatt et viktig fundament i en helhetlig industriell infrastruktur. Langsiktig krafttilgang sikres best ved egenprodusert kraft. Hjemfall svekker dette fundamentet og dermed industriens utviklingsmuligheter.

Flertallsforslaget om likebehandling av offentlige og private konsesjonærer slik at også industriens kraftverk skal ha hjemfall først 75 år etter lovendringstidspunktet, innebærer en vesentlig forbedring. Ved at Stortinget vedtar å gjennomføre flertallets forslag sikres industrien trygghet for fortsatt tilgang på egenprodusert kraft.

Likebehandling vil også i lang tid fremover fjerne de disinsentiver hjemfall har i forhold til investeringer i industriens kraftverk og således bidra til best mulig utnyttelse av vannressursene også i disse kraftverk. Dette har særlig betydning for de kraftverk som etter innholdet i konsesjonene relativt snart faller tilbake til staten. Videre fjernes den urimelighet som i dag foreligger i forhold til investeringer som gjennomføres på bakgrunn av krav og pålegg fra det offentlige. Slike investeringer er i dag vesentlig mer tyngende for hjemfallsbelagte kraftverk enn for offentlig eide kraftverk uten hjemfall, og innebærer i seg selv et diskriminerende element.

Et mindretall i utvalget går inn for at de nye hjemfallsreglene ikke skal gjelde for industriens kraftverk, men at dagens hjemfallsvilkår skal videreføres. Deler av mindretallet argumenterer med at det å gi industrien samme hjemfallsvilkår som offentlige kraftverkseiere vil innebære overføring av verdier fra staten til industrien. Dette er ikke riktig. Som det fremgår over, er forskjellsbehandling i strid med EØS-avtalen og diskriminerende konsesjonsvilkår kan ikke håndheves. Videre har situasjonen som påpekt flere steder innstillingen også tidligere vært den at industrien etter hvert som hjemfallstidspunktet har nærmet seg, har hatt muligheter for å kunne beholde en del av verdiene som ligger i forventede kontantstrømmer fra kraftverkene etter hjemfallstidspunktet ved å delta i restruktureringsprosjekter som fører til at kraftverkene blir offentlig eiet. Det har imidlertid aldri vært noen ønsket løsning at regelverket "fremtvinger" løsninger hvor industrien må oppgi eierskap til egne kraftverk. Det er likevel grunn til å fremheve at en løsning i tråd med mindretallets forslag ville medføre at industrien kom enda dårligere ut etter lovendringen enn tidligere, og at denne løsning også ville være i strid med EØS-avtalen.

5 Best mulig utnyttelse av vannkraftressursene

For å kunne styrke og videreutvikle norsk industri er det nødvendig med økt krafttilgang til internasjonalt konkurransedyktige priser. Rikelig tilgang til elektrisk kraft til konkurransedyktige priser har vært en forutsetning for at kraftforedlende industri har kunnet etablere seg i Norge. Denne forutsetningen er ikke lenger tilstede. En jevn vekst i forbruket uten tilsvarende vekst i tilgangen har svekket kraftbalansen og øket prisene i markedet. Fra naturens side ligger det imidlertid til rette for at situasjonen kan forbedres vesentlig. Dette krever imidlertid at det lages rammebetingelser som legger til rette for en god utnyttelse av naturressursene og investeringer i ny produksjonskapasitet.

De endringer flertallet foreslår i hjemfallsordningen, vil være et viktig bidrag. Det følger av utvalgets mandat og premissene for utredningen at det skal legges vekt på å legge til rette for en god utnyttelse av vannkraftressursene. Dette vil styrke forutsetningene for at kraftbalansen skal kunne forbedres. Utvalget har i kapittel 6.3 gitt en god beskrivelse av hvordan dagens hjemfallsordning med ulike vilkår for ulike eiere har uheldige virkninger for ressursutnyttelsen. Vi vil særlig fremheve den betydningen det kan ha for kraftbalanse og forsyningssikkerhet dersom rammebetingelsene fører til for lave investeringer i økt kraftproduksjon.

Statssekretær Oluf Ulseth viser i en presentasjon holdt den 13. januar i år til et potensial for å øke produksjonen ved opprustning og utvidelser til 12 TWh/år. Dette er det dobbelte av det nåværende underskuddet på kraftbalansen i et normalår. Det økonomiske potensialet for produksjonsøkninger avhenger i praksis av hva det legges til rette for gjennom rammebetingelsene.

Et eksempel på et allerede gjennomført prosjekt i ovennevnte kategori kan være det opprustnings-prosjektet Hydro nettopp har avsluttet i Tyin kraftverk. Gjennom opprustningen av Tyin har Hydro vist både vilje og evne til å gjennomføre store opprustningsprosjekt. Ut fra statssekretærens tall er det rimelig å anta at tilsvarende opprustningsmuligheter finnes i andre kraftverkssystemer eiet av offentlige og til dels mer kapitalsvake kraftselskap. Private selskap har i dag ingen insentiver til å vurdere om offentlig eide kraftverk kan ha tilsvarende muligheter siden dagens forskjellsbehandling av private og offentlige eiere gjør at det i praksis er umulig for private selskap å kjøpe seg inn i slike kraftanlegg.

På tilsvarende måte gjør forskjellsbehandlingen mellom private og offentlige konsesjonærer det lite interessant for private selskaper å vurdere deltakelse i mulige restruktureringsprosjekter med sikte på å bedre effektiviteten i bransjen. En ordning hvor alle aktører behandles likt åpner for at flere og sterkere aktører på profesjonelt og forretningsmessig grunnlag kan engasjere seg i bransjen med sikte på å bedre effektivitet og ressursutnyttelse. Dette vil bedre forutsetningene for en sterk og effektiv norsk kraftbransje.

Som påpekt av utvalget avslutningsvis i innstillingens pkt. 6.3, vil rammevilkår som er nøytrale i forhold til eierskap også bidra til økt effektivitet og bedre ressursutnyttelse i selskap som ikke berøres av eierskifter. Like rammevilkår på eiersiden vil således ha stor betydning for å sikre best mulig utnyttelse av vannkraftressursene, både ved hensiktsmessige restruktureringer og ved mer effektiv utnyttelse av dagens eiere.

6 Hjemfallsvilkårets innhold

Hydro støtter flertallets forslag om partielt hjemfall. Denne ordning er mindre inngripende overfor konsesjonærene enn totalhjemfall og avbøter i en viss utstrekning de uheldige virkninger ved dagens ordning i forhold til investeringer. Samtidig ivaretar ordningen de hensyn som tradisjonelt anføres til støtte for hjemfallsordningen, hensynet til offentlig kontroll over naturressursen og hensynet til offentlige inntekter.

Partielt hjemfall innebærer at konsesjonærene som har påtatt seg risiko og foretatt investeringer, får beholde noe av sine investeringer. Partielt hjemfall innebærer videre at konsesjonærene får en bedre økonomisk basis for å kjøpe tilbake den delen som hjemfaller ved at den delen som ikke hjemfaller kan tjene som ekstra sikkerhet i.f.m. låneopptak for å finansiere kjøpet. Partielt hjemfall vil således bedre mulighetene for fortsatt eierskap i kraftsktoren for dagens offentlige og private eiere.

Hensynet til offentlig styring og kontroll som blir fremhevet som et hovedhensyn for hjemfall, kan ikke påberopes for at hjemfallsandelen settes så høyt som flertallet foreslår. Staten har *som regulator* et omfattende sett av styringsmidler uavhengig av hjemfall bla. ved vilkår om tidsbegrensning og konsesjonsvilkår om utnyttelsen. I den grad man ved hjemfall vil sikre statlig kontroll *som eier*, burde det være tilstrekkelig at staten etter hjemfall sitter med en eierandel på 51%. En hjemfallsandel av denne størrelse vil også innebære betydelige inntekter for det offentlige i tillegg til grunnrenteskatten som er det virkemiddel som prinsipielt bør benyttes for inndragning av grunnrente. Dette tilsier at hjemfallsandelen ikke fastsettes til mer enn 51 % av verdien av vannfall med tilhørende anlegg.

En fordel ved flertallets forslag om partielt hjemfall er videre at det legges opp til at konsesjonæren i utgangspunktet skal få anledning til å råde over sin respektive andel av kraftproduksjon, magasin og vanntilsig etter hjemfallet. Som påpekt foran er langsiktig krafttilgang svært viktig for industrien. Sett fra industriens side vil det derfor ha stor betydning at man fortsatt vil kunne disponere over deler av kraften etter hjemfallet.

7 Kommentarer til utvalgets tallmateriale og beregninger

Vi har ikke foretatt noen full gjennomgang av de beregninger og det tallmateriale som ligger til grunn for utvalgets anbefalinger. Vi vil imidlertid påpeke at de tall som benyttes i tilknytning til kraft-produksjonen i RSK er for høye.

I utredningens tabell 5.1 er Røldal-Suldal oppført med en middelproduksjon på 3130 GWh pr år. Som kilde er oppgitt NVE, og tallene stemmer med NVEs simuleringsresultater for middel-produksjonstallene basert på tidsserien 1970-1999. Vi er kjent med at NVE selv er kritisk til disse simuleringsresultatene og gyldigheten for enkeltsystemer, og at NVE derfor har til hensikt å publisere nye tall så snart en pågående kvalitetssikring er gjennomført for hele landet. Til sammenligning var produksjonen i RSK-verkene i gjennomsnitt i perioden 1994-2003 ca 8% lavere enn NVEs simuleringstall, en periode med gjennomsnittlig høyere tilsig enn hva man kan legge til grunn for en langtidsnormal.

Econ har brukt tallene fra NVEs simuleringer i sine beregninger. Dette medfører at Econs beregninger i noen grad overvurderer verdien av dagens hjemfallsvilkår for privateide kraftverk.

For øvrig påpekes at det i tabell 5.1 feilaktig er oppført Hydro Aluminium Vekst AS som eier av Tyin, Fortun, Moflåt og Mæl. Det korrekte er at Hydro Aluminium a.s eier Tyin og Fortun mens Norsk Hydro Produksjon a.s eier Moflåt og Mæl.

