

Case No: 70506  
Event No: 674734 (formerly 639551)  
Dec. No: 181/13/COL

**[non confidential version]\***

**EFTA SURVEILLANCE AUTHORITY DECISION  
of 8 May 2013**

on alleged aid to Kollektivtransportproduksjon AS (“KTP”), Oslo Vognselskap AS and  
Unibuss AS

(Norway)

The EFTA Surveillance Authority (“the Authority”)

Having regard to:

The Agreement on the European Economic Area (“the EEA Agreement”), in particular to  
Articles 61 to 63 and Protocol 26 thereof,

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,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article  
1(1) of Part I and Articles 4(2) and 13(1) of Part II,

Whereas:

## **I. FACTS**

### **1. Procedure**

- (1) By letter dated 8 September 2011 (Event No 608512), the Authority received a complaint (“the complaint”) against aid allegedly awarded to the companies that are now incorporated under the names Kollektivtransportproduksjon AS (“KTP”)<sup>1</sup> and Unibuss AS.<sup>2</sup> The Authority received and registered the complaint on 12 September 2011.
- (2) By letters dated 28 October 2011 (Event No 613296) and 16 November 2011 (Events No 615369, 615397, 615674-615677), the Authority forwarded the complaint to the Norwegian authorities and requested additional information. By letter dated 16 December

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\* In this non confidential version of the decision, information covered by the obligation of professional secrecy has been taken out. Where information has been taken out, this is marked with [...]. Where figures have been excluded, a range within which the figure exists, has, where appropriate, been indicated.

<sup>1</sup> On 30 April 2013, it was decided that KTP would change its name to Sporveien Oslo AS. On 7.5.2013, the name change was registered in the Norwegian Register of Business Enterprises (*Brønnøysundregistrene*). For the purposes of the present decision, the Authority will refer to the company by the shorthand “KTP”.

<sup>2</sup> For an explanation of the alleged aid to Oslo Vognselskap AS, see paragraph (7).

2011 (Events No 618867 and 625694), the Norwegian authorities provided additional information.

- (3) By letter dated 19 October 2012 (Event No 649160), the Authority requested additional information. By letter dated 26 November 2012 (Events No 654671-654677), the Norwegian authorities provided additional information.
- (4) The measures covered by the complaint in the case at hand to a large extent relate to the public financing of local scheduled metro and tram transport in Oslo. On 19 December 2012, the Authority closed its formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene.<sup>3</sup> As local scheduled metro and tram transport in Oslo is financed according to the same principles as local scheduled bus transport, it was, in the view of the Authority, necessary to conclude on the question of whether an existing aid scheme existed, before assessing the state aid nature of the measures covered by the complaint in the case at hand.
- (5) By letter dated 26 March 2013 (Event No 666828), the Authority requested further information. The Norwegian authorities responded by letter dated 8 April 2013 (Events No 668593 and 668594).

## 2. The complaint

- (6) The complaint alleges that the companies now incorporated under the names KTP and Unibuss AS have benefitted from a variety of measures that constitute state aid. Distinguishing between the periods before and after the full liberalisation of the scheduled bus market in Oslo by 30 March 2008, the complainant submits that the aid granted after the liberalisation must be subject to recovery as it is unlawful and incompatible. For aid granted before the liberalisation, at least all aid exceeding the relevant costs of the public service must be regarded as unlawful, incompatible and recoverable.
- (7) The complaint covers the following three categories of measures both before and after the liberalisation:
  - i. Guarantees provided free of charge by Oslo Municipality covering various debts and liabilities of KTP. Relating to the scope of the complaint in the context of the guarantees, the Authority notes that a municipal guarantee obligation, that previously applied to KTP's predecessor AS Oslo Sporveier, now applies to the company Oslo Vognselskap AS, which is a sister company of KTP. The Authority will also consider that guarantee obligation as covered by the complaint.
  - ii. Loans from Oslo Municipality which the complaint considers that KTP, given its poor financial position, would not have been able to secure on the credit market, at least not on equal terms.
  - iii. Overcompensation and cross-subsidies that the complaint alleges was involved in so-called "bus for metro" and "bus for tram" contracts directly awarded by KTP's metro and tram subsidiaries to KTP's bus subsidiary, Unibuss AS.

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<sup>3</sup> Authority Decision No 519/12/COL of 19.12.2012 *closing the formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene* ("Decision No 519/12/COL"), not yet published but available free of charge on the Authority's website: <http://www.eftasurv.int/state-aid/state-aid-register/norway/nr/1598>.

- (8) Additionally, the complaint refers to state aid allegedly involved in the transfer of an electronic payment and ticketing system, the so-called NBB<sup>4</sup> in 2009, from KTP to Ruter AS (“Ruter”). The complainant alleges that KTP significantly overstated the market value of the system and that the transfer therefore involved state aid from Ruter to KTP.

### 3. Public transport in Oslo

- (9) In Norway, the responsibility for providing local scheduled transport services is conferred on the counties. Oslo Municipality is a county as well as a municipality. For ease of reference, it is referred to as Oslo Municipality in the following.
- (10) The following table contains a timeline from 1 January 1994 until today that provides an overview of the different companies that have been involved in the provision of local scheduled transport services in Oslo and their responsibilities.

Responsibility	1.1.1994	1.1.1997	2003	1.7.2006 - 1.1.2007	1.1.2008	1.1.2009
<b>Administrative</b>	AS Oslo Sporveier			New AS Oslo Sporveier	Ruter AS	
<b>Operations</b>	AS Oslo Sporveier			KTP AS		
<b>Owner rolling stock</b>	AS Oslo Sporveier			Oslo Vognselskap AS		
<b>Metro</b>	AS Oslo Sporveier		Oslo T-banedrift AS			
<b>Tram</b>	AS Oslo Sporveier		Oslo Sporvognsdrift AS		Oslotrikken AS	
<b>Bus</b>	AS Oslo Sporveier	AS Sporveisbussene <sup>5</sup>			Unibuss AS <sup>6</sup>	

- (11) Before 1994, all public transport administration in Oslo was carried out by AS Oslo Sporveier, as Oslo Municipality had delegated to that company the task of planning and administering public transport in its territory. At the same time, AS Oslo Sporveier operated in-house divisions providing bus, metro and tram services<sup>7</sup> in Oslo. Separate accounts were kept for each division.
- (12) Since 1994 until today, AS Oslo Sporveier (and later, its subsidiaries) have also operated tour bus services outside its public service remit.<sup>8</sup>
- (13) From 1994 to 2002, Oslo Municipality owned 98.8% of the shares in AS Oslo Sporveier. In 2002, it acquired the remaining shares in the company and thus became the sole owner of AS Oslo Sporveier.
- (14) 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

<sup>4</sup> NBB is an acronym for: *Nytt billett- og betalingsystem*. In English: “New ticketing and payment system” (translation by the Authority).

<sup>5</sup> See Decision No 519/12/COL, cited above, at paragraph 52.

<sup>6</sup> See Decision No 519/12/COL, cited above, at paragraphs 60-61.

<sup>7</sup> Including the development and maintenance of metro and tram infrastructure.

<sup>8</sup> See Decision No 519/12/COL, cited above, at paragraphs 51-52 and 57-61.

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.

- (15) In contrast, metro and tram services have not been tendered out.
- (16) In 2003, the metro and tram divisions were separated from AS Oslo Sporveier, and organised as its subsidiaries: Oslo T-banedrift AS (metro) and Oslotrikken AS (tram).<sup>9</sup>
- (17) Oslo Sporveier AS retained the administrative responsibility for the provision of metro and tram transport in Oslo. In that capacity it entered into framework agreements with Oslo T-banedrift AS for metro transport and metro infrastructure development and maintenance and Oslotrikken AS for tram transport and tram infrastructure development and maintenance.<sup>10</sup> In this decision these services are referred to simply as “metro and tram services”.
- (18) From 1 July 2006 to 1 January 2007, the administration of 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 name to Kollektivtransportproduksjon AS (“KTP”). The administrative functions of the former AS Oslo Sporveier were transferred to the new AS Oslo Sporveier. On 1 January 2008, the new AS Oslo Sporveier merged with the company responsible for managing local scheduled transport in the neighbouring county of Akershus, Stor-Oslo Lokaltrafikk AS. The new company was named Ruter. From then on, Ruter has administered the local scheduled transport in Oslo and Akershus County. It is owned by Oslo Municipality (60%) and Akershus County (40%). In this Decision, unless otherwise specified or evident from the context, KTP is used to refer to both KTP and its predecessor AS Oslo Sporveier (as the company responsible for the operation of local scheduled transport, first directly and later indirectly through subsidiaries that were gradually established), and Ruter is used to refer to Ruter as well as its predecessors, the new as well as the former company by the name of AS Oslo Sporveier (as the administrative division).
- (19) As part of the 2006 reorganisation process the company Oslo Vognselskap AS was separated from KTP on 1 January 2007. The company took over the ownership of metro and tram rolling stock. Like KTP, Oslo Vognselskap AS is directly and wholly owned by Oslo Municipality. Oslo Vognselskap AS acquires and owns metro and tram rolling stock and leases it to Ruter, which in turn makes the rolling stock available to Oslo T-banedrift AS and Oslotrikken AS for the provision of metro and tram transport. Oslo Vognselskap AS does not provide services outside the group.

#### **4. Financing of metro and tram services in Oslo**

- (20) The complaint refers to alleged cross-subsidies in Oslo between the publicly financed metro and tram services and bus services provided by KTP and its subsidiaries.
- (21) The following provides an overview of the relevant legal framework including the administrative practice relating to the organisation of metro and tram services in Oslo since the entry into force of the EEA Agreement in Norway on 1 January 1994.

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<sup>9</sup> From 2003 to 2009 Oslotrikken AS went by the name Oslo Sporvognsdrift AS. In this Decision, unless otherwise specified or evident from the context, Oslo Sporvognsdrift AS and Oslotrikken AS are collectively referred to by the name of the latter.

<sup>10</sup> The framework were complemented by annexes (renewed on an annual basis) specifying the public service obligation in detail, in terms of the obligation of the parties, the level of service, the route schedule and the principles for the calculation of the compensation.

- (22) Since 1 July 1993, transport by metro and tram in Norway has been regulated by the Railway Act.<sup>11</sup> According to that act, an authorisation is needed in order to operate metro and tram services.<sup>12</sup> Schedules and tariffs for routes financed by public service compensation, are subject to the control of the counties.<sup>13</sup>
- (23) The Railway Act does not otherwise regulate the financing of metro and tram services as public services. In practice,<sup>14</sup> public metro and tram services have since before 1994 been compensated in accordance with the procedure for compensation of local scheduled bus transport services that are, at present, laid down in the Commercial Transport Act of 2002 (the “CTA”)<sup>15</sup> and the Commercial Transport Regulation of 2003 (the “CTR”).<sup>16</sup> The CTA repealed and replaced the Transport Act of 1976.<sup>17</sup> The CTR repealed and replaced two regulations.<sup>18</sup> The Norwegian authorities have confirmed that the relevant provisions have not been significantly altered since the entry into force of the EEA Agreement in 1994.
- (24) With respect to the provisions on the financing of public transport services, the analogous application of the CTA and in particular its Article 22, entails that the counties are responsible for compensating the operators of metro and tram services. Compensation is only 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). 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 it wishes to establish or maintain within its region.<sup>19</sup> The counties are free to determine the manner in which the concessionaires are to be compensated; the CTA and the CTR do not have any particular provisions on how the compensation is to be provided. The Authority understands that Article 22 CTA is read as allowing for compensation to cover the cost of the public service (including a reasonable profit) minus the ticket revenues, and that compensation beyond that could not be based on the CTA.
- (25) Furthermore, the Norwegian authorities have explained that the financing of metro and tram has been carried out in accordance with the administrative procedures for the

<sup>11</sup> Act of 11.6.1993 No 100 (e.i.f. 1.7.1993).

