

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 305/09/COL

of 8 July 2009

**on the power sales agreement entered into by Notodden municipality and Becromal Norway AS
(Norway)**

THE EFTA SURVEILLANCE AUTHORITY⁽¹⁾,

Having regard to the Agreement on the European Economic Area⁽²⁾, and in particular Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice⁽³⁾, and in particular Article 24 thereof,

Having regard to Article 1(3) of Part I and Articles 4(2), 4(4) and 7(2) of Part II of Protocol 3 to the Surveillance and Court Agreement⁽⁴⁾,

Having called on interested parties to submit their comments pursuant to those provisions⁽⁵⁾, and having regard to their comments,

Whereas:

I. FACTS

1. Procedure

The Authority's Decision No 718/07/COL to initiate the formal investigation procedure was published in the *Official Journal of the European Union* and in the EEA Supplement hereto⁽⁶⁾. The Authority called on interested parties to submit their comments. The Authority received no comments from interested parties. By letter dated 4 February 2008 (Event No 463572), the Norwegian authorities have submitted comments to the opening decision.

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ OJ C 96, 17.4.2008, p. 21, and EEA Supplement No 20, 17.4.2008, p. 36.

⁽⁶⁾ OJ C 96, 17.4.2008, p. 21, and EEA Supplement No 20, 17.4.2008, p. 38.

By letter dated 21 May 2008, the aid recipient, Becromal Norway AS, requested a meeting with the Authority. A meeting was held at the Authority's premises on 11 June 2008. In the meeting, the representatives of Becromal mentioned, inter alia, an additional agreement between the municipality of Notodden and Becromal, relating to the municipality's use of wastewater from the power plant operated by Becromal (Event No 482695).

2. Description of the investigated measure

Notodden is a municipality in the County of Telemark in south-eastern Norway. Located where two rivers flow into the lake Heddalsvatnet, the municipality has significant hydropower resources within its limits.

In that capacity, the municipality is entitled to receive a certain amount of so-called 'concession power' from concessionaires for waterfall exploitation every year. The system of concession power is laid down in Section 2(12) of the Industrial Licensing Act and Section 12(15) of the Waterfalls Regulation Act⁽⁷⁾. According to these provisions, which are identical in wording, counties and municipalities in which a power plant is located are entitled to receive up to 10 per cent of a plant's yearly production at a price determined by the State. With respect to concessions granted prior to 1959, such as the

⁽⁷⁾ These provisions read: 'The licence shall stipulate that the licensee shall surrender to the counties and municipalities in which the power plant is located up to 10 per cent of the increase in water power obtained for each waterfall, calculated according to the rules in section 11, subsection 1, cf. section 2, third paragraph. The amount surrendered and its distribution shall be decided by the Ministry concerned on the basis of the county's or municipality's general electric power supply needs. The county or municipality may use the power provided as it sees fit. [...] The price of power [for the municipality] shall be set on the basis of the average cost for a representative sample of hydroelectric power stations throughout the country. Taxes calculated on the profit from power generation in excess of a normal rate of return are not included in the calculation of this cost. Each year the Ministry shall set the price of power supplied at the power station's transmission substation. The provisions of the first and third sentences do not apply to licences valid prior to the entry into force of Act No 2 of 10 April 1959.' (Translation by the Norwegian Ministry of Petroleum and Energy.)

concession in the case at hand, the price is based on the so-called 'individual costs' of the plant, unless a lower price is agreed on⁽¹⁾. Thus, the price of concession power will normally be lower than the market price.

Each municipality's entitlement to concession power is decided on the basis of its 'general electric power supply needs'. According to the Norwegian Water Resources and Energy Directorate, this includes electric power for industry, agriculture and households, but not power for power intensive industries and wood conversion⁽²⁾. From 1988 Notodden municipality had been entitled to approximately 3,9 GWh from the Sagafoss waterfall located in Notodden, which appears to have been raised to 7,114 GWh in 2002⁽³⁾.