8 Hjemfallsinstituttets effekt på investeringsnivå

En viktig realøkonomisk innvending mot hjemfallsinstituttet er hjemfallets negative virkning i forhold til investeringer. Særlig de 10-20 siste år før hjemfall vil samfunnsøkonomisk lønnsomme investeringer ofte ikke være bedriftsøkonomisk lønnsomme for kraftsverkseieren.

Dette er problemstillinger Hydro kjenner svært godt til. I RSK-systemet vil vilkåret om hjemfall i 2022 i økende grad være et disinsentiv i forhold til rasjonelle investeringer. Vi viser også til notat til utvalget utarbeidet av utvalgsmedlem Ryssdal som illustrerer hjemfallets negative effekt på investeringer med konkrete eksempler.

Utvalget foreslår videreføring av ordningen med foregrepet hjemfall for å kompensere for disse problemene. Dette er positivt. Som påpekt i innstillingens vedlegg 1, vil imidlertid foregrepet hjemfall først og fremst være et egnet virkemiddel der investeringskostnadene er betydelige i forhold til tilbakekjøpsprisen. Foregrepet hjemfall er et mindre egnet virkemiddel i forhold til mindre investeringer i for eksempel oppgraderinger eller ny teknologi. Slike investeringer vil i sum over flere år kunne være betydelige og av stor samfunnsmessig betydning. Det er rimelig å forvente at slike investeringer vil være aktuelle i de fleste kraftverk som nærmer seg hjemfall.

Partielt hjemfall vil også i en viss utstrekning avdempe hjemfallets negative effekt for investeringer.

Ingen av de tiltak som omhandles i innstillingen vil imidlertid tilfredsstillende avbøte hjemfallets uheldige virkning i forhold til investeringer. Flertallets forslag om at ingen kraftverk vil hjemfalle før 75 år etter lovendringen, vil imidlertid utsette hjemfallsinstituttets negative effekt i forhold til investeringer i lang tid. Med en slik løsning vil det være mulig å vurdere nye ordninger når disse problemstillinger igjen blir aktuelle.

9 Detaljerte kommentarer til foreslåtte lovendringer

Nedenfor følger noen bemerkninger til utvalgets konkrete forslag til lovendringer slik de er fremmet i utredningens kapittel 13 samt til de merknader utvalget har gitt til de enkelte paragrafene i kapittel 12.

9.1 Bestemmelser vedrørende anleggenes tekniske tilstand ved hjemfall.

Konsesjonæren plikter etter dagens lovverk å sørge for at anlegg som hjemfaller er i "fullt ut driftsmessig stand". Utvalget foreslår at det innføres hjemmel til å utdype kravet i forskrifts form. Utvalget foreslår videre at departementet gis myndighet til pålegge konsesjonæren tiltak for å sikre at kravet til driftsmessig stand oppfylles. Videre foreslås det at konsesjonsmyndigheten skal kunne kreve oversikt over det enkelte anleggs tekniske stand. Endringene foreslås implementert ved endringer i industrikonsesjonslovens §2 fjerde ledd post 17 og vassdragsreguleringsloven §10 nr. 4.

Gjennom en rekke forskrifter stilles det i dag krav om teknisk tilstand, kartlegging og oppfølging av ulike anleggsdeler i et kraftanlegg. Gjennom disse har man i dag et godt rammeverk som ivaretar hensynet til tilfredsstillende og sikker drift.

Etter at energiloven ble vedtatt har bransjen fokusert på økt lønnsomhet innen drift og vedlikehold av kraftverk. Rehabiliteringskostnad er en av flere parametere som måles, og hvor utnyttelse av komponenter og systemers levetid er det som i vesentlig grad styrer nivået. Det skjer fortløpende tekniske fremskritt og det er ikke uvanlig at aktiviteter i en langtidsplan blir forskjøvet på grunn av den tekniske utviklingen. Hydro har erfaringer for dette samtidig som vi har klart å øke anleggenes pålitelighet. Dette viser at det er vanskelig å fastslå med tilstrekkelig sikkerhet når et anlegg bør oppgraderes i et langtidsperspektiv.

Å innføre et regime der staten ved pålegg skal bestemme rehabiliteringsnivået 10-15 år frem i tid vil være et tilbakeskritt i den utvikling vi nå har sett i forhold til å finne det "optimale" gjennomføringstidspunkt i forhold til den tekniske utviklingen. Etter Hydros oppfatning vil et slikt regime bidra til at rehabilitering ikke blir foretatt ut fra hva som er samfunnsøkonomisk og bedriftsøkonomisk optimalt.

Problemstillinger knyttet til at konsesjonæren ikke har oppfylt konsesjonsforpliktelsen blir mindre relevante ved partielt hjemfall. Ved at ordningen med foregrepet hjemfall opprettholdes, vil konsesjonæren ventelig også ønske å inngå i forhandlinger med staten dersom det vil påløpe store kapitalutlegg mot slutten av konsesjonstiden. Uansett vil en gjennomgang på objektivt grunnlag på hjemfallstidspunktet avdekke om konsesjonæren burde ha foretatt oppgraderinger. Den delen som ikke hjemfaller, vil kunne tjene som økonomisk sikkerhet for statens krav.

Hydro mener på denne bakgrunn at det ikke er behov for forskriftshjemmel og at gjeldende ordning hvor krav til driftsmessig stand vurderes på hjemfallstidspunktet bør videreføres. Et regime som foreslått i høringsdokumentet vil lett kunne bli et byråkrati som hinder en god samfunnsøkonomisk utnyttelse av anleggenes potensielle levetid.

9.2 Kompensasjon dersom konsesjonæren finner at betingelsene for videre drift etter hjemfall ikke er akseptable.

Utvalgets flertall foreslår at konsesjonæren etter et partielt hjemfall skal få to måneders frist til å vurdere om vilkårene i den nye konsesjonen er akseptable. Dersom konsesjonæren ikke finner at vilkårene er akseptable skal staten overta konsesjonærens andel vederlagsfritt. Det siste er ikke rimelig. Det er heller ikke gitt noen begrunnelse for dette. Dersom staten overtar konsesjonærens andel bør staten betale markedspris til konsesjonæren. Vi finner det også rimelig at konsesjonæren får tilstrekkelig tid til å forsøke å overdra konsesjonen til andre enn staten.

9.3 Forkjøpsrett til andeler hos konsesjonæren

I lovutkastet § 2 fjerde ledd post 19 er det lagt opp til at staten og konsesjonæren har forkjøpsrett ved salg av andeler i det nyetablerte selskap hvor staten og konsesjonær sammen eier vannfall og

produksjonsanlegg. Hydro støtter denne løsning. En forkjøpsrett for staten ved salg av eierandeler i bakenforliggende selskaper vil, etter Hydros oppfatning, vanskelig la seg gjennomføre på en hensiktsmessig og praktisk gjennomførbar måte. Særlige utfordringer oppstår i forhold til børsnoterte selskap. Statens behov for slik forkjøpsrett er antagelig heller ikke stort ettersom staten uansett sitter med kontrollerende eierandel etter hjemfall. Hydro går derfor mot forslaget om at staten skal ha forkjøpsrett ved omsetning av eierandeler i bakenforliggende ledd.

9.4 Kompensasjon for kortvarig konsesjonstid.

Vassdragsreguleringsloven §10 nr. 5 gir hjemmel for at det kan gis kompensasjon ved hjemfall dersom det er kort tid mellom konsesjonstildeling og hjemfall. Denne hjemmelen foreslås fjernet (innstillingen side 172). Begrunnelsen er at alle konsesjoner heretter skal gis med 75 år til hjemfall. Vi antar imidlertid at det også i fremtiden kan være praktisk å ha en slik bestemmelse. Man kan for eksempel tenke seg at det i et allerede regulert vassdrag som nærmer seg hjemfall, kan være behov for å gi konsesjon for ytterligere reguleringstiltak. Dersom nytten av tiltaket i slike tilfeller tilfaller kraftverk med kort gjenværende konsesjonstid, vil det kunne være hensiktsmessig å kunne tilby kompensasjon ved hjemfall for at reguleringen skal kunne gjennomføres.

9.5 Garantiordningen for årlige erstatninger

Utvalget foreslår at vassdragsreguleringslovens 16 nr 5 niende ledd oppheves. Bestemmelsen stiller krav til at konsesjonær som er pålagt hjemfall må stille sikkerhet for utbetaling av årlige erstatninger. Hydro er enig i at bestemmelsen skal oppheves.

Et mindretall bestående av statens tre representanter går inn for at opphevelsen ikke skal få virkning for allerede eksisterende sikkerhetsstillelser. Dette forslaget innebærer en videreføring av en eksisterende forskjellsbehandling mellom ulike konsesjonærer. Videreføring av denne forskjellsbehandlingen vil etter Hydros mening være i strid med EØS-avtalen.

10 Statens og fylkeskommunens forkjøpsrett

OED har tidligere foreslått å oppheve statens og fylkeskommunens forkjøpsrett i industri-konsesjonslovens §§ 6 og 9 og retten til å tre inn i bruksrettsavtale etter § 10. Hydro slutter seg til den begrunnelse departementet har gitt for å oppheve disse bestemmelser og vil i tillegg påpeke at disse bestemmelser antagelig vil være i strid med EØS-avtalen. Bestemmelsene bør derfor oppheves når hjemfallsinstituttet revideres.

11 Rettigheter ervervet før 1909

Vannfall ervervet før 1909 er holdt utenfor utvalgets mandat. Etter Hydros oppfatning foreligger det ikke rettslig grunnlag for å foreta endringer i regelverket i forhold til disse rettigheter. På bakgrunn av utvalgets mandat legger Hydro til grunn at det heller ikke er aktuelt å foreslå endringer her.

Med hilsen
for Norsk Hydro ASA

Evind Reiten
Generaldirektør

Vedlegg: Memorandum av Professor Leigh Hancher av 1.mars 2005

Allen & Overy LLP

MEMORANDUM

To	Norsk Hydro ASA
From	Leigh Hancher
Our ref	15647-00006 AMCP:45071.1
Date	1 March 2005
Subject	**The Proposed Revisions to Norwegian Concession Legislation – and their conformity with EEA law**

Executive Summary

I have been asked to consider four issues with regard to the compatibility of the rules laid down in the Industrial Concessions Act 1917 and the Watercourse Regulations Act of 1917, in the light of the rules on free movement of capital, the rights of establishment and the state aid regime as applied to Norway through its obligations under the European Economic Area Agreement 1994 (hereafter EEA).

