

Case No: 60510  
Event No: 562875  
Dec. No: 254/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION  
of 21 June 2010  
AS Oslo Sporveier and AS Sporveisbussene

(Norway)

THE EFTA SURVEILLANCE AUTHORITY<sup>1</sup>,

HAVING REGARD to the Agreement on the European Economic Area<sup>2</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice<sup>3</sup>, in particular to Article 24 thereof,

HAVING REGARD to Article 1 of Part I and Article 17 of Part II of Protocol 3 to the Surveillance and Court Agreement<sup>4</sup>,

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement<sup>5</sup>, and in particular the State aid Guidelines on the rules on public service compensation, state ownership of enterprises and aid to public enterprises,

Whereas:

## I. FACTS

### 1. Procedure

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

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<sup>1</sup> Hereinafter referred to as the Authority.

<sup>2</sup> Hereinafter referred to as the EEA Agreement.

<sup>3</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>4</sup> Hereinafter referred to as Protocol 3.

<sup>5</sup> Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/state-aid-register/>

By letter dated 7 September 2006 the Authority forwarded the complaint to the Norwegian authorities and invited them to comment (Event No. 387163).

By letter dated 11 October 2006 the Norwegian authorities replied to the information request. The letter was registered by the Authority on 19 October 2006 (Event No. 392725).

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

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

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

By e-mail dated 25 February 2008 the complainant submitted further information (Event No. 466226).

By letter submitted electronically on 2 April 2008 the Authority requested yet further information (Event No. 47192). The Norwegian authorities replied by letter submitted electronically on 29 April 2008 (Event No. 475480).

By e-mails dated 25 May 2008, 4 June 2008, 15 August 2008, 1 September 2008 and 20 January 2009, the complainant submitted further information (Event Nos. 478132, 479743, 488527, 489591, 489623, 489626, 505210 and 505503).

During the beginning of 2010 the Authority and the Norwegian authorities have had informal contact both via telephone and electronic mail regarding the case. Information received by the Authority in this context has been consolidated in a letter submitted to the Authority electronically on 21 April 2010 by the Norwegian authorities (Event no: 554417).

## **2. Description of the measures**

### **2.1. The complaint**

The complainant has argued that AS Sporveisbussene received state aid contrary to Article 61(1) of the EEA Agreement on three accounts: (i) the State transferred via its 100% owned company, Oslo Sporveier AS, NOK 41 499 000 in new equity to AS Sporveisbussene; (ii) AS Sporveisbussene has been cross-subsidized via AS Oslo Sporveier, including via using Oslo Sporveier's negative tax position to reduce the tax burden on AS Sporveisbussene; and (iii) AS Sporveisbussene has passed on cross-subsidization to its subsidiaries by owning the busses used by the subsidiaries without receiving compensation.

With respect to aid resulting from the tax position the complainant refers to any advantage to AS Sporveisbussene resulting from a joint corporate tax filing for AS Oslo Sporveier at

group level. By submitting a filing at group level, a profit-making company (AS Sporveisbussene) may pay less taxes due to a reduction of its profits caused by a joint filing with a loss-making company (AS Oslo Sporveier).

The following describes the facts relevant for assessing whether the alleged measures involve state aid.

## **2.2. AS Oslo Sporveier and establishment of AS Sporveisbussene**

Oslo Municipality is responsible for public transport facilities (such as underground transport systems, trams, buses and trains) in Oslo. Oslo Municipality delegated the task of planning and administering the public transport in Oslo to its 100% owned company, AS Oslo Sporveier, established in 1924. AS Oslo Sporveier has since its establishment been active in bus transport, metro (“*T-banen*”), tram (“*Trikk*”) and ferry transport. Until 1934, AS Oslo Sporveier was majority-owned by Oslo Municipality with 51%. As of 1934 Oslo Municipality became practically the sole owner (with 98.8% ownership) until a reorganisation in July 2006.<sup>6</sup> Following this reorganisation, a new company, Kollektivtransportproduksjon, which is wholly owned by Oslo Municipality, became a 100% owner of AS Oslo Sporveier. According to the Norwegian authorities Oslo Municipality was involved in all issues of commercial importance relating to the carrying out of collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/contracts with subsidiaries (such as AS Sporveisbussene) or other third parties.<sup>7</sup>

AS Oslo Sporveier operated an in-house department which carried out most collective bus transport in Oslo.<sup>8</sup> On 23 April 1997 the bus transport department was separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveisbussene.

