

EUROPEAN ENERGY LAW REPORT VI

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EUROPEAN ENERGY LAW REPORT VI

Edited by
MARTHA M. ROGGENKAMP
ULF HAMMER



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European Energy Law Report VI

Edited by Martha M. Roggenkamp and Ulf Hammer

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LIST OF ABBREVIATIONS

AB	Administrative Board
ACER	Agency for the Cooperation of Energy Regulators
AGCM	Autorità garante della Concorrenza e del Mercato
AoC	Agreement of Co-operation
BBL	Balgzand Bacton Line
Bcm	billion cubic metres
BEB	BEB Gewerkschaften Brigitta und Elwerath Betriebsführungs-Gesellschaft mbH (renamed 'BEB Erdgas und Erdöl GmbH')
BIT	Bilateral Investment Treaty
BOR	Board of Regulators
BP	British Petroleum
BPM	Bataafse Petroleum Maatschappij
CEER	Council for European Energy Regulators
CHP	combined heat and power
CO ₂	Carbon dioxide
CREG	Commission de Régulation de l'Électricité et du Gaz (<i>Belgium regulator</i>)
DG	Directorate-General
DG TREN	Directorate-General for Energy and Transport
DONG	Dansk Olie og Naturgas (<i>Danish Oil and Natural Gas Company</i>)
DSM	<i>Staatsmijnen</i> (Dutch State Mines)
DSRN	duly substantiated reasonable need for capacity
DUC	Danish Underground Consortium
EBN	Energie Beheer Nederland (<i>Dutch state participant</i>)
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECT	Energy Charter Treaty
EDF	Electricité de France
EEA	European Economic Area
EEC	European Economic Community
EEZ	exclusive economic zone
EFTA	European Free Trade Association
EIA	environmental impact assessment

EMGTG	ExxonMobil Gastransport Deutschland GmbH
ENI	Ente Nazionale Idrocarburi (<i>National Entity for Hydrocarbons in Italy</i>)
ENTSO	European Network of Transmission System Operators
ENTSOE or ENTSO-E	European Network of Transmission System Operators for Electricity
ENTSOG or ENTSO-G	European Network of Transmission System Operators for Gas
EOS	European Observation System
EP	European Parliament
E&P	Exploration and Production
EREG	European Regulators Group for Electricity and Gas
ESA	EFTA Surveillance Authority
ESER	European System for Energy Regulation
ETSO	European Transmission System Operators
EU	European Union
EURATOM	European Atomic Energy Community
FDI	foreign direct investment
FLAGS	Far North Liquids and Associated Gas System
FULDA	functional legal design and analysis method
FYROM	Former Yugoslav Republic of Macedonia
GATT	General Agreement on Tariffs and Trade
GdF	Gaz de France
GGPSSO	Guidelines for Good Third Party Access Practice for Storage System Operators
GTE	Gas Transmission Europe
GTS	Gas Transport Services (<i>gas transmission system operator in the Netherlands</i>)
GEUS	Geological Survey of Denmark and Greenland
HELCOM	Helsinki Commission
IA	Impact Assessment
ICSID	International Centre for Settlement of Investment Disputes
IGI	Interconnection Greece-Italy
IMO	International Maritime Organization
ISO	Independent System Operator
ITO	Independent Transmission Operator
LNG	Liquefied Natural Gas
MEA	Minister of Economic Affairs
MEGAL	Mittel-Europäische-Gasleitungsgesellschaft
MEP	Member of the European Parliament
MFN	Most Favoured Nation