1. What are the implications of the rules of free movement of capital (as expressed in the ESA Reasoned Opinion) with respect to the existing private concessionaires, including concessions granted prior to the entry into force of the EEA Agreement?

2. Are concessions held by public undertakings granted prior to the entry into force of the EEA Agreement protected against limitation (through the imposition of reversion) in accordance with the principle of retroactivity? If this principle should apply in this case, what are its implications for the existing concessions held by private undertakings?

3. Is the existing reversion scheme also contrary to the rules on state aid?

4. Given that a new reversion scheme will be implemented, including for public concessionaires, are existing private concessionaires entitled to the same concession period as public concessionaires from the entry into force of a new legal regime? It is requested that this aspect should be assessed in the light of the free movement rules as well as the state aid rules.

5. In dealing with these four issues, I conclude that the implications of the free movement rules (for both capital and establishment), as stated in the ESA Reasoned Opinion, are that the current regime infringes Article 31 and 40 of the EEA Agreement. I note however, that to date the Norwegian government has not attempted to maintain and subsequently defend these restrictions before the EFTA Court, but has instead

opted to amend the relevant legislation. It is therefore not yet apparent whether the government might nevertheless seek to rely on public security and public policy-related arguments to defend eventual modifications to the current regime which would maintain a differential treatment for private concessions and which might also expand the scope for public ownership or control in order to ensure that certain public policy objectives are realised. This cannot be excluded. However, there may be numerous arguments to be made to rebut any purported justifications for derogation from the basic principles on free movement and freedom of establishment, given that the European Court of Justice has interpreted the scope of any permissible exceptions very strictly. In particular the Court has interpreted the proportionality principle very strictly and has not been favourable to restrictions on ownership rights when other less far-reaching methods of securing justified public policy goals such as energy security are available to national governments. The EFTA Court has taken a similar strict approach.[1]

6. I further conclude that it is not relevant for the application of the EEA rules that individual concessions were granted before 1 January 1994 , the date on which the EEA entered into effect. It is the effects which flow from the legislation which are of primary importance. It must be borne in mind that the relevant EC Treaty articles and the Articles of the EEA Agreement require the abolition of **existing** restrictions to the free movement of capital and to the freedom of establishment, irrespective of the form of those restrictions or the date at which they first took effect. In addition the Treaty and the EEA Agreement prohibit the adoption of new restrictions – creating **future** obstacles to the realisation of the Treaty principles.

7. With regard to the potential application of the EEA rules on state aids, it appears that the present regime as introduced in 1917 confers a selective advantage on one group of undertakings - the holders of public concessions of unlimited duration. However the fact that this advantage is created by the legislation of 1917 means that these measures must in all probability be classified as existing aid scheme and therefore are not illegal for want of notification. The classification of a measure as an existing aid may not however immunize that measure from assessment under the state rules. It cannot prevent the ESA from adopting 'appropriate measure' and requesting future modifications or amendments to a regime, and this may be of relevance in considering the legality of reversion without compensation when a private concession expires.

8. I further conclude that the models proposed by the minority of the law commission do not appear to remove the restrictions to the freedom of establishment and free movement of capital identified by the ESA in its Reasoned Opinion. Inequality of treatment between **existing** private and public concession holders is in effect maintained in all of the models even although all **new** concessions issued after the relevant amendments to the legislation will be for the same duration, irrespective of the legal status of the concession holder. This means that in practice an investor company from another EEA or EU member state who intends to acquire or has already acquired an existing concession, or an interest therein, would continue to be subject to the same restrictions as those already condemned by the ESA in its Reasoned Opinion of June 2002. Unlike the current public concession holders, none of these models for amendment would provide for the extension of existing private concessions or for revision of the reversion conditions attached to such private concessions. Furthermore, by continuing to confer a selective advantage on the holders of public concessions who will effectively enjoy concession rights of a far longer duration, the proposed models would in all probability be contrary to Article 61(1) EEA. In the event of amendments

[1] See ruling of the EFTA Court in Case E-1/100 Islandbankiof 14th July 2000. [2000-01] EFTA Ct. Rep. 8 at §16 and its ruling in Case E-1/04 of 23 November 2004, Fokus Bank ASA, nyr.

to the current legislation, the benefits conferred are likely to be classified as new aid, and as such must be notified for approval to the ESA in accordance with the provisions of Article 62 EEA.

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1. This memorandum examines four issues, based on the questions referred to me by Norsk Hydro. The first three questions relate essentially to the present legal regime and the fourth question relates to the future. These questions are as follows:

   (1) What are the implications of the rules of free movement of capital (as expressed in the ESA Reasoned Opinion) with respect to the existing private concessionaires, including concessions granted prior to the entry into force of the EEA Agreement?

   (2) Are concessions held by public undertakings granted prior to the entry into force of the EEA Agreement protected against limitation (through the imposition of reversion) in accordance with the principle of retroactivity? If this principle should apply in this case, what are its implications for the existing concessions held by private undertakings?

   (3) Is the **existing** reversion scheme also contrary to the rules on state aid?

   (4) Given that a **new** reversion scheme will be implemented, including for public concessionaires, are existing private concessionaires entitled to the same concession period as public concessionaires from the entry into force of a new legal regime? It is requested that this aspect should be assessed in the light of the free movement rules as well as the state aid rules.

2. In the following sections of this memorandum I will briefly recapitulate the background to these four questions in order to place each set of issues in its legal context. I will then turn to a brief account of the relevant EEA rules, taking into consideration the recent case law handed down by the European courts after the reasoned opinion of the EFTA Surveillance Authority (ESA) on 20 February 2002 (hereafter Reasoned Opinion). Against this legal analysis, I will then consider the legal options available to a holder or acquirer of an existing private concession in order to realise its rights under European Law and to ensure that existing restrictions and illegalities are terminated so that private and public concessionaires are placed on an equal footing. I will then consider at a general level the alternative amendments which were discussed in the Law Commission and are being further considered the Norwegian government to ensure that the Norwegian legislation is no longer in breach of the relevant EEA rules, and I will discuss their possible implications for existing concessions (both public and private).

Background

3. The relevant Norwegian legislation, which dates back to 1917 provides in its Section 2-17 that a concession for the acquisition of rights of ownership or use of a waterfall is usually granted for a limited duration of 60 years. After that period, all installations should be returned to the Norwegian state without compensation. However, in accordance with Section 4 the concession may be granted for an unlimited time to enterprises organised according to the Law on State Enterprises of 1991. Similarly, for an enterprise which is owned or controlled for a minimum of two thirds of its capital/votes by such a company or by a local or regional authority, the concession is granted for unlimited duration. Furthermore, in accordance with Section 4, the State may exercise pre-emptive rights when the transfer of shares or parts in a publicly owned undertaking possessing waterfalls has the result that at least 2/3 of the company share capital or voting rights are no longer held by the public

authorities. In accordance with Section 2-22, if a private undertaking purchases a waterfall within the period of 60 years, the conditions of the original concession apply to the new owner. However, if the new owner is a Norwegian public undertaking the concession will be granted for an unlimited period.

4. In practice this means that for private undertakings concessions may only be granted for a maximum of 60 years and on expiry of this period, the concessions for the waterfalls and all related production facilities which have been subsequently constructed to produce hydro-power from that water course must revert to the Norwegian state without compensation. Concessions held by public undertakings and entities are, in accordance with Section 4 of the Law, indefinite. Hence there is no question of reversion without compensation. The ESA did not accept that these restrictions were justifiable either

   (i) as a legitimate management of a natural resource which is not covered by the EEA Agreement; or
   (ii) as a legitimate exercise of ownership rights.

5. The ESA concluded that the Norway had infringed Articles 31 and 40 of the EEA Agreement. The Norwegian government subsequently set up a Law Commission to examine the issue of how the legislation of 1917 and the concession regime could be amended to be brought into line with the EEA Rules.

6. It is understood that the Law Commission has considered a number of options for reform, some of which have been proposed by the Norwegian authorities and that the latter are now considering how to move forward on this matter. Further hearings are scheduled to examine the matter further.

Part I: The Restrictions arising out of the Norwegian Legislation and the Relevant EEA Rules

7. It will be recalled that the ESA handed down its Reasoned Opinion of 20th February 2002. In the period since February 2002 the European Courts have handed down a number of important rulings which further clarify the scope of the European Treaty rules relating to free movement of capital[2], freedom of establishment[3] and to a certain extent, the rules on state aid as they apply to the award of concessions.[4] A number of these recent rulings have been discussed in the opinion of Associate Professor Kolstad, dated 5 November 2004 (hereafter the Kolstad Opinion). These various rulings concerning the scope of Article 43 and 56EC confirm the reasoning applied by the ESA to the 1917 concession rules. It may be noted that only in one of the 'golden share' cases did the Court accept that certain restrictions on the free movement of capital could be justified on grounds of public security and only on very strict procedural conditions.[5]

8. It may be useful to recall the restrictions arising out of the current regime as identified in the communication sent by ESA to Norway on 7th November 2001 and recalled in the opening paragraphs of the ESA's subsequent Reasoned Opinion:

   i) Public companies (and other public authorities) enjoy a concession for unlimited duration whereas private companies hold only a concession for 60 years – in other words 'discriminatory duration';

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2 These include the three 'golden share' rulings of June 2002; Commission v France; Commission v Portugal and C-503/99 Commission v Belgium and the two subsequent rulings of May 2003 (Case C-98/01 Commission v United Kingdom and C-493/00 Commission v Spain).
3 Case C-167/01, Inspire Art, [2003] ECR I-10155 and Case C-299/02, Commission v. the Netherlands [2004] nyr.
4 Case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg, [2003] ECR I-7747.
5 Case C-503/99, Commission v Belgium, [2002] ECR I-4809.

ii) Private concessions (that is concessions held by non-public companies or entities) are subject to a right of reversion without compensation whereas public companies and authorities being unlimited, are not subject to this obligation - in other words 'discriminatory reversion rules';

iii) The pre-emptive rights enjoyed by the State when the transfer of shares or parts in a publicly owned undertaking has the result that at least 2/3 of the company share capital or voting rights are no longer held by public authorities – in other words a form of 'golden share' construction; and

iv) If a private undertaking purchases a waterfall within 60 years the conditions of the original concession apply to the new owner. A private owner may therefore only run the concession for the remaining time to reach the 60 year maximum whereas a Norwegian public undertaking could extend the concession for an unlimited time – 'discrimination in respect of market access'.

