Case No: 71524
Event No: 633449 (former 618726)
Dec. No: 123/12/COL

[*non confidential version*]

EFTA SURVEILLANCE AUTHORITY DECISION
of 28 March 2012
opening the formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene

(Norway)

The EFTA Surveillance Authority ("the Authority")

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Articles 49, 61 to 63 and Protocol 26,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement"), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1 of Part I and Articles 4(2) and (4), 6 and 13 of Part II,

HAVING REGARD to the consolidated version of the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 ("the Implementing Provisions Decision"),[1]

Whereas:

I. FACTS

1. Procedure

1.1 Administrative procedure leading to the Authority's Decision No 254/10/COL

(1) By letter dated 11 August 2006, the Authority received a complaint from Konkurrenten.no AS ("the complainant") alleging that the Norwegian authorities had granted state aid to AS Oslo Sporveisbussene ("the complaint"). The letter was registered by the Authority on 16 August 2006 (Event No 384017). By letter dated 17 August 2006 to the complainant, the Authority acknowledged the receipt of the complaint (Event No 384134).

(2) By letter dated 7 September 2006, the Authority forwarded the complaint to the Norwegian authorities and invited them to comment (Event No 387163). By letter dated 11 October 2006, the Norwegian authorities replied to the information request. The letter was registered by the Authority on 19 October 2006 (Event No 392725).

[1] Available at: http://www.eftasurv.int/media/decisions/195-04-COL.pdf.

(3) By letter dated 20 October 2006, the complainant submitted further comments. The letter was registered by the Authority on 23 October 2006 (Event No 394520).

(4) By letter dated 29 November 2006, the Authority requested further information from the Norwegian authorities (Event No 394397). The Norwegian authorities replied by letter dated 11 January 2007. The letter was registered by the Authority on 12 January 2007 (Event No 406541).

(5) By letter dated 19 June 2007, the Authority requested further information from the Norwegian authorities (Event No 425271). The Norwegian authorities replied by letter submitted electronically on 16 August 2007 (Event No 434326).

By e-mail dated 20 February 2008, the complainant submitted further information (Event No 466226).

(6) By letter submitted electronically on 2 April 2008, the Authority requested yet further information from the Norwegian authorities (Event No 471926). The Norwegian authorities replied by letter submitted electronically on 29 April 2008 (Event No 475480).

(7) The complainant submitted further information by e-mails dated 25 May 2008 (Event No 478132), 2 June 2008 (Event No 479743), 9 July 2008 (Events No 489623 and 489626), 14 August 2008 (Event No 489591), 15 August 2008 (Event No 488527), 1 September 2008 (Event No 489591), 20 January 2009 (Event No 505210) and 22 January 2009 (Event No 505503).

(8) During the beginning of 2010, the Authority and the Norwegian authorities had informal contact both via telephone and e-mail regarding the case. Information received by the Authority in this context was consolidated in a letter submitted to the Authority electronically on 21 April 2010 by the Norwegian authorities (Event No 554417).

(9) On 21 June 2010, the Authority adopted Decision No 254/10/COL closing the case on the grounds that the aid involved existing aid that was incompatible with Article 49 of the EEA Agreement and Regulation 1370/2007. However, as the existing aid measures had been terminated on 30 March 2008, the Authority concluded that no further measures were required. By letters dated 21 June 2010, the Authority forwarded copies of Decision No 254/10/COL to the Norwegian authorities (Event No 558824) and the complainant (Event No 561949).

1.2 Judgment of the EFTA Court in Case E-14/10 Konkurrenten.no AS v EFTA Surveillance Authority

(10) By application lodged at the Registry of the EFTA Court on 2 September 2010, the complainant brought an action for annulment of the Authority's Decision No 254/10/COL.

(11) On 22 August 2011, the EFTA Court rendered its judgment in Case E-14/10 Konkurrenten.no v EFTA Surveillance Authority, annulling Decision No 254/10/COL in its entirety, for the following reasons.

(12) Firstly, the Court found that the Decision was inadequately reasoned, in that the Authority had failed to explain how the renewal of the concession, as of 1 January 2000, could be classified as part of an existing aid scheme, or why it could not be considered to be a relevant alteration of that aid scheme.[2]

(13) Secondly, the Court held that the Authority had infringed its obligation to open the formal investigation procedure in respect of aid granted during the period 1997 – 2000. It found that the Authority could not exclude the possibility that AS Oslo Sporveier had received aid over and above the losses associated with discharging the public service obligation,

[2] Judgment, paras. 55 – 63.

and that the Authority indeed considered that such overcompensation was likely. Given that the Authority was unable, after almost four years of investigation, to establish which parts of the aid were existing aid and which parts were unlawful aid, the Authority should have opened the formal investigation procedure in order to become, as far as possible, fully informed of the facts. The applicant's plea addressing the same issues with regard to the period 2000 – 2008 was also declared well founded.[3]

(14) Thirdly, the Court held that the Authority had failed to identify whether the capital injection only concerned unfunded pension liabilities that arose in connection with the discharge of public service obligations, or if it also covered other activities. As the Court could not review the Decision in relation to the applicant's claim that the capital injection did not correspond to a payment for transport services provided, this amounted to a lack of reasoning.[4]

1.3 Re-assessment of the complaint

(15) The Authority commenced a reassessment of the complaint, and by e-mail dated 25 October 2011 to the Norwegian authorities (Event No 613053) requested additional information. The Norwegian authorities responded in a telephone conference on 28 October 2011. Additionally, the Norwegian authorities provided further information in meetings in Oslo on 29 November 2011 and in Brussels on 9 December 2011 and 17 January 2012. By e-mails of 13 December 2011 (Event No 621639) and 20 January 2012 (Event No 622816), the Norwegian authorities submitted further information.

(16) By letter dated 27 January 2012 (Event No 622888), the Authority requested further information from the Norwegian authorities. The Norwegian authorities responded by letter dated 22 February 2012 (Events No 625908, 625916, 625949, 626065 and 626066) and e-mails of 5 March 2012 (Events No 627096 and 627097).

2. The content of the complaint

(17) The complaint alleged that the following measures may involve unlawful state aid:

1. Cross-subsidies between the four companies AS Oslo Sporveier, AS Sporveisbussene, Arctic Express AS and Sporveisbussenes Turbiler AS,[5]

2. A capital injection of NOK 41 499 000 made in 2004 by AS Oslo Sporveier into AS Sporveisbussene,

3. A favourable tax position acquired in a non-competitive market, allowing AS Sporveisbussene to avoid paying tax on profits, and

4. Guarantees granted by AS Sporveisbussene to the benefit of its subsidiaries Arctic Express AS and Sporveisbussenes Turbiler AS.

3. Background: Norwegian legislative framework on local scheduled bus transport

3.1 Commercial Transport Act 2002 and Commercial Transport Regulation 2003

(18) At present, the local bus transport sector is regulated by the Commercial Transport Act of 2002 (the "CTA")[6] and the Commercial Transport Regulation of 2003 (the "CTR").[7] The

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3 *Ibid*, paras. 76 - 80

4 *Ibid*, paras. 84 – 91.

5 References to the "Oslo Sporveier Group" in this Decision will be used to refer to AS Oslo Sporveier and its subsidiaries.

CTA repealed and replaced the Transport Act of 1976.[8] The CTR repealed and replaced two regulations.[9]

(19) Based on the information submitted by the Norwegian authorities, the relevant provisions regulating local bus transport, presented in the following, appear not to have been significantly altered since the entry into force of the EEA Agreement in 1994.

3.2 Administrative responsibility of the counties

(20) In Norway, the responsibility of providing local public transport services is conferred on the counties. However, the counties are not under any obligation to offer such services.

(21) The counties can either administer local bus transport services through their own organisation, or through an administrative company[10] set up by the county. The CTA provides that when the county sets up an administrative company, the funds intended for the financing of the local bus transport services will be allocated to that company.[11] The administrative companies can obtain the bus transport services from a third party, or provide the services themselves.

3.3 Co-financing of local transport services by the state and counties

(22) The counties partly finance the local transport services with tax revenue. In addition, under the CTA the counties receive state funding by way of annual block grants.[12] The amount of the grants are determined on the basis of the extent to which the counties need contributions from the state. Therefore the counties have to provide the Ministry of Transport with budgets, accounts and other relevant information necessary to assess the need for contributions.[13]

3.4 Concessions

(23) Under the CTA, concessions are required to carry out remunerated bus transport services.[14]

Both a general and a special concession are needed for operators of scheduled passenger transport services.

3.4.1 General concession for remunerated passenger transport

(24) Undertakings providing passenger transport services for remuneration must have a general concession.[15] In order to obtain a general concession, the applicant must (i) provide a certificate of good conduct, (ii) have satisfactory financial means and abilities, and (iii) have satisfactory professional qualifications.[16] General concessions are not time limited.[17]

3.4.2 Special concessions for scheduled passenger transport

(25) In addition to the general concession, any undertaking wishing to carry out scheduled passenger transport for remuneration must have a special concession.[18] There are two

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6 Act of 21.6.2002 No 45 (e.i.f. 1.1.2003).
7 Regulation of 26.3.2003 No 401 (e.i.f. 1.4.2003).
8 Act of 4.6.1976 No 63 (e.i.f. 1.7.1977). Repealed and replaced by the CTA on 1.1.2003.
9 Regulation of 12.8.1986 No 2170 (e.i.f. 1.1.1987) and Regulation of 4.12.1992 No 1013 (e.i.f. 1.1.1994). Both repealed and replaced by the CTR on 1.4.2003.
10 In Norwegian: *Administrasjonsselskap*.
11 Article 23 CTA.
12 Article 22(3) CTA.
13 Article 22(4) CTA.
14 Articles 4 and 6 CTA.
15 Article 4(1) CTA.
16 Article 4(2) CTA and Chapter I of the CTR.
17 Article 27(1) CTA.
18 Article 6(1) CTA.

types of special concessions: (i) area concessions, and (ii) route specific concessions. The area concession is of a residual nature, in that it permits its holder to operate scheduled bus transport services in the entire area covered in so far as other route specific concessions have not been granted for routes in the area. The holder of a route specific concession is the sole entity entitled to operate scheduled bus transport on that route.