Since 1994 AS Oslo Sporveier operated a tour bus division. The division was transferred to AS Sporveisbussene when the company was established in 1997. On 1 January 2006 the division was separated from AS Sporveisbussene into a newly established company, AS Sporveisbussenes Turbiler AS, owned 100% by AS Sporveisbussene.

In 2003 AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005 AS Sporveisbussene acquired the company, Arctic Express, engaged in flight bus transport and regional bus transport.

### *Reorganisation of AS Oslo Sporveier and AS Sporveisbussene*

In 2006, a reorganisation turned AS Sporveisbussene into a parent company with three subsidiaries. The subsidiaries were renamed from Nexus Trafikk to UniBuss AS; Sporveisbussenes Turbiler AS to UniBuss Tur AS; and Arctic Express AS to UniBuss Ekspress AS. On 1 July 2006 Oslo Municipality established a new company, Kollektivtransportproduksjon AS, with AS Sporveisbussene as its subsidiary.

<sup>6</sup> The minority shareholders (accounting for 0.02%) were private individuals.

<sup>7</sup> Oslo Municipality was involved via the management board of AS Oslo Sporveier.

<sup>8</sup> Three other operators, ING. M.O Schøyens Bilcentraler A/S, Norgesbuss AS/Oslo and Follo Busstrafikk A/S also held concessions for carrying scheduled bus transport on a few specified routes in Oslo. Oslo Norgesbuss AS/Oslo acquired Follo Busstrafikk A/S in 1996 and with that also took over its concessions.

Kollektivtransportproduksjon AS took over the operative part of AS Oslo Sporveier (such as bus transport and related service functions). At the same time a newly established company, AS Oslo Sporveier, was given responsibility for the organisation of collective transport services on behalf of Oslo Municipality.

Following yet another reorganisation in 2008, AS Sporveisbussene became a holding company for the subsidiaries Unibuss (operating scheduled bus transport in Oslo and Akershus based on public tenders) as well as UniBuss Tur AS and UniBuss Ekspress AS (both operating tourbusses, flight busses and express busses).

### 2.2.1. Concession and compensation

Since the 1950's AS Oslo Sporveier has held concessions awarded by Oslo Municipality for carrying out scheduled bus transport in Oslo. The latest concession was awarded by Oslo Municipality on 16 November 1992 and permitted AS Oslo Sporveier to operate scheduled bus transport in the entire Oslo grid (the "Concession"). The Concession was awarded on the basis of the rules in the 1976 Transport Act and was therefore valid for ten years: It was granted with retroactive effect from 1 January 1990 until 31 December 1999.<sup>9</sup> The Concession was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out. Since all scheduled bus transport was tendered out by 30 March 2008 the renewal period of the Concession expired on that date.

The Concession - and the previous concessions granted since 1976 - were all based on a Royal Decree issued on the basis of the Transport Act.<sup>10</sup> The Royal Decree provides that the grant of a concession is linked to an obligation to carry out the transport services stipulated in the concession.<sup>11</sup> Since the Concession was granted for carrying out scheduled bus transport services in Oslo, AS Oslo Sporveier was therefore under an obligation to carry out the relevant services in Oslo.