<sup>12</sup> Article 6 of the Railway Act.

<sup>13</sup> Article 7(2) of the Railway Act.

<sup>14</sup> The Norwegian authorities have explained that, historically, there have not been many tram systems in operation in Norway. In addition to the tram in Oslo, there is a tram system in operation in Bergen and in Trondheim. Oslo is the only municipality with a metro system.

<sup>15</sup> Act of 21.6.2002 No 45 (e.i.f. 1.1.2003).

<sup>16</sup> Regulation of 26.3.2003 No 401 (e.i.f. 1.4.2003).

<sup>17</sup> Act of 4.6.1976 No 63 (e.i.f. 1.7.1977). Repealed and replaced by the CTA on 1.1.2003.

<sup>18</sup> 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.

<sup>19</sup> The Norwegian authorities, in their comments to the opening decision, have confirmed this and explained, with reference to legal literature (*Norsk Lovkommentar*), that the preceding provision – Article 24a of the Transport Act of 1976 – was interpreted in the same way. In that regard, *Norsk Lovkommentar* to the Transport Act of 1976 (available on <http://www.rettsdata.no/> (access requires a paid subscription)) on the issue of compensation states the following in note 43 (in Norwegian): “*I rutetrasporten vil det dog ofte være aktuelt å pålegge utøver en større rutetjeneste som sammenholdt med de takster som godkjennes, ikke gir et forsvarlig økonomisk grunnlag. I slike tilfeller kan plikten bare opprettholdes dersom det ytes tilskudd, jf. § 24 a*”. Translation by the Authority: “For scheduled transport it will, however, frequently be appropriate to require the transport operator to provide a more comprehensive service that, in light of the set maximum prices, would not be of sound financial interest. Under such circumstances, the public service obligation can only be maintained against compensation, cf. Article 24a.”

financing of local scheduled bus services in Oslo, which the Authority recently examined in its Decision No 519/12/COL.<sup>20</sup>

- (26) In Oslo, there is a common payment and ticketing system applying to all operators of local scheduled transport services. The payment and ticketing system is the responsibility of Ruter.<sup>21</sup> The ticket prices are subject to the control of Oslo Municipality. The operators of local scheduled transport must deploy the ticketing system as approved by Oslo Municipality.<sup>22</sup> The Norwegian authorities have explained that as long as Oslo Municipality wishes to establish or maintain public service obligations for the provision of local scheduled transport services, the municipality is under the obligation to finance the payment and ticketing system it requires the transport providers to use.
- (27) The metro and tram operator is allowed to keep the ticket income generated by the operation of the scheduled metro and tram transport. The metro and tram operator is eligible to receive public service compensation from Oslo Municipality for costs not covered by the ticket income.
- (28) In Oslo, since the 1980s, the compensation for metro and tram services has been determined in accordance with the procedure described in the following. In essence, a lump sum that covers the difference between the estimated costs of operating the public service in question and the income from sale of tickets is determined by Oslo Municipality and the service provider. This is 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 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.

<sup>20</sup> See Decision No 519/12/COL, cited above, at paragraphs 63 – 70.

<sup>21</sup> Prior to the establishment of Ruter, it was the responsibility of the new AS Oslo Sporveier and before that again, the administrative part of AS Oslo Sporveier, see table in paragraph (10).

<sup>22</sup> Article 30(1) CTR.

October/November	The City Government proposes a revised budget.
December	The budget is approved by the City Council.

- (29) Based on the budget proposals (and possible amendments during the budget discussions in the City Council), the compensation is granted by budget decisions within certain assumptions 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 contain certain goals with respect to, inter alia, the volume of produced transportation services and costs per travel.
- (30) The assessment of the amount of compensation is 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 affect the costs.
- (31) Separate accounts have been kept for each company and each division. This entails that separate accounts have been kept for the different public services and other non-publicly financed activities (i.e. the tour bus services).
- (32) Under the framework agreements for metro and tram services, the calculation of the compensation has been carried out on an annual basis in accordance with the principles described above.
- (33) The Norwegian authorities have provided turnover and profit figures for Oslo T-banedrift AS and Oslotrikken AS for the years 1994-2009. Over that period, the accumulated results of both companies were negative. In the individual years where the companies have turned a profit, it has generally been less than 1% and never more than 5.8% (before tax).

## 5. Guarantees

- (34) The Norwegian authorities have explained that in January 1993, Oslo Municipality started providing municipal guarantees to cover the obligations of the companies it owned.<sup>23</sup> At that time, under the Local Government Act<sup>24</sup> and the Regulation on municipal and county municipal guarantees,<sup>25</sup> municipal guarantees could only<sup>26</sup> be issued if they would not be connected to "commercial activities" within the meaning of the Norwegian legislation (see paragraph (39) below).

<sup>23</sup> Up until then, the municipality had contracted loans on behalf of the entities owned by the municipality. With the entry into force of the Local Government Act, this practice was no longer allowed. After an amendment to the Local Government Act by Act of 7.7.2000 no 71 (e.i.f. 1.1.2001), the practice of contracting loans on behalf of its entities was again allowed. According to Article 50(6) of the Local Government Act, the municipalities can contract loans on the behalf of others when the other entity "is not engaged in economic activities and the funds are not to be used for investments" (translation by the Authority), in Norwegian: "*Kommuner og fylkeskommuner kan ta opp lån for videre utlån. Det kan også tas opp lån til forskuttering når det er gjort avtale om full refusjon. Vilkåret er at mottakere ikke driver næringsvirksomhet og at midlene skal nyttes til investeringer*".

<sup>24</sup> Act of 25.9.1992 No 107.

<sup>25</sup> Regulation of 9.2.1993 No 4046.

<sup>26</sup> Initially, a public (municipal) interest was also required, see City Council Decision of 29.9.1993 in Case 755 as amended by the City Council Decision of 19.11.1993 in Case 722. In the latter Decision, public transport was explicitly held to be of such an interest. From 1.3.2001, with the entry into force of the new Regulation on municipal and county municipal guarantees of 2.2.2001 No 144, repealing and replacing the Regulation of 9.2.1993 No 4046, a public (municipal) interest was no longer required.

- (35) In Oslo, the City Council grants guarantees. They are subject to the approval of the County Governor.<sup>27</sup> Each decision to issue a guarantee has been based on a risk assessment, examining the company's liquidity, debt ratio and assets. Each loan covered by a municipal guarantee is subject to the approval of the Finance Department of Oslo Municipality. In that process the Finance Department will check the compliance with the decisions of the City Council.
- (36) Up until 2003, the City Council provided guarantees for public transport purposes within the remits of the relevant legislation and on the basis of the principles set out in its Decisions. The guarantees were all issued free of charge.
- (37) No new guarantees have been granted since 2004.
- (38) Since 2001, all relevant municipal guarantees have been limited to cover loans related to investments in metro and tram infrastructure and rolling stock (the "metro and tram guarantees"). These guarantees have covered the debts of KTP (infrastructure) and of Oslo Vognselskap AS (rolling stock), after it was separated from KTP. By mid-2012, debt amounting to NOK 310 million was covered by the metro and tram guarantees. In addition, one guarantee has covered a loan related to investments in NBB (the "NBB Guarantee"). This guarantee was granted to cover KTP's debt related to NBB in 2003 and ceased in 2009, when NBB was transferred from KTP to Ruter.
- (39) The investments in infrastructure and rolling stock and in NBB are not considered to be "commercial activities" within the meaning of the regulatory framework on municipal guarantees. The Norwegian authorities have clarified that the criteria "commercial activities" (in Norwegian: "*næringsvirksomhet*") is a concept of national law, and is not parallel to the EEA concept of "economic activities" carried out by an "undertaking". The provision of metro and tram infrastructure and rolling stock and NBB is not regarded as commercial activities within the meaning of the Norwegian legislation.
- (40) The loans covered by the guarantees have not exceeded the costs of the investments (in infrastructure and rolling stock or NBB).
- (41) All the relevant guarantees are deficiency guarantees that cover the principle amount of the loans plus up to 20% in the event that their terms are breached. The guarantees only cover loans of up to 20 years tenor where at least 5% of the principal is paid back annually.

## 6. Loans

### 6.1 "Forwarding" of infrastructure loans

- (42) The Norwegian authorities have explained that Oslo Municipality obtains loans on the capital markets to finance infrastructure developments ("infrastructure loans"). These loans have been obtained to finance the activities of KTP, the borrowed capital has therefore been lent from Oslo Municipality to KTP on the exact same terms as obtained by Oslo Municipality. In the following, this practice is referred to as "forwarding of loans". The forwarding of loans is a means to finance the metro and tram transport services in accordance with the municipality's general obligation to finance local schedule transport in its territory. As noted above, according to Article 50(6) of the Local Government Act,

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<sup>27</sup> In Norwegian: *Fylkesmannen*.

the municipalities can contract loans on the behalf of others when the other entity “is not engaged in commercial activities and the funds are to be used for investments”.<sup>28</sup>

- (43) In line with this, Oslo City Council, having obtained the financing on the capital markets, decided on 17 June 2009 to grant KTP a long term loan of NOK 177 million for the financing of metro infrastructure to Holmenkollen in Oslo. On 29 March 2012, Oslo City Council also decided to grant KTP a loan of NOK 250 million to build a metro rolling stock base and parking facilities.

## 6.2 Short term liquidity loans

- (44) The Norwegian authorities have explained that Oslo Municipality from 2002 until 2009, granted KTP a total of 15 short term liquidity loans (“the 15 short term liquidity loans”).
- (45) The interest rate was set at NIBOR (Norwegian Inter Bank Offered Rate) plus [60-90] bps. NIBOR is provided at 1, 2, 3, 6, 9 and 12 month rates (as well as 1 and 2 week rates). For loans 1-7, 9-10 and 13-15, Oslo Municipality applied the NIBOR rate closest to the duration of the loan period for the individual loan. For loans 8 and 12 which had a non-standard tenor, that was close to the 6 month NIBOR (for loan 8 – 5 months, and loan 12 – 7 months), the 6 month NIBOR was applied. For loan 11, which had a duration of 7.5 months, and thus equally close to the 6 and 9 month NIBOR rate, Oslo Municipality used a weighted average (50/50) of those rates. In the following, this practice is referred to as “the closest relevant NIBOR”.
- (46) The loans were not collateralised. The loans (with interest) were repaid in accordance with the agreed terms. The short term liquidity loans functioned as a form of revolving credit. Thus, the loans were not necessarily repaid in full at the end of the loan period, but simply revolved into a new credit period. The following table provides an overview of the loans:

Loan No	Principal (in NOK million)	Date of grant	Loan period	Duration (in months)	NIBOR	Margin [in bps]	Interest rate
1	200	11.12.2002	1.1.2003 – 30.6.2003	6	6.05%	[60-90]	[...]
2	50	11.12.2002	1.1.2003 – 30.6.2003	6	6.30%	[60-90]	[...]
3	200	22.6.2003	1.7.2003 – 30.12.2003	6	3.46%	[60-90]	[...]
4	100	17.12.2003	1.1.2004 – 30.6.2004	6	2.33%	[60-90]	[...]
5	200	14.6.2004	1.7.2004 – 31.12.2004	6	2.34%	[60-90]	[...]
6	100	21.12.2004	1.1.2005 – 30.6.2005	6	2.03%	[60-90]	[...]