(26) The special concession confers upon the concessionaire both a right and a duty to carry out the transport service as set out in the concession.[19] When applying for a special concession, a proposal for a transportation schedule and tariffs must be submitted.[20] Schedules and tariffs are subject to the control of the counties. The counties can order changes in the schedules and tariffs.[21]

(27) The special concessions can either be awarded (i) through tender procedures (granted for the period determined in the tender procedure,[22] which in any event will not be for a longer period than 10 years[23]), or (ii) directly, without the use of a tender (granted for a 10 year period).[24]

3.5 Contracts

(28) To complement the concessions, the counties may enter into contracts with the concessionaires about the provision of the public service. The counties are free to determine the form of these contracts.[25]

3.6 Remuneration to the concessionaires

(29) The counties are responsible for remunerating the concessionaires.[26] Compensation is granted to undertakings that operate unprofitable routes (*i.e.* where the revenue generated from the sale of tickets does not cover the cost of operating the service).

(30) According to the Norwegian authorities, under Article 22 CTA the county is under the obligation to compensate the operators for the provision of the transport service on unprofitable routes. The counties are free to determine the manner in which the concessionaires are to be remunerated; the CTA and the CTR do not have any particular provisions on how the compensation is to be provided.

(31) The Authority understands that Article 22 CTA is read as allowing for compensation to cover the cost of the public service minus the ticket revenue, and that compensation beyond that could not be based on the CTA.

4. Organisation of the local scheduled bus transport in Oslo

(32) As noted above, the responsibility of providing local scheduled public transport services is conferred on the counties. Oslo Municipality is a county as well as a municipality. In the following, it is referred to as Oslo Municipality.

From before 1994, all public transport administration in Oslo was carried out by AS Oslo Sporveier,[27] as Oslo Municipality has delegated to the company the task of planning and

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19 Article 25 CTR.

20 Articles 28 and 29 CTR. These are the requirements the Authority considers to be the most relevant for the purposes of describing the national scheme, however, a number of other detailed requirements for a special concession are set out in the CTR.

21 Articles 28(2) and 29(2) CTR.

22 Article 27(2) CTR.

23 As stated in the preparatory works, chapter 10.1 of Prop. 113 L (2009-2010).

24 Article 8 CTA. The possibility to tender the concessions was introduced by an amendment of the Transport Act of 1976 by Act of 11.6.1993 no 85 (e.i.f. 1.1.1994).

25 Article 22(5) CTA. The 1997 Transport Agreement between AS Oslo Sporveier and AS Sporveisbussene, discussed in section I.4 below, is an example of such a contract.

26 Article 22(1) CTA.

administering public transport in Oslo.[28] At the same time, AS Oslo Sporveier operated an in-house department[29] carrying out most[30] of the scheduled bus transport in Oslo. This activity was carried out on the basis of an area concession awarded on 16 November 1992, permitting AS Oslo Sporveier to operate scheduled bus transport services in the entire Oslo grid in so far as other route specific concessions had not been granted.

(33) The concession had been granted for a 10-year period, with retroactive effect from 1 January 1990.

(34) Additionally, from 1994, AS Oslo Sporveier operated small-scale tour bus services outside its public service remit.

(35) On 23 April 1997, the bus department, including the small tour bus division, was separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveisbussene. From then on AS Sporveisbussene carried out the scheduled local bus transport in accordance with the concession awarded to AS Oslo Sporveier.

(36) The companies entered into a Transport Agreement, signed on 23 April 1997, and with retroactive force with effect from 1 January 1997 ("the Transport Agreement"). The Transport Agreement was due to expire at the date of expiry of the existing concession (i.e. 31 December 1999), but it would be prolonged automatically for one year at a time as long as AS Oslo Sporveier's area concession would be renewed. Under this Transport Agreement, AS Sporveierbussene assumed the public service activities of AS Oslo Sporveier and received remuneration directly from AS Oslo Sporveier for these services.

(37) The area concession was renewed for another 10 years on 20 September 2001, with retroactive effect from 1 January 2000.

(38) In 2001, Oslo Municipality decided that all scheduled bus transport in Oslo should be tendered out. On this basis, scheduled bus transport was gradually put up for public tender in five lots during the period 2003-2008. The respective contracts entered into force the year following that in which they had been tendered out. The last lot was tendered in 2007, and the last contract entered into force on 30 March 2008.

(39) Due to its residual nature, the scope of the area concession would be reduced in accordance with the gradual tendering of the routes that once had been covered by the area concession. Thus, the area concession awarded to AS Oslo Sporveier expired on 30 March 2008 (when all scheduled bus transport in Oslo had been tendered out). As the concession lapsed, so did the Transport Agreement.

(40) As set out above, in 1997 AS Sporveisbussene took over the small tour bus division from AS Oslo Sporveier.

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27 Since 1934 Oslo Municipality has practically been the sole owner of AS Oslo Sporveier (with 98.8% ownership) until a reorganisation in July 2006. Following this reorganisation, a new company, Kollektivtransportproduksjon, which is wholly owned by Oslo Municipality, became the 100% owner of AS Oslo Sporveier.

28 According to the Norwegian authorities Oslo Municipality was involved in all issues of commercial importance relating to the carrying out of collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/contracts with subsidiaries (such as AS Sporveisbussene) or other third parties. Oslo Municipality was involved via the management board of AS Oslo Sporveier.

29 Additionally, AS Oslo Sporveier had other departments operating *i.a.* underground, tram and ferry services.

30 Three other operators, ING. M.O. Schøyens Bilcentraler A/S, Norgesbuss AS/Oslo and Follo Busstrafikk A/S also held concessions for carrying scheduled bus transport on a few specified routes in Oslo. Norgesbuss AS/Oslo acquired Follo Busstrafikk A/S in 1996 and with that took over its concessions.

(41) In 2003, AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005, AS Sporveisbussene acquired the company Arctic Express AS and its subsidiary Lavprisexpressen.no, engaged in airport express services and regional bus transport. In 2006, the tour bus division was separated from AS Sporveisbussene into a newly established company, Sporveisbussenes Turbiler AS, owned 100% by AS Sporveisbussene.

(42) From 1 July 2006 to 1 January 2007, the administration of the public transport in Oslo was reorganised. A new company was established under the name AS Oslo Sporveier (the "new AS Oslo Sporveier"). The former AS Oslo Sporveier changed its name to Kollektivtransportproduksjon AS ("KTP"). The administrative functions of the former AS Oslo Sporveier were transferred to the new AS Oslo Sporveier.

(43) KTP retained the operative part of AS Oslo Sporveier and the ownership of AS Sporveisbussene. The latter turned into a parent company with three subsidiaries. The subsidiaries were renamed (from Nexus Trafikk to Unibuss AS; Sporveisbussenes Turbiler AS to Unibuss Tur AS; and Arctic Express AS to Unibuss Ekspress AS).

5. Compensation for the public service obligation in Oslo

5.1 Administrative practice

(44) As noted above, Oslo Municipality is responsible for compensating operators of public services it wishes to establish or maintain within its region.[31]

(45) In Oslo, there is a common ticketing system that applies to all operators for bus, tram, underground and ferry. The public service operators are not responsible for the ticketing system. The ticketing system is the responsibility of KTP (formerly AS Oslo Sporveier), and the ticket prices are subject to the control of Oslo Municipality.

(46) The concessionaire is allowed to keep the ticket income generated by the operation of the scheduled bus transport.[32] When the ticket income is not sufficient to cover the cost of the operations, the concessionaire is eligible for public service compensation from Oslo Municipality.

(47) In the late 1980s, a system of compensation in the form of annual grants of lump sums was introduced. In essence, a lump sum that covered the difference between the estimated costs of operating the public service in question and the income from sale of tickets was determined by Oslo Municipality and the concessionaire. This was done as part of the general budget process in Oslo Municipality. According to the Norwegian authorities, the budget process can be outlined as follows:

January/February	The City Government (*Byrådet*) decides the budget limits for the next year.
March	The municipal departments and undertakings are informed of the budget limits and the time limit for submission of budget proposals.
March/April	The municipal undertakings deal with the budget of the following

[31] Article 22 CTA.

[32] All ticket revenue generated by direct sale on their own buses, plus a share of the ticket revenue stemming from AS Oslo Sporveier, Stor-Oslo Lokaltrafikk and Norges Statsbaner.

	year.
May	The municipal departments and undertakings submit their budget proposals based on previous years income and costs, activity level, budget limits and assumptions on future cost developments and efficiency gains.
June – August	Discussions between the departments/undertakings and the responsible governmental unit are carried out in order to clarify the budget and the activities covered by it.
September	The budget proposal is announced by the City Government.
October	The different committees of the City Council (*Bystyret*) deal with the different parts of the budget.
October/November	The City Government proposes a revised budget.
December	The budget is approved by the City Council.

(48) According to the Norwegian authorities, this has been the administrative practice in Oslo Municipality at least since 1994.

(49) With regard to the compensation for the scheduled bus transport, the aim of the process was to determine the amount of compensation necessary to cover the difference between the estimated costs of operating the public service and the income from the sale of tickets.