In addition to the concession power volumes that the municipality was entitled to under the regulations on concession power, Notodden municipality appears to have had its own rights of use of the waterfall Sagafoss in Notodden. This right of use was exploited by Tinfos AS and not by the municipality itself. In return, the municipality was entitled to additional volumes of electric power from the plant. The commercial relationship between Notodden and Tinfos is currently governed by a contract entered into on 15 August 2001⁽⁴⁾. This contract stipulates that, until 31 March 2006, the municipality was entitled to buy 30 GWh per year, including 3,9 GWh concession power, from Tinfos AS. The price was set at 13,5 øre/kWh for concession power and the additional volume alike. After 31 March 2006, the municipality has only been entitled to buy the volume constituting the concession power, and the prices established for the municipality's purchase of such power has been applicable since then.

The relevant legal basis for the municipalities' right to concession power, referred to above, expressly states that municipalities may dispose of the concession power as they see fit, irrespective of the fact that the amount to which they are entitled is calculated on the basis of their 'general electric power supply needs'. Thus, there is nothing to prevent municipalities from selling this power to power intensive industries, or any other industry, established within the municipality.

Against this background, on 10 May 2002, the municipality entered into an agreement⁽⁵⁾ with the aluminium foil producer Becromal concerning the resale of the power

volumes to which it was entitled under the agreement with Tinfos. The agreement takes retroactive effect and, therefore, also governs the power volumes sold to Becromal from 14 May 2001 until the date of signature of the contract. The volumes covered appear to correspond to the volumes under the municipality's contract with Tinfos until 31 March 2007: i.e. 14,4794 GWh from 14 May 2001 to 31 December 2001, 30 GWh per year from 2002 to 2005, 7,397 GWh from 1 January 2006 to 31 March 2006, and, finally, an option for Becromal to buy the municipality's concession power from 1 April 2006 to 31 March 2007. The prices also mirror those laid down in the municipality's contract with Tinfos, i.e. 13,5 øre/kWh until 31 March 2006, and, from 1 April 2006 to 31 March 2007, 'the conditions at which Notodden municipality may, at that time, buy the power in question'.

Becromal did choose to buy the concession power in the period from 1 April 2006 to 31 March 2007⁽⁶⁾. Notodden municipality has explained that, for the period from April to June 2006, the municipality paid 15,21 øre/kWh for the concession power, and sold the power to Becromal at the same price. From July to December 2006, the municipality paid 11,235 øre/kWh and sold the power to Becromal at 15,21 øre/kWh. From January through March 2007, the municipality paid 10,425 øre/kWh and sold at 14,20 øre/kWh⁽⁷⁾.

By letter dated 4 March 2007⁽⁸⁾, Becromal requested a prolongation of the power purchase agreement. It also asked whether higher volumes could be included in the contract. On 30 April 2007, the municipality replied to the request, offering Becromal to buy the municipality's concession power at 20 øre/kWh (which is said to correspond to the spot price at Nord Pool, the Nordic power exchange, for May 2007) for the period from 1 April to 31 December 2007, and thereafter a three-year agreement at the price of 26,4 øre/kWh from 1 January 2008 to 31 December 2010. The municipality also stated that from 1 April 2007 the concession power volume would be 7,113 GWh.

On 30 June 2007, Becromal replied that it accepted the prices offered for the last 9 months of 2007. By contrast, it declined the offer for the period 2008-2010, as it was considered to be too high. The municipality replied, by letter dated 4 July, that in light of Becromal's letter, it considered that an agreement had been reached concerning power volumes for 2007. Hence, it would come back soon with a draft agreement. In respect of the period from 2008 to 2010, it upheld its previous position that the contract must be on market terms⁽⁹⁾. The municipality has later confirmed that no formal agreement has yet been entered into. Nor have negotiations been held with respect to the period after 1 January 2008⁽¹⁰⁾.