<sup>28</sup> Translation by the Authority, in Norwegian: “Kommuner og fylkeskommuner kan ta opp lån for videre utlån. Det kan også tas opp lån til forskuttering når det er gjort avtale om full refusjon. Vilåret er at mottakere ikke driver næringsvirksomhet og at midlene skal nyttes til investeringer”.

7	75	23.6.2005	1.7.2005 – 31.12.2005	6	2.24%	[60-90]	[...]
8	75	19.12.2005	1.1.2006 – 31.5.2006	5	2.69%	[60-90]	[...]
9	100	31.8.2007	1.9.2007 – 3.3.2008	6	5.48%	[60-90]	[...]
10	100	21.12.2007	1.1.2008 – 2.10.2008	9	5.91%	[60-90]	[...]
11	100	12.2.2008	18.2.2008 – 2.10.2008	7.5	6.00%	[60-90]	[...]
12	100	13.2.2008	4.3.2008 – 2.10.2008	7	6.03%	[60-90]	[...]
13	300	25.9.2008	2.10.2008 – 2.4.2009	6	7.81%	[60-90]	[...]
14	300	24.3.2009	2.4.2009 – 2.10.2009	6	2.77%	[60-90]	[...]
15	300	22.9.2009	2.10.2009 – 2.11.2009	1	1.58%	[60-90]	[...]

- (47) The Norwegian authorities state that although KTP has not been rated by a credit agency nor under a national rating system, in discussions with the bank Nordea Bank ASA (“Nordea”), the credit worthiness of the company was held to be comparable to a rating of [...] as of 2011 (on a standalone basis it would be given a [...] rating, taking into account the public ownership, the rating would be [...]). When granting the 15 short term liquidity loans to KTP, the department of finance of Oslo Municipality has used the credit margin reported for issuers having a credit rating of [...]. That rating estimate is based on Oslo Municipality’s knowledge of the company as the sole shareholder. The fact that KTP mainly provides publicly financed transport services was also taken into account by Oslo Municipality.
- (48) The Norwegian authorities have provided information about the terms under which KTP has obtained loans from commercial banks.
- (49) The Norwegian authorities have informed the Authority that KTP had two different regular bank connections in the period within which the 15 short term liquidity loans were granted. From December 2002 until August 2009 that bank connection was DNB. In August 2009, KTP switched to Nordea. Nordea remained KTP’s bank until the last liquidity loan was granted by Oslo Municipality in September 2009.
- (50) The Norwegian authorities have explained that both DNB and Nordea took into account Oslo Municipality’s ownership of KTP, and its role as a provider of public services when assessing the company’s creditworthiness. On this basis, both banks considered KTP to have [...] rating and regarded the credit offered to the company as [...]. Additionally, the Norwegian authorities have provided a financial overview of the KTP group for the period

2001-2011. According to that overview the financial results of the group were positive each year, with the exception of 2002.

- (51) As KTP's regular bank connection, DNB provided the company with a cash credit in order to secure the liquidity of the company through periods of cash flow fluctuations. The cash credit was granted for a year at a time and was automatically renewed if not terminated. If terminated, the outstanding balance would have had to be settled. The cash credit was collateralised with 12 metro cars, of the type T2000 produced in 1994, with an insurance value of NOK 96 million. The Norwegian authorities have explained: that, due to the fact that some of the information dates back more than 10 years, they have not been able to retrieve complete information about the terms of the cash credit offered to KTP by DNB. The Norwegian authorities have however been able to determine that, in the years 2003 to 2005, DNB charged an interest on the cash credit of NIDR<sup>29</sup> plus [10-50] bps; that the interest level was lowered at some point in time between January 2006 and July 2007 to NIDR plus [10-50] bps. It remained at this level until July 2007 when the offered rate was changed to 3 months NIBOR plus [10-50] bps; that, from December 2002 until 1 July 2008, the general cash credit limit was NOK 150 million; and that, during this period, the limit was temporarily increased at times. On 1 July 2008, the credit limit was raised to NOK 300 million. It remained at this level until Nordea became KTP's regular bank connection in August 2009.
- (52) From August 2009 until September 2009, when the last short term liquidity loan was granted to KTP by Oslo Municipality, Nordea offered KTP uncollateralised cash credit at 1 month NIBOR plus [60-120] bps. The cash credit limit was NOK 300 million. There were not specific payback periods, as the cash credits were granted for a year at the time, and were automatically renewed if not terminated. In case of termination, the credit utilised had to be repaid.
- (53) Additionally, the banks offered individual loans to KTP. In 2008, DNB provided KTP with an uncollateralised loan of NOK 255 million at NIBOR plus [150-200] bps. The Norwegian authorities have explained that this loan was granted at an exceptionally high rate due to the financial crisis. The purpose of the loan was to finance KTP's acquisition of the company Bussanlegg AS. That company holds 4 bus depots,<sup>30</sup> which are all leased to Ruter under a long term leasing agreement. On 27 October 2009, that loan was refinanced with a loan of NOK 248 million offered by the bank Skandinaviske Enskilda Banken AB ("SEB"), of three year tenor at either 3 month NIBOR plus [50-90] bps or 6 months NIBOR plus [50-90] bps. As collateral, KTP provided a first priority pledge in Bussanlegg AS, as well as step-in rights for the lease agreement with Ruter.
- (54) The Norwegian authorities have informed the Authority that apart from the pledge in Bussanlegg AS and the mortgage of the 12 T2000 metro cars, KTP has not mortgaged or pledged any other operational asset in the period when the short term liquidity loans were granted and in force.
- (55) According to the Norwegian authorities, KTP has not obtained any other loans from private banks in the period when the short term liquidity loans were granted and in force.
- (56) In 2011, Nordea gave KTP an uncollateralised five year loan of NOK 200 million at 3 months NIBOR plus [50-90] bps.

<sup>29</sup> NIDR (Norwegian Interbank Deposit Rate) is like NIBOR, a benchmark based on rates offered by Norwegian banks. The duration rate for NIDR is one month. It is comparable to 1 month NIBOR. The Norwegian authorities have explained that historically, NIDR has been very close to 1 month NIBOR.

<sup>30</sup> In Norwegian: *bussanlegg*.

- (57) In the years when the 15 short term liquidity loans were granted (2002-2009), KTP raised additional capital on the market via one to twelve month notes,<sup>31</sup> at interest levels described in the following table. As with the 15 short term liquidity loans, the closest relevant NIBOR would be applied. Thus, the NIBOR with the same tenor as the loan would be applied and when the tenor would be between two NIBOR durations, as was the case with the note issued on 28 September 2006, a weighted average of the two NIBOR rates would be applied. The notes were issued to finance investments in tram and metro infrastructure and rolling stock. They have been collateralised with the municipal deficiency guarantees, described above in chapter I.5.

<b>Principal (in NOK)</b>	<b>Date</b>	<b>Duration (in months)</b>	<b>NIBOR</b>	<b>Margin [in bps]</b>	<b>Interest</b>
130,000,000	22/01/2002	9	6.21%	[(-)20-90]	[...]
120,000,000	13/02/2002	6	6.54%	[(-)20-90]	[...]
60,000,000	18/03/2002	1	6.65%	[(-)20-90]	[...]
120,000,000	25/04/2002	9	7.04%	[(-)20-90]	[...]
150,000,000	05/06/2002	3	7.09%	[(-)20-90]	[...]
70,000,000	29/08/2002	6	7.23%	[(-)20-90]	[...]
150,000,000	05/09/2002	9	7.17%	[(-)20-90]	[...]
135,000,000	22/10/2002	12	6.82%	[(-)20-90]	[...]
120,000,000	27/01/2003	7	5.74%	[(-)20-90]	[...]
70,000,000	27/02/2003	9	5.15%	[(-)20-90]	[...]
90,000,000	19/03/2003	6	5.36%	[(-)20-90]	[...]
150,000,000	13/05/2003	6	4.70%	[(-)20-90]	[...]
125,000,000	27/08/2003	6	2.98%	[(-)20-90]	[...]
140,000,000	13/11/2003	6	2.92%	[(-)20-90]	[...]
125,000,000	19/02/2004	6	1.84%	[(-)20-90]	[...]
160,000,000	24/03/2004	8	1.86%	[(-)20-90]	[...]
140,000,000	13/05/2004	6	2.02%	[(-)20-90]	[...]
120,000,000	20/10/2004	6	2.00%	[(-)20-90]	[...]
130,000,000	15/11/2004	6	1.99%	[(-)20-90]	[...]
120,000,000	26/11/2004	12	2.12%	[(-)20-90]	[...]
125,000,000	24/02/2005	6	2.05%	[(-)20-90]	[...]
120,000,000	20/04/2005	6	2.17%	[(-)20-90]	[...]
120,000,000	12/05/2005	6	2.17%	[(-)20-90]	[...]
125,000,000	24/08/2005	6	2.35%	[(-)20-90]	[...]
150,000,000	20/09/2005	9	2.52%	[(-)20-90]	[...]
120,000,000	19/10/2005	6	2.54%	[(-)20-90]	[...]
120,000,000	15/11/2005	6	2.67%	[(-)20-90]	[...]
129,000,000	30/11/2005	4	2.60%	[(-)20-90]	[...]
125,000,000	24/02/2006	6	2.74%	[(-)20-90]	[...]
129,000,000	30/03/2006	6	2.87%	[(-)20-90]	[...]
120,000,000	20/04/2006	12	3.13%	[(-)20-90]	[...]
120,000,000	15/05/2006	6	3.07%	[(-)20-90]	[...]
150,000,000	20/06/2006	6	3.16%	[(-)20-90]	[...]

<sup>31</sup> In Norwegian “notes” are: *sertifikatlån*.

125,000,000	09/08/2006	6	3.39%	[(-)20-90]	[...]
129,000,000	28/09/2006	2.5	3.41%	[(-)20-90]	[...]
120,000,000	15/11/2006	6	3.79%	[(-)20-90]	[...]
165,000,000	15/12/2006	3	3.84%	[(-)20-90]	[...]
125,000,000	26/02/2007	6	4.44%	[(-)20-90]	[...]
165,000,000	15/03/2007	3	4.42%	[(-)20-90]	[...]
120,000,000	19/04/2007	3	4.62%	[(-)20-90]	[...]
300,000,000	21/06/2007	6	4.96%	[(-)20-90]	[...]
120,000,000	19/07/2007	3	4.89%	[(-)20-90]	[...]
125,000,000	27/08/2007	6	5.46%	[(-)20-90]	[...]
120,000,000	19/10/2007	3	5.71%	[(-)20-90]	[...]
160,000,000	19/12/2007	6	6.03%	[(-)20-90]	[...]
120,000,000	18/01/2008	3	5.69%	[(-)20-90]	[...]
125,000,000	26/02/2008	6	6.01%	[(-)20-90]	[...]
130,000,000	14/03/2008	3	6.26%	[(-)20-90]	[...]
120,000,000	18/04/2008	6	6.41%	[(-)20-90]	[...]
130,000,000	23/06/2008	3	6.43%	[(-)20-90]	[...]
125,000,000	26/08/2008	6	6.82%	[(-)20-90]	[...]
155,000,000	19/03/2009	6	3.11%	[(-)20-90]	[...]
105,000,000	21/09/2009	6	2.34%	[(-)20-90]	[...]
50,000,000	21/09/2009	3	1.88%	[(-)20-90]	[...]