(50) Based on the budget proposals (and possible amendments during the budget discussions in the City Council), the compensation was granted by budget decisions within certain presumptions that were specified in each decision, *i.e.* to achieve certain efficiency gains and maintain the preceding year's transport services to the public. The decisions also contained certain goals with respect to, inter alia, the volume of produced transportation services and costs per travel.

(51) The assessment of the amount of compensation was based on the costs incurred in the preceding years, corrected for efficiency gains, the development of the Norwegian consumer price index, salaries, taxes, and laws and regulations that would affect the costs.

(52) According to the Norwegian authorities, separate accounts were kept for the public service and commercial activities (*i.e.* the tour bus service) carried out by AS Oslo Sporveier. According to the Norwegian authorities, the cost of the commercial activities of AS Oslo Sporveier was not taken into account for the calculation of the annual compensation for public services.

(53) According to the Norwegian authorities, also under the Transport Agreement concluded in 1997, which lapsed on 30 March 2008 when all public service contracts had been tendered and the area concession itself lapsed, the calculation of the compensation was carried out on an annual basis in accordance with the principles described above.

(54) Thus, the public service compensation was determined in accordance with the same procedure. The amount of public service compensation was determined on the basis of the difference between cost and revenue on the public service and adjusted in accordance with the same correction factors throughout the entire period under assessment, and separate accounts were kept for the public service activities and the non-public service activities.

5.2 Introduction of a quality bonus/malus system

(55) According to the Norwegian authorities, a quality bonus/malus system was agreed on by AS Oslo Sporveier and AS Sporveisbussene and introduced before 2004. According to that system, the performance of AS Sporveisbussene was assessed in accordance with the following criteria: (i) total customer satisfaction, (ii) punctuality, (iii) level of safety and comfort, and (iv) the driver being forthcoming.

(56) AS Oslo Sporveier granted a quality bonus to AS Sporveisbussene of NOK 3.9 million in 2004. The Authority is not aware of any other quality bonuses being granted.

5.3 Common cost and intra-group transactions

(57) According to the Norwegian authorities, AS Sporveisbussene paid market prices for all services that were provided by AS Oslo Sporveier.

(58) Likewise, the Norwegian authorities maintain that the commercial activities of AS Oslo Sporveier and AS Sporveisbussene and its subsidiaries were always charged market prices for all services provided by AS Oslo Sporveier and AS Sporveisbussene (for example, the tour bus division paid market prices for their use of office space, garage facilities and administration provided by the Oslo Sporveier Group).

(59) The Norwegian authorities have indicated that from 2004 onwards, […][33] % of the overall costs were levied from all subsidiaries for general overheads.

(60) However, the Norwegian authorities have not submitted further information on the allocation of the common costs, or whether such a particular allocation key was used for this purpose, or whether the payment for the services that the commercial subsidiaries of AS Sporveisbussene received was done on an arms-length basis and on market terms.

(61) Furthermore, no explanations have been provided as to the rationale of introducing a 'general overhead fee' in 2004, and if overheads were exclusively born by the public service activities before that date.

5.4 Profitability of the public service

(62) According to an overview of the annual results of the bus activities of AS Oslo Sporveier and AS Sporveisbussene submitted by the Norwegian authorities, the average annual profit of the companies was 0.49 % in the period from 1994 to 2008. This figure, however, includes commercial activities from 2005 onwards. The average annual return for the period between 1994 and 2005, for which the data submitted by the Norwegian authorities relates exclusively to the public service was 1.98 %.[34]

6. Capital injection of 2 April 2004

6.1 The complaint

(63) The complainant states that AS Oslo Sporveier transferred NOK 41 499 000 in new equity to AS Sporveisbussene in 2004, and alleges that this transaction may have involved state aid as no private market investor would inject capital in a loss-making company. The complainant furthermore questions whether capital has been injected in order to fund new activities taking place in a market exposed to competition.

(64) The Norwegian authorities have confirmed that Oslo Municipality injected new capital into Oslo Sporveier Group on 2 April 2004, and that this measure related to a one-time

[33] The exact figure is covered by the obligation of professional secrecy. It is in the range of 2% - 7%.
[34] Own calculation by the Authority.

contribution to the pension fund of the Group (Oslo Sporveiers Pensjonskasse)[35] to cover an accumulated shortage of funds in the existing pension fund accounts. The amount of this capital injection allocated to AS Sporveisbussene was NOK 111 760 000. The Norwegian authorities have furthermore explained that at the same time as the capital injection took place, AS Sporveisbussene changed accounting principles for estimating future pension obligations with the result that from 2004 onwards such obligations were recognized in their accounts.[36]

(65) Based on the information submitted by the Norwegian authorities, the Authority assumes that the complainant, when referring to the transfer of NOK 41 499 000 in his correspondence with the Authority, has compared the 2003 and 2004 accounts of AS Sporveisbussene, and deducted NOK 39 501 000 (total equity in 2003) from 81 000 000 (total equity in 2004).[37] In this Decision, the Authority will assess the actual capital injection of NOK 111 760 000, which is the amount allocated to cover the pension obligations of AS Sporveisbussene (as opposed to NOK 41 499 000 referred to by the complainant).

(66) The Norwegian authorities have submitted explanations regarding the rationale for this capital injection, which relates to the pension liabilities of AS Sporveisbussene. These are summarised in the following.

6.2 Mid-1990s shortfall in AS Oslo Sporveier Group's pension fund and increased annual compensation

(67) The Norwegian authorities have explained that the Norwegian local authorities – and companies owned or controlled by them – were obliged to provide their employees with an indexed pension equal to 70 % or 66 % of their final salary upon retirement at the age of 67.[38]

(68) By the mid-1990s, it had become clear that the pension fund of the Oslo Sporveier Group was underfunded. The underfunding had accumulated over several years as the payments of premiums to the pension fund did not take adequate account of increased pension obligations resulting from factors such as increases in the employees' salaries, longer life expectancy, changes in expected rates of disability etc. According to the Financial

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35 Oslo Sporveiers Pensjonskasse was the pension fund for the employees of the Oslo Sporveier Group. The 2004 capital injection covered the underfunding related to the pension obligations of Oslo Sporvognsdrift AS, Oslo T-banedrift AS, AS Oslo Sporveier and AS Sporveisbussene.

36 The Norwegian authorities have explained that prior to the 2004 capital injection, AS Sporveisbussene recorded its pension obligations using the so called "corridor solution". Using this accounting method, the company amortised adjustments in calculated pension obligations over a period of ten years. The "corridor solution" was based on the assumption that there will be deviations every year between the long-term assumptions and realities and that, over time, such differences will even out. In 2004, the Norwegian authorities decided to change the accounting method used for recording pension obligations. Annual adjustments that included, in the accounts, all costs over the period of assumed average employment were made. As a consequence, AS Sporveisbussene recorded in 2004 a reduction in equity of NOK 80 934 000 (under the item "estimatavvik"), which reflects this change in accounting methods. These changes resulted in an increase in the obligations recognized in the balance sheet and a corresponding reduction of the equity capital of the company. This change in accounting principles did not have an impact on the amount of capital needed to offset the underfunding of the pension fund, but rather explains some of the changes in the accounts of AS Sporveisbussene from 2003 to 2004 to which the complaint referred.

37 Alternatively, the complainant might have deducted the share capital reduction of NOK 70 261 000 (as reported in the accounts of 2004) from the actual capital injection, which amounted to NOK 111 760 000.

38 Given that Norwegian national insurance would provide a basic pension between 40 % and 50 %, the employer provided the remaining part through either pension funds or life insurance companies. Oslo Sporveier Group organized their pension fund as a municipal pension fund (Oslo Sporveiers Pensjonskasse), in accordance with chapter 7 of the Insurance Act of 10.6.2005 No 44.

Supervisory Authority of Norway (*Kredittilsynet*), the pension fund of AS Oslo Sporveier had a coverage of only 46.9 % per 31 December 1995. Municipal pension funds with a coverage below 95 % must be increased with a minimum of 1.5 % per year.[39] Oslo Municipality, as its owner, was therefore legally obliged to cover the underfunding of Oslo Sporveier Group.[40] Thus, as resolved by decision of 23 December 1996, AS Oslo Sporveier had to submit a plan on how to make up for the shortfall. Consequently, a payment plan to eliminate the shortfall by 2020 was laid down. This plan was approved by the Financial Supervisory Authority on 9 July 1997.

(69) In accordance with the payment plan, Oslo Municipality adjusted upwards the annual public service compensation so as to cover the increased pension premiums.

6.3 Capital injection into Oslo Sporveiers Pensjonskasse

(70) According to the Norwegian authorities, Oslo Municipality decided in 2003 to cover the pension fund shortfall at Oslo Sporveier Group with a one-time payment. As a result, on 2 April 2004, AS Oslo Sporveier injected NOK 802.5 million[41] in Oslo Sporveiers Pensjonskasse to cover the current total shortfall.[42] The capital injection covered the underfunding of the pension liabilities relating to the employees of Oslo Sporvognsdrift AS, Oslo T-banedrift AS, AS Oslo Sporveier and AS Sporveisbussene.

(71) The Norwegian authorities have explained that although Oslo Municipality was legally obliged to cover the underfunding of Oslo Sporveier Group, it was not required to do so by a one-time payment: it chose to do so as this solution would be more cost efficient than adhering to the existing amortisation plan. The annual amortised amount to service the underfunding was higher than the finance costs needed to service a bank loan of the same size. Moreover, a one-time payment was estimated to provide savings in the operating budget of approximately NOK 160 million, and reduce the Group's annual pension costs by NOK 60 million.