In order to compensate for the operation of bus transport services based on the Concession Oslo Municipality granted, as of the establishment of AS Oslo Sporveier, funding to AS Oslo Sporveier. From the 1980's the compensation was granted as a lump sum to cover the difference between costs and ticket revenues based on *all* activities carried out by AS Oslo Sporveier. Hence the lump sum also financed the operation of scheduled bus transport in Oslo to the extent that this was not covered by ticket revenue.

In order to be able to continue to fund scheduled bus transport in 1997 after the separation of the bus transport division into a separate company (i.e., AS Sporveisbussene), AS Oslo Sporveier and AS Sporveisbussene entered into a "Transport Agreement" on the provision of scheduled bus transport services in Oslo. The Transport Agreement provided that AS Sporveisbussene carries out scheduled bus transport in Oslo based on the Concession on behalf of AS Oslo Sporveier. The Transport Agreement, which was entered into on 23

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<sup>9</sup> The Transport Act is entitled "*Lov om samferdsel*", 1976-06-04 no. 63. Section 3 of the Transport Act provides that concessions are granted for ten year periods. This is repeated in section 7(2) of a Royal Decree issued on the basis of the Transport Act, "*forskrift*" no. 2170 of 8.12.1986.

<sup>10</sup> Royal Decree ("*forskrift*") no. 2170 of 8.12.1986.

<sup>11</sup> Section 7 of Royal Decree no. 2170 of 8.12.1986 stipulates "*Ruteløyve gir rett og plikt til å drive den transport som løyvet omfatter, i samsvar med vilkårene som er satt for virksomheten.*".

April 1997, entered into force retroactively with effect from 1 January 1997 with an initial three year duration (from 1 January 1997 until 31 December 1999) and automatic annual renewals thereafter. The Transport Agreement expired automatically in the event scheduled bus transport in Oslo would be subject to tenders. The contract expired on 30 March 2008 when all scheduled bus transport in Oslo had been tendered out.

By linking the Transport Agreement to the Concession, AS Oslo Sporveier channelled the compensation received from Oslo Municipality for carrying out scheduled bus transport to its subsidiary AS Sporveisbussene. Based on the Transport Agreement (and explanations by the Norwegian authorities) AS Sporveisbussene was entitled to receive on an annual basis (i) all revenue generated on ticket sales; (ii) a share of “other“ ticket sales (i.e., daily/monthly/annual cards and coupon cards); (iii) a share of revenue from tickets sold by trains (NSB) and bus transport (“Stor Oslo Lokal Trafik”) outside of Oslo; and (iv) a subsidy. The subsidy was fixed annually for the following year on the basis of the following formula: Using as a basis the amount of costs for the previous year the parties negotiated and agreed on a “cost amount” and then deducted (i) 3% of the total to ensure efficiency improvements; and (ii) the estimated revenues for the following year. The difference represented the subsidy.

The Norwegian authorities have provided the Authority with the following figures on the annual amounts of the subsidy: NOK 97 million in 1997; NOK 60.6 million in 1998; NOK 42 million in 1999; NOK 42 million in 2000; NOK 37.3 million in 2001; NOK 19.2 million in 2002; NOK 10.5 million in 2003; and NOK 11.5 million in 2004.

In addition hereto the Norwegian authorities have explained that in the year of 2004 AS Sporveisbussene received “a quality bonus” over and beyond the subsidy. The bonus represented NOK 3.9 million.

#### *2.2.2. Introduction of competition in scheduled bus transport in Norway and Oslo*

The Norwegian authorities have explained that the provision of local scheduled bus transport in Norway was opened for competition in 1994 on the basis of an amendment to the 1976 Transport Act.<sup>12</sup> The amendment introduced the possibility to subject routes to public tenders. Oslo municipality tendered out only a few small routes while other municipalities made more extensive use of this option.

However, in 2001 Oslo Municipality decided that all scheduled bus transport in Oslo should be put up for tender, starting in 2003. On this basis scheduled bus transport in Oslo was gradually put up for public tenders in five lots during the period between 2003 and 2008 as set out in the table below. The respective contracts entered into force the year following that in which they had been tendered out.