⁽¹⁾ The 'individual costs' of the plant are calculated in accordance with the legal provisions applicable until 1959. Under these provisions, the individual cost price would be calculated as the plant's production costs including 6 per cent interest on the initial costs, plus a mark-up of 20 per cent, divided by average yearly production in the period 1970-1999. See the so-called KTV-Notat No 53/2001 of 24 August 2001, Event No 455241.

⁽²⁾ KTV-Notat No 53/2001, cited above.

⁽³⁾ See Norway's reply to question 4 in the second request for information, Event No 449660.

⁽⁴⁾ Annex to Event No 449660.

⁽⁵⁾ Annex to Norway's reply of 9 July 2007, Event No 428860.

⁽⁶⁾ The Authority is not in possession of a copy of any such prolongation agreement.

⁽⁷⁾ Event No 521513, e-mail dated 11 June 2009.

⁽⁸⁾ Annex to Norway's reply of 9 July 2007, Event No 428860.

⁽⁹⁾ See annexes to Norway's reply of 9 July 2007, Event No 428860.

⁽¹⁰⁾ See Norway's reply to the Authority's second request for information, Event No Event No 449660.

3. Comments by the Norwegian authorities

The Norwegian authorities have submitted their comments by forwarding a letter from Notodden municipality.

The municipality argues, primarily, that the market price for long-term over-the-counter (OTC) contracts at Nord Pool was in fact roughly similar to the price agreed between the municipality of Notodden and Becromal. In fact, according to the table 'Prices of electric energy traded in the wholesale market and concession power — 1994-2005' downloaded from the homepage of Statistics Norway⁽¹⁾, the average price for contracts of 1 to 5 years' duration in 2001 was 13,6 øre/kWh, whilst the price agreed between Notodden and Becromal was 13,5 øre/kWh.

The municipality recognises that contract price and that appearing in the table from Statistics Norway are both significantly lower than the Nord Pool spot price. In that respect, it points out that the difference between the price to Becromal and the market price in the range of NOK 17,5 million, mentioned in a letter from the municipality to the company and referred to in the opening decision, actually refers to the difference between the agreed price and the spot price.

With regard to the relevant benchmark price, the municipality argues that the contract price should be compared to the price for OTC contracts and not to the spot price. Although the municipality could have sold the power volumes purchased under this agreement on the spot market, thereby potentially obtaining a higher price, it is argued that this would expose the municipality to significant financial risk. This risk stems from the municipality's right and obligation to purchase 30 GWh per year from Tinfos, at the price of 13,5 øre/kWh for the period until 31 March 2006. Thus, if the spot price, during that period, was to drop below 13,5 øre/kWh, the municipality would incur a loss. The Norwegian authorities describe the contract with Becromal as a back-to-back contract, designed to secure the municipality against financial loss.

II. ASSESSMENT

1. The presence of State aid

1.1. State aid within the meaning of Article 61(1) EEA and the Authority's doubts in the opening decision

State aid within the meaning of Article 61(1) EEA Agreement is defined as follows:

'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

It follows from this provision that, for State aid within the meaning of the EEA to be present, the aid must be granted through State resources; it must confer a selective economic advantage upon the recipient(s); the beneficiary must be an undertaking within the meaning of the EEA Agreement and the aid measure must be capable of distorting competition and affecting trade between the contracting parties.

In the opening decision, the Authority considered that the contract between Notodden municipality and Becromal would confer a selective advantage on Becromal, and, thus, involve aid, if the price agreed between the parties did not correspond to the market price. The Authority held that the facts of the case indicated that the contract price might have been lower than the market price. Firstly, the Authority pointed out that the price in the municipality's power sales contract with Becromal reflected its own purchase price under the contract with Tinfos. As this price, in turn, was partly based on the price for concession power and partly reflected compensation to the municipality for Tinfos' exploitation of the municipality's right of use to the waterfall, it was likely to be considerably lower than the market price.

The Authority pointed out that the price seemed low compared to other contracts entered into around the same time. Finally, it referred to the municipality's own statement that the contract might have saved Becromal NOK 17,5 million compared to the market price.