- (58) The Norwegian authorities have explained that when the financial crisis hit at the end of 2008, several of the notes were due. Given the difficulties in finding investors during that period that would issue new notes, KTP in 2009 in order to refinance the notes due, raised capital on the market via bonds at the following terms:

Year	Terms	Amount (in NOK million)	Duration
February 2009	[4-6.5] % <sup>32</sup>	200	3 years
March 2009	6 month NIBOR + [100-140] bps	110	3 years
November 2009	[4.5-6.7] % <sup>33</sup>	300	5 years

- (59) The bonds of February and March 2009 were collateralised by municipal deficiency guarantees, described above in chapter I.5. The bond of November 2009 was collateralised by a mortgage of real estate.

## 7. Bus for metro and tram

- (60) When the tram or metro services in Oslo are interrupted, buses are used to ensure the continuation of the public transport. Bus services replace the tram or metro services in two different situations: (i) where there has been a planned interruption of the tram or metro service, for instance when metro lines are being upgraded, and (ii) when ad hoc interruption occurs, for instance due to technical problems.

<sup>32</sup> No reference to NIBOR at the terms of this bond.

<sup>33</sup> No reference to NIBOR at the terms of this bond.

- (61) As transport operators, KTP and its subsidiaries Oslo T-banedrift AS and Oslotrikken AS are as a rule responsible for ensuring the continuation of the metro and tram services in case of interruptions and the financing of the bus replacement services. Decisions to commission busses to replace metro services are taken by Oslo T-banedrift AS and to replace tram services by Oslotrikken AS.
- (62) Since 2003, the bus for metro and tram contracts for planned interruptions have been tendered out. Since 2011,<sup>34</sup> all bus for metro and tram contracts for both planned and ad hoc interruptions have been tendered out.<sup>35</sup> Up until 2011, the ad hoc contracts were directly awarded to KTP's bus subsidiary Unibuss AS.<sup>36</sup> Contract invoices were issued for each ad hoc interruption. The prices were set according to the same principles as when Unibuss AS provided similar services to other customers, *i.e.* based on working hours and costs per km.
- (63) The Norwegian authorities have provided the Authority with examples of bus rental contracts that illustrate the price model for both external and intra-group customers. In 2008, Unibuss AS rented busses to the company Grønn Hverdag and the Oslo Police for the price of NOK [600-1000] per hour and NOK [5-11] per km (for rigid buses). The same prices were charged in the same year to the tram operator Oslotrikken AS for renting rigid buses. In 2011, Unibuss AS rented buses to the company Motion Blur AS for the price of NOK [600-1000] per hour and NOK [5-11] per km (for rigid buses). The company was also offered to rent articulated buses for NOK [5-11] per km. The same prices were offered in the same year to Oslo T-banedrift AS for renting articulated buses.
- (64) The Norwegian authorities have explained that the bus for metro and tram contracts, due to their limited application, have been of a marginal importance for Unibuss AS. The Norwegian authorities have also provided figures on the total value of the ad hoc bus for metro and tram contracts for the period 2004-2007 (in NOK thousands). The following table gives an overview of that information, as well as a conversion to EUR thousands.<sup>37</sup>

Annual contracts	Metro (NOK)	Metro (EUR)	Tram (NOK)	Tram (EUR)
2004	[1000-1500]	[...]	[500-1500]	[...]
2005	[50-200]	[...]	[1000-2000]	[...]
2006	[1000-1500]	[...]	[200-1000]	[...]
2007	[50-200]	[...]	[500-1500]	[...]

<sup>34</sup> From 2008, Oslo T-banedrift AS started tendering out contracts for ad hoc interruptions on some metro lines.

<sup>35</sup> In 2011, KTP put a framework agreement up for tender. The agreement encompassed both planned and ad hoc interruptions. The tender was won by the company Norgesbuss AS. KTP has now concluded an agreement with Norgesbuss AS on the basis of the tender.

<sup>36</sup> Prior to 2009 Unibuss AS was a subsidiary of the company AS Sporveisbussene. In 2009, these two companies merged into the company that today is Unibuss AS. The former Unibuss AS (the former subsidiary of AS Sporveisbussene) previously went under the name Nexus Trafikk AS. Prior to the establishment of Nexus Trafikk AS in 2003, AS Sporveisbussene carried out the bus activities of the Oslo Sporveier Group. In this decision, unless otherwise specified, Unibuss AS is used to refer to Unibuss AS and its relevant predecessors.

<sup>37</sup> Converted from NOK to EUR using the relevant annual conversion rates published on the Authority's website: <http://www.eftasurv.int/state-aid/rates/>.

## 8. NBB

- (65) In Oslo, the entity administering the local scheduled passenger transport is responsible for providing a payment and ticketing system that is interoperable on all modes of transport. As explained above, the responsible entity is now Ruter. Prior to that AS Oslo Sporveier, and subsequently, the new AS Oslo Sporveier held that responsibility. As set out above, the Norwegian authorities have explained that as long as Oslo Municipality wishes to establish or maintain public service obligations for the provision of local scheduled transport services, the municipality is under the obligation to finance the payment and ticketing system it requires the transport providers to use. This obligation stems from Article 22 of the CTA, and thus the principles as explained in paragraph (24) above also apply for the compensation for the provision of the payment and ticketing system.
- (66) In 2003, AS Oslo Sporveier entered into an agreement with the electronics company Thales on the development of the payment and ticketing system, NBB. At that time, AS Oslo Sporveier held both the administrative responsibility for the organisation of transport services and the operative responsibility for providing local transport services. Until the system was transferred to Ruter in 2009, the ownership of the system was held by AS Oslo Sporveier's (and thereafter KTP's) subsidiary Sporveisbilletter AS.
- (67) As a consequence of the re-allocation of competences in the 2006 reorganisation process (see paragraph (18) above), it was decided that NBB, when fully operational, was to be transferred to Ruter, the company that took over the administrative responsibility for the organisation of local transport services in Oslo. On 30 June 2006, AS Oslo Sporveier and KTP ((then under establishment and) the then indirect owner (to be) of NBB (through the subsidiary Sporveisbilletter AS)) formalised the decision on the transfer of NBB and the terms for the co-operation on the development of the system.<sup>38</sup> The terms of the future transfer of NBB to Ruter would be agreed upon at a later stage.
- (68) On 25 September 2009, when it had become fully operational, NBB was transferred to Ruter on the basis of a contract concluded by Ruter and KTP.
- (69) The starting point for determining the transfer price was a valuation made by Deloitte dated 31 December 2008 (the "Deloitte Report") commissioned by KTP. Deloitte based its valuation<sup>39</sup> on the costs accrued in developing the system<sup>40</sup> minus the costs not adding to the value of its use.<sup>41</sup> Applying this methodology, and taking into account the NBB Guarantee,<sup>42</sup> Deloitte identified total project costs amounting to NOK 354 million.

<sup>38</sup> In Norwegian: Samarbeidsavtale mellom Kollektivtransportproduksjon AS (produksjonsselskapet) og AS Oslo Sporveier (administrasjonsselskapet) vedrørende Nytt billett- og betalingssystem (NBB).

<sup>39</sup> In the report, Deloitte considered the following alternative valuation methods: (i) the net present value, (ii) the comparable purchase price, and (iii) the re-purchase price. None of these methods were held to be suitable. As for the first method, Deloitte concluded that the net present value was not a suitable since the future benefits related to NBB were too uncertain. The second method was not held to be a viable option as Deloitte was not able to find a suitable comparator to establish a comparable transfer price. Finally, the re-purchase price was also not held to be relevant as the delays caused by developing a new system and the uncertainties related to the cost estimates of re-purchasing.

<sup>40</sup> The development costs include: costs incurred by Thales, salaries of KTP staff, KTP's financial costs, etc.

<sup>41</sup> The costs not adding to the value of the system are related to: delays, wear and tear, vandalism of the system, etc.

<sup>42</sup> The NBB Guarantee provided by Oslo Municipality to KTP was explicitly taken into account by Deloitte when assessing the interest costs incurred by KTP in the financing of NBB, see Chapter 6.4 of the Deloitte Report. However, Deloitte concluded that only NOK 20 million (of the total NOK 27.8 million) of the incurred financial costs had added to the value of NBB. As a result, with the price of NBB not

Concluding that NOK 92 million of those costs had not added to the value of the use of the system, Deloitte estimated the net system value at NOK 261.5 million (as of 31 December 2008, the date of valuation).<sup>43</sup> In their September 2009 contract, KTP and Ruter based the transfer price on the methodology used in the Deloitte report, and thus agreed on the NOK 261.5 million as the net transfer price. As the transaction was subject to VAT, the final price to be paid by Ruter was NOK 326 875 000 (including VAT).

- (70) In addition to the transfer price, it was agreed that Ruter should pay KTP an additional NOK 10 million (ex. VAT) for costs incurred in developing NBB functionalities that Ruter had eventually cancelled.<sup>44</sup>
- (71) Furthermore, KTP continued to incur operating and investment costs related to NBB after the Deloitte valuation of 31 December 2008 until the system was transferred to Ruter in September 2009. Thus, at the conclusion of the transfer agreement, Ruter also covered NOK 68 million incurred by KTP in 2009.
- (72) The Norwegian authorities have explained that the costs incurred by KTP in the development of NBB not covered by Ruter represent sunk costs for the company.

## 9. Comments by the Norwegian authorities

### 9.1 Guarantees

- (73) The Norwegian authorities take the view that investments in metro and tram infrastructure, including investments in metro and tram rolling stock, should be regarded as investments connected to non-economic activities and thus not falling within the remit of the state aid rules. As they are specifically tailored for the particular metro and tram lines in Oslo, and thus cannot easily be put in operation elsewhere, the Norwegian authorities argue that the metro and tram rolling stock must be considered as part of the metro and tram infrastructure.
- (74) In any event, the Norwegian authorities argue that the Municipality's issuing of premium-free guarantees should be considered to form part of the overall scheme for contributions to the public metro and tram transport in Oslo. Thus, the issuing of guarantees is claimed to constitute an inherent part of the Municipality's responsibility for the financing of the public service. Finally, the Norwegian authorities stress that the guarantees only covered activities in areas that are not open to competition. As separate accounts were kept for all the companies within the KTP group, the Norwegian authorities argue that any advantage stemming from the premium-free guarantees would therefore not benefit activities subject to competition and would consequently not have the potential to distort competition.

### 9.2 Loans

- (75) As regards the short term liquidity loans, the Norwegian authorities contend that these do not entail state aid within the meaning of Article 61(1) of the EEA Agreement. In their view, the loans have been provided at market terms comparable to loans granted to KTP by commercial banks. What the Norwegian authorities refer to as a [...] credit rating of KTP was made on objective terms and should be likened to that of a long standing bank connection with a thorough knowledge of its borrower. Additionally, they argue that the

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including costs not adding to the value of its use, KTP was only compensated for the NOK 20 million of the NOK 27.8 million in financial costs incurred.

<sup>43</sup> In the Deloitte Report the figure is occasionally presented in a rounded off form as NOK 262 million. The purchase price for NBB was based on the NOK 261.5 million figure.

<sup>44</sup> A large part of the cancelled functionality relates to interoperability issues with train and bus ticketing systems where functionality overlapping with NBB functionality was in the process of being developed.

municipality's 100% ownership of KTP in practice represents a form of collateral, as the municipality's complete control over the company entails that it, as the owner, could ensure compliance with the loan agreement. This especially given the fact that KTP, in the period when the loans were granted and in force (11 December 2002 – 2 November 2009), apart from the pledge of the shares of Bussanlegg AS and the mortgage of the 12 T2000 metro cars, did not mortgage or pledge any of its operational assets. Finally, the Norwegian authorities stress that the loans were only granted to KTP and that KTP only carries out its activities in areas that are not open to competition. As the accounts of KTP are clearly separated from the other companies in the same group, the Norwegian authorities argue that any potential advantage received by KTP through the loans would therefore not flow to other companies in the group, and would, due to the non-liberalised nature of the activities carried out by the company, not have the potential to distort competition.