(72) Of the NOK 802.5 million, NOK 111 760 000 went to cover the pension obligations of AS Sporveisbussene. According to the Norwegian authorities the full amount was paid directly from AS Oslo Sporveier to the Oslo Sporveiers Pensjonskasse and was not transferred as cash to AS Sporveisbussene. In the annual accounts of AS Sporveisbussene for 2004, the pension contribution of NOK 111 760 000 was recorded as an injection of new share capital.

6.4 Underfunding of the pension liabilities for the tour bus employees

(73) According to the Norwegian authorities, a part of the capital injection transferred to AS Sporveisbussene covered pension liabilities for employees in the tour bus operation for the period 1994 (when the tour bus operations commenced) until 1 January 1997.

(74) The Norwegian authorities have submitted calculations according to which approximately NOK 430 300 of the total capital injection was related to pension liability underfunding in the tour bus division.

6.5 Change of pension funds to Vital Forsikring ASA

(75) The payment of NOK 111 760 000 also enabled AS Sporveisbussene to transfer its pension fund from Oslo Sporveiers Pensjonskasse to Vital Forsikring ASA, a life insurance company. The change took effect on 1 June 2004. Under the then applicable

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39 Regulation of 19.2.1993 no 117, section 28 A.

40 Not complying with this obligation could have had several legal consequences for Oslo Sporveier Group, for instance it may have been declared bankrupt.

41 Of which NOK 800 million was transferred from Oslo Municipality.

42 The amount paid to Oslo Sporveiers Pensjonskasse was NOK 711 980 00 (NOK 90 519 282 (14.1 % of the total amount NOK 802.5 million) was employment tax).

Norwegian law, all premiums intended to cover the shortfall had to be paid in full, before AS Sporveisbussene could transfer its pension obligations from one fund to another.[43]

7. Taxation of the Oslo Sporveier Group

7.1 Allegations of the complainant

(76) The complainant has argued that AS Oslo Sporveier's negative tax position has been used to reduce the tax burden on AS Sporveisbussene. According to the complainant, favourable tax conditions in the Oslo Sporveier Group could possibly have been used to avoid payment of tax on profits made in a market wholly or partially exposed to competition. The basis for this complaint seems to be that AS Sporveisbussene in the period 2000-2004, while having a profit before tax of approximately NOK 54 796 000, only had a taxable income of NOK 2 027 000.

(77) According to the Norwegian authorities, it seems that the complainant is referring to the taxation rules regarding contributions between companies belonging to the same group (group contributions). AS Sporveisbussene has apparently transferred parts of its profits thus avoiding the payment of income tax on the amount transferred.

7.2 The relevant provision of the Norwegian Tax Act

(78) According to the Norwegian Tax Act,[44] every undertaking within a group shall be taxed as a single taxable entity; there is no consolidation of groups of companies for tax purposes. However, under certain conditions, the taxation rules permit income earned by the companies in the group to be distributed within the group by way of so called "group contributions".

(79) Group contributions are allowed[45] when the contributing company and the receiving company are limited liability companies[46] and belong to the same group.[47] In addition, the parent company has to own more than 90 % of the subsidiary, and hold an equivalent share of the votes.[48] A group contribution may consist of money, working capital or other financial contributions.[49]

(80) The group contributions are deductible for the granting company to the extent that the contribution is covered by the taxable income of the contributor.[50] The receiving company, on the other hand, is liable for paying taxes on the group contribution.[51] The contribution is considered as an income for the receiving company in the same year as the granting company deducts the contribution in its tax assessment. Provided that the recipient suffers a deficit, the contribution may be set off against any losses, also those incurred in previous years.

II. ASSESSMENT

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43 Act of 10.6.1988 no 39 (repealed), Article 8c-11 in conjunction with Article 8c-10 at paragraphs 1 and 3.

44 The Tax Act of 26.3.1999 no 14, Article 2-2.

45 Articles 10-2 to 10-4 of the Tax Act.

46 According to article 10-1 in the Tax Act, the rules governing group contributions are applicable for "aksjeselskap, allmennaksjeselskap samt likestilt selskap og sammenslutning".

47 As provided by Act of 13.6.1997 no 44, Articles 1-3 and 1-4.

48 Article 10-4(1) of the Tax Act.

49 The actual payment does not necessarily need to take place in the same year as the income is made, provided that it will be effected by a real transfer of wealth at a later date. Accordingly, it is sufficient that the granting company undertakes an unconditional obligation to make the contribution.

50 Article 10-2(1) of the Tax Act.

51 Article 10-3(1) of the Tax Act.

1. The presence of state aid

(81) Article 61(1) of the EEA Agreement reads 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.*"

(82) The Authority will in the following assess whether the four alleged measures referred to in the complaint constitute state aid within the meaning of Article 61 of the EEA Agreement. The Authority will assess (i) whether there are state resources involved, (ii) whether the alleged measures confer an economic advantage on the relevant entities of the Oslo Sporveier Group, and (iii) whether the alleged measures distort competition and have an effect on trade between the Contracting Parties.

2. Alleged cross-subsidies – compensation for the public service and the 2004 capital injection

2.1 Introduction

(83) A preliminary assessment of the complaint concerning the alleged cross-subsidisation and the 2004 capital injection is set out below.

Concerning the complaint that cross-subsidisation has occurred between the public service activities and the commercial activities of AS Oslo Sporveier, AS Sporveisbussene, Arctic Express AS and Sporveisbussenes Turbiler AS, the Authority understands the allegation to be that compensation for the provision of the local scheduled transport service has subsidised the commercial activities carried out by the Oslo Sporveier Group.

(84) It is evident that cross-subsidisation (in the sense of entailing incompatible state aid) can only occur if the cross-subsidising undertaking receives state aid within the meaning of Article 61(1) of the EEA Agreement. Thus, in respect of this part of the complaint, the Authority must first assess if the financing measures, i.e. (i) the annual payments from Oslo Municipality granted to AS Oslo Sporveier and AS Sporveisbussene (via AS Oslo Sporveier) as compensation for the provision of scheduled bus services, and (ii) the 2004 capital injection, entail state aid.

2.2 Presence of state resources

(85) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the aid must be granted by the State or through state resources.

(86) As a preliminary point, both local and regional authorities are considered to be equivalent to the State.[52] Hence, Oslo Municipality is equivalent to the State for the purposes of the EEA state aid rules.

(87) In the present case it is clear that the State, in the capacity of Oslo Municipality, provided funding to AS Oslo Sporveier for carrying out scheduled bus transport until 1997. For the period 1997-2008 it is undisputed that AS Oslo Sporveier passed on the annual compensation to AS Sporveisbussene, according to the terms of the Transport Agreement,

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[52] Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings, OJ L 318, 17.11.2006, p. 17, incorporated by means of Annex XV to the EEA Agreement.

which appears in essence to have formalised the previous unwritten administrative practice of calculating the annual compensation.[53]

(88) As regards the 2004 capital injection into AS Sporveisbussene to cover the underfunding of the pension fund it is undisputed that the State, in the capacity of Oslo Municipality, contributed NOK 111 760 000 as capital for AS Sporveisbussene.

(89) The Authority therefore comes to the preliminary conclusion that the 2004 capital injection and the compensation to AS Oslo Sporveier, and then to AS Sporveisbussene (via AS Oslo Sporveier) for carrying out bus transport services in Oslo were granted by the State and financed by state resources.

2.3 Economic advantage

2.3.1 Introduction

(90) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must confer an economic advantage on an undertaking, for example by relieving it of charges that are normally borne from its budget.

(91) The beneficiaries of any potential aid will be AS Oslo Sporveier and/or AS Sporveisbussene. That an undertaking, or undertakings, will benefit from any economic advantage does not therefore raise any doubts.

2.3.2 Compensation for scheduled bus transport in Oslo

(92) As mentioned above, the compensation to AS Oslo Sporveier and AS Sporveisbussene for carrying out bus transport services in Oslo constitutes – at least in part – compensation for costs incurred by providing a public service. Such compensation does not entail an economic advantage if the criteria established in the *Altmark* case-law of the European Court of Justice are met.[54]

(93) Furthermore, as regards the 2004 capital injection, the Authority considers that AS Sporveisbussene received the capital injection to cover the underfunding of pension obligations that had accrued before 1997, and is at this stage of the view that the entire capital injection was used for this purpose. It is also worth noting that whilst certain changes to the capital position of AS Sporveisbussene were recorded in the accounts, the full amount was paid directly from AS Oslo Sporveier to the pension fund and was not transferred as cash to AS Sporveisbussene.

(94) However, in order to determine whether the capital injection described above entailed an economic advantage for AS Sporveisbussene, a distinction needs to be drawn between the capital that was injected to remedy the underfunding of the pension accounts of the public service employees ("public service capital injection"), and the capital that covered the underfunding of the pension accounts of the employees in the commercial arm of AS Sporveisbussene ("commercial activities capital injection"). As set out above, according to the Norwegian authorities, approximately NOK 430 300 of the 2004 capital injection

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[53] As regards, in particular, the quality bonus from AS Oslo Sporveier to AS Sporveisbussene of NOK 3.9 million, the Authority has not received information allowing it to exclude that the funds stem from state resources, or that the payment is not imputable to the State. As Oslo Municipality is involved in all issues of commercial importance relating to the provision of scheduled bus transport in the Oslo region, and AS Oslo Sporveier is a publicly-owned company, it is likely that the transaction could be held to be imputable to the State and thus represent state resources within the meaning of Article 61(1) of the EEA Agreement.

[54] Case C-280/00 *Altmark* [2003] ECR I-7747. See also Case T-289/03 *BUPA* [2008] ECR II-81.

appears to have been related to underfunding of pension accounts in the commercial tour bus division.

(95) As for the public service capital injection, it does not relate to new costs but to costs accrued in the past which had technically not been reflected in the general accounts of the company. However, these liabilities were already present at the time of the capital injection, which seems to have been necessary to make up for the shortfall in the pensions funds.