1.2. The presence of an advantage within the meaning of Article 61(1) EEA

In order for this condition to be fulfilled, the measures must confer on Becromal advantages that relieve it of charges that are normally borne from its budget. This would be the case when a public entity does not fix an energy tariff in the manner of an ordinary economic agent but uses it to confer a pecuniary advantage on energy consumers⁽²⁾. In the case at hand, an advantage would be present if the power price in the contract between Becromal and Notodden municipality is lower than the market price. In that case, the measure would also be selective since it exclusively benefits Becromal.

⁽¹⁾ See updated table on http://www.ssb.no/english/subjects/10/08/10/elektrisitetar_en/tab-2008-05-30-23-en.html

⁽²⁾ See Joined Cases 67/85, 68/85 and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR 219, paragraph 28.

1.2.1. The basis for establishing the market price

As a preliminary comment, the Authority notes that the cost-based price mechanism in the agreement, as referred to above, gives rise to a presumption that an economic advantage is present. The prices of concession power which the municipalities are entitled to buy, on the basis of the legislation referred to above, would in the majority of cases be significantly lower than the market price. However, for a finding that an economic advantage is present, it is not sufficient to rely on that presumption alone. It must be demonstrated that the price was in fact lower than the market price for a similar contract as the one between Notodden and Becromal.

In order to establish the market price, the Authority must assess which price would have been acceptable to a private investor in a market economy. In the opening decision, the Authority referred to a difference of NOK 17,5 million between the price paid and the market price. In their comments to the Authority's opening decision, the Norwegian authorities have clarified that this was the difference between the spot market price and the contract price. However, as the contract in question is a bilateral contract of five years' duration, the contract price cannot necessarily be compared to the spot market prices, as those prices reflect the sale of electricity on the power exchange Nord Pool. In Nord Pool's Elspot market, hourly power contracts are traded daily for physical delivery in the next day's 24-hour period⁽¹⁾. Thus, the duration of the contracts and the conditions under which they are traded differ significantly from the current contract.

What falls to be examined is whether a private investor operating in a market economy would have chosen to enter into a long-term bilateral contract for the same price and on the same terms as in the agreement in question. In making that

assessment, the Authority cannot replace the municipality's commercial judgement with its own, which implies that the municipality, as the seller of electricity, must enjoy a wide margin of judgement. Only where there is no other plausible explanation for the municipality's choice of contract would it be qualified as State aid⁽²⁾. Since there is a market for bilateral long-term contracts and a market price can be established, it must be assumed that market investors may, depending on the circumstances, prefer such arrangements to spot price sales, even if selling the power volumes on the power exchange (thus obtaining the spot price) might have yielded a higher profit. There can be a number of commercially sound reasons to prefer one, stable buyer rather than the fluctuating prices on the power exchange for a certain period of time, such as risk reduction and administrative simplification.

Against this background, the Authority finds that the contract price should be compared to the average price for the type of contracts entered into on similar terms and for a similar duration, at around the same time. The Authority specifically notes that what falls to be assessed is the market price which could be reasonably expected at the time of entering into the contract, not the subsequent price development in the market during the contract period.

1.2.2. Market price data for bilateral long-term contracts

In order to establish the market price for bilateral long-term contracts at the time of entry into the contract, the Norwegian authorities, in their comments to the decision to open the formal investigation procedure, have submitted statistics from Statistics Norway pertaining to prices of electric energy traded in the wholesale market and concession power for the years 1994 to 2005 (Table 24 from Statistics Norway at the time, currently 23).