MW	megawatt
MWh	megawatt hour
NAM	Nederlandse Aardolie Maatschappij
NCA	national competition authority
NCS	Norwegian Continental Shelf
NEL	Norddeutsche Erdgasleitung
NMa	Nederlandse Mededingingsautoriteit (<i>Dutch competition authority</i>)
NRA	national regulatory agency
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OFGEM	Office of Gas and Electricity Markets
OMV	Österreichische Mineralölverwaltung Aktiengesellschaft
OPAL	Ostsee Pipeline Anbindungs-Leitung
OPEC	Organisation of the Petroleum Exporting Countries
PSO	Public Service Obligation
rTPA	regulated Third Party Access
R&D	Research and Development
RTE	Gestionnaire du Réseau de Transport Electricité
RWE	Rheinisch-Westfälische Elektrizitätswerke
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SEP	NV Samenwerkende Electriciteits Productiebedrijven (<i>Co-operation of Electricity Generators in the Netherlands operating before 1998</i>)
SSER	Second Strategic Energy Review
Stc	<i>Staatscourant</i> (official gazette)
TEC	Treaty of the European Community
TEN	Trans-European Networks
TEN-E	Trans-European Energy Networks
TEP	Third Energy Package
TEU	Treaty of the European Union
TPA	Third Party Access
TSO	Transmission System Operator
UCTE	Union for the Co-ordination of Transmission of Electricity
UIOLI	use-it-or-lose-it
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Laws of the Sea
US/USA	United States/United States of America
VCLT	Vienna Convention on the Law of Treaties

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FOREWORD

The editors are very pleased to present the *European Energy Law Report VI*. The *European Energy Law Report* is an initiative taken by the organizers of the European Energy Law Seminar which has been organized on an annual basis since 1989 at Noordwijk aan Zee in the Netherlands. The aim of this seminar is to present an overview of the most important legal developments in the field of EU and national energy law. Whereas the first seminars concentrated on the developments at EU level, which were the results of the establishment of an Internal Energy Market, the focus has now gradually switched to the developments at the national level following the implementation of the EU Directives with regard to the internal electricity and gas markets. This approach can also be found in these reports.

Similar to the *European Energy Law Reports I, II, III, IV and V*, which were presented at the following European Energy Law Seminar, this Report is also the result of the papers presented at the seminar which was held on 31 March and 1 April 2008. The current report contains four sections representing the following legal topics: Liberalizing the EU Energy Sector: Antitrust Rules and Selective Topics from the Third Energy Package, Liberalizing the EU Energy Sector: The Need for Network Investment, Energy Market Liberalization and Security of Supply: a Balancing Act and The role of the State in Energy Production: Changes in National Regimes. We are grateful for the support of the speakers at the seminar and their co-operation in rewriting their papers for the purpose of this book. We also would like to thank the authors and co-authors who were not speakers at the seminar but were willing to participate in this project so that we are able to provide you with a “complete” picture of all topics discussed. Finally, we would like to acknowledge the help and support of the publisher in publishing this book. We are confident that these reports will be part of a good and long-term tradition.

Martha Roggenkamp and Ulf Hammer
Leiden/Oslo, 9 March 2009

INTRODUCTION

MARTHA ROGGENKAMP and ULF HAMMER

The *European Energy Law Report VI* presents an overview of the most important developments in the field of EU and national energy law and policy as discussed at the European Energy Law Seminar which was held on 31 March and 1 April 2008 in Noordwijk aan Zee in the Netherlands. The book is divided into four different parts with each covering a different development in the energy sector. The order and content of these sections is not necessarily the same as the papers presented at the seminar.

Liberalising the EU Energy Sector: Antitrust Rules and Selective Topics from the Third Energy Package

The European Energy Law Seminar traditionally examines the developments regarding the establishment of the Internal Energy Market. The EU Commission has applied two different instruments to achieve this goal: the application of the provisions in the EU Treaty (most particularly the antitrust rules) and, in addition, the application of specific secondary EU law. The number of EU energy laws – Directives and Regulations – has gradually been increasing since the 1990s. In practice, the provisions in the secondary legislation facilitating market liberalisation cannot be applied without considering the application of EU competition law.

This volume therefore starts with an analysis of some recent developments in EU competition law regarding the energy sector. This chapter by Marc van der Woude is entitled “The Application of Antitrust Rules in the Energy Sector: Action Time” and can be considered as a sequel to chapters published earlier in the *European Energy Law Reports II, III, IV* and *V*. These previous Reports also discussed recent developments of EU competition law and examined amongst others the modernization of the antitrust rules and the energy sector inquiry. However, as the title of this Report indicates the situation has changed and it is time for action. This is illustrated by the fact that the EU Commission and the national competition authorities in the meantime have started to vigorously apply competition rules to the energy sector. In order to illustrate this, the author first briefly presents the toolbox provided by Regulation 1/2003 to take such action. This is followed by an overview of the most important cases during the last year. This includes a brief