(96) Therefore, the public service capital injection can be considered to form part of the cost that Oslo Municipality had to bear in exchange for AS Oslo Sporveier and AS Sporveisbussene (via AS Oslo Sporveier) providing the public service. Instead of injecting this capital, Oslo Municipality could have paid out a higher annual public service compensation.

(97) Thus public service capital injection constituted an integral part of the public service compensation granted to AS Sporveisbussene, as it had been from the mid-1990s until the capital injection was made (and as it would have been if carried out in accordance with the amortisation plan until 2020) .

Exclusion of aid based on Altmark

(98) In the *Altmark* judgment the European Court of Justice (the "Court of Justice") held that compensation for a public service does not constitute state aid when four cumulative criteria are met.

- First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.

- Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.

- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.

- Fourth, and finally, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.[55]

(99) The Authority will firstly examine the fourth criterion, namely whether the compensation was based on a tender or on the basis of the costs of an efficient and well-run company.

(100) Oslo Municipality paid an annual compensation to AS Oslo Sporveier for scheduled bus transport services, which from 1997 was passed on to AS Sporveisbussene. However, with regards to the routes operated under the area concession, neither AS Oslo Sporveier nor AS Sporveisbussene were selected in a public procurement procedure. Hence, neither the compensation from Oslo Municipality to AS Oslo Sporveier nor the compensation subsequently passed on from AS Oslo Sporveier to AS Sporveisbussene were based on prices resulting from public tenders.

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[55] Case C-280/00 *Altmark* [2003] ECR I-7747, paragraphs 89-93.

(101) Furthermore, the Norwegian authorities have neither argued that (nor provided the Authority with information enabling a verification of whether) the costs incurred by AS Oslo Sporveier or AS Sporveisbussene correspond to the costs of a typical undertaking, well run and adequately equipped. Therefore, the preliminary opinion of the Authority is that the fourth Altmark criterion is not met.

(102) On the basis of the above, the Authority considers at this stage that the scheduled bus transport services carried out under the area concession in Oslo have, both in the case of AS Oslo Sporveier and AS Sporveisbussene, therefore not been discharged in accordance with the fourth criterion of the *Altmark* judgment. Consequently, as the *Altmark* criteria must be satisfied cumulatively for public service compensation not to constitute state aid,[56] the Authority's preliminary conclusion is that the annual compensation, including the public service capital injection, confers an economic advantage to AS Oslo Sporveier and AS Sporveisbussene.

2.3.3 The commercial activities capital injection

(103) As set out above approximately NOK 430 300 of the 2004 capital injection appears to have been related to underfunding of pension accounts in the tour bus division. As this part of the injected capital does not relate to public service cost, it cannot be assessed on the basis of *Altmark*. Thus, according to settled case-law, it is it is necessary for the Authority to establish whether the recipient undertaking, AS Sporveisbussene, received an economic advantage which it would not have obtained under normal conditions.[57] In doing so, the Authority has to apply the market economy investor test[58] which in essence provides that state aid is granted whenever a state makes funds available to an undertaking which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature.[59]

(104) It should be recalled that the initial amortisation plan was triggered by a decision of Norway's Financial Supervisory Authority requesting AS Oslo Sporveier to make up for the shortfall in its pension fund. This meant that the owners of AS Oslo Sporveier and AS Sporveisbussene needed to either remedy the underfunding in their business, or run the risk of their company becoming insolvent.

(105) In assessing whether the capital injection was done on conditions that would be acceptable to a private investor, the Authority points out that a private owner/investor in a similar situation – *i.e.* with the options to either (a) inject fresh capital into the company, or (b) liquidate the company and invest the same amount elsewhere, would choose strategy (a) only if it was globally more profitable than strategy (b). The fact that the owner had made a previous investment is otherwise irrelevant in this context.[60] This means that it is not sufficient to choose the "cheapest" solution, which the Norwegian authorities have submitted the capital injection was, in order to meet the market economy investor

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56 Case C-280/00 *Altmark* [2003] ECR I-7747, paragraphs 94-95.

57 Case C-39/94 *SFEI* v *La Poste* 2006 ECR I-3547, at paragraph 60.

58 This principle is explained in the Authority's guidelines Part IV Rules on public service compensation, state ownership of enterprises and aid to public enterprises, Application of state aid provisions to public enterprises in the manufacturing sector.

59 Cf. for example Opinion of Advocate General Jacobs, Joined Cases C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission* [1994] ECR I-4103, at paragraph 28. See also Case 40/857 *Belgium v Commission (Boch)* [1986] ECR - 2321, at paragraph 13; Case C-301/87 *France v Commission (Boussac)* [1990] ECR I-307, at paragraph 39-40; Case C-303/88 *Italy v Commission (Lanerossi)* [1991] ECR I-1433, at paragraph 24.

60 Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, at paragraph 222.

benchmark, but that it is necessary to demonstrate an acceptable rate of future return for the "price of this cheapest solution".

(106) The Norwegian authorities have not, however, further substantiated their argument in this respect, and have in particular not submitted any profitability forecasts that a market economy investor would presumably have made.

(107) Furthermore, none of the information submitted indicates that the Municipality of Oslo injected further capital in this part of the business based on expectations of acceptable long-term profit. Moreover, the Authority is not aware of then minority shareholder(s) of AS Oslo Sporveier having contributed to remedy the underfunding – and a private shareholder surely would have requested the other shareholders to either do so *pro rata*, or would have increased its stake.

(108) For the above reasons, the Authority is at this stage uncertain whether the market economy investor test is met with regard to the commercial activities capital injection.

3. Favouring certain undertakings or the production of certain goods

(109) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the aid measure must be selective by favouring certain undertakings or the production of certain goods.

(110) The Court of Justice has held that in order to determine whether a measure is selective, the question is whether the undertaking(s) in question are in a legal and factual situation that is comparable to other undertakings in the light of the objective pursued by the measure.[61]

(111) In the present case, the annual compensation and the capital injection favoured AS Oslo Sporveier and/or AS Sporveisbussene to the exclusion of other bus transport operators. Such other bus operators operate scheduled bus transport services in Norway or elsewhere in the EEA and were therefore in a similar legal and factual situation compared to AS Oslo Sporveier and AS Sporveisbussene. For these reasons, the Authority is of the preliminary view that these two measures are selective.

4. Distortion of competition and effect on trade between Contracting Parties

(112) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the aid measure must distort or threaten to distort competition and affect trade between Contracting Parties. According to the EFTA Court case law, this requires the Authority to examine whether such aid is *liable* to affect trade and to distort competition.[62]

(113) Since before the entry into force of the EEA Agreement in Norway several undertakings have provided scheduled bus services in Oslo, the Authority preliminarily concludes that the annual compensation and the capital injection were liable to distort competition since then.[63]

(114) With respect to the effect on trade and the fact that the present case concerns a local market for bus transport in Oslo, the Authority recalls that in the *Altmark* judgment, which also concerned regional bus transport services, the Court of Justice held that

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61 Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* ECR [2001] I-8365, paragraph 41.

62 Joined Cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnfjord and Others* v *EFTA Surveillance Authority* [2005] EFTA Court Report, 117 at paragraph 93.

63 Moreover, the Court of Justice observed in the *Altmark* judgment that since 1995 several EU Member States had voluntarily opened up certain urban, suburban or regional transport markets to competition from undertakings established in other EU Member States, the risk to inter-Member State trade was not hypothetical, but real as the market was open to competition (paras. 69 and 79).

> "a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States … The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned."[64]

(115) This means that even if – as in the present case – only the local bus transport market (Oslo) is concerned, public funding made available to one operator in such a local market is liable to affect trade between Contracting Parties.[65] Consequently, the Authority considers that the annual compensation and the capital injection were liable to affect trade between Contracting Parties.

5. Taxation of the Oslo Sporveier Group

(116) The complainant has argued that AS Oslo Sporveier's negative tax position has been used to reduce the tax burden on AS Sporveisbussene.

(117) Based on the submissions of the Norwegian authorities, it appears to the Authority that the complainant is referring to the taxation rules regarding contributions between companies belonging to the same corporate group ('group contributions').

(118) The Authority observes that these rules are applicable to AS Oslo Sporveier and AS Sporveisbussene, as the latter is a wholly-owned subsidiary of the former. Thus, AS Oslo Sporveier or any of its subsidiaries could in principle offset taxable profits by distributing contributions within the group.

(119) The Authority points out that the complainant seems to have taken issue with what appears to be an application of the general Norwegian rules on corporate taxation. The Authority notes that the complainant has neither alleged, nor submitted any information sustaining that the relevant tax rules are drafted in a manner which could lead to state aid being granted to specific companies.

(120) Moreover, and with more particular regard to the case at hand, it appears to the Authority that the offsetting of taxable income by making a group contribution would not confer an economic advantage on AS Sporveisbussene when it, as a condition of benefitting from the tax deductions, was obliged to make a contribution to the group of the same amount as the tax base reduction obtained in this manner. By transferring income, AS Sporveisbussene may avoid paying taxes on the transferred amount, but the amount will not be at its disposal. Arguably, the benefit of not paying taxes on an income which is no longer disposable does not produce any obvious effects resulting in an economic advantage for that entity (although the situation may be different for the corporate group as a whole).

(121) However, the Authority considers that it is in possession of insufficient facts and information allowing it to assess the application of the Norwegian Tax Act to and by the Oslo Sporveier Group, and to exclude without any doubt that in this case a potential economic advantage may have indirectly been derived by AS Sporveisbussene, or the Oslo Sporveier Group, in a manner incompatible with the state aid rules.

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64 Paragraphs 77 and 82 of the *Altmark* judgment.