Table 23

Prices of electric energy traded in the wholesale market and concession power — 1994-2007 — Øre/kWh⁽³⁾

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|--------------------------------------------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Bilateral contracts, total | 13,2 | 14,4 | 16 | 17,1 | 13,5 | 13,2 | 12,5 | 14,7 | 16,5 | 21,9 | 18,9 | 19,1 | 26,4 | 24,1 |
| Contracts up to 1 year duration | 11,9 | 14,7 | 17,2 | 19,6 | 15,1 | 13,4 | 12,5 | 18,4 | 20,5 | 29,2 | 23,8 | 23,6 | 36 | 24,2 |
| Contracts up to 1-5 years' duration | 14,2 | 15,6 | 16,8 | 18,7 | 14,9 | 15,6 | 15,2 | 13,6 | 17,3 | 21 | 18,8 | 18,5 | 23,7 | 31 |
| Contracts with more than 5 years' duration | 13,5 | 12,7 | 14 | 13,7 | 11,2 | 11 | 10,7 | 10,5 | 10,4 | 12,4 | 12,4 | 12,1 | 20,6 | 15,5 |
| Market power trade, total | 17,3 | 12,3 | 25,4 | 14,2 | 12,1 | 11,7 | 11 | 19 | 21,6 | 30,8 | 23,8 | 24,7 | 39,5 | 24,3 |

⁽¹⁾ See further explanations on http://www.nordpoolspot.com/trading/The_Elspot_market

⁽²⁾ See, by analogy, the Authority's Guidelines on the Application of State Aid Provisions to Public Enterprises in the Manufacturing Sector, paragraphs 5(1) and 5(3).

⁽³⁾ http://www.ssb.no/english/subjects/10/08/10/elektristetaar_en/tab-2009-05-28-23-en.html

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|-----------------------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Spot prices | 18,2 | 11,3 | 25,4 | 14,3 | 12,1 | 11,7 | 11 | 18,8 | 21,6 | 30,8 | 24,9 | 24,7 | 39,6 | 24,3 |
| The regulation market | 17,3 | 14,8 | 25,3 | 13,6 | 12,1 | 11,8 | 10,3 | 19,1 | 20,8 | 30,5 | 23,8 | 24,3 | 38,4 | 24,4 |
| Concession power | 9,8 | 9,4 | 10,4 | 10,9 | 9,1 | 10 | 9,3 | 10 | 9,7 | 8,7 | 7,6 | 7,5 | 6,8 | 7,6 |

This table shows that the average price per kWh in bilateral contracts of 1 to 5 years' duration, was 13,6 øre in 2001, and 17,3 øre in 2002. The prices for contracts of more than five years duration were 10,5 øre and 10,4 øre. The Authority has requested information from Statistics Norway relating to the contracts on which the statistics are based. According to Statistics Norway, the prices in the table are based on wholesale contracts in effect in the year in question, including contracts entered into earlier but still running. Moreover, contracts with end-users are not included in this table ⁽¹⁾. Statistics Norway have also provided a technical explanation on the data set relied on to the Norwegian authorities ⁽²⁾.

The Authority has also found other statistics from Statistics Norway's database to be relevant, including, in particular, Table 7 'Time series covering quarterly and yearly prices of electric energy in the whole sale market, taxes excluded':

Table 7

Time series covering quarterly and yearly prices of electric energy in the whole sale market, taxes excluded ⁽³⁾

| | 1 2001 | 2 2001 | 3 2001 | 4 2001 | 1 2002 | 2 2002 | 3 2002 | 4 2002 | 1 2003 | 2 2003 | 3 2003 | 4 2003 |
|--------------------------------------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Sales of electricity | 24,3 | 17 | 15,8 | 16,1 | 16,9 | 13 | 14,2 | 25,6 | 29,2 | 20,7 | 23,8 | 25,4 |
| Fixed-price contracts, full-time | 13,7 | 12,1 | 13,6 | 17,4 | 16,1 | 14,6 | 12,6 | 11,2 | 23,7 | 10,7 | 10,9 | 11,1 |
| Fixed-price contracts, free-time | 21,5 | 19,8 | 17,9 | 17,8 | 18,7 | 15,9 | 14,4 | 20,6 | 26,1 | 22,1 | 28,1 | 24,4 |
| Electricity access | 21,5 | 15,8 | 14,7 | 15 | 14,3 | 11,5 | 12,6 | 22,6 | 28,3 | 21,1 | 21,1 | 21,9 |
| New fixed-price contracts (entered into the last 3 months before the measuring week) | 13,8 | 15,6 | — | — | — | — | — | — | — | — | — | 33,1 |