9. These four inter-related restrictions were summarised in the letter of formal notice sent on 27th June 2001, and have been subsequently assessed on the basis of the rules pertaining to the free movement of capital (Article 40 EEA) and the rules pertaining to freedom of establishment (Article 31 EEA). There has, however, been no consideration of whether certain aspects of the reversion provisions might infringe Articles 61 and 62 EEA - the rules pertaining to state aids. Nevertheless the ESA dealt with all four of the identified restrictions throughout its Reasoned Opinion and found all four restrictions to be in conflict with the relevant EEA principles enshrined in Articles 31 and 40. It did not suggest that there was any justification for any one of the four restrictions. The ESA had not been provided with any information that the public entities in question had been entrusted with the operation of services of general interest (see §19). It is up to the Member State to invoke an exception to the basic principle and to provide the appropriate arguments to justify reliance on this exception, as well as to establish that the national measure in question is proportionate to the objective pursued. To date this has not occurred in the present case. The consequences of these restrictions are spelled out at §§37 and 38 (freedom of establishment) and at §§44 to 49 (free movement of capital) of the ESA's Reasoned Opinion. These can be summarised as follows.

10. First, the difference in treatment as regards the length of the concessions results in favourable treatment for Norwegian undertakings: undertakings from other EEA states will be precluded from participating on a stable and continuous basis in Norwegian economic life in a similar way as that which is allowed for Norwegian undertakings.

11. Second, undertakings from other EEA countries would be deterred from exercising their fundamental rights from seeking a concession in Norway – in particular a private undertaking could only acquire a concession from another private undertaking for up to the maximum period of 60 years. Again the situation would be different if a Norwegian public undertaking would acquire the concession. These two situations were in the ESA's opinion, contrary to the freedom of establishment rules and this was not disputed by Norway.

12. It is therefore important to stress that the Reasoned Opinion concludes that the restrictions inherent in the legislative system and in the operation of the concessions themselves, as they presently stand, are an impediment to the realisation of the rights of freedom of establishment as guaranteed under Article 31 EEA.

13. The same is true with regard to the ESA's analysis of Article 40 with regard to the rules guaranteeing the free movement of capital. On the one hand, the legislative rules - and in particular the combination of the restricted duration of the concessions and the rules on reversion - are a barrier for investors wishing to acquire shares of private undertakings. Again, restrictions are inherent in the legislation, as well as in the operation of the concessions themselves. On the other hand, given the rights attached to individual concessions, an investor in a public undertaking would have to modify its structure of ownership. Private investors would have a disadvantage when bidding for either waterfalls or shares in private undertakings due to the different rights and obligations attaching to the concessions held by public as opposed to private firms, as well as the restrictions which would be subsequently imposed on a 'private' investor. Furthermore, the pre-emptive rights or 'golden share' granted to the State reinforces the situation that investments from private investors will be rendered more difficult.

Subsequent Case Law on the Freedom of Establishment - Article 31

14. The application of the rules on establishment are not dependent on a finding of discriminatory treatment in a national provision as between nationals and undertakings from other Member States: the EC Treaty and EEA rules are interpreted in such a way that any national provision which results in hindrance or obstacle to market access for companies from other Member States contravenes Article 43 EEC and its equivalent Article 31 EEA. All measures which prohibit, impede or render less attractive the exercise of such freedoms must be regarded as constituting such restrictions. This approach is exemplified in the recent rulings in Case C-299/02 Commission v. Netherlands of 14 October 2004 and in Case C-167/01 Inspire Art, of 30 September 2003. In Case C-299/02 the Court summarised its approach as follows:

> 'It is settled case law that Article 43 EC precludes any national measures which even though it is applicable without discrimination on grounds of nationality is liable to hamper or to render less attractive the exercise by Community nationals of the freedom of establishment guaranteed by the Treaty' (at §15). Hence in this case a Dutch law relating to ship registration which required that a proportion of the shareholders of a Community company owning a ship must be of Community or EEA nationality and the directors of a company owning a ship must be of Community or EEA nationality was held to be contrary to Article 43 EC. The Court reasoned that
>
> > "In this case, the ship registration scheme has the effect of restricting the freedom of establishment of shipowners. When shipowner companies wishing to register their ships in the Netherlands do not satisfy the conditions in issue, their only course of action is to alter the structure of their share capital or board of directors; and such changes may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences."

15. Such obstacles or impediments to the freedom of establishment are particularly difficult to justify as the Court has recently confirmed in Case C-299/02 at §§25 and 26. It would be necessary for Norway to justify the present system either under one of the exemptions listed in Article 33 EEA, i.e., that it is justified for reasons of public security and/or public policy, or under the so-called mandatory requirements rule. In this respect and in order to benefit from exemption or from the so-called mandatory requirements approach, it is necessary to show that the provision is (i) applied in a non-

discriminatory way; and (ii) is justified by imperative (i.e., mandatory) requirements in the public interest and is suitable and proportionate to achieve the justified objectives. The European Court has consistently rejected national rules hindering establishment as unjustified and disproportionate. General regulatory controls are usually seen as sufficient to guarantee public interest objectives.[6]

16. Nevertheless, in the recent series of 'golden share' cases[7], several of which concerned restrictions on ownership rights in the energy sector, the Court did not apply Article 43 EC. It held that as the various 'golden share constructions' infringed Article 56 EC (the equivalent of Article 40 EEA), there was no need for it to go on and examine the application of the rules on freedom of establishment. It is therefore not yet entirely clear whether the European Courts might accept public policy or security of supply arguments to justify restrictions on freedom of establishment in the energy sector.

17. In its earlier case law of 1997 concerning exclusive rights of import and export of electricity and gas[8], it was sympathetic to the Member States arguments in this respect. While there are good arguments to be made that this case law pre-dated the adoption of the internal electricity and gas market directives of 1996 and 1998 respectively, as revised in the directives of 2003, and that the Court is likely to take a stricter approach today, it must not be forgotten that issues of energy security remain highly sensitive and one cannot exclude that a Court will take a cautious approach. This is illustrated by the careful Opinion of Advocate General in Case C-17/03 VEMW v SEP of October 2004 in which she recommends that the Court pays careful attention to the security of supply issues raised in this case concerning preferential access for certain public sector electricity contracts to cross-border interconnectors following electricity market liberalisation. In particular she places considerable stress on the question of whether or not the restrictions in question – national measures reserving a certain percentage of interconnector capacity to a particular company – can be seen to be proportionate to the objective of public security.

18. At the present stage the Norwegian government does not appear to have put forward detailed justifications for the present regime based on public security or public policy[9]: its summary arguments in this respect were dismissed in the Reasoned Opinion and it would appear that the government accepts that the current regime must be amended in some manner to remove from its provisions the existing inequalities between public and private undertakings. Nevertheless, it would also appear that the Norwegian government might wish to continue to differentiate in its treatment of existing public and private concessions to some extent although to date no justification for the differential treatment of existing concessions has been put forward by the Norwegian government to justify any derogation from the rules on freedom of establishment.

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6 For a useful overview see Advocate General Colomer in Case C-140/03, Commission v Greece, Opinion of 7 December 2004.

7 See cases cited above at note 2.

8 Cases C-157/94, Commission v. the Netherlands, [1997] ECR I-5699; C-158/94, Commission v. Italy, [1997] ECR I-5789; C-159/94, Commission v. France, [1997] ECR I-5815 and C-160/94, Commission v. Spain, [1997] ECR I-5851.

9 The main lines of its defence of the current regime consisted of the argument that water resources were excluded from the scope of the EEA Agreement entirely and in the alternative, that Article 125 EEA safeguarded national property rights including the right to exercise state ownership rights. Both arguments were roundly rejected in the Reasoned Opinion.

Free Movement of Capital - Article 40 EEA

19. Similarly, the scope of Article 56 EC (and its equivalent Article 40 EEA) is widely interpreted and applied by the European Court (and by the EFTA Court) so that any national measure which may dissuade investors to invest in the shares or assets of an undertaking within a particular national territory can be deemed to amount to a restriction. The prohibition is not restricted to measures which lead to either overt or covert discrimination, but extends to any measure which makes a particular investment less attractive to investors from other member states. In its ruling in Case C-452/01 Ospelt of 2003, the ECJ held that the EEA's prohibitions on restrictions on the free movement of capital are identical to those set out in Article 56(1) of the EC Treaty. Article 56(1) became directly effective as of 1 January 1994. The restrictions imposed on private concessions as identified above were also found to be in conflict with Article 40 by the ESA in its Reasoned Opinion, i.e., the limited duration, the reversion provisions and the state's pre-emption rights.

20. Subsequent to the ESA's Reasoned Opinion, the Court of Justice has confirmed that Article 56 has a broad scope and applies to a variety of mechanisms, collectively referred to as 'golden share' mechanisms, which allow a government to exert an influence on the commercial decisions of certain strategic enterprises. Several of these rulings concerned the energy and natural resource sector. On the basis of these ruling it can be concluded that the Norwegian government's powers to attach and maintain particular conditions to existing private concessions is in conflict with the principles enshrined in Article 56. For example, an investor acquiring today shares in a private undertaking in Norway would not be able to dispose of the same rights as a public undertaking or authority. There would be a possibility that the state would exercise its rights of pre-emption; there would also be a limitation on the enjoyment of investment up to a total duration of 60 years and in addition the rights of reversion would be imposed.