discussion of the decision to fine E.ON for breaching a seal after a dawn raid inspection in 2006. The level of this fine – 38 million euro – certainly indicates that the Commission takes the new action seriously. Other actions by the EU Commission and the national competition authorities in the energy sector concerned the pursuing of some energy cartels and several actions to abolish restrictions regarding the access to resources, infrastructure and customers. Although more competition in principle should lead to lower prices, this is in practice not necessarily the case. The author indicates that, *inter alia*, for historical reasons the EU Commission is not making use of all available legal instruments (Article 82 EU Treaty). In contrast, however, national competition authorities have been investigating several cases dealing with excessive consumer prices. Interesting examples are found in Spain and Germany. Although it may be too early to conclude, the author raises the question whether anti-trust rules are used to create new market structures in stead of merely introducing more competition in existing markets.

The following four chapters of the first part of this book outline the basic principles of the so-called “Third Energy Market Package”. This package of legislative proposals is meant to create another step towards the establishment of an internal energy market. Jan Gerrit Westerhof discusses in Chapter II a number of particular issues of the Third Internal Energy Market Package such as (i) the proposal to establish an Agency for the Cooperation of Energy Regulators (“ACER”), (ii) the proposals for further unbundling through, for example, ownership unbundling or the establishment of an Independent System Operator (ISO), and (iii) the cross-border effects of the proposals. The author outlines the content and aim of these proposals as well as the position of the European Council and Parliament during the legislative process. A more in-depth analysis on the proposals to establish ACER and to achieve a further unbundling are discussed separately in more detail in the next chapters from four different authors and thus by four different perspectives.

In Chapter III Claude-Alban Swanson analyzes the need for such Agency from a regulatory perspective. She identifies two types of Agencies, i.e. Executive Agencies and Regulatory Agencies. One key difference between both types of Agency is that a common legal framework applies only to Executive Agencies and that Regulatory Agencies in the absence of such a framework are set up on a case-by-case basis. The proposed ACER falls in the latter category. Any attempts to define a common legal framework for Regulatory Agencies have so far not yet been successful. Consequently, the legislative powers of these Agencies are limited as a result of existing case law (the *Meroni* case of 1956 and the *Romano* case of 1981). After discussing the legal basis for establishing Regulatory Agencies, the

author examines the background, governance and tasks of the proposed ACER. As ACER needs to facilitate the cooperation of national energy regulators, the author also reviews the relationship between ACER and these national regulators and the other organizations in which the national regulators already cooperate such as CEER and ERGEG.

The next chapter written by Erik Gottschal is entitled “The Role of an Energy Agency in Regulating an Internal Energy Market: cross border regulation across the line?” This chapter examines in greater detail the impact of ACER on the independent network companies and then more particularly on the proposed cooperation of the existing transmission system operators in the electricity and gas sector. The author illustrates his analysis by using examples from the gas sector and the gas transmission system operators. These examples include issues relating to the establishment of the north-west European gas market, i.e. the need for streamlining transport capacity and transportation tariffs. Although the author recognizes the need for further cooperation between TSOs in order to establish an internal energy market, he also makes some critical remarks. The most important critique concerns the organization of the division of powers. The powers of ACER regarding the establishment of framework guidelines will, for example, have an impact similar to the impact of legislation and this situation is, according to the author, obviously in contradiction with the principle of balancing of powers as developed by Montesquieu.

The final two chapters of this part of the book continue with the highly controversial subject of ownership unbundling. The EU Commission considers ownership unbundling as the preferred option for further unbundling of the network activities from the production and supply activities. An alternative could be the establishment of an Independent System Operator. In the EU, examples are found of both concepts. Chapter V first describes the experience with ownership unbundling in the Netherlands. The Netherlands is an interesting example as ownership unbundling not only has been implemented successfully on the transmission system level but also needs to be implemented on the distribution system level. Martha Roggenkamp examines the experiences with ownership unbundling of the TSOs and the background for introducing ownership unbundling in the energy distributions sector. It is interesting to note that in both situations the possible privatization of (parts of) the energy sector to a certain degree has triggered the unbundling process. One of the major differences between both situations is, however, the extent to which it has raised political debate. Whereas the unbundling of the transmission networks rarely received any attention, it almost created political revolt when it involved the distribution sector. In addition, it is interesting to note that the definition of ownership

unbundling on the national level is not necessarily the same as the one used on EU level in the Third Energy Market Package. This may again lead to unwanted controversy between the EU and its Member States.