- (76) As regards the infrastructure loans, the Norwegian authorities take the view that these too, have been granted at market terms and do not involve state aid. Furthermore, the Norwegian authorities underline that the infrastructure loans have been granted as a means of financing non-economic activities, and that they also for that reason do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

### **9.3 Bus for metro and tram**

- (77) The Norwegian authorities argue that as the bus for metro contracts either have been put up for public tender or the prices for *ad hoc* missions have been based on market terms, there is no economic advantage involved within the meaning of Article 61(1) of the EEA Agreement.
- (78) In addition, as the *ad hoc* contracts have been entered into directly between Unibuss AS and Oslo T-banedrift AS and Oslotrikken AS, the Norwegian authorities argue that the conclusion of these contracts is not imputable to the state; that the contracts, thus, do not involve state resources and therefore no state aid is present.

### **9.4 NBB**

- (79) As for NBB, the Norwegian authorities state that the price of NBB was determined on the basis of an independent third party valuation from Deloitte, and argue that the transfer of the system from KTP to Ruter does not involve any state aid within the meaning of Article 61(1) of the EEA Agreement.
- (80) The Norwegian authorities furthermore argue that if the financing of NBB is to be regarded as entailing state aid, that aid would be existing in nature, as it would have been provided on the basis of the existing aid scheme for compensating local scheduled transport services.

## II. ASSESSMENT

### 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) Consequently, for a measure to be categorised as state aid within the meaning of the EEA Agreement, each of the four cumulative conditions laid down in Article 61(1) of the EEA Agreement must be fulfilled. First, there must be an intervention by the State or through state resources; second, the intervention must be liable to affect trade between Contracting Parties; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition. In the following, the Authority will assess whether the measures covered by the complaint fulfil these cumulative conditions. Firstly, it will assess the 15 short term liquidity loans. Secondly, the bus for metro and tram contracts. Thirdly, the metro and tram guarantees, the infrastructure loans and the measures compensating KTP for the development of NBB – the NBB transfer payment, the coverage by Ruter of costs incurred by KTP in 2009 and the NBB Guarantee (the “NBB measures”).

### 2. 15 short term liquidity loans

#### 2.1 Advantage – the private creditor test

(83) For a measure to qualify as aid for the purposes of Article 61(1) of the EEA Agreement it must confer an advantage that relieves an undertaking of charges that are normally borne from its budget. The conditions which a measure must meet in order to be treated as aid for the purposes of Article 61 of the EEA Agreement are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through state resources.<sup>45</sup>

(84) As regards loan agreements, specifically, an advantage 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 creditor applying ordinary commercial criteria. In other words, the private creditor test – like the closely related private investor test – seeks to establish whether the debtor would have obtained the same advantage from a private creditor under normal market conditions as that which was made available to it through state resources. It must therefore be assessed how a circumspect private creditor in a market economy would have acted in a similar situation to that of the public creditor.<sup>46</sup>

<sup>45</sup> Case E-12/11 *Asker Brygge AS v EFTA Surveillance Authority*, judgment of 17.8.2012, not yet reported, paragraph 56. Case C 73/11 P *Frucona Košice v Commission*, judgment of 24.1.2013, not yet reported, paragraph 70. Case C-124/10 P *Commission v EDF*, judgment of 5.6.2012, not yet reported, paragraph 78.

<sup>46</sup> Compare the Opinion of Advocate General Kokott of 6.9.2012 in Case C 73/11 P *Frucona Košice*, cited above, paragraph 58 and the case law referred to.

- (85) In applying the private creditor test, the Authority must make an economic assessment taking into account all the relevant information.<sup>47</sup> Moreover, the question whether the recipient undertaking could also have obtained the same advantage under normal market conditions as that which it was granted by the public authority must be assessed from the perspective of a circumspect private creditor, without there being any kind of discretion on the part of the national authority granting the advantage.<sup>48</sup> Further, the Authority must base its assessment on the information which would have been available to such a private creditor at the time when the advantage in question was granted; here when the loan agreements at issue were concluded. Finally, the proper weighting of the different aspects of the individual case on the basis of which a private creditor would have to form its opinion is not a matter of law, but a matter of fact, and which requires an assessment of complex economic circumstances, for which the Authority enjoys a broad margin of appreciation under the EEA state aid rules.

## 2.2 Loans structured as commercial short term loans

- (86) As noted, the Norwegian authorities have consistently and without exception granted the 15 short term liquidity loans on the same terms, namely at the closest relevant NIBOR plus [60-90] bps. The loans (with interest) were repaid in accordance with the agreed terms. They functioned as a form of revolving credit. Thus, the loans were not necessarily repaid in full at the end of the loan period, but simply revolved into a new credit period.
- (87) In commercial short term loans, NIBOR (or a similar parameter as a representation of a risk free base rate) plus a margin adjusting for risk (depending on credit rating and collateral), is normally used to determine the interest rate of a loan.
- (88) The Authority notes that the 15 short term liquidity loans were indeed composed according to this methodology, their structure thus commercial in nature.
- (89) As NIBOR forms the basis for the risk free rate, the main focus of the assessment in the following is whether the margin set by Oslo Municipality is comparable to what a private market creditor would have required.

## 2.3 The Authority's reference rates

### 2.3.1 Proxies for the market rate

- (90) In order to determine whether loans provided from state resources have been granted at favourable terms, their interest rate levels may be compared to the reference rates which the Authority regularly sets as a proxy for the market rate.<sup>49</sup> The reference rates set by the Authority represent a form of safe harbour in the sense that loans with conditions that equal those of the reference rates can be regarded as not conferring an advantage on the borrower. However, loans granted at more beneficial rates cannot automatically be regarded as conferring an advantage on the borrower. The Authority will, where it is in possession of specific market indicators on the basis of which a private lender would find it acceptable to grant a similar loan at a lower price than the Authority's reference rates, base its assessment on these specific indicators.<sup>50</sup>

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<sup>47</sup> Case C 73/11 P *Frucona Košice*, cited above, paragraphs 73-74.

<sup>48</sup> Opinion of Advocate General Kokott in Case C 73/11 P *Frucona Košice*, cited above, paragraph 52-56.

<sup>49</sup> See the Authority's Guidelines on reference and discount rates (OJ L 105 21.4.2011 p. 32), page 1, first paragraph.

<sup>50</sup> See the Authority's Decision No 127/13/COL on the pricing mechanism of Export Credit Norway (not yet published), paragraphs 26-34. See also the Commission decisions in Case NN 4/2010 (Denmark) State financing of long term export loans (OJ C 94 14.4.2010 p. 3) and Case SA.23600 (former C 38/2008)

### 2.3.2 Three methodologies

- (91) In period when the 15 short term liquidity loans were granted, three different methodologies for setting the reference rates have been in force. The first applied from April 2000 until the end of February 2006 (the “2000 methodology”).<sup>51</sup> The second, from March 2006 until the end of 2008 (the “2006 methodology”).<sup>52</sup> The third entered into force on 1 January 2009 (the “2009 methodology”).<sup>53</sup>

### 2.3.3 The 2000 and 2006 methodologies

- (92) The 2000 and 2006 methodologies were in force when the first 13 loans were granted. The first 13 loans were 5-9 month liquidity loans. The two methodologies aim at reflecting the average level of interest rates charged on medium and long-term loans (5 to 10 years) backed by normal security.<sup>54</sup> In general, the risk of default increases with the length of the loan, and under normal circumstances the interest rate will therefore increase as the term of the loan increase. The applicable methodologies also provide a rate for loans backed by normal security. Loans 1-13 were not collateralized. The Authority therefore does not consider the proxies reflected in the 2000 and 2006 methodologies appropriate proxies when assessing loans 1-13. Nevertheless, the Authority notes that, if one considers the requirement of normal security to be fulfilled (see paragraph (98) below), the majority of the loans, loans 1-2 and 9-13, are issued at interest rates above the safe harbour of the applicable reference rates, (notably, this includes loan 13, granted during the financial crisis) as demonstrated by the following table:

Loan No	Principal	Date of grant	Loan period	NIBOR charged	Margin charged [in bps]	Interest rate charged	Reference rate <sup>55</sup>	Margin
1	200	11.12.2002	1.1.2003 – 30.6.2003	6.05%	[60-90]	[...]	6.32%	[...]
2	50	11.12.2002	1.1.2003 – 30.6.2003	6.30%	[60-90]	[...]	6.32%	[...]
3	200	22.6.2003	1.7.2003 – 30.12.2003	3.46%	[60-90]	[...]	6.32%	[...]
4	100	17.12.2003	1.1.2004 – 30.6.2004	2.33%	[60-90]	[...]	4.62%	[...]
5	200	14.6.2004	1.7.2004 – 31.12.2004	2.34%	[60-90]	[...]	3.75%	[...]
6	100	21.12.2004	1.1.2005 – 30.6.2005	2.03%	[60-90]	[...]	4.18%	[...]
7	75	23.6.2005	1.7.2005 – 31.12.2005	2.24%	[60-90]	[...]	4.18%	[...]

(Germany) Financing arrangements concerning Munich Airport Terminal 2 (not yet published), paragraphs 91-92.

<sup>51</sup> OJ L 274 26.10.2000 p. 26.

<sup>52</sup> OJ L 324 23.11.2006 p. 34.

<sup>53</sup> OJ L 105 21.4.2011 p. 32.

<sup>54</sup> The 2000 methodology, paragraph 3 and the 2006 methodology, paragraph 7.

<sup>55</sup> The applicable reference rate is based on the date when the interest rate for the liquidity loan is determined, i.e. 2 days prior to the disbursement of the loan.

8	75	19.12.2005	1.1.2006 – 31.5.2006	2.69%	[60-90]	[...]	4.56%	[...]
9	100	31.8.2007	1.9.2007 – 3.3.2008	5.48%	[60-90]	[...]	5.26%	[...]
10	100	21.12.2007	1.1.2008 – 2.10.2008	5.91%	[60-90]	[...]	6.25%	[...]
11	100	12.2.2008	18.2.2008 – 2.10.2008	6.00%	[60-90]	[...]	6.25%	[...]
12	100	13.2.2008	4.3.2008 – 2.10.2008	6.03%	[60-90]	[...]	6.25%	[...]
13	300	25.9.2008	2.10.2008 – 2.4.2009	7.81%	[60-90]	[...]	6.25%	[...]

- (93) As the Authority does not however consider the reference rate for loans 1-13 to set out the most relevant proxy, it will, in the following, apply other parameters for assessing whether those loans were granted on terms acceptable to a private market creditor, and consequently whether they involve state aid within the meaning of Article 61 of the EEA Agreement.

### 2.3.4 The 2009 methodology

#### 2.3.4.1 Proxies for the market rate

- (94) The Authority will in the following assess loans 14-15 under the 2009 methodology. The Authority again recalls that the reference rates are proxies, and that it will, where it is in possession of specific indicators of the interest rates that the borrower could obtain on the market, base its assessment on these specific indicators. The Authority will assess such specific indicators in chapter II.2.4 below.

#### 2.3.4.2 Base rate

- (95) In order to determine a reference rate for loans 14-15, a base rate must be established. The 2009 methodology normally applies a one-year NIBOR, however the Authority explicitly states in the 2009 reference rate guidelines, that it has reserved the right to use shorter (or longer) maturities adapted to certain cases.<sup>56</sup> Given that the interest rate normally will increase as the term of a loan increases, and that loan 14 was of a 9 month duration, and loan 15 of a 1 month duration, it is the opinion of the Authority, that using the NIBOR closest to the duration of the actual loan would be a better proxy than a one-year NIBOR, though the difference may not be significant.