21. As with the rules on freedom of establishment a Member State may claim that a rule which restricts the free movement of capital as guaranteed by Article 40 EEA (or Article 56 EC) can be justified under one of the exemptions listed in Article 58, or in accordance with the so-called mandatory requirements rules. The same general principles apply: the measure in question may be justifiable and permissible if it can be demonstrated that they pursue in a non-discriminatory way an objective in the public interest, and further that they are appropriate for ensuring that aim pursued is achieved and are not disproportionate.[10]

22. Again, as Norway has consented to amend the offending legislation, it is assumed that it accepts that the existing legislative provisions resulting in discriminatory duration and reversion rights constitute an infringement of Article 40. Nevertheless, it would also appear that the Norwegian government may wish to continue to differentiate in its treatment of existing public and private concession holders in the future although no justification for the differential treatment of existing concessions has been put forward to justify a derogation from the rules on freedom of movement for capital.

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[10] See Case C-452/01, Ospelt and Schlössle Weissenberg, [2003] ECR I-9743, at §34. See also Case C-98/01, Commission v United Kingdom, [2003] ECR 1-4641 at §47.

The Nature of the Rights infringed

23. Before turning in detail to the possible remedies that may be contemplated in order to remove the infringements discussed above, it is first important to recall the nature of the rights involved for undertakings who are entitled to benefit from the guarantees provided in the Treaty. The fundamental importance of these rights has been emphasised frequently by the Court of Justice and the EFTA Court. [11] These rights are clear and unconditional - they have direct effect so that individuals (including natural and legal persons) can rely on these fundamental rights before their national courts. Individuals are entitled to enforce these directly effective rights at all times in order to challenge the restrictions in question which prevent the exercise of the rights to freedom of establishment or the right to invest in an undertaking, which is inherent in the freedom of movement of capital.[12] It is therefore of importance to consider the implications of any proposed changes to the Norwegian legislation from this perspective also. Enforcement of EEA law is not the sole prerogative of the ESA - national courts also have a role to play. In order to illustrate the situation in terms of the current legislation and in terms of some of the apparent 'models' for reform now under consideration, three different examples are presented. The first Box concerns the present situation and outlines a scenario in which an action could be raised before a national court to have certain provisions in the Law of 1917 declared to be unenforceable. As this example illustrates, given that the 1917 regime remains un-amended, a company wishing to acquire a concession is still confronted with the same limitations as to the duration of that concession and to the same restrictions with regard to reversion as identified by ESA. However these rights are directly effective and so the legislation of 1917 is open to challenge before the national courts. National courts are under a duty of loyal co-operation pursuant to Article 3 of the EEA Agreement and must give precedence to the EEA Agreement in such situations. This means that they should set aside the discriminatory provisions in the 1917 legislation.

24. The second two boxes illustrate the impact of two possible types of future amendment where although future concessions are treated equally, a difference in treatment between private and public concession holders is still maintained. This is essentially because in each future scenario only the existing public concession holders are able to 'convert' their concessions to duration of 75 years (at least) following legislative reform: holders of existing private concessions must surrender their own concessions on the expiry of the 60 years already imposed under the Law of 1917. The option or right of 'conversion' is not open to this category.

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[11] See most recently the Advocate General's Opinion in Case C-140/03 Commission v Greece , loc. Cit.

[12] Pursuant to Section 2 of the EEA Act of 27 November 1992, no 109 the provisions of the EEA Agreement shall, in cases of conflict, prevail over other provisions regulating the same issue.

1. THE PRESENT SITUATION

It is perhaps most efficient to illustrate the impact of this aspect of EEA/European law by reference to a simple example. Hence if in March 2002 Company Z based in Germany had wished to acquire a shareholding in Company A - a company holding a private concession in Norway which would expire in 2020 - then Company Z would have acquired a concession which might have been issued in 1960, that is before the EEA came into effect. Would this make a difference to Z's legal rights? Norwegian legislation in force as of 2002 (and still in force today) would require that as of 2020 the new shareholder Company Z would have to return its assets to the state - for which it would receive zero compensation. The only 'theoretical' alternative for Company Z is to change its legal form and become a public undertaking. If it did this it would maintain its concession for an unlimited period of time and it would not be subject to a reversion requirement. However, it is virtually impossible for Company Z to acquire the same legal status as a Norwegian public undertaking so this option is entirely theoretical. Company B, a Norwegian public undertaking, can however acquire shares in Company A and acquire rights to the concession for an unrestricted period without reversion rights. It is therefore in a better position than Company Z. In accordance with EC and EEA Treaty law, the statutory legal provisions in question (that is Section 2-17 of the 1917 Law) would be unenforceable as they infringe both Articles 31 and 40 EEA, and the national court would be obliged to declare the relevant provisions to be contrary to binding EEA law and hence unenforceable. Therefore, in 2002 the State could not have relied upon the 1917 Act and required reversion at the end of the 60 year period as long as public undertakings enjoyed preferential treatment.

2. FUTURE SCENARIOS – MODEL 1 – 'Owner Neutrality'

Imagine that the date is now 2006. The Norwegian government has just amended the law of 1917 in order to comply with an 'owner neutral model' which would take effect for concessions granted in the *future* – i.e., after entry into force of the new legislation but not retroactively to concessions granted prior to that date. In accordance with the new legislation all concessions irrespective of the status of their holders are limited to a maximum duration of 75 years, calculated from the date of entry into force of the amended legislation. This means that because they were not subject to any limitation in duration in the past, the concessions held by public authorities or bodies would be valid until 2081 - that is 75 years after the entry into force of the new law. Existing concessions - that is, concessions held outside the public sector - would still only be valid for a total of 60 years after the concession was granted.. However, all new private concessions would also be issued for 75 years. Unlike public concessions an 'existing' private concession would not be converted into a 'new' one or have its duration extended (see below).

In our example, the position of an investor company is in effect the same as it was under the old (un-amended) legislation - the concession it could acquire from an existing holder would still be restricted to 60 years duration: it could not benefit from the rules for future or new concessions - that is rules which effectively allow existing public concessions to be prolonged by a period of 75 years. All public undertakings on the other hand would continue to benefit from favourable treatment – all their concessions – irrespective of when they were first issued - would be effectively be treated as 'new' and extended by an additional period of 75 years. Hence a public company (in essence a Norwegian company) would be better off – it would then be able to enjoy rights under its concession at least until 2081 irrespective of the number of years which it had enjoyed the use of that concession prior to the adoption of the new legislation.

3. MODEL 2 - 'The Transaction Model'

With respect to the 'transaction model' it is contemplated that in accordance with new legislation that reversion conditions would only be attached when a sale of a waterfall or of shares in the owner company took place: prior to the sale event, there would be no change in the reversion obligation for existing concessions in so far as those concessions already contained such an obligation. For concessions which do NOT contain such a condition, it is contemplated that if and when a 'sale' transaction takes place, then this will be the point in time at which a reversion obligation (which may eventually be total or partial) will be attached to the concession. Reversion will not take place immediately but at the expiry of a standard concession period (probably 75 years). Hence in this variant, existing (private) concessions still remain unaltered in terms of their duration (60 years) and in all probability in terms of the reversion conditions, and if a private concession is sold to a third party, these conditions will not alter – the maximum duration remaining will be subject to the 60 year ceiling and, in all probability, reversion conditions.

Let us suppose that sometime in the course of 2006 this 'transaction-model' is introduced into the legislation. The practical effect will be that existing private concessions will still terminate after 60 years and reversion requirements will be imposed, whereas the duration of those public concessions issued prior to the adoption of the new legislation remains uncertain – the application of the 75 year limitation being only triggered by the subjective decision on the part of the current (public) concession holder to sell or transfer the concession. The point of time at which such a decision will be made is indeterminate and even having made this decision, the current holder of a (public) concession will only then be subject to the 75 year limitation period. In effect, the current holders of such concessions have a far greater range of options available to them to maximise their investments than those available to the holders of existing private concessions. The discrimination between the two types of concessions is continued into the indefinite future, and hence the objections raised by the ESA in its Opinion are not dealt with adequately.

Moreover, the exact scope and consequences of any revised reversion provisions may be apparent only some time in the far future - i.e. on the eventual expiry of the (public) concession so that an investor making an investment in a company holding a private concession would not be in a position to fully evaluate the types of reversion conditions which could eventually be applied or otherwise imposed on a competitor (public) company even although this may fundamentally affect the value of its own investments.

Conclusion

It is therefore clear that the 'owner neutral' approach will not remedy the situation: investors from other Member States who could in effect only acquire existing private concessions or obtain concessions for a limited duration of 60 years prior to the amendments to the 1917 legislation still cannot exercise their fundamental rights to establishment and to free movement of capital as guaranteed by Article 31 and 40 EEA, and as interpreted by the ESA in its Reasoned Opinion. In practice, even after the introduction of an 'owner neutral' or a ' transaction model' on the lines currently proposed, these investors cannot enjoy the same rights as Norwegian (public) companies who were able to acquire unlimited concessions prior to the amendments to the 1917 legislation and who will subsequently qualify for a form of 75 year extension of these concessions. Hence the outcome in Box 2 and 3 is in fact the same as in the hypothetical case discussed in Box 1: a national court would be obliged to put the new legislation aside as it prevents an investor from

acquiring and operating its concession in such a way that it can exercise the rights guaranteed by the Treaty and the EEA Agreement.[13]

Given the implications of these three different scenarios when considered from the position of a company seeking to enforce its rights under the freedom of establishment and free movement of capital as guaranteed by EC/EEA law, the relevant question then becomes what amendments are indeed required to ensure that these fundamental rights are fully respected and that the Norwegian state avoids the situation as sketched in Box 1 and 2 above.

In this respect it should also be borne in mind that the relevant Treaty Articles are directly effective and fully binding. It is thus not an option for a Member State to postpone the recognition of these directly enforceable rights (as all the relevant transitional periods have elapsed). Hence, it seems clear that full compliance with the Treaty rules can only be realised if the relevant terms attached to or otherwise governing *existing* concessions are no longer enforced or enforceable in a discriminatory manner. This means either that the terms of the existing private concessions have to be aligned with those of existing public concessions and subject to the same reversion requirements (unlimited duration and no reversion requirement) or that the existing public concessions have to be aligned with those pertaining to the private concessions (i.e., 60 years duration and reversion without compensation). That is a choice that is open to the Norwegian legislator, but the over-riding objective remains that the rights and obligations attached to public and private concessions must be placed on an equal footing. Hence a company or investor from another Community or member state should enjoy the same rights and is subject to the same obligations with respect to the duration of the concession which it can acquire from an existing private concession holder as a public concessionaire would enjoy under its concession. Hence the exercise by Norway of its options remain firmly subject to EEA law as well as other international legal norms, including the European Convention on Human Rights.