| | 1 2004 | 2 2004 | 3 2004 | 4 2004 | 1 2005 | 2 2005 | 3 2005 | 4 2005 | 1 2006 | 2 2006 | 3 2006 | 4 2006 |
|--------------------------------------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Sales of electricity | 21,2 | 19,2 | 21,3 | 19,9 | 18,9 | 23,4 | 22,6 | 21,6 | 30,7 | 25,5 | 44,1 | 38,2 |
| Fixed-price contracts, full-time | 17,8 | 10,9 | 16 | 11 | 12,1 | 11,9 | 11,1 | 10,5 | 10,7 | 10,7 | 10,5 | 13,8 |
| Fixed-price contracts, free-time | 20,7 | 21,5 | 23,2 | 20,7 | 22,6 | 21,6 | 17,9 | 20,3 | 26,9 | 21,9 | 36,7 | 33 |
| Electricity access | 19,6 | 17,3 | 19,7 | 19,1 | 16,8 | 22,8 | 22 | 18,6 | 29 | 26,2 | 42,7 | 36,7 |
| New fixed-price contracts (entered into the last 3 months before the measuring week) | — | 25,5 | — | 18,9 | 23,2 | — | — | — | 33,5 | — | — | — |

⁽¹⁾ Event No 495870.

⁽²⁾ Event No 503107, *Redegjørelse SSB*.

⁽³⁾ Only columns and rows concerning the most relevant prices and time periods have been included here. The full version can be obtained on http://www.ssb.no/english/subjects/10/08/10/elkraftpris_en/arkiv/tab-2009-04-06-07-en.html

On the basis of the wording of the contract ⁽¹⁾, it would seem that the contract between Notodden municipality and Becromal is a so-called 'full-time contract', i.e. a contract providing a fixed amount of power each minute over whole contract period ⁽²⁾. For fixed price, full-time contracts (row number two in the above table), the average price was 12,1 øre/kWh on 14 May 2001, or 14,6 øre/kWh on 10 May 2002.

Furthermore, the last row in the table shows prices in new fixed price contracts, entered into the last three months before the measuring week. It shows that the price in the second quarter of 2001 was 15,6 øre/kWh, whilst the price for the second quarter of 2002 seems to be unknown. These figures include full-time and free-time contracts alike.

The Authority has also collected statistics from Nord Pool. Nord Pool's statistics show the average price per date for one year financial contracts traded on the power exchange. The prices reflect the price of financial contracts at the date in question. On 14 May 2001, the prices of the contract types in question were 18,4 øre/kWh, 17,413 øre/kWh and 17,75 øre/kWh ⁽³⁾.

Finally, Statistics Norway also produces statistics of electricity prices to end-users of electric power ⁽⁴⁾. However, the Authority has not found these statistics to be of much relevance for the contract in question, as the prices applicable for energy intensive industries, according to Statistics Norway, probably include long-term government subsidised contracts entered into before the entry into force of the EEA Agreement. Thus, these prices are far lower than the wholesale prices referred to above ⁽⁵⁾.

1.2.3. The relevance of the various price statistics for the purpose of establishing the market price for the Becromal contract

In order to identify the most comparable price data, a detailed examination of the contract between Notodden and Becromal is necessary.

⁽¹⁾ Clause 2 of the contract reads: 'The power volumes shall be spread evenly over each year in order that, at any given point of time each calendar year, the same effect is taken out.'

⁽²⁾ Event No 521166, e-mail from Statistics Norway dated 5 June 2009. The opposite of full-time contracts is 'free-time contracts', i.e. contracts allowing the user to choose how much power is taken out at each moment in time.

⁽³⁾ Event Nos 521164 and 521163.