#### 2.3.4.3 Margin

- (96) At the outset, the Authority notes that the 2009 method for establishing a margin for a reference rate does not fit equally well to all forms of credit provided to undertakings through public resources. In the case at hand, a municipality has granted loans to a company which it wholly owns without obtaining a formal credit rating of the company and without securing the loans with collateral. Further, the Authority considers it appropriate to have regard to the particular circumstances surrounding the Oslo Municipality's full ownership of KTP and other relevant factors, when, under the 2009

<sup>56</sup> The Guidelines on reference and discount rates, under the heading "Calculation basis: 1-year IBOR": "The base rate is based on 1-year money market rates. The Authority is reserving the right to use shorter or longer maturities adopted to certain cases."

methodology, assessing what would be an appropriate risk premium. Thus, taking the specific circumstances into account, the Authority, in the following, sets out its views on how it, in the absence of a formal rating and traditional collateral, applies the principles of the 2009 methodology.

- (97) In terms of credit rating, the Authority recalls that the Norwegian authorities have explained in discussions with Nordea that the credit worthiness of the company, although not officially rated, was held to be comparable to a rating of [...] as of 2011 (on a standalone basis it would be given a [...] rating, however taking into account the public ownership, the rating would be [...]). Furthermore, when granting the 15 short term liquidity loans to KTP, the department of finance of Oslo Municipality has used the credit margin reported for issuers having a credit rating of [...]. That rating estimate is based on Oslo Municipality's knowledge of the company as the sole shareholder. The fact that KTP mainly provides publicly financed transport services, and is entitled to compensation for the provision of those services, in accordance as described in chapter I.4, was also taken into account. In light of these circumstances, the Authority is convinced that KTP could hold the rating as estimated in the period in which loans 14 and 15 were granted.
- (98) As for the criterion of collateral, the Authority recalls that loans 14 and 15 were not collateralised. However, in the period when they were granted there were no wide reaching pledges resting on the operational assets of KTP. In fact, in the entire period within which the 15 short term liquidity loans were granted, the only pledged assets were the shares of Bussanlegg AS to SEB and the 12 T2000 metro cars to DNB. Thus, the remaining assets of KTP effectively served as collateral for Oslo Municipality. Further, Oslo Municipality was the sole owner of KTP in the entire period. Even if the loans were not collateralised, as its owner, the municipality had control over the company and could ensure that the company carried out its activities in a manner that would respect the loan agreements. Indeed the loans were, without exception, paid back in accordance with the agreed terms or revolved into a new credit period. Also taking into account that KTP was primarily providing public services for which it was compensated on a cost basis, the risk of the company coming in a position where it could not respect its obligations was low. Taking these factors into account, the Authority concludes that the conditions of the loans effectively can be compared to a situation where Oslo Municipality would have a normal to high degree of collateralisation.
- (99) On the basis of the assessment above, loans 14-15 would be within the safe harbour of the reference rates set under the 2009 methodology; using the 9 month (loan 14) and 1 month (loan 15) NIBOR base rates as applied by Oslo Municipality and adding a [60-90] bps risk premium as if the rating of KTP would be [...] and the collateralisation [...] (or alternatively, if the rating would be [...] and the collateralisation [...]).

<b>Loan No</b>	<b>Principal</b>	<b>Date of grant</b>	<b>Loan period</b>	<b>NIBOR charged = base for reference rate</b>	<b>Margin charged = margin for reference rate [in bps]</b>	<b>Interest rate charged = Reference rate</b>
14	300	24.3.2009	2.4.2009 – 2.10.2009	2.77%	[60-90]	[...]

15	300	22.9.2009	2.10.2009 – 2.11.2009	1.58%	[60-90]	[...]
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(100) However, the Authority again recalls that the reference rates are proxies, and that it will, where it is in possession of specific indicators of the interest rates that the borrower could obtain on the market, base its assessment on these specific indicators. This is done in the following.

## 2.4 Actual market indicators

### 2.4.1 Short and longer term credit

(101) When the 15 short term liquidity loans were granted, KTP was able to secure credit on the market using an assortment of financial instruments. In order to assess whether KTP through the 15 short term liquidity loans obtained an advantage from Oslo Municipality, that it would not have obtained on the market under normal market conditions, the Authority will compare the terms of those short term liquidity loans with the terms of the financing that KTP secured on the market. In order to find the best proxy among the credit that was granted, it is necessary to examine all the relevant characteristics of the financing obtained by KTP. To that effect, it must be noted that there is a fundamental difference between short and longer term credit. Debt with a tenor of 12 months or less is considered as current or short term liabilities according to international accounting standards. The assessment of risk on short term credit is different from that of longer term credit in that with long term credit, the risk of borrower default increases. Under normal circumstances, an increased tenor therefore results in higher interest rates as represented by the yield curve.

### 2.4.2 Short term credit

#### 2.4.2.1 Introduction

(102) In the relevant period, KTP obtained three different forms of short term credit. Firstly, cash credit from DNB and subsequently Nordea, secondly, notes issued on the credit market and thirdly, the 15 short term liquidity loans from Oslo Municipality.

#### 2.4.2.2 Cash credit

(103) In the period December 2002 to August 2009, KTP was provided with cash credit from DNB, and after that from Nordea. The cash credit is similar to the 15 short term liquidity loans in that it provides liquidity for the company's day-to-day operations and smoothes out the difference in timing between in- and outflows of cash. The purpose and structure of the cash credit is as such similar to that of the short term liquidity loans provided by the municipality.

(104) In the period within which the first 14 short term liquidity loans were granted, DNB provided cash credit at NIDR plus [10-50] bps, later at NIDR plus [10-50] bps and finally at 3 month NIBOR plus [10-50] bps. On 1 July 2008, DNB raised the general cash credit limit from the initial NOK 150 million to NOK 300 million. The DNB cash credit was collateralised with 12 metro cars with an insurance value of NOK 96 million.

(105) Taking into account that NIDR is comparable to 1 month NIBOR, and that 3 month NIBOR normally is higher than 1 month NIBOR, it is clear that KTP, through the DNB credit was able to secure significant short term liquidity financing at an interest rate lower than that offered by Oslo Municipality on the first 14 short term liquidity loans.

- (106) The 15 short term liquidity loans, although not secured by traditional collateral, were, as noted above, granted by Oslo Municipality, the sole owner of KTP, with a thorough overview of its activities and its financial solidity, and more importantly, with an owner's control over the company. KTP furthermore mainly carried out activities for which it was compensated on a cost coverage basis by the municipal purse. KTP furthermore consistently repaid the 15 short term liquidity loans in accordance with the agreed terms. Taking these elements into account, it is the view of the Authority that a private creditor in a similar situation would not necessarily have required collateral to secure similar short term liquidity loans. Therefore, the lack of collateral does not entail that the interest level of the short term liquidity loans cannot be compared to that of the DNB cash credit, which was partly collateralised.
- (107) In August 2009, KTP changed its regular bank connection to Nordea, who offered KTP uncollateralised cash credit at 1 month NIBOR plus [60-120] bps. The cash credit limit was NOK 300 million. Loan 15 from Oslo Municipality to KTP was granted at 1 month NIBOR plus [60-90] bps. Both types of credit were uncollateralised. However, in contrast to Oslo Municipality, Nordea, did not have the added security of being the owner of the company, thus the absence of the owner's knowledge and control over the company can explain the [15-30] bps difference in risk premium between the two types of short term credit arrangements. Additionally, a [15-30] bps difference on a short term credit instrument of a one month tenor is a difference that would typically be held to be within the margin of discretion of public authorities when the nature of an advantage is assessed within the context of the state aid rules.

#### 2.4.2.3 Notes

- (108) Additionally, throughout the entire period within which the 15 short term liquidity loans were granted, KTP also issued one to twelve month notes in the market. The notes were collateralised with municipal deficiency guarantees. Given that the notes were of a short term duration, and given that the Authority, as explained above, considers Oslo Municipality, as the sole owner of KTP, to be in a position comparable to that of a lender with collateral, the Authority considers the collateralised notes to represent a suitable comparator to the 15 short term liquidity loans. The interest rates obtained on the notes varied between the closest relevant NIBOR minus [not below (-)20] bps to plus [not above 90] bps. This is consistently lower than the closest relevant NIBOR plus [60-90] bps rate used by Oslo Municipality for the 15 short term liquidity loans. Thus, the fact that KTP was able to secure similar short term credit through the notes at a significantly lower rate suggests that KTP was not provided with an advantage through the 15 short term liquidity loans.

#### 2.4.3 Longer term credit

- (109) In the period within which the 15 short liquidity loans were granted and in force, KTP also obtained long term financing through two individual bank loans and three bonds. These instruments had a tenor of three years or more. Due to the longer term nature of these credit facilities, the Authority finds them less relevant as a comparator to the 15 short term liquidity loans. Due to the higher risk of default on a longer term, a long term creditor will generally require a higher risk premium.
- (110) With regard to the bonds, a further distinguishing element that makes two out of the three bonds less suitable as comparators to the short term liquidity loans is the fact that the interest rates, in contrast to the short term credit, were fixed (i.e. set without reference to NIBOR or similar). Thus, the interest rates of two out of the three bonds are not sensitive

to the general developments in the money market and do not have readily identifiable base rate and risk margin components.

- (111) As for the 2008 uncollateralised NOK 255 million loan from DNB with an interest of NIBOR plus [150-200] bps, this was granted in the throes of the then breaking financial crisis. As a longer term loan, granted under exceptional circumstances, it is, for the reasons stated above, not comparable to short term credit granted under similar circumstances. Within this context, the Authority nevertheless notes that KTP was able to refinance the 2008 DNB loan in the following year by the NOK 248 million SEB loan offered at either 3 month NIBOR plus [50-90] bps or 6 month NIBOR plus [50-90] bps, terms comparable to those of the 15 short term liquidity loans. Similarly, in 2011, after the period within which the 15 short liquidity loans were granted and in force, KTP secured an uncollateralised five year loan of NOK 200 million at 3 months NIBOR plus [50-90] bps, which again are terms comparable to those of the 15 short term liquidity loans.

#### *2.4.4 Short term credit is the best proxy for the 15 short term liquidity loans*

- (112) Due to the differences in tenor of the various forms of financing, the Authority considers the terms obtained on short term cash credit, and the notes, to be the most relevant market proxies for comparison with the 15 short term liquidity loans. As illustrated above, the terms of this financing have generally been at terms below the terms charged by Oslo Municipality for the 15 short term liquidity loans. In light of that, and taking into account the margin of discretion of Oslo Municipality as a market economy creditor, the Authority concludes that the 15 short term liquidity loans have been granted on terms comparable to that of credit raised on the market.

### **2.5 Conclusion – no aid**

- (113) In sum, the Authority concludes that the 15 short term liquidity loans have not conferred an advantage on KTP. For this reason, they do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

### **3. Bus for metro and tram**

- (114) In the following the Authority assesses whether the direct award to KTP subsidiary Unibuss AS up until 2011 of bus for metro and tram contracts for *ad hoc* interruptions has provided Unibuss AS with an economic advantage.
- (115) The *ad hoc* bus for metro and tram contracts were appreciably limited in scope. The Norwegian authorities have provided figures on the total value of the *ad hoc* bus for metro and tram contracts for the period 2004-2007. In that period Unibuss AS on an annual basis invoiced approximately NOK [not below 0.05] million to NOK [not above 1.5] million for bus for metro services and NOK [not below 0.2] million to NOK [not above 2] million for bus for tram services.
- (116) Invoices were issued for each commission and the prices were based on working hours and costs per km. These principles and prices were the same as those used when Unibuss AS provided similar services to external customers, such as Grønn Hverdag, the Oslo Police and Motion Blur AS, see paragraph (63) above. Taking these factors into account, the Authority is of the view that the contracts with Unibuss AS have been concluded on a commercial basis. Therefore the Authority concludes that Unibuss AS has not, through the bus for metro and tram contracts, received an economic advantage, within the meaning of Article 61(1) of the EEA Agreement.