Part 2: Retroactivity

31. I have also been asked to consider whether concessions held by public undertakings granted prior to the entry into force of the EEA Agreement are protected against limitation/reversion conditions in the future on the basis of the principle of retroactivity.

32. It follows from §§43 and 49 of the Reasoned Opinion that the current legislative framework is considered to be incompatible with the EEA provisions. It therefore has to be revised with a view to removing the offending provisions and to ensure that the rights guaranteed under the Treaty and the EEA are capable of unconditional and immediate realisation.[14] The obligation to bring the present infringements to an end does not appear to require the abolition of the concession regime or the abolition or withdrawal of the concessions (whether public or private) granted before 1994. It merely requires recognition of the fact that certain elements of that regime require adjustment and as a result, the existing concessions (public and private) will be governed by an amended legal framework which will put them on an equal footing. Hence concessions granted under the regime must be treated on equal terms. If the Norwegian government intends to substitute the present legislation for a new approach, then all concessions granted under the new regime must also be granted under equal terms irrespective of whether they are held by public or private companies. At the same time if the regime is

[13] The related state aid issues will be dealt with below.

[14] Strictly speaking the ESA would be entitled to proceed with an enforcement action against Norway even if the legislation in question is subsequently amended – it is established jurisprudence of the Court of Justice that amendments subsequent to the dispatch of a Reasoned Opinion and the lapse of the two month period to reply, do not need to be taken into account.

amended only to deal with future issues, this will not necessarily remove the restrictions inherent in the current regime as differential treatment between public and private concessions will not be removed by the introduction of a limitation/reversion clause which will in fact be implemented on a discriminatory basis.

33. From this perspective the alleged arguments with respect to the prohibition on retroactivity are not of any particular validity. As directly effective, binding provisions requiring the abolition of existing restrictions, Articles 31 and 40 can be invoked before the national courts. As explained on the basis of the examples provided above, a national judge would have to apply those rules to the restrictions imposed on existing private concessions (i.e., granted prior to 1994) irrespective of whether this might interfere with the legitimate expectations (under national law) of holders of existing concessions for an unlimited period. In the current situation the Treaty imposes obligations on the national governments to remove all restrictions and obstacles to the realisation by companies from other EC or EEA Member States of the freedoms in question. The position of third parties (that is, public companies or authorities holding concessions of an unlimited duration) appears to be of little immediate relevance here, especially when (as is the case here) the rights of third parties are not directly challenged or otherwise affected by the enforcement of the Treaty rules against Norway in the sense that their concessions could be determined to be null and void or otherwise affected by such a challenge.[15] This result could not occur: at most the national court would disallow the particular limitations applying to existing private concessions and hence place these on the same footing as private ones.

34. The validity of the concessions issued prior to 1994 is not in dispute nor is their continued legal validity after 1994 affected by the application of the relevant Articles of the EEA Agreement. Certain terms of the concessions - in particular their duration – may, however, be affected by the legislation eventually adopted to remove the existing discrimination and hence illegality which affects concessions held by private undertakings as well as the measure to be taken to put both types of concession on equal footing in respect of reversion requirements. Arguably, if the Norwegian government was to take no legislative action at all, then in the event of a challenge to the current legislation in the national courts, the courts would have to rule that the 60 year limitation and the reversion provisions as imposed under the 1917 Law were unenforceable in a particular case, effectively *de facto* placing the existing concessions on the same footing as public concessions.

35. It is difficult to see why in this type of situation, a national court could be forced to consider that the legitimate expectations of public concession holders would be harmed by this result. The interests of these concessions holders are indeed those of 'third parties'; in other words, they are not parties to the existing private concessions, and as such they have no rights in or deriving from those specific concessions which would be affected by the prolongation of the existing private concessions as such. Even if it was possible to argue that the public concession holders had a legitimate expectation to continued better treatment than their private sector counterparts under Norwegian law, this could not be sustained under European law - the very purpose of the free movement rules is to remove the cause of this preferential treatment.

36. The relevant question is then whether a different view should be taken if the current legislation is the subject of enforcement proceedings initiated by the ESA before the EFTA Court. Do the rights of third

[15] For a situation where a licence or permit granted to party A by a Member State is challenged by party B – see Case C-201/02, Wells, nyr - this being no obstacle to the national court to apply European law and secondary legislation.

parties (that is, of individuals or companies who have no rights in private concessions but are holders of public concessions and as such enjoy better economic terms) have to be taken into account in this situation? In my view, there is no case law which would lend support to such a conclusion. On the contrary. The rules on free movement of capital and establishment have immediate binding effect in the legal systems of the Member States. As the Court of Justice has held with regard to the application of Article 12 EC (the prohibition on discrimination on the grounds of nationality) to Austrian legislation, that provision must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member States' accession to the Communities.[16] The same rule of interpretation has been applied to Article 56 EC: this provision can apply to the future effects (i.e., post 1994) of situations arising prior to the new Member State's accession.[17]

37. It is certainly true that the European Courts and its Advocate Generals have suggested that the assessment may be different in what is sometimes referred to as horizontal situations - where the relationship is based on contract or agreement between two (non-State) parties. In vertical situations, which concern the relationship between a State and an undertaking, the formal rules which the parties have to comply with in relation to concessions are not determined by agreement or contract. The parties do not choose these rules by way of agreement; but rather the concession holders are subject to rules which can be amended at will by the legislature, for example, for reasons of public interest and public policy. While it may be true that in some jurisdictions a 'concession' is deemed to be an agreement governed by private law and could perhaps be qualified as a contract, the problematic terms in the Norwegian concession regime are laid down in legislation - the Act of 1917 - and are not found only in the concessions as such. Hence, in this 'vertical' situation Community law does not recognise any particular legal principles such as sanctity of contract, legal certainty or legitimate expectations which deserve a higher level of protection over and above the fundamental principles of free movement.

38. It can also be pointed out that in a situation where a Member State has failed to implement secondary legislation such as a directive causing the validity of a concession or permit issued in breach of that directive to be called into question by a third party in a legal action before a national court (sometimes known as a tripartite situation), the Court has held that the retroactive annulment of the permit or concession is a direct consequence of the breach of Community law by the Member State. Although it is acknowledged that the original permit holder suffers loss as a result of the Member State's failure to act in accordance with its Community law obligations and implement the directives in question, the Court has confirmed that this would not justify denying the recognition of the rights guaranteed under the Treaty.[18] In other words, although the legitimate expectations of the permit or concession holder are acknowledged, they are not given sufficient weight to over-rule the application of the basic Treaty principles.

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16 See Case C-122/96, S.A. Saldanha and MTS Securities Corporation v. Hiross Holding AG, [1997] ECR I-5325.

17 See Advocate General Leger in Case C-464/88, Westdeutsche Landesbank Girozentrale v Stefan, Opinion of 13 July 200 at §67. Although the Court's ruling is cited by Kolstad at pt 2.8.1 to support his conclusion that the EEA Agreement cannot have retroactive effect, it is respectfully submitted that he has taken the Court's ruling in that case out of context. The Court was asked to determine whether a provision of Austrian law which had lapsed in 1991 could have been 're-activated' by the entry into force of Article 73 EEC on 1 January 1994. The Court answered in the negative but not because of any general prohibition on retroactivity - the facts were quite different and the Court's reasoning was based on quite different principles.

18 See Case C-201/02, Wells, nyr.

39. In the present case it seems to be claimed that the principle of retroactivity would preclude 'interference' with concessions granted before 1994 - presumably whether public or private - but the emphasis is placed on the protection of public concessions whose value would be reduced (see generally Section 2.8.1 of the Kolstad Opinion). This Opinion indicates that it is probable that the principle of retroactivity would not be an obstacle to the enforcement of the rules on freedom of establishment, but it could be an obstacle to the enforcement of the rules on free movement of capital. Although case law of the European court is cited to support this argument, that case law does not appear to be of much direct precedential value as it does not concern the application of the Treaty provisions as such. It concerns secondary legislation, such as regulations (as in the Racke case) or directives (as in the Marks & Spencer case) and it also relates to the very different situation where new obligations (replacing existing European regimes) are imposed as of particular date. In the final event, the Kolstad Opinion appears to decline to take a definite position on this issue (at sections 2.8.2 and 2.9.1).

40. Furthermore, if this principle was to be applied to the present situation in order to reach the conclusion that only concessions issued after 1 January 1994 need be varied, this would lead to the surprising result that the restrictions on the free movement of capital and the freedom of establishment as identified by the ESA would continue in existence for at least another 75 years. Such a result would therefore prolong the infringement - and would be an entirely unacceptable result, as Advocate General Léger has pointed out in his Opinion in the Westdeutsche Landesbank case. Moreover, such a result is contrary to the very wording of the Treaty provisions in question. Both Article 31 and Article 40 require Member States to abolish existing restrictions as well as to refrain from introducing new ones. By failing to abolish existing restrictions - that is, restrictions existing at the time of accession - a Member State maintains in force a measure which is incompatible with its Treaty obligations.

41. It is therefore highly doubtful that the existing public concessions can be deemed to be somehow protected from legislative interference on the basis of the prohibition against retroactivity. If, however, that was to be the case, then the only course of action available would be to apply the same principles to all existing concessions (public and private) and to remove the restrictions on duration as well as the obligation of reversion. In this way the Norwegian government would guarantee the rights provided for in Articles 31 and 40 EEA and would respect the principle of legal certainty and legitimate expectation.[19]

Conclusion with regard to questions 1 and 2

42. Given that the Norwegian government is obliged to abolish all existing restrictions and must refrain from adopting new ones, and given that the disparities applying to the existing concessions may restrict the rights guaranteed by Articles 31 and 40 EEA, these restrictions should be removed. The terms of all forms of existing concessions should be put on an equal footing. If the current legislation was to be challenged in a national court it may be expected that the 60 year limitation and the reversion obligation would be declared to be unenforceable. The national court could not substitute a new limitation period or a new reversion obligation, however. It could only assume that existing private concessions would have to be dealt with in the same way as public concessions in order to remove the restrictions at issue – by setting aside the offending provisions of the 1917 Law and the discriminating conditions in the concessions.