⁽⁴⁾ See Table 19 'Weighted average prices for electricity and grid rent, exclusive of VAT — 1997-2007 — Øre/kWh', http://www.ssb.no/english/subjects/10/08/10/elektrisitetaar_en/tab-2009-05-28-19-en.html

⁽⁵⁾ Event No 495870, e-mail from Statistics Norway dated 8 October 2008.

The contract was signed on 10 May 2002, but has retroactive effect as from 14 May 2001, when the delivery started. Thus, it can be questioned whether the relevant benchmark prices would be the prices applicable on 10 May 2002 or the prices applicable on 14 May 2001. As a starting point, it would seem correct to look at the date at which the contract was entered into, since it is at that time the parties, on the basis of the expected future market development, fix the price and other contract terms. However, when the contract has retroactive effect, as here, some form of implicit agreement on price and other contract terms must have existed as from the beginning of the power delivery. Thus, the Authority finds that not only the prices relating to the date the contract was signed, but also the general price trends in the period around the start of delivery and the signing of the contract, must be taken into account.

Secondly, it must be pointed out that the benchmark price should, ideally, be based on contracts of a similar type and of similar duration. This would mean fixed price, full-time contracts of approximately five years' duration. Furthermore, the benchmark price should, preferably, be based on statistics for contracts entered into in 2001-2002, not for contracts which were simply in effect at that time.

Against that background, it should, firstly, be noted that the prices from Nord Pool seem to be of less relevance since they reflect the prices of financial contracts, of one year's duration. Financial contracts do not concern physical power volumes, but guarantee the buyer a certain power volume at an agreed price in a specified period in the future. The power will have to be physically traded in the spot market before the contract is settled. Financial contracts are entered into as a price securing measure for future power needs ⁽⁶⁾. Thus, the conditions under which such contracts are traded are different and they must be seen as a different product from the contract in question, which concerns a physical power volume from a specific plant. Therefore, it is the Authority's view that the prices in the financial market are not necessarily directly comparable to the price agreed between Becromal and Notodden municipality.

As regards Table 24 rendered above, it shows the prices of all contracts which were in effect in the year in question. The same is true with respect to the prices for full-time contracts in Table 7 ('Time Series covering quarterly and yearly prices of electric energy in the wholesale market, taxes excluded, øre kWh'). Ideally, the price paid by Becromal should be compared to

⁽⁶⁾ The basic characteristics of the financial power market are described on Nord Pool's homepages: <http://www.nordpoolspot.com/en/PowerMarket/The-Nordic-model-for-a-liberalised-power-market/The-financial-market>

the prices of contracts entered into in 2001, not to the prices of all contracts in effect at that time. However, that type of information has not been made available to the Authority. The prices for new fixed price contracts entered into the last 3 months (the last row in Table 7) do reflect the prices of new contracts. Those statistics do not distinguish between full-time and free-time contracts. Since the prices of full-time contracts are generally seen to be somewhat lower than the prices of free-time contracts elsewhere in the table, it would seem to be likely that the prices of new contracts would also have been somewhat lower had full-time contracts been shown separately. Moreover, it seems that Statistics Norway does not have sufficient price data for this type of contracts from the 3rd quarter 2001 until the 3rd quarter 2003, as no prices are included in the table for this period.

In conclusion, the Authority finds that no single price from these statistics is suitable for accurately establishing the market price of this type of contract entered into at the material time. At the same time, the prices for 1 to 5⁽¹⁾ years' bilateral contracts in Table 24, the prices of fixed price, full-time contracts in Table 7 and the prices of new fixed price contracts in the same table concern the same or a similar type of agreements. Therefore, they are relevant to establishing the market price for the Becromal agreement. Taken together, these price data can provide a price range that, in the Authority's view, could give a useful indication of the market price.