In the EU there is little experience with the establishment and operation of an ISO. One of the few examples concerns the exploitation of the Norwegian offshore gas grid. Signe Thomassen therefore describes in further detail the “Establishment of an Independent System Operator: The Norwegian Experience”. The establishment of an ISO in Norway goes well beyond any discussion on EU level. It was already proposed in a White Paper in 2000–2001 and led to a complete reorganization of the offshore pipeline system. The ownership of all offshore pipelines is integrated in one joint venture “Gassled” and the exploitation of this pipeline system was put in the hands of the ISO Gassco (see also European Energy Law Report I). The author explains the background of this reorganization, the applicable regulations, the organisation of the system operation and the way in which the booking process takes place. An important aspect of the unbundling and ISO concept is the organization of new investments. Therefore a separate section deals with the development of new infrastructure, i.e. the relationship between Gassco and Gassled in the decision-making process to achieve the required new infrastructure. The author concludes that so far Gassco has not had any problems in finding sponsors for new infrastructure and the ISO model has worked satisfactorily.

Liberalizing the EU Energy Sector: The Need for Network Investment

As it appears from the previous chapter, the organization of sufficient investments in the energy sector is one of the main challenges in a liberalized market. This is especially true for energy networks as they are part of the regulated market and in principle depend on the income from regulated transportation tariffs. Part II of this book therefore concentrates on network investment. Examples are taken from the electricity as well as the gas sector.

Hamilcar Knops addresses in Chapter VII the question “How Adequate is the European Legal Regime for Investments in Electricity Networks?” Adequate network investment is crucial for achieving long-term security of supply. In order to achieve the required investment he proposes a regime change which includes the introduction of the so-called ‘functional legal design & analysis method’ (FULDA). He applies this analysis to the electricity transmission sector. A first step in the analysis is the question whether the existing transport facilities are adequate. The outcome obviously depends on the forecasting of the future demand for transport. Proper forecasting depends again on the availability of adequate information and the economic context. If the conclusion is that new transport

investment is necessary, the question arises how this should be organized. Who is responsible for these investments: the operator or the owners of the grid? The question gets more complicated if one considers the issue from a cross-border or regional perspective. Moreover, any decision-making process also requires some sort of coordination between network operators and/or owners. Closely related to these questions is also the way in which and how governmental control needs to be organized. The author concludes that the EU Commission's proposals for a new package of energy legislation will bring some improvements but also will lead to new questions as far as network investments are concerned.

In principle investments in energy infrastructure should be made by TSOs (and DSOs) on the basis of the income transportation tariffs provide. However, the EU Commission recognizes that under specific circumstances investors should be able to be exempted from this rule as otherwise some specific (and essential) energy infrastructure would not be constructed. Tjarda van de Vijver presents in Chapter 8 the "Commission Policy in Third Party Access Exemption Requests for New Gas Infrastructure". After describing the general principles of the regime of TPA, he analyzes the exemption regime of Directive 2003/55/EC including the Commission's interpretation note of 2004. Because of the insufficient clarity of several aspects of the exemption clause, the Commission put forward in 2008 a draft staff working document. This document provides the basis for analyzing the individual requirements for exemption, i.e. enhancement of security of supply, competition condition, level of risk and cooperation of regulators. The author concludes that it is difficult to find a common thread in the Commission's and national regulators' approach as a result of which exemptions to a large extent are awarded on a case-by-case basis but this may again be explained by the need to avoid any risks of decreasing incentives in network investments.

Energy Market Liberalization and Security of Supply – A Balancing Act

Part III of this book deals with the intricate relationship between energy market liberalization and the need for security of energy supply. Whereas the Electricity Directive of 1996 and the Gas Directive of 1998 barely referred to the issue of supply security and relied on the market to safeguard security of supply, the issue is now getting high on the political agenda as illustrated by the Third Energy Market Package. Part III of this book therefore focuses on the relationship between market liberalization and energy supply security. When discussing the issue of security of supply one should in fact distinguish between two different aspects, i.e. the traditional concept of security of supply in the sense of adequate availability of resources and the concept of reliability of supply which includes the adequacy of infrastructure facilities.