[19] This conclusion also seems to be shared by Kolstad at footnote 54 of his Opinion.

43. The substitution of new terms to govern both public and private concessions is a task for the legislator. The legislator, however, is required when amending the legislation to achieve the same result - that is to effectively remove the existing restrictions to the exercise of the rights guaranteed by Articles 31 and 40. It follows that in doing so it must not introduce new restrictions.[20] This duty is not affected by a prohibition against retroactive effect in the sense that the rights obtained under existing public concessions must be assumed to be protected from future interference. If, however, the principle of non-retroactivity is to be upheld, the proper solution is to place existing private concessions on an equal footing and remove the 60 year limitation period and the reversion obligation. Hence, all concessions issued under the present regime would have the same terms. The terms which might apply to future concessions - that is, concessions to be issued under any amendments to the Act of 1917 - will be discussed in Part 4 below. Before dealing with this issue, I shall first deal with the application of the EC State Aid rules to the present, un-amended regime.

Part 3: The Application of Articles 61(1) and 62 EEA ('the EEA State Aid Regime') to the present system

44. To what extent do public undertakings holding concessions for unlimited duration and without reversion obligations under the current regime benefit from a state aid within the meaning of Article 61(1) EEA (which is identical to Article 87(1) EC)?

45. This aspect of the present regime has not yet been assessed by the ESA in its present Reasoned Opinion. It cannot be precluded that this could be the basis for a separate ground of complaint relating to infringement of Articles 61 and 62 EEA. However, given that the Reasoned Opinion has been based solely on Articles 31 and 40 EEA, the ESA cannot now expand the scope of the present enforcement proceedings resulting from a failure to comply with the Reasoned Opinion to include an alleged infringement of Articles 61 and 62 EEA. This aspect must be dealt with in separate proceedings.

46. The basic elements of Article 61(1) are discussed in full at sections 2.9.3 to 2.9.6 of the Kolstad Opinion. It is well established in the case law that a national measure which requires certain undertakings to pay concession fees or rental fees or licence fees or their equivalent, but exempts others, results in a state aid:[21] the measure creates a select advantage for the undertakings who are not required to pay the fee in question and distorts competition between such companies and those who do have to pay such fees.[22] The same reasoning applies to the reversion obligation: the fact that public undertakings are exempt while private undertakings are not, leads to a selective benefit and a distortion. It is no argument that the state 'as owner' of the public undertakings does not forego resources in this situation in the sense that the profits earned by public undertakings already go to the state as owner. The two roles of the state - as owner of the enterprise and in the exercise of its state prerogative - must not be confused.[23] By way of contrast the Commission has recently confirmed that it may be permissible for a state to waive a concession fee imposed on a public enterprise where this

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20 This would only result in exposure to further enforcement proceedings – see for example the recent Greek opticians case (Case C-140/03, Commission v Greece, nyr) as well as to possible court challenge.

21 Case C-53/00, Ferring, [2001] ECR I-9067.

22 In addition, it must be demonstrated that the measure has the potential to affect inter-state trade - a test which is very easily met in practice.

23 See in this respect Case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg, [2003] ECR I-7747, and in particular the Opinion of Advocate General Leger in this case.

proved to be more onerous than those imposed on its private sector counterparts. This would not be creating a selective advantage but would be merely equalising the terms of competition.[24]

47. I would therefore endorse the conclusion at section 2.9.6 of the Kolstad Opinion that the present legislation confers a selective advantage on the public concession holders. It seems further to be the case that it would be difficult for Norway (or the alleged beneficiaries) to make out a case that the aid was justified and therefore compatible under Article 61(2) or 61(3). Furthermore it also appears that following the reorganisation of the Norwegian electricity sector in 1991, it would be difficult for the Norwegian state to justify the aid element as a form of compensation for public service obligations. No such obligations are apparently imposed on public concession holders. However, as the Kolstad Opinion also concludes at section 2.9.4.3, p.54, the aid arises out of the differential treatment of public and private concessions as it presently stands in the Act of 1917, and is to be classified as **existing aid**. It cannot however be excluded that certain subsequent amendments or administrative practices relating to the implementation of the Act of 1917 after 1994 could have significantly altered the scope of that treatment to the extent that the amendments themselves should have been notified to the ESA as a form of new aid, as required by Article 62(1) EEA. This issue has not been dealt with in the Kolstad Opinion. According to the case law of the Court of First Instance on the interpretation of Article 1(c) of the Regulation 659/99 which provides that an alteration to existing aid is to be equated with new aid, the Court has held that it is not the 'altered existing aid' that must be regarded as new aid, but only the alteration as such that it is liable to classified as new aid. Accordingly it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme.[25] In this respect it may be noted that the Commission has held that it is entitled to examine the continuity of a scheme as a result of amendment – if the amendments merely maintain the status quo then the underlying measure will be treated as an existing aid. If however the amendments introduce novel aspects, for example if they provide for public funding for the existing recipients to enter new markets then this may well change the substance of the measure into new aid.[26]

48. In the absence of further details on this aspect, it would seem that it is likely that the concession system as it presently stands is likely to be classified as existing aid in accordance with Council Regulation 659/99 and Article 62 (1) and (3) of the EEA Agreement, as well as Protocol 3, Article 1(b) of the ESA/Court Agreement. Hence, and so long as the Act of 1917 applies, the existing aid scheme may be implemented until the ESA requests Norway as an appropriate measure to amend the aid in the light of changed market circumstances. The major differences between a new aid and an existing aid scheme are (i) that the latter cannot be challenged in a national court for want of notification; and (ii) that if, following the required procedures, an existing aid is found to be incompatible with the Treaty or the EEA by the Commission or the ESA then it must be amended for the future, in accordance with the appropriate measures proposed by the ESA. Hence no recovery obligation can be imposed on beneficiaries with respect to aid enjoyed under an existing scheme – the EEA or Commission's ruling on the incompatibility of an existing aid measure only removes the right to future benefits.

49. It must be stressed that even if the measure is to be classified as existing aid, this does not prevent the ESA from conducting an assessment of the impact of that measure at any time prior or up to the date

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24 Commission Decision C62/1999, capital increase and other measures – RAI, October 15, 2003.
25 Joined Cases T-195/01 and T-207/01, Government of Gibraltar v. Commission, [2002] ECR II-2309 at §§109-111.
26 See in this respect Commission Decision N37/2003, UK – Digital Curriculum, October 1, 2003.

of reversion. It may be considered that this is the date that the 'benefit' is partially realised – a public entity can eventually acquire an expired concession from the state after the expiry of a concession of a private concession holder which is obliged to surrender it to the state without compensation whereas the public concession holder itself is not subject to any reversion conditions in relation to its own assets. A private concession holder could of course apply for a new concession to operate these same assets but it would have to pay to have them returned to it. Irrespective of the date of a reversion, a public concession holder is clearly never in the same disadvantaged position as it is not subject to a reversion obligation at any point in time in respect of its own activities. It therefore further enjoys a continued advantage over and above private competitors – an advantage which might make it easier to obtain finance on the market for example. Given these benefits, it would be open to the ESA at any time – either on its own initiative or as a result of a complaint – to remind the Norwegian government of its duty to co-operate with the ESA to keep existing aid schemes under constant review. The ESA can, taking into consideration the changed market and legal circumstances since the Act was originally enforced, and following the requisite procedures for the review of existing aid, require the Norwegian government to take appropriate measures to withdraw or abolish the legislative provisions which require reversion without compensation for private concessions. In this respect the only real difference between the status of existing aids and new aids relates to the procedural element: the ESA has a discretion to conduct a review of an existing measure at any point of time – it can not be obliged by a complainant to investigate the legality of an existing aid measure nor can it be subject to a procedure for failure to act. Similarly, the national courts have no role to play in the procedures concerning existing aid. The requirements with respect to notification and standstill only apply to new aids.

50. In this respect a parallel can be drawn with the Commission's recent investigations into the financial state guarantees granted to the French company EdF – guarantees which EdF enjoys as a consequence of its legal status as an 'EPIC' under French law. The relevant legislation conferring the legal status and with it the state guarantee dates from 1946 and is therefore a form of existing aid. EdF benefited from the very existence of the unlimited state guarantee in that it could use it to borrow at preferential rates on the financial market. However in the course of proceedings the Commission requested the French government to remove or radically amend the state guarantee for the future, hence eliminating the both the continuing aid element and the eventual benefit which would have of course have become manifest if and when EdF had relied upon its right to draw down the guarantee at some future time.[27] In its final decision on this issue the Commission has accepted that if the French government adopts adequate measures to withdraw the existing aid by an agreed date then the aid will be terminated.[28]

Part 4: Future Amendments to the Act of 1917

The Future Reversion Regime

51. I have also been asked to consider the following question:

> "Given that a new reversion scheme will be implemented, including for public concessionaires, are existing private concessionaires entitled to the same concession period as public

[27] OJ 2003 C164/7 .

[28] Decision 2005/145 of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries, published in the OJ of 22.2.2005, L49/9.

concessionaires from the entry into force of a new legal regime? It is requested that this aspect should be assessed in the light of the free movement rules as well as the state aid rules."

52. In the following paragraphs I will comment on possible future amendments to the current regime and in doing so, I will briefly review some of the reversion options that have been discussed at national level, and on which amendments to the current legislation could eventually be based.

53. One option for reversion could be that all the waterfalls and the related production facilities revert to the state at the end of the concession period. The Ministry proposed on 29th November 2002 to introduce a revision scheme which would convert all concessions granted to public undertakings to limited concessions with a duration of 75 years from the conversion date. It may be that the concession will be imposed as of the date of entry into force of the legislation or it may be that the concession will be imposed at the time of sale of such waterfall. Hence, all new concessions granted after the amendment will be limited to 75 years, with similar or identical reversion conditions. The terms of the concessions already granted to private entities will not be altered or otherwise revised at all under this model.