In Table 24, the prices for 1 to 5 years' contracts which were in effect in 2001 and 2002 were 13,6 øre/kWh and 17,3 øre/kWh, respectively. For contracts of more than five years duration the prices were 10,5 øre/kWh and 10,4 øre/kWh. Table 7 shows that the prices of fixed price, full-time contracts in effect in the second quarter of 2001 and 2002, respectively, were 12,1 øre/kWh and 14,6 øre/kWh. Finally, the price of new fixed price contracts entered into in the second quarter of 2001 was 15,6 øre/kWh. These prices differ somewhat, and can hardly be compared directly. Still, it would seem that the price in the Becromal agreement, 13,5 øre/kWh, would fall within the price range which can be established on the basis of these price data. Also, there seems to have been a certain degree of uncertainty in the market, given the significant differences in some price data from one quarter to the next one (see Table 7).

In order to establish that the price in the contract conferred an advantage on Becromal within the meaning of the State aid rules, the Authority must find that price deviates sufficiently

from the established market price to justify such a finding⁽²⁾. As described above, the exact market price for the contract at the time of conclusion cannot be established. However, the general price picture during the relevant period, and in particular the price of 1-5 years' wholesale contracts in 2001 (13,6 øre/kWh, Table 23), the price of fixed price, full-time contracts in the second quarter of 2001 (12,1 øre/kWh, Table 7) and new fixed price contracts entered into in the second quarter of 2001 (15,6 øre/kWh, Table 7), give a good indication of the market price range. Moreover, as stated above, the price for contracts over five years was 10,5 øre/kWh in 2001. In the original agreement, the agreed price was 13,5 øre/kWh. In light of the general price tendencies during the relevant period, as described above, and in particular the seemingly most comparable prices, the Authority considers that the contract price does not seem to differ sufficiently from the likely market price for the Authority to conclude that the contract gave Becromal an economic advantage.

As for the prolongation agreement, the Authority understands that Clause 7 of the original agreement confers a legal right on Becromal to extend the contract from 1 April 2006 to 31 March 2007 on the conditions laid down in the clause. Included in the original agreement, the clause was concluded and made binding on the parties in 2001/2002. As an alternative, the parties could have chosen to enter into a six years' rather than a five years' contract at the price of 13,5 øre/kWh. That being the case, the Authority finds that the price in the prolongation period should be assessed as a part of the original agreement; i.e. with reference to the market price for long-term, bilateral contracts entered into in 2001/2002. As noted above, the prices in the prolongation period were 15,21 øre/kWh and 14,20 øre/kWh, depending on the season. As these prices are higher than the original contract price of 13,5 øre/kWh, they do not, in line with the arguments set out above, differ sufficiently from any reasonable market price range for an economic advantage to be present.

In these circumstances, the Authority concludes that the Becromal agreement did not confer an advantage on Becromal within the meaning of Article 61(1) EEA.

2. Conclusion

On the basis of the foregoing assessment, the Authority considers that the agreement between Notodden municipality and Becromal Norway AS for the period from 14 May 2001 to 31 March 2006, as well as the prolongation from 1 April 2006 to 31 March 2007, do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement,

⁽¹⁾ Including the prolongation agreement, the contract has a duration of nearly 6 years. However, the Authority assumes that the contract is still more comparable to other 1 to 5-year contracts, since all contracts exceeding five years' duration are grouped together, including contracts of very long duration (e.g. more than 20 years).

⁽²⁾ See, by analogy, statements by the Court of First Instance in cases pertaining to the sale of real estate: Case T-274/01 *Valmont*, [2004] ECR II-3145, paragraph 45 and Joined Cases T-127/99, T-129/99 and T-148/99, *Diputación Foral de Alava*, [2002] ECR II-1275, paragraph 85 (not appealed on this point).

HAS ADOPTED THIS DECISION:

Article 3

Only the English text is authentic.

Article 1

The EFTA Surveillance Authority considers that the contract between Becromal Norway AS and the Municipality of Notodden in force from 14 May 2001 to 31 March 2006, as well as its prolongation until 31 March 2007, do not constitute State aid within the meaning of Article 61 of the EEA Agreement.

Done at Brussels, 8 July 2009.

For the EFTA Surveillance Authority

Article 2

This Decision is addressed to the Kingdom of Norway.

Per SANDERUD
President

Kristján A. STEFÁNSSON
College Member