65 See also Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 26.

6. Alleged guarantees from AS Sporveisbussene to its subsidiaries

(122) The Authority has asked the Norwegian authorities to clarify whether the subsidiaries of AS Sporveisbussene have benefitted from any guarantees granted by their owner, as alleged by the complainant.

(123) The Norwegian authorities have stated that no guarantees have been granted by AS Sporveisbussene, and that its subsidiaries consequently have not benefitted from any guarantees from AS Sporveisbussene. The Authority is in possession of no information suggesting that this is incorrect.

(124) In light of this, the Authority sees no reason to investigate further this part of the complaint.

7. Conclusion

(125) The Authority preliminarily concludes that the annual compensation disbursed until 2008 and the 2004 capital injection of NOK 111 760 000 in Oslo constitute aid within the meaning of Article 61(1) of the EEA Agreement.

(126) As regards the allegations concerning the taxation of AS Sporveisbussene, the Authority is, as indicated above, unable to exclude without any doubt that a potential economic advantage may have indirectly been derived by AS Sporveisbussene, or the Oslo Sporveier Group, in a manner incompatible with Article 61(1).

The Authority sees no reason to investigate further the alleged guarantees from AS Sporveisbussene to its subsidiaries.

8. Classification of the aid as existing or new

(127) Regarding the allegation of potential cross-subsidisation, it is necessary in this context to firstly determine if the aid in question is to be qualified as existing or new aid. Were the public service compensation existing aid (*i.e.* granted under an existing aid scheme), the Authority could at most request the Norwegian State to bring it in line with the state aid provisions of the EEA Agreement (if the aid was deemed incompatible and the existing aid scheme in question still applicable). If, on the other hand, the aid was considered as new aid, the consequence of its incompatibility would normally be the recovery of the aid.

8.1 Introduction – the Court's Judgment

(128) Article 1(b)(i) of Part II of Protocol 3 provides that "existing aid" shall mean:

> *"all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement."*

(129) The Authority notes that AS Oslo Sporveier, at the time of the entry into force of the EEA Agreement in Norway (1 January 1994), was compensated for carrying out scheduled bus transport in Oslo in accordance with the provisions of the transport legislation and established administrative practice (pre-dating the EEA Agreement), as described in detail above.

(130) In the judgment in Case E-14/10 annulling the Authority's Decision No 254/10/COL, the EFTA Court stated the following on the question of the existing or new nature of the aid:

> *"Whether the aid granted […] constitutes "existing aid" […] depends upon the interpretation of the provisions of Protocol 3 SCA […]*

[…]to qualify as an "existing aid measure" under the EEA State aid rules, it must be part of an aid scheme that was put into effect before the entry into force of the EEA Agreement."[66]

8.2 Aid scheme

(131) Article 1(d) of Part II of Protocol 3 provides that an **aid scheme**:

"shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;"

(132) Article 1(e) of Part II of Protocol 3 provides that **individual aid**:

"shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;"

(133) This distinction is of particular importance in the context of existing aid, as Protocol 3 only provides the Authority with a competence to keep under constant review existing systems of aid (cf. Article 1.1 of Part I of Protocol 3). Likewise, Section V of Part II of Protocol 3 only applies to existing aid schemes (the terms "aid schemes" and "systems of aid" are to be treated as synonyms in the Authority's view[67]).

The Authority recalls that the Norwegian transport legislation in essence sets out the following key parameters that are relevant for the aid measures at hand: (i) a system of co-financing of scheduled bus transport services (from state and county), (ii) that the counties are responsible for administering the scheduled bus transport services, control concessions, routes, schedules and ticket prices, and (iii) a detailed concession system.

(134) Moreover, according to the Norwegian authorities, Article 22 CTA entails that Oslo Municipality is under the obligation to compensate the operators for the provision of the transport service on unprofitable routes (where the revenue generated from the sale of tickets does not cover the cost of operating the service). The Authority understands that the compensation aims to cover the gap between the costs and the revenues (in the form of ticket sales).

(135) Before the entry into force of the EEA Agreement, Oslo Municipality had chosen to provide scheduled bus transport services under the relevant provisions of the CTA and CTR, compensating unprofitable routes in accordance with the administrative practice described above. This continued without interruption until the last directly awarded concession had run its course (on 30 March 2008).

(136) Whether the system in Oslo as outlined above constitutes an aid scheme in accordance with the definition of Article 1(d) of Part II of Protocol 3 depends on whether the legal framework for the financing of scheduled bus transport in Oslo can be considered to be "an act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner".

(137) The Authority notes that this definition was incorporated into the EEA Agreement in 2001 with the insertion of Part II of Protocol 3. Prior to 2001, when Protocol 3 was brought in

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66 Paragraphs 50 – 53.

67 Cf. Sinnaeve/Slot, The new Regulation on State aid Procedures, Common Market Law Review 36/1999, p. 1153, footnote 28.

line with the Procedural Regulation, there was no similarly precise definition in EEA law determining what an aid scheme was. Moreover, the rationale for the concept of existing aid – in principle that of providing EEA States and beneficiaries of state with some legal certainty regarding arrangements that predate the entry into force of state aid control in their legal systems whilst providing the Authority with the possibility of bringing such systems in line with EEA law – must in the Authority's view be borne in mind.

(138) Furthermore the Authority notes that the case-law of the European Courts does not provide detailed guidance as regards the interpretation of this definition. The Authority has thus reviewed its own case practice and that of the European Commission and found that existing "aid schemes" were held to encompass non-statutory customary law[68] and administrative practice related to the application of statutory[69] and non-statutory law[70]. In one case, the European Commission found that an aid scheme relating to *Anstaltslast* and *Gewährträgerhaftung* was based on the combination of an unwritten old legal principle combined with widespread practice across Germany.[71]

(139) Nevertheless the Authority is at this stage in doubt as to whether the three criteria defining an "aid scheme" as provided for in Protocol 3 - (i) an act on the basis of which aid can be awarded, (ii) requiring no further implementing measures and (iii) defining the potential aid beneficiaries in a general and abstract manner - are met.

As for the first criterion, the Authority notes that the CTA and the CTR are acts on the basis of which Oslo Municipality could award aid.

(140) As for the second criterion, the Authority notes that the administration of any aid scheme requires a certain decision-making process which can (but does not have to) lead to individual awards of aid being made. However, an arrangement that would for example require, for individual aid to be awarded, the adoption of further legislative measures, cannot be considered as an aid scheme.

(141) A mere "technical application", as indicated above, of the provisions providing for the scheme would thus not be an implementing measure.[72] Moreover, the mere fact that a decision awarding aid under an aid scheme has implications for the budget of the authority

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68 See the Authority's Decision No 405/08/COL HFF (OJ L 79, 25.3.2010, p. 40), Chapter II.2.3.1, p. 23: "*The State guarantee on all State institutions for all their obligations follows from general unwritten rules of Icelandic public law predating the entry into force of the EEA Agreement. The guarantee is applicable to all State institutions, regardless of when they are established, or of their activities, or changes in those activities. This possible aid measure must be regarded as a scheme falling within the definition in Article 1 (d) in part II of Protocol 3 to the Surveillance and Court Agreement.*"

69 See Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37, 11.2.2004, p. 13).

70 From the Authority's Decision No 491/09/COL Norsk Film group (OJ C 174, 1.7.2010, p. 3), Chapter II.2 p. 8: "*the yearly payments made by the Norwegian State since the 1970s to Norsk FilmStudio AS/Filmparken AS for the production of feature films and to maintain an infrastructure necessary for the production of films were based on an existing system of aid. The Authority considers that in this case, where regular payments were consistently made over a very long period of time, the practice shows that state support was an essential element in the financing of the company. The Authority considers on that basis that the annual grants were made under an existing system of state aid within the meaning of Article 62 EEA.*" In that case, the Authority opened the formal investigation into a payment of NOK 36 million that had been made in addition to the regular payments and an alleged preferential tax measure. With Decision No 204/11/COL (not yet published in the OJ, available online: http://www.eftasurv.int/state-aid/state-aid-register/) the Authority closed the procedure on the basis that the NOK 36 million payment was made on the basis of the existing aid scheme and that the tax measure did not constitute state aid.

71 See Commission Decision in Case E-10/2000 (Germany) *State guarantees for public banks in Germany* (OJ C 150, 22.6. 2002, p. 6).

72 See Commission Decision in Case E 4/2007 (France) *Charges aéroportuaires*, paragraph 56 (OJ C 83, 7.4.2009, p. 16).

administering that scheme, cannot, in the Authority's view, mean that such decisions are to be regarded as implementing measures.

(142) In a similar vein, considering acts of entrustment such as the award of a concession, for which the CTA foresees a duration of 10 years, in the case at hand as an implementing measure would make it *ex ante* impossible to set up an aid scheme for public service compensation under which aid to several undertakings could be awarded, as any entrustment would then entail individual aid. A concession – as any other act of entrustment – specifies one particular undertaking, and could thus not relate to a group of undertakings, "defined in a general and abstract manner".