In Chapter IX, Silke Goldberg begins with a discussion of “The Impact of the Third Energy Package on European Security of Supply”. She makes an initial distinction between internal and external aspects of security of supply (or reliability *versus* security of supply), and notes that the package mainly deals with those aspects of security of supply that concern the functioning of the internal market. Among these internal aspects, the Third Energy Package focuses primarily on the long-term ability of transmission, distribution and metering systems to function adequately so as to meet demand. Consequently, the internal aspects governed by the Package mainly concern the above-mentioned issues of unbundling and the establishment of ACER. As to ownership unbundling, the Commission argues that it will increase network investments compared to investments by vertically integrated TSOs. But the long-term effects of ownership unbundling are uncertain and remain to be seen. As to the position of ACER, the Package introduces security of supply as one of its objectives. In order to reinforce the position of national regulators at the European level and to institutionalize their cooperation, the Package contains a proposal for the creation of ACER. The main contribution of ACER to security of supply will be the development of a level playing field of energy companies across the EU. ACER could be the first step in the development towards a European regulator. Goldberg concludes that the Package represents a chance for EU legislators to implement the recommendations of the Sector Inquiry. However, the future of the Package is dependent on political agreement between the Council and the European Parliament. Such an agreement looked far from certain at the time of writing.

The external concept of supply security is discussed in Chapter X where Sanam Haghighi asks the question “Establishing an External Policy to Guarantee Energy Security in Europe?” The energy security problem she addresses is Europe’s reliance on imported energy from external sources, i.e. sources outside the EU. Haghighi explores the above question from a legal point of view. The legal starting point is that EU competences primarily concern the internal market. External relationships fall under the competences of the Member States. Haghighi proves her point by analyzing several EU hard law measures. In this context, the term ‘hard law measures’ include important secondary legislation in the EU that is relevant for external security of supply. She also analyzes soft law measures in the form of White Papers, Green Papers and Communications from the Commission. On this basis, Haghighi concludes that the above measures “fail to identify the real and concrete steps that need to be taken at the external level”. In the latter regard, Haghighi calls for a balanced approach that takes into account the interests of both consuming and producing nations.

The Energy Charter Treaty (ECT) was originally introduced in order to create long-term security of energy supply. Although Russia has not yet ratified the ECT it may in practice already apply. Sedat Cal analyzes in Chapter XI “Reciprocity and Provisional Application under the Energy Charter Treaty: Legal Aspects”. The ECT is a multilateral treaty that aims at providing a level playing field for investments and trade activities in the energy sector. Thus, the ECT addresses external aspects that so far have been lacking in EU legislation. Reciprocity and provisional application of the ECT are very important factors in obtaining a level playing field. The author analyzes the concept of reciprocity within the framework of the ECT as the Treaty calls for non-discrimination and most favoured nation (MFN) and/or national treatment (NT) in relations among the Member States. This is followed by an examination of reciprocity in relation to provisional application under the Treaty. In the latter regard he provides a detailed analysis from an international law perspective.

Another example of guaranteeing long-term supply security is the development and construction of the Nord Stream pipeline. In Chapter XII, Nichola Cho and Fausta Geelhoed, present “The Nord Stream Project – A brief Overview of its Legal and European Relevance for Supply Security”. Nord Stream is a proposed offshore natural gas pipeline directly linking Russia and Western Europe via the Baltic Sea. The pipeline will be constructed and operated by Nord Stream AG, an international consortium, and will transport Russian gas to the EU with the purpose of supplying European businesses and households. Thus, this project is another example illustrating the external dimension as regards security of supply. The pipeline project is still in its development phase and the authors focus on several issues relating to the construction of the pipeline such as the protection of the offshore environment. They analyze Nord Stream’s relationship to a comprehensive regulatory framework, which includes UNCLOS, the Espoo Convention, the Helsinki Convention and the European Union Decision on trans-European energy networks. They find that the framework contains the basic mechanisms to manage environmental concerns and security of supply, but that there are inconsistencies that call for further development of the framework. The authors also investigate Nord Stream’s relationship to European gas market liberalization. In this regard, they find that a functioning internal gas market is necessary for the project to effectively contribute to security of supply. If that is the case, the Nord Stream Project will also support European gas market liberalization.