54. A different variation is that a condition requiring a form of partial reversion will be attached to concessions with a duration of 60 years, i.e., to existing private concessions as well as to public concessions. Partial reversion condition will only be imposed on the latter category as of 75 year after the entry into force of the amended legislation. At the expiry of the relevant concession, the waterfall shall revert to the state as well as an unspecified percentage of the value of the power plant/production facilities.

55. A further possibility would be a termination settlement which would be paid to the concessionaire upon expiry and reversion of the concession, and would represent a portion of the transfer of assets the reversion represents. - full ownership will revert to the state.. Existing private concessions would continue to revert after 60 years. Existing public concessions would revert after 75 years from the date of amendment and all new concessions, irrespective of the legal status of the concession holder, would revert after 75 years calculated from the date of the amendment.

Assessment

56. The outcome of each of these models contains one constant factor: existing private concessions will continue to be limited to 60 years, whereas public concessions will be granted a '*de novo*' period of 75 years as of the date of entry into force of the new legislation (or if the 'transaction model' is adopted, for a period of 75 years from the date of sale or transfer of the concession.

57. If the legislation is adopted this year, then the first round of public concessions will expire in 2080 whereas the first private concessions will expire in 2009. Furthermore, it appears that the minority of the law commission propose that any revised reversion options will only apply to concessions granted after the entry into force of the new legislation. Hence, existing private concessions will continue to be subject to total reversion without compensation at the end of the 60 year period.

Freedom of Establishment and Free Movement of Capital

58. In his assessment of each of the various options, Kolstad concludes at 3.3.1 that the failure to accord existing private concessions the same treatment as new concessions will not amount to an infringement of Articles 31 and 40 EEA. It is assumed that he intends to convey the argument that new concessions are *de iure* and *de facto* different from existing concessions and hence, there can be no discrimination as one is comparing two very different sets of circumstances: new and old concessions. There is, however, no explicit reasoning presented in his Opinion to support this conclusion nor is there any reference to precedent. Yet common sense would seem to dictate that by maintaining the current rules for existing private concessions in un-amended form - Norway has not abolished the restrictions on the free movement of capital or on freedom of establishment as assessed by the ESA. It is merely prolonging them without any objective justification.[29] The introduction of such an amendment would create a new restriction: it would create an unequal set of conditions for existing private concessions holders who would not have the option for conversion of their concessions into '75 year plus' concessions at any point in time; this option is only open to holders of public concessions. Hence, a company from another Community or EEA member state, which has acquired or would acquire an existing private concession would be placed in a disadvantageous situation vis-à-vis Norwegian (public) companies. De facto it is only the latter group which enjoy the right of conversion. The same conclusions reached by the ESA in its Reasoned Opinion with reference to the application of Articles 31 and 40 EEA continue to apply as the restrictions on the freedom of establishment and freedom of movement of capital do not appear to have been eliminated in any of the three proposed models (see also the criticism of the 'owner neutral and transaction models' in Box 2 and Box 3 above).

The relevance of the State Aid rules

59. The Kolstad Opinion also appears to conclude that the maintenance of continued differences in treatment following legislative amendment can lead to a disadvantage for private concessionaires which may be 'new aid' under the state aid rules. Without discussing the various models and options under discussion in detail here, it will be assumed for the sake of the following analysis that the Norwegian government is contemplating adopting an approach to legislative amendment which in effect will create new categories of concession holders following its entry into force. On the one hand there will be no essential difference in treatment in the granting of future, new concessions between public and private undertakings or entities. On the other hand the amending legislation may well maintain essential differences in treatment between existing private and public concession holders either *de facto* or *de iure*.

60. It will be recalled that with respect to the current regime it appears that a selective advantage is granted to public concessionaires which are not subject to any reversion rights and which enjoy the concessions for unlimited duration. The elements of the selective advantage comprise both the differential duration periods as well as the fact that only private concessionaires are subject to reversion (see above). It is also apparent that the legislation may be amended on the basis of one of the options discussed above with a view to aligning the future treatment of public and private concession holders on reversion.

61. It should first be stressed that if the existing private concessionaires are put on the same footing and are accorded the same treatment in relation to the calculation of reversion values as their public concession counterparts – this cannot be construed as a form of state aid to the former category. As the Commission has stated in its decision concerning financial measures in support of the Italian television company,

[29] See also in this respect Advocate General Stix-Hackl in Case C-17/03 VEMW v SEP, Opinion of 28 October 2004. See also the ruling of the Court of Justice in Joined Cases C-261/01 and C-262/01, Van Calster and Cleeren, [2003] ECR I-12249, where the Court concluded that a state measure which retroactively appeared to maintain a status quo already found illegal under European law was also to be ruled to be illegal.

RAI, if a company has been subject to more onerous concession terms than its competitors in the past, then the rectification of this situation cannot be considered to amount to the conferral of a selective advantage.[30]

62. If however any differential treatment in terms of duration as well as eventual reversion values is maintained between private and public concessionaires, it may well be argued that the existing aid scheme, as introduced in the Act of 1917 is not in fact amended or altered, within the meaning of Article 1(c) of Regulation 659/99 and hence the amending legislation would not change the scope or purpose of the original scheme. If that was the result, then there would be no obligation on the Norwegian government to notify the amending legislation as 'new aid' nor could its failure to do so be challenged before a national court.

63. However, as already explained, the case law of the Court of Justice on the scope of existing aid schemes would seem to preclude this conclusion, as would the recent decision-making practice of the Commission.[31]

64. It can therefore be concluded that by introducing amending legislation and in so far as it effectively regulates differential treatment for the calculation of reversion values between public and private concession holders in the future, the amended legislative regime could be classified as a new form of aid which would require notification to and eventual approval by the ESA .

65. It remains the case that as long as a separate category of 'existing private concessions' is de facto maintained, and even if the reversion values are calculated in the same way for all 'new' concessions and for existing concessions, the latter category would still have to surrender its rights at the end of 60 years – that is in some cases, at least 50 years earlier than its existing public sector counterparts. If this lost value is not calculated into the reversion calculations then it can be argued that the element of state aid to the public concessionaires persists. The legislative amendments which de facto maintain a separate category of existing private concessions which is treated differently from either existing public or new public or new private concessions classify as new aid and should therefore be notified to the ESA for eventual approval.

66. Furthermore, even where total reversion, with compensation, becomes the rule for all concession holders – irrespective of their status as public or private - it is assumed that the value of the actual compensation is to be calculated on an objective and transparent basis in accordance with a set of general criteria which are applicable to all concessionaires irrespective of their status. Under this option the enhanced assets(that is waterfall, or watercourse plus production facilities) are being transferred back to the state against compensation. As long as this compensation system is applied in a non-discriminatory manner it would not appear to confer any selective benefits on the undertakings involved. However if the differences in effective duration of the existing concessions held by private companies (60 years maximum) as opposed to those held by public companies (75 years + effective pre-amendment concession years) is not taken into account then there would be a high risk that the compensation price for the latter category could be over-valued given that the concessionaire has been able to exploit the assets in question for a longer period. Obviously this comparison will be a very difficult exercise to perform in practice given the length of time (up to 50 years?) which could elapse between the

30 Commission Decision C62/1999, capital increase and other measures – RAI, October 15, 2003.
31 See Decision N37/2003, BBC Digital Curriculum, October 2003, loc.cit.

compensation 'rounds' applicable to existing private concessions and the first compensation rounds which would eventually apply to public concessions already granted under the present regime and subsequently extended in duration in accordance with the amending legislation.

67. The fact remains that if total reversion is still imposed at a much earlier stage on existing private concession holders than for their existing public counterparts then this seems to constitute a selective benefit for the latter group - and will place that group at a financial disadvantage vis-à-vis its public sector competitors throughout the duration of the concession as well as upon eventual reversion.

68. In conclusion although each of the options under discussion seem to have the effect of putting new concessions on an equal footing (irrespective of the legal status of the concession holder) and would appear to apply the same rules on the calculation of reversion values and/or compensation to them, as long as existing private concession holders cannot benefit from the same rights with respect to duration then a selective benefit appears to be conferred on the holders of existing public concessions. This group will continue to benefit from a much longer concession period – a longer period which is to be endorsed by the amending legislation. The adoption of the amending legislation may be sufficient to lead to a classification of new aid and hence a duty upon the government to notify its intentions to the ESA. Even if the government is not of the view that the amended scheme would amount to a new aid it nevertheless has a duty under Article 62 EEA to co-operate with ESA to keep existing state aid schemes under review, and in this respect it is at very least under a duty to inform ESA of its legislative intentions and allow ESA to offer its comments prior to the adoption of this legislation. If ESA takes the view that the amending legislation constitutes incompatible aid, irrespective of whether it is ' new' or 'existing' aid it is entitled to open the procedures provided for in Article 62 EEA and require the government to amend its proposals.

Conclusion

69. It is important when reviewing the various options open to the Norwegian government to reform the legislation introduced in 1917 to bear in mind the aims and objectives of Articles 31 and 40 EEA. Any failure to remedy the situation with regard to the limitations on existing private concessions will fail to meet the rights and obligations guaranteed to Community and EEA nationals by those Articles. The failure to put existing private concessions on the same basis as existing public concessions in the future will mean that the rights of such parties will be hampered or rendered less effective, given that the effect of the continuing differential treatment would mean that existing public concession holders continue to enjoy preferential treatment vis-à-vis their private counterparts. Only these public concession holders have the right (and ability) to 'convert' their existing concessions into a longer term of 75 years. This right which obviously enhances the value of the assets in question, is not available to investors in existing private companies.

70. Hence it is of importance that the new legal regime should confer the same treatment on **existing** public as well as private concession holders – in terms of the duration of the concession and the terms attached to it. Failure to observe this principle of equal treatment could lead to new enforcement proceedings on the part of ESA and also to private actions in the national courts.

71. The conferral of selective benefits on a particular category of undertakings through permitting those undertakings to benefit from more generous conditions with regard to the duration of their concessions

and/or the financial conditions on reversion is a form of state aid within the meaning of Article 61(1)EEA. Although the present concession scheme has been applied since 1917, alterations to the substance of the original scheme can transform the measure into new aid which should be notified as new aid.