(143) On the other hand, the Authority is of the view that "implementing measures" should be understood as entailing a certain degree of discretion, that could influence the amount, characteristics or conditions under which the aid is granted to a significant degree. In particular, it would seem that every scheme determines for which clearly defined purpose aid can be awarded. Thus, where a public body for example has general powers allowing it to use different instruments to promote the local economy, and grants several capital injections based on those general powers, this granting of capital injections implies the use of considerable discretion as to the amount, characteristics or conditions and purpose for which the aid is granted, and is hence not to be regarded as an aid scheme.[73]

(144) In the case at hand, it is clear that no further legislative measures needed to be adopted for compensation payments to AS Oslo Sporveier and AS Sporveisbussene to be made. The preliminary opinion of the Authority is that the CTA and CTR arguably ringfenced the discretion of Oslo Municipality, to the extent that they appear to have been applied by the Municipality, in line with its administrative practice, in a way that did not allow for compensation in excess of cost for the public service minus revenue. Moreover, the compensation was not based on discretionary budget allocations. Oslo Municipality, after choosing to maintain the public service, was not free to decide whether to cover the loss of AS Oslo Sporveier and AS Sporveisbussene or not. Oslo Municipality was obliged to do so, and did so, every year until 2008, in line with a routine procedure. It is also evident that the compensation was and could only be granted for the purpose of financing local scheduled bus transport in Oslo. The municipality could not have awarded aid for different purposes on the basis of the provisions described above.

(145) However, the Authority cannot, on the basis of the information provided, conclude that the provisions and practice that set out how providers of scheduled bus services were to be remunerated in Oslo is sufficiently precise and detailed. The Authority has doubts as to the exact extent of the discretion enjoyed by Oslo Municipality, taking into account the administrative practice, in determining the amount of compensation for scheduled bus services.

(146) As for the last criterion, the compensation system in Oslo applies to all concessionaires that have been entrusted with providing bus services on unprofitable routes.

(147) Consequently, in particular given the Authority's doubts as regards the second criterion mentioned above, the Authority cannot at this stage conclude that the financing of AS Oslo Sporveier and AS Sporveisbussene, as described above, constitutes an aid scheme.

(148) However, so as to address issues of law relevant for the final assessment of this case, the Authority sets out its preliminary views below based on the assumption that public service compensation for AS Oslo Sporveier and AS Sporveisbussene has been awarded on the basis of an aid scheme.

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[73] Cf. Commission Decision in Case C 6/2008 (Finland) *Public Commercial Property Åland Industrihus*, (not yet published), paragraphs 107-109 in particular.

8.3 Existing aid due to the entry into force of the EEA Agreement

(149) Article 1(b)(i) of Part II of Protocol 3 provides that existing aid encompasses all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement.

(150) As described above, the provisions providing for the scheme have been in place since before the EEA Agreement entered into force in Norway on 1 January 1994. As it appears that the market for local bus transport was already exposed to some competition on that date, the Authority is of the preliminary view that the scheme became an existing aid scheme on 1 January 1994.

8.4 Aid not granted on the basis of the provisions providing for the scheme

8.4.1 Judgment in Case E-14/10

(151) In the judgment in Case E-14/10, the EFTA Court stated the following on the question of the existing or new nature of the aid:

"(…) what is relevant is whether the aid was granted in accordance with the provisions providing for it.

(…) in so far as the compensation payments were indeed used to finance the operation of non-profitable scheduled bus services, the defendant (the Authority) may correctly have classified those payments as existing aid.

However, (…) any aid granted to Oslo Sporveier in excess of the losses actually incurred in connection with the services in question cannot be regarded to constitute, on the basis of that aid scheme, existing aid (…)"[74]

(152) The Authority understands the judgment of the EFTA Court to mean that only payments made on the basis of the existing aid scheme can be considered as existing aid disbursed under that scheme. Payments not made on the basis of the provisions providing for the scheme cannot be protected by the existing aid nature of that scheme.[75]

Therefore, to determine whether the aid granted is existing or new, the Authority must assess whether it was granted in accordance with the scheme providing for it.

(153) The Authority's preliminary view is that the scheme was based on the CTA, the CTR as applied in Oslo in accordance with the established administrative practice.

(154) The scheme only provided for cost coverage (the difference between cost and revenue) of the unprofitable scheduled bus services that the concessionaires provided. This therefore is the benchmark against which the Authority must assess the extent to which the measures covered by the complaint have been made on the basis of the aid scheme.

(155) In the following, the Authority assesses whether (i) the annual compensation and (ii) the 2004 capital injection were granted on the basis of the provisions providing for the system of compensation.

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74 Paragraphs 73-76.

75 The same logic applies for schemes that have been approved by the Authority or the European Commission. See for example Case C-47/91, *Italy v Commission* [1994] ECR-4635, paragraphs 25-26.

8.4.2 Annual compensation

(156) As set out above, the Authority is at this stage of the view that at least a large part of the compensation that AS Oslo Sporveier and AS Sporveisbussene have received has been awarded in line with the existing aid scheme, which provides in essence for loss coverage for the public service. Such a scheme would appear to presuppose the separation of accounts, an appropriate allocation of common costs and arms-length intra-group transactions for undertakings that in addition to providing public services also engage in commercial activities. Complying with these principles seems necessary to avoid that aid is granted outside the scheme.

(157) According to the Norwegian authorities, market prices were paid for services that were provided between the companies in the Oslo Sporveier Group.

(158) However, aside from indicating that from 2004 onwards, […][76] % of the overall costs were levied from all subsidiaries for general overheads, the Norwegian authorities have not submitted information that would allow the Authority to conclude that the allocation of the common costs was done in accordance with a particular allocation key, or that the payment for the services that the commercial subsidiaries of AS Sporveisbussene received was done on an arms-length basis and on market terms. Furthermore, no explanations have been provided as to the rationale of introducing a general overhead fee in 2004, and if overheads were exclusively born by the public service activities before that.

(159) Thus, the Authority cannot, on the basis of the information provided, conclude that all payments to AS Oslo Sporveier and AS Sporveisbussene were made on the basis of the provisions providing for the aid.

In particular, the Authority has doubts as to whether the commercial activities carried out by the Oslo Sporveier Group (the tour bus activities in particular), were financed by the annual public service compensation in contravention of the provisions providing for the aid. The information provided has not enabled the Authority to conclude that the annual payments were restricted to cover only costs that could be covered in accordance with the legal framework of the scheme – in other words, whether the annual compensation exceeded the difference between the costs and the revenues of the public service.

8.4.3 2004 capital injection

(160) Turning to the 2004 capital injection, already since the mid nineties, it was clear that the pension fund of AS Oslo Sporveier was underfunded. Thus, a payment plan to remedy the fund's shortfall by 2020 was implemented. In accordance with that plan, Oslo Municipality increased the public service compensation to AS Oslo Sporveier in order for the compensation to cover all the costs incurred by the provision of the public service.

(161) In 2004, the remaining shortfall was covered by a capital injection of NOK 111 760 000. Although it was not granted as part of the annual lump sum to AS Sporveisbussene, the payment appears to mainly[77] have been made on the basis of the existing aid scheme, in that it went to cover a cost incurred whilst providing the public service.

(162) As noted above, the CTA and the CTR do not have any particular provisions on how the concessionaire is to be compensated for the public service, in practice, the compensation has simply been awarded annually in the form of lump sums in accordance with the established administrative practice. The EFTA Court has held[78] that when an existing aid scheme does not have any particular provisions on how the aid is to be provided, a

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76 The exact figure is covered by the obligation of professional secrecy. It is in the range of 2% - 7%.

77 See below on the approximate amount of NOK 430 300 that went to cover non-PSO pension costs.

78 Paragraph 87 of the Judgment of the EFTA Court.

divergence from the usual procedure cannot in and of itself, lead to the finding that the aid was not granted on the basis of that scheme. The fact that the 2004 capital injection was not made in accordance with the normal annual block grant procedure cannot in and of itself entail that it was not made on the basis of the scheme.

(163) As described above, Oslo Muncipality had since the mid-1990s increased the annual public service compensation payments to cover a historic shortfall in the pension fund of the Oslo Sporveier Group by 2020. These pension costs were predominantly[79] linked to the public service which Oslo Municipality was obliged to cover in accordance with their obligation to cover the cost of the public service. Instead of continuing with the annual payments until 2020, it was decided that the 2004 capital injection should cover the remaining share of the underfunding, thus eliminating the need for further annual payments to cover the historic underfunding.

(164) On this basis, the Authority is of the preliminary opinion that the 2004 capital injection was largely carried out in accordance with the provisions providing for the aid.

(165) However, the Norwegian authorities have informed the Authority that the capital injection was not restricted to cover the cost of the pensions related to the public service. The Norwegian authorities have explained that the capital injection also covered pension obligations related to employees engaged in commercial tour bus services and have calculated the amount of this compensation to be approximately NOK 430 300.

(166) As this portion of the compensation does not appear to have been disbursed on the basis of the provisions providing for the aid, it appears that it cannot be held to be covered by the existing aid scheme. Thus, the preliminary opinion of the Authority is that it represents new aid.

8.5 Alterations to existing aid

(167) According to Article 1(b)(i) of Part II of Protocol 3, a measure that existed prior to the entry into force of the EEA Agreement and was still in force afterwards is existing aid.

(168) Further, Article 1(c) of Part II of Protocol 3 provides that "new aid" is:

> *"all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;"*

(169) In *Namur*, the Court of Justice stated the following:

> *"[…] the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amounts in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it."* [80]

(170) As set out in the factual description of the case above, there are a number of events that could potentially be considered as altering the scheme and turning it into new aid.

8.5.1 1997 internal reorganization

(171) In 1997, an internal reorganization led the newly established entity AS Sporveisbussene to take over the responsibility of carrying out the scheduled bus transport services previously provided by AS Oslo Sporveier.

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79 See below on the approximate amount of NOK 430 300 that went to cover non-PSO pension costs.

80 Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28.

(172) Purely formal or administrative changes to an aid scheme do not lead to the reclassification of existing aid as new.[81] The question is whether this reorganization brought with it a change to the existing aid scheme involving new aid.