In the final chapter of this part of the book, Jørgen Henningen analyzes the “Second Strategic Energy Review” (SSER) issued by the Commission in 2008. The author is very critical of the SSER. His starting point is that different energy

resources have completely different security profiles. On this basis, he makes a clear distinction between oil and gas. Oil is by far the most critical as regards resource exhaustion. This does not apply to natural gas; gas reserves are rather underestimated. Moreover, gas can be used more in the transport sector, thus contributing to reduced CO₂ emissions. In its Second Strategic Review the Commission makes the opposite assumption; gas is the key energy dependency problem. Henningsen replies: “Beginning with a wrong assumption prevents – not surprisingly – to arrive at the right conclusion.”

The Role of the State in Energy Production – Changes in National Regimes

The final part of this report focuses on the role of the State in energy production. It provides examples from three different jurisdictions in the European area. The examples involve both the oil and gas sector as well as electricity generation.

In Chapter XIV, Menno Caviet provides an overview of “2008: The present State of State Participation in the Netherlands and the Status of Its Security of Gas Supply”. His starting point is that States can have different roles. He discusses the roles of the Dutch State as legislator and as participant in the energy activities. In the latter regard, the participation in the Groningen field is of special importance. Caviet describes the “*Gasgebouw*”, a complex structure designed as a result of the discovery of the Groningen gas field in 1959 where the State through a State participant (now EBN) is involved both as a participant (not licensee) in the production of gas from the Groningen field operated by NAM, and as one of the shareholders in Gasunie which transports and sells the production from the Groningen field. Now, Gasunie has been demerged: the shares in the company that owns the gas grid have been transferred to the Dutch State. The allocation of shares in the “remaining” sales company is the same as before (25% Shell, 25% Exxon, 40% EBN and 10% the State). The company is now called GasTerra. This restructuring has been presented earlier in EELR IV by Martha Roggenkamp. The present State company that is involved in GasTerra, is EBN. Caviet presents the current role of EBN, which can be described as a mix of advisor to the government, participant in the “*gasgebouw*” (gas production) and a commercial entity. Summing up, the Dutch model can best be described as a mixed model where State participation is an important component.

Another mixed model is found in Denmark. In Chapter XV, Anita Rønne, presents “State Participation in Danish Oil and Gas Licences – A New Role for the State”. State participation in hydrocarbon licences has been an integral part of the Danish licensing system since the start of the 1980s. In 2005, the Danish North Sea Fund was established by a special Act to take responsibility for the State’s participation in new hydrocarbon licences. Simultaneously, a state-owned entity

– the Danish North Sea Partner was established for the purpose of administering the Fund under the Ministry of Climate and Energy. The Fund is responsible for the 20% participation which the State reserves for itself in each licence. In addition, the Danish North Sea Fund will be responsible for the 20% State participation in DUC from 2012. The author provides an overview of the organization of the Danish North Sea Fund, the scope of the Fund's rights and obligations, and its income and financing.

The last chapter of this book deals with the role of the State in electricity production in Norway. The position of the Norwegian State in the hydropower market has changed as a result of a decision by the EFTA Court in 2007. In Chapter 16, Finn Arnesen, therefore analyzes “The EFTA Court Decision on Norwegian Hydro Power and Norway's Response to that Decision”. The EFTA Court held that Norway had infringed Articles 31 and 40 of the EEA Agreement (free establishment and free movement of capital) by maintaining in force legislation according to which Norwegian public undertakings benefit from concessions for the acquisition of waterfalls for energy production for an unlimited period of time, while all other undertakings can only get a time-limited concession with subsequent State take-over of the waterfalls and the hydro power installations without compensation. The Court found that Article 125 EEA, which corresponds to Article 295 EC, allows Norway to pursue a “system of property ownership” regarding certain categories of assets. According to the Court, the Norwegian concession regime did not qualify in this regard since it did not aim at attaining a system where the relevant assets as a matter of principle are owned by public entities. The Norwegian response to the EFTA Court decision has been amendments of the Industrial Licensing Act whereby other entities than Norwegian public entities can no longer acquire waterfalls. Thus, Norway has moved away from a mixed system of public and private ownership (to waterfalls) to a system of public ownership. Arnesen notes: “It may be considered as somewhat of a paradox that ESA's efforts to dismantle restrictions on establishment and free movement of capital resulted in an even more restrictive regime.”