(117) Based on the above, the Authority considers that the award of bus for metro and tram contracts to Unibuss AS do not involve state aid within the meaning of Article 61 of the EEA Agreement.

#### **4. Metro and tram guarantees, infrastructure loans and NBB measures**

##### **4.1 Guarantees – Scope of the Authority’s assessment**

(118) For the purpose of defining a temporal scope for its assessment, the Authority, at the outset, notes that in accordance with Article 15(3) of Part II of Protocol 3 “[a]ny aid with regard to which the limitation period has expired, shall be deemed to be existing aid”. The Authority has no competence to address existing aid that has been terminated.

(119) The second paragraph of Article 15(3) of Part II of Protocol 3 provides that the limitation period begins on the day on which unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any “action” taken by the Authority with regard to the unlawful aid shall interrupt the limitation period. Sending an information request qualifies as an “action” taken by the Authority.<sup>57</sup>

(120) The Authority received and registered the complaint on 12 August 2011. By letter dated 28 October 2011, the Authority forwarded the complaint to the Norwegian authorities and requested additional information. Thus, the limitation period was interrupted by the Authority’s action on that date. Any aid granted by way of a guarantee 10 years prior to 28 October 2011 would thus be deemed to be existing aid.

(121) From 1993 until 2003, Oslo Municipality granted guarantees to KTP. The Norwegian authorities have explained that since 2001, the municipal guarantees have only covered loans related to investments in metro and tram infrastructure and rolling stock (the metro and tram guarantees), as well as a loan related to investments in NBB (the NBB Guarantee). The Norwegian authorities have confirmed that the loans covered by the guarantees did not exceed the costs of the investments. Thus, any other potential aid granted prior to 2001 in the form of guarantees would be existing aid that would have been terminated and thus aid that the Authority would not be competent to address. Therefore, the Authority limits its investigation to potential aid granted since 2001 under the metro and tram guarantees and the NBB Guarantee.

##### **4.2 State resources**

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

(123) Within the context of the state aid rules, local and regional authorities are considered to be equivalent to the State.<sup>58</sup> Hence, Oslo Municipality is equivalent to the State.

(124) Oslo Municipality has issued guarantees to KTP and Oslo Vognselskap AS. The risk associated with the guarantees that rests on the municipality represents a potential burden on its resources. While a guarantee might never be called upon, it nevertheless entails a

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<sup>57</sup> See Case T-369/00 *Département du Loiret v Commission* [2003] ECR II-1789, paragraphs 81-85.

<sup>58</sup> See 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 at point 1a of Annex XV to the EEA Agreement. And, specifically for guarantees, see the Authority’s Guidelines on State Guarantees (OJ L 105 21.4.2011 p. 32), at Chapter 2.1 second paragraph.

contingent liability, and would constitute an additional burden for the municipality in the event of its implementation.<sup>59</sup>

- (125) In the same manner, the infrastructure loans forwarded from Oslo Municipality to KTP also represent a potential burden on the municipality. The forwarding of the loans entails a contingent liability, and would constitute an additional burden for the municipality in case of default on the part of KTP.
- (126) The NBB transfer payment and the coverage by Ruter of costs incurred by KTP in 2009 have been made by Ruter which is an entity owned by Oslo Municipality and Akershus County. Ruter is financed and controlled by these public authorities. Therefore these measures involve state resources. The NBB Guarantee involves state resources as it, like the metro and tram guarantees, represents a potential burden on the municipality.
- (127) On the basis of the above, the Authority concludes that the metro and tram guarantees, the infrastructure loans and the NBB measures were disbursed from state resources within the meaning of Article 61(1) of the EEA Agreement.

### 4.3 Undertaking

- (128) In order for a measure to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, it has to favour an “undertaking”. An undertaking is any entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed.<sup>60</sup> Any activity consisting in offering goods and services on a given market is an economic activity.<sup>61</sup>
- (129) The metro and tram guarantees covered only loans related to investments in metro and tram infrastructure and rolling stock. The infrastructure loans covered only investments in metro infrastructure.
- (130) The Norwegian authorities have argued that KTP and Oslo Vognselskap AS, when investing in metro and tram infrastructure and rolling stock, do not engage in an economic activity and that they therefore cannot be considered as undertakings within the meaning of Article 61(1) of the EEA Agreement.
- (131) The Authority recalls that KTP and its subsidiaries Oslo T-banedrift AS and Oslootrikken AS, as well as Oslo Vognselskap AS together provide metro and tram transport services in Oslo. KTP is responsible for the development and management of the metro and tram infrastructure. When examining the economic nature of infrastructure development, there is no cause to dissociate the activity of building or enlarging infrastructure from the subsequent use to which it is put. The nature of the development activity must be determined according to whether the subsequent use of the infrastructure is an economic activity.<sup>62</sup>

<sup>59</sup> See Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paragraph 80.

<sup>60</sup> Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 78 and Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* (“Flughafen Leipzig-Halle”; not yet published), paragraph 50.

<sup>61</sup> Case C-288/11 P *Flughafen Leipzig-Halle*, cited above, paragraph 50 and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36.

<sup>62</sup> See Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2011] p. II-1311, paragraph 95 (the judgment was upheld in Case C-288/11 P *Flughafen Leipzig-Halle*, cited above). See also Commission Decision in Case SA.34056 *Cable car for London* (OJ C 220 25.7.2012 p. 6), paragraphs 34-36.

- (132) The Norwegian authorities have neither claimed nor demonstrated that the markets for providing metro and tram transport services in Oslo, are closed markets. The Authority also notes that the European Commission considers offering local rail transport services on the market to be an economic activity.<sup>63</sup> Metro and tram tracks and a payment and ticketing system are essential elements for the economic activities engaged in by the metro and tram transport operators. The development and construction of such infrastructure thus permit the metro and tram transport providers to engage in their principal economic activity. Thus, entities carrying out these activities are undertakings within the meaning of Article 61(1) of the EEA Agreement.
- (133) On this basis, the Authority considers KTP to constitute an undertaking when it develops and manages the metro and tram infrastructure and develops NBB.
- (134) Furthermore, Oslo Vognselskap AS constitutes an undertaking when it rents out rolling stock for the provision of metro and tram transport services.

#### 4.4 Economic advantage

- (135) In order to constitute state aid within the meaning of Article 61(1) EEA Agreement, the aid measure must represent an economic advantage.
- (136) The Authority has adopted Guidelines on State Guarantees (“the GSG”)<sup>64</sup> which provide clarity as to how the Authority assesses the state aid nature of state guarantees. The GSG apply to the transport sector.<sup>65</sup> Generally, the Authority assesses the state aid nature of state guarantees on the basis of the GSG.<sup>66</sup> Normally, a guarantee confers an advantage on its recipient if the recipient does not pay an appropriate premium for the guarantee. As neither KTP nor Oslo Vognselskap AS have paid a premium for any of the guarantees provided by Oslo Municipality, it appears *prima facie* that as the two companies have received an economic advantage stemming from the guarantees.
- (137) The Authority also notes that Oslo Municipality has forwarded loans to KTP on the same terms that it has obtained on the credit market. As KTP does not pay a premium for this service to Oslo Municipality, and as it is not clear whether KTP would obtain credit on the same terms without the intervention of Oslo Municipality, it appears *prima facie* that KTP receives an advantage stemming from the forwarding of the infrastructure loans.
- (138) The Norwegian authorities have however explained that both the metro and tram guarantees and the infrastructure loans have been awarded as public service compensation

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<sup>63</sup> Commission Decision in Case C 58/06 (Germany) Aid implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ L 210 17.8.2011 p. 1), and Commission Decision in Case N 258/2006 (Poland) Silesian Trams S.A. (OJ C 207 30.8.2006 p. 2), paragraphs 16-35. Furthermore, the provision on the market of cable-reliant local transport services with cable cars is also an economic activity, see the Commission Decision in Case SA.34056 Cable car for London (OJ C 220 25.7.2012 p. 6), paragraph 36.

<sup>64</sup> OJ L 105 21.4.2011 p. 32.

<sup>65</sup> GSG Chapter 1.3, fifth paragraph.

<sup>66</sup> Under those rules, state aid is not considered to be involved where a guarantee is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy (GSG Chapter 3.1, second paragraph). A private operator would require compensation for such risk-carrying normally in the form of an appropriate premium. Thus, where, as is the case here, the municipality forgoes such a premium, it does not act as a private operator under the normal conditions of a market economy. Consequently the guarantee entails an economic advantage for the undertaking.

for the provision of metro and tram services. Whether public service compensation confers an advantage on its recipient has to be assessed on the basis of the *Altmark* criteria.<sup>67</sup>

- (139) Additionally, KTP was given the task by Oslo Municipality of developing NBB within the remit of its public service obligation. The development of NBB, therefore, is considered an ancillary element of the provision of the public service itself. The NBB measures, provided as remuneration for the provision of that service, therefore also represent public service compensation, also to be assessed on the basis of the *Altmark* criteria.
- (140) The Authority considers that the fourth *Altmark* criterion,<sup>68</sup> namely whether the compensation was based on a tender or on the basis of the costs of an efficient and well-run company, is not met. Since 2001, KTP has been compensated by Oslo Municipality for the provision of metro and tram services in cooperation with its subsidiaries Oslo T-banedrift AS and Oslotrikken AS. Furthermore, Oslo Vognselskap AS has been compensated for the provision of rolling stock to the metro and tram operators. The agreement between, on the one hand, the public authorities of Oslo Municipality and on the other, KTP and Oslo Vognselskap AS for the provision of metro and tram services and related services have not been awarded on the basis of public procurement procedures. The task of developing NBB was also not awarded on the basis of public procurement procedures. Hence, the compensation has not been based on prices resulting from public tenders. Furthermore, the Norwegian authorities have not provided the Authority with information enabling a verification of whether the costs incurred by KTP and Oslo Vognselskap AS correspond to the costs of a typical undertaking, well run and adequately equipped. As all four *Altmark* criteria have to be met cumulatively in order for public service compensation to escape the classification of conferring an advantage on the recipient,<sup>69</sup> the Authority, without assessing the fulfilment of the other *Altmark* criteria, concludes that the metro and tram guarantees constitute advantages for KTP and Oslo Vognselskap AS. The Authority furthermore concludes that the infrastructure loans and the NBB measures constitute advantages for KTP.

#### 4.5 Selectivity

- (141) According to Article 61(1) of the EEA Agreement, in order to constitute state aid, a state measure must be selective by favouring certain undertakings or the production of certain goods.
- (142) In order to determine whether a measure is selective, the question is whether the undertaking(s) in question are in legal and factual situation that is comparable to other undertakings in the light of the objective pursued by the measure.<sup>70</sup>
- (143) The metro and tram guarantees favour only KTP and Oslo Vognselskap AS and the infrastructure loans favour only KTP in their economic activities related to metro and tram transport services. The NBB measures favour only KTP. As a result, other metro or tram operators are excluded from the scope of these measures. Further, railway and bus operators that are in a comparable legal and factual situation in the sense that they pursue the same objective, i.e. passengers' transportation, are also excluded.