(173) The Norwegian authorities have explained that, in essence, the change from AS Oslo Sporveier to AS Sporveisbussene as the provider of the service was a change of a formal nature. By establishing AS Sporveisbussene, AS Oslo Sporveier created a subsidiary for operating public bus services that it formerly ran itself. AS Oslo Sporveier – in its position as the mother company – remained, however, the primary recipient of the compensation and holder of the concession, and simply underwent an internal re-organisation that led to AS Sporveisbussene being in charge of providing the services in accordance with the concession. For this it received compensation from its mother company. The reorganization did necessitate the conclusion of the Transport Agreement, which however, as the Norwegian authorities have explained, did not substantially change the established administrative practice relating to the financing of the public service. Additionally, the reorganization did not involve any changes to the CTA or CTR.

(174) On this basis, the reorganization of 1997 cannot be held to have involved a substantive change to the aid scheme.[82] Consequently, the scheme remained in the Authority's preliminary view an existing aid scheme after the reorganization.

8.5.2 Renewal of concession

(175) With reference to the description of the scheme above, the Authority notes that it does not consider the concession to form part of the provisions providing for the existing aid scheme. The concession, granted for a duration of 10 years pursuant to the CTA, appears to be an act of entrustment. The entrustment in essence determines the route(s) for which the concessionaire has a right and obligation to provide a scheduled service. The Authority considers that an existing aid scheme will not be altered by the grant or renewal of an act of entrustment under that scheme.

(176) In any event, other than the temporal prolongation, no changes were made to the renewed concession. AS Sporveisbussene simply continued, on the same terms, to carry out the public service on behalf of AS Oslo Sporveier on the basis of the concession.

(177) Therefore, the Authority does not consider the renewal of the concession as an alteration to the existing aid scheme.

8.5.3 Introduction of a quality bonus/malus system

(178) AS Oslo Sporveier introduced a new bonus/malus system some time before 2004. The Authority has not received exact information on when this system was introduced. Nor has the Authority received information on how the system was implemented in the contractual relationship between AS Oslo Sporveier and AS Sporveisbussene. Thus, further information is necessary for the Authority to fully assess the nature of the quality bonus and its relationship to the existing aid scheme.

(179) The Authority is at this stage of the opinion that the quality bonus that AS Sporveisbussene received in 2004 pursuant to the bonus/malus system could either form part of the compensation for the public service, possibly constituting part of the reasonable

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[81] See Article 4(1) of the Implementing Provisions Decision. See also the opinion of Advocate General Lenz in *Namur* (cited above).

[82] This is supported by the conclusions drawn by the European Commission in similar cases, see the Commission Decisions in Case NN 73/2008 (Hungary) *Sharing of loans between MÁV Zrt. and MÁV-TRAKCIÓ Zrt.* (OJ C 109 13.5.2009 p. 5), at paragraphs 59-60 and Case E 14/2005 (Portugal) *Compensation payments to public service broadcaster RTP* (not published in the OJ) at paragraphs 78-80.

profit that the company appears to have been entitled to, or a change to the existing aid scheme. If so, this measure could constitute new aid.[83]

8.6 Period subsequent to 30 March 2008

(180) In the early 2000s, Oslo Municipality decided to tender all public service contracts for scheduled bus transport in the Oslo region. By 30 March 2008, this process was brought to an end, thus AS Oslo Sporveier's concession was without object, and all services were provided on the basis of tendered contracts.

(181) Therefore, from 30 March 2008 onwards, the new concessionaires have been remunerated on the basis of the tendered contracts, and not in accordance with the system described above under which aid had been granted to AS Oslo Sporveier and AS Sporveisbussene before.

9. Compatibility of the aid

(182) As set out above, the Authority is of the preliminary view that a substantial part of the aid to AS Oslo Sporveier (in the form of annual compensation and the 2004 capital injection) was granted under an existing aid scheme. The Authority has furthermore come to the preliminary conclusion that the bonus/malus system introduced some time before 2004 may represent new aid. Moreover, the Authority has preliminarily concluded that some of the aid was potentially granted outside the aforementioned scheme and thus constitutes new aid.

(183) The Authority notes that the Norwegian authorities have not submitted any arguments relating to the compatibility of either the new or existing aid described above. In the absence of such information and, in particular, without a detailed account of which costs formed the basis for the annual payment negotiations and the methodology and justification for the allocation of common cost, the Authority cannot take a final view on this matter.

(184) However, it would appear to the Authority that the compensation payments for the public service, or at least parts thereof, and the capital injection to offset the underfunding of the pension fund, or at least parts thereof, could be compatible public service compensation under Article 49 EEA. This provision cannot be applied directly[84] but only by virtue of Council Regulations, i.e. Regulations 1191/69[85] or Regulation 1370/2007[86]. An essential element in the assessment under both regulations is to verify that aid in the form of public service compensation only covers the cost of the public service (including a reasonable profit) and does not lead to overcompensation.

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[83] Only changes affecting the substance of an existing scheme can transform that existing aid to new aid. Changes severable from the existing aid will not affect the substance of that existing aid (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission*, [2002] ECR II-2309, para. 111).

[84] See *Altmark* (cited above), at paragraph 107.

[85] Regulation 1191/1969 on public service in transport by rail, road and inland waterway, (OJ L 156, 8.6.1969 p.8), incorporated in the EEA Agreement by means of Annex XIII to the EEA Agreement.

[86] Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315 03.12.2007 p. 1), incorporated in the EEA Agreement by means of Annex XIII to the EEA Agreement. Regulation 1370/2007 entered into force in Norway on 1 January 2011, see Regulation of 17.12.2010 No 1673.

(185) Moreover, it also cannot be excluded at this stage that the aid measures under assessment, in particular the capital injection to remedy the underfunded pension fund, could be compatible under Article 61(3)(c) of the EEA Agreement.

(186) Should any new aid have been granted that benefitted the commercial activities of the Oslo Sporveier Group, the Authority does not at this stage envisage any provision in EEA state aid law that could form the basis for deeming such aid compatible. As the Authority expresses solely a preliminary view however, the Norwegian authorities are invited to submit arguments and information regarding the compatibility of all state aid that was granted to the Oslo Sporveier Group, including (potential) aid to the commercial activities.

10. Conclusion

(187) Based on the information submitted by the complainant and the Norwegian authorities, the Authority has come to the conclusion that the complainant's allegations that guarantees provided by AS Sporveisbussene may involve unlawful state aid are unfounded.

(188) However the Authority preliminarily considers that the three additional measures referred to by the complainant - namely (i) the annual compensation payments for scheduled bus services, (ii) the 2004 capital injection, and (iii) an alleged a favourable tax position benefiting AS Sporveisbussene – may entail state aid in the meaning of Article 61(1) of the EEA Agreement. As regards the second measure, the Authority has doubts whether (parts of) it might indeed have been granted in line with the market economy investor principle.

(189) As established above, the Authority moreover is at this stage of the view that most of the state aid appears to have been granted on the basis of an existing aid scheme which entitled concessionaires that provided public scheduled bus services in Oslo to a compensation which would cover the difference between ticket revenue and cost for discharging the public service. However, the Authority has doubts as to the precise delineation of that scheme, *i.e.* how exactly the costs, that formed the basis for the annual negotiations on the compensation payment, were calculated, and which costs were exactly taken into account. Given that the beneficiary is also engaged in commercial activities, the Authority doubts at this stage if indeed costs that should have been borne by those commercial activities were taken into account in the process of calculating the annual compensation.

(190) Furthermore, and in line with the judgment of the EFTA Court, the Authority is of the view that any aid not granted in line with the scheme would have to be qualified as new aid. It preliminarily considers that the 2004 capital injection also covered underfunded pension funds of employees of the commercial activities of the beneficiary. Moreover, it doubts whether the quality bonus described above has been granted on the basis of the scheme, or whether it is a severable amendment to the scheme involving new aid.

(191) Finally, if any new aid not in line with the scheme has been granted, the Authority has doubts as to whether such aid would be compatible with the EEA Agreement, in particular Articles 49 and 61(3)(c) thereof.

(192) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute aid, are existing aid or new aid compatible with the functioning of the EEA Agreement.

(193) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit

their comments, as well as all documents, information and data needed to address the doubts of the Authority outlined above, as well as all relevant information that will enable the Authority in consolidating its preliminary views expressed in this decision. In particular, it invites the Norwegian authorities to comment, within one month of the date of receipt of this Decision, on:

a) the compliance of the commercial activities capital injection with the market economy investor principle;
b) the description of the potential existing aid scheme in this decision;
c) the costs that were taken into account for the calculation of the annual compensation, and whether it can be excluded that costs of the commercial activities were taken into account for this purpose;
d) the distribution of common costs between the various activities and subsidiaries, and the methodology for the pricing of services provided by the public service activities to the commercial activities;
e) a detailed description of the rules on group taxation, and their application to and by the Oslo Sporveier group;
f) the nature and potential compatibility of the amounts paid under the bonus/malus system;
g) how, should any of the above measures entail new aid, they could be considered compatible with the EEA Agreement.

(194) The Authority requests the Norwegian authorities to immediately forward a copy of this decision to the potential recipients of the aid.

(195) The Authority must remind the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted to the beneficiaries will have to be recovered, unless, exceptionally, such recovery would be contrary to a general principle of EEA law.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers the allegation that guarantees provided by AS Sporveisbussene to its subsidiaries may involve unlawful state aid are without object.

Article 2

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the compensation for scheduled bus services in Oslo paid to AS Oslo Sporveier and AS Sporveisbussene during the period 1 January 1994 – 30 March 2008, the capital injection paid by Oslo Municipality on 1 June 2004, and the application of the group taxation rules to and by the Oslo Sporveier Group.

Article 3

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Norwegian authorities are requested to provide within one month from notification of this decision, all documents, information and data needed for assessment of the nature and compatibility of the aid measures.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 28 March 2012.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member