<sup>67</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht („Altmark“)* [2003] ECR I-7747, paragraphs 89–93.

<sup>68</sup> Case C-280/00 *Altmark*, cited above, paragraph 93.

<sup>69</sup> Case C-280/00 *Altmark*, cited above, paragraph 94.

<sup>70</sup> Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnffjord* [2005] EFTA Court Report 117, paragraph 77 and Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41.

(144) Therefore, the Authority concludes that all these measures are selective.

#### 4.6 Distortion of competition and affect on trade between Contracting Parties

(145) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the aid measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

(146) The present case concerns a local market for public transport in Oslo. In that respect, the Authority recalls that in the *Altmark* judgment, which concerned regional bus transport services, the Court of Justice held that:

*“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.”<sup>71</sup>*

(147) This implies that even if only a local transport service is concerned, public funding made available to one operator in a local or regional market that is open to competition, is liable to distort competition and affect trade between Contracting Parties.<sup>72</sup>

(148) The Authority notes that the EEA has gradually opened the rail transport markets to competition already since 2001 with the adoption of the first liberalisation package.<sup>73</sup> In addition, the Norwegian authorities have not supplied the Authority with any information concerning the granting of legally exclusive rights to the operators concerned that would imply that the provision of metro and tram services is still closed to competition. In the absence of proof of the contrary taking also into account the gradual opening of the market in the EEA, the Authority considers that it is likely that other companies would be interested in entering the markets of providing metro and tram services in Oslo.

(149) Consequently, the Authority considers that the metro and tram guarantees, the infrastructure loans and the NBB measures are liable to distort competition and affect trade between Contracting Parties.

#### 4.7 Conclusion

(150) On the basis of the above, the Authority concludes that the metro and tram guarantees, the infrastructure loans and the NBB measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

<sup>71</sup> Case C-280/00 *Altmark*, cited above, paragraphs 77 and 82.

<sup>72</sup> See also Commission Decision in Case N 258/2006 (Poland) *Silesian Trams S.A.* (OJ C 207 30.8.2006 p. 2), paragraphs 21-34.

<sup>73</sup> See the Authority’s Guidelines on state aid for railway undertakings (OJ L 105 21.4.2011 p. 32) and the references to directives listed therein (paragraph 9). Metro and tram services are also covered by 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 3.12.2007 p. 1), incorporated in the EEA Agreement by means of Annex XIII to the EEA Agreement.

## 5. Classification of the metro and tram guarantees, the infrastructure loans and the NBB measures as existing aid

(151) 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;”*.

(152) Article 1(d) of Part II of Protocol 3 provides that “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 (...)”*.

(153) The providers of metro and tram services in Oslo are compensated in accordance with the principles currently laid down in the CTA, the CTR and the relevant administrative practices.

(154) The Authority has, in a separate procedure, concluded that that legislation and the parallel administrative practice relating to the compensation for local scheduled bus transport in Oslo constitutes an aid scheme.<sup>74</sup>

(155) As the legislative principles and the administrative practice relating to the compensation for metro and tram services in the case at hand are the same, the Authority, in line with the conclusions drawn in that procedure, finds that the financing of metro and tram services in Oslo by Oslo municipality has been based on *“act[s] 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”*.<sup>75</sup>

(156) In particular, the Authority notes that the CTA, the CTR and relevant administrative practices are acts on the basis of which Oslo Municipality awarded the metro and tram guarantees, the infrastructure loans and the NBB measures.

(157) The financial measures have been awarded without further implementing measures being required. Oslo Municipality did not have any discretion that would influence to a significant degree the amount, characteristics or conditions under which the aid was granted. According to the Local Government Act and the Regulation on municipal and county municipal guarantees, municipals guarantees could only be issued if they would not be connected to “commercial activities”.

(158) In the case at hand, the guarantees in question have been restricted to cover loans in metro and tram infrastructure and rolling stock that are used for the provision of the public services. The loans are a means to finance the metro and tram services in accordance with the municipality’s obligation to finance local scheduled transport in Oslo. The NBB measures have been provided to compensate for the development of the payment and ticketing system used for the local scheduled transport services in Oslo.

(159) No further legislative measures needed to be adopted for the compensation payments to the aid recipients.

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<sup>74</sup> See Decision No 519/12/COL, cited above.

<sup>75</sup> Article 1(d) of Part II of Protocol 3.

(160) In view of the above, the Authority concludes that the financing measures have been provided on the basis of an aid scheme, pursuant to principles and practices that have applied since before the entry into force of the EEA Agreement in Norway (1 January 1994) until today. As no substantive alterations have occurred,<sup>76</sup> the Authority concludes that the aid scheme is existing in nature.

#### **6. Whether the metro and tram guarantees, the infrastructure loans and the NBB measures were granted on the basis of an existing aid scheme**

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

*“(...) in so far as the compensation payments were indeed used to finance the operation of non-profitable scheduled bus services, 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 scheme, existing aid (...)”<sup>77</sup>*

(162) It follows that only measures implemented on the basis of the existing aid scheme can be considered as existing aid disbursed under that scheme. Conversely, measures not implemented on the basis of the scheme cannot be protected by the existing aid nature of the scheme.<sup>78</sup>

(163) Since 2001, all the metro and tram guarantees subject to this Decision have been restricted to cover loans related to investments in metro and tram infrastructure and rolling stock. It is also clear that the infrastructure loans have only covered investments in metro and tram infrastructure. These aid measures have been complemented with annual grants taking into account the cost of the service and disbursed in accordance with the procedure described in chapter I.4 of this Decision. Separate accounts have been kept for the metro and tram services. The accumulated results of both the metro and tram services have been negative. In individual years KTP and its subsidiaries have turned a modest profit (up to 5.8% before tax).

(164) In light of this, the Authority finds that the metro and tram guarantees and the infrastructure loans have not led to overcompensation i.e. compensation in excess of the losses actually incurred in connection with the services in question plus a reasonable profit. To the contrary, the measures have been awarded to cover only the cost of the metro and tram services (plus a reasonable profit) on the basis of the existing aid scheme. Therefore, the metro and tram guarantees and the infrastructure loans constitute existing aid awarded on the basis of an existing aid scheme.

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<sup>76</sup> For clarity, the Authority notes that it does not regard the Local Government Act as a provision providing for the aid scheme. Therefore the amendment of 2001 allowing the Municipality to contract loans on behalf of its entities, does not represent an amendment to the scheme as such. In any event, the Authority regards the 2001 amendment as a purely administrative and technical adjustment not affecting the substance of the scheme, and therefore, in any event not liable to alter the existing nature of the aid. In this context, the forwarding of a loan is in financial terms, comparable to guaranteeing for a loan. Both before and after the amendment of 2001, Oslo Municipality was free to issue guarantees for the same purposes.

<sup>77</sup> Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* [2011] EFTA Court Report 266, paragraphs 74 and 76.

<sup>78</sup> 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.

- (165) Concerning the NBB measures, as stated in paragraph (65) above, the Norwegian authorities have explained that as long as Oslo Municipality wishes to establish or maintain public service obligations for the provision of local scheduled transport services, the municipality is under the obligation to finance the payment and ticketing system it requires the transport providers to use. On this basis, the Norwegian authorities argue that if the financing of NBB is to be regarded as entailing state aid, that aid would be existing in nature as it would have been provided on the basis of the existing aid scheme for compensating local scheduled transport services.
- (166) The Authority notes that in the course of the 2006 reorganisation, it was decided that NBB should be transferred from KTP to the new administrative entity, Ruter. The transfer price was evaluated by Deloitte taking into account the costs accrued minus costs not adding to the value of NBB. On this basis, Deloitte concluded, and the parties agreed, that the value of the system amounted to NOK 261.5 million,<sup>79</sup> whereas in developing the system, KTP had incurred NOK 92 million in sunk cost not adding to the value of NBB, which would have to be covered by KTP itself. Thus, the transfer price mirrors a substantial part of the costs and expenses KTP actually incurred in developing the system.
- (167) Further, the calculation of the payment from Ruter to KTP of NOK 68 million for costs incurred in 2009 is also based on cost coverage principles.
- (168) Additionally, Oslo Municipality issued a guarantee free of charge to cover KTP's loans related to the financing of NBB. This guarantee ceased after the transfer of NBB to Ruter in 2009. In the assessment of actual interest costs incurred by KTP in developing NBB, Deloitte specifically takes into account the guarantee.<sup>80</sup>
- (169) The Authority considers that the guarantee was a means of financing the development of NBB. Had it not been granted and KTP had secured a loan on the market or had it been granted at a premium on market terms, higher costs would likely have incurred. This is so since a loan on otherwise equal terms, when unsecured, generally comes at a higher cost for the lender, than one backed by a guarantee. Also, if the guarantee was not free of charge, KTP would have to pay a premium, which would then result in an increase of the compensation paid by the Norwegian authorities (through Ruter) for the costs incurred by KTP in developing the system.
- (170) In conclusion, the measures for NBB covered a substantial part but not all the costs KTP incurred in developing NBB. The Authority considers that the state aid measures did not lead to the overcompensation of KTP, and, therefore, the NBB measures constitute existing aid awarded on the basis of an existing aid scheme.

## 7. Conclusion

- (171) On the basis of the foregoing assessment, the Authority, in accordance with Article 13(1) of Part II of Protocol 3 in conjunction with its Article 4(2), has concluded that the 15 short term liquidity loans and the bus for metro and tram contracts directly awarded to Unibuss AS do not involve state aid within the meaning of Article 61 of the EEA Agreement.

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<sup>79</sup> The transaction was subject to VAT, therefore the final price for Ruter was NOK 326 875 000 (including VAT).

<sup>80</sup> The actual cost was not used as the final basis for the value of the system. The costs not adding to the value of the system were subtracted. This led to the final transfer price not covering the actual financial costs in full.

- (172) Furthermore, the Authority considers the metro and tram guarantees, the infrastructure loans and the NBB measures to constitute state aid within the meaning of Article 61 of the EEA Agreement. The Authority has concluded that this aid has been granted on the basis of an existing system of aid. The Authority has furthermore concluded that the measures have been granted for the provision of public services, and that they have not entailed any overcompensation. The Authority has not identified other elements in the existing system of aid that presently would require it to propose appropriate measures in accordance with the procedure laid down in Article 1(1) of Part I of Protocol 3.

HAS ADOPTED THIS DECISION:

*Article 1*

The 15 short term liquidity loans which Oslo Municipality granted Kollektivtransportproduksjon AS from 2002 until 2009 do not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

*Article 2*

The bus for metro and tram contracts concluded with Unibuss AS for ad hoc interruptions until 2011 do not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

*Article 3*

The metro and tram guarantees provided by Oslo Municipality to the benefit of Kollektivtransportproduksjon AS and Oslo Vognselskap AS, involve state aid within the meaning of Article 61(1) of the EEA Agreement. These measures have been granted on the basis of an existing system of aid.

*Article 4*

The infrastructure loans granted by Oslo Municipality to Kollektivtransportproduksjon AS involve state aid within the meaning of Article 61(1) of the EEA Agreement. These measures have been granted on the basis of an existing system of aid.

*Article 5*

The NBB measures benefitting Kollektivtransportproduksjon AS involve state aid within the meaning of Article 61(1) of the EEA Agreement. These measures have been granted on the basis of an existing system of aid.

*Article 6*

This Decision is addressed to the Kingdom of Norway.

*Article 7*

Only the English language version of this decision is authentic.

Done at Brussels, on 8 May 2013.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sabine Monauni-Tömördy  
*College Member*