- 1 24.10.2003 with entry into force on 3 October 2004;
- 2 14.4.2004 with entry into force on 3 April 2005;
- 3 5.11.2004 with entry into force on 3 October 2005;
- 4 23.8.2005 with entry into force on 20 August 2006; and
- 5 12.1.2007 with entry into force on 30 March 2008.

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<sup>12</sup> Amendment introduced by law of 11 June 1993, no. 85. The amendment entered into force on 1.1.1994.

In parallel, the existing Transport Agreement between AS Oslo Sporveier and AS Sporveisbussene was phased out until the agreement fully expired on 30 March 2008. The phasing out of the Transport Agreement was based on a provision explicitly stating that the Transport Agreement should not be an obstacle in case Oslo Municipality should decide to put all routes covered by the Transport Agreement up for public tenders. The Transport Agreement also stated that routes which were put up for public tender were automatically excluded from the agreement. The exclusion of a route was simultaneous with the entry into force of the tender contract for the same route.

Hence, since 31 March 2008 AS Sporveisbussene has operated scheduled bus transport services exclusively based on contracts won in public tenders.

### **2.3. Alleged transfer of new equity worth NOK 41.5 million**

The complainant has referred to the annual accounts for AS Sporveisbussene for 2003 and 2004 and has argued that a capital injection of about NOK 41.5 million given in 2004 by AS Oslo Sporveier to AS Sporveisbussene may involve state aid because AS Oslo Sporveier had carried forward losses of approximately NOK 1 billion in the same year. In this respect the complainant has referred to (i) the accounts for 2003 which shows an item entitled "other injected capital" of NOK 39 501 000; and (ii) to the accounts for 2004 which shows an item entitled "company equity" of NOK 81 000 000. The complainant considers that the difference (i.e, NOK 81 000 000 minus NOK 39 501 000) of NOK 41 499 000 represents a capital injection in 2004 which may involve state aid as no private market investor would inject capital in a loss-making company.

First, the Norwegian authorities have, via their auditors, Ernst & Young, pointed to the fact that it appears from the annual accounts for AS Sporveisbussene for 2003 that NOK 39 501 000 represents capital injected in 2003. Moreover, it appears from the 2004 annual accounts that the item of NOK 81 000 000 in 2004 does not represent the entire equity, but merely *one* of the equity items, which contributed to a total of NOK 119 256 000 in equity for 2004. Hence the capital injection in the company for 2004 is not identified by deducting NOK 39 501 000 from NOK 81 000 000.

The Norwegian authorities have further explained that there was a capital injection to the group of AS Oslo Sporveier in 2004. In this regard the Norwegian authorities submitted a memorandum, prepared by Ernst & Young, explaining that in 2004, Oslo Municipality injected capital of approximately NOK 800 million to cover underfunding of the pension fund for AS Oslo Sporveier group, including AS Sporveisbussene.<sup>13</sup> In this context the Norwegian authorities have explained that the Norwegian local authorities - and companies owned or controlled by them - were obliged to provide their employees with an indexed pension equal to 70% or 66% of their final salary upon retirement at the age of 67. If necessary, companies had to subscribe to a supplementary pension fund. This is what the group of AS Oslo Sporveier did and hence also AS Sporveisbussene. It was this additional pension fund which had been underfunded up until the end of 2002 in respect of already acquired pension rights.

The Norwegian authorities have explained that it is not unusual for pension funds to have been underfunded because the premiums paid were too low. The underfunding stems from

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<sup>13</sup> Memorandum entitled "Redegjørelse vedrørende bakgrunn for kapitalendring i AS Sporveisbussene i 2004", of 8.10.2006 (Event No. 392725).

uncertainty in relation to the parameters used for purposes of identifying the amount owed in pension obligations (such as life expectancy, salary at the age of retirement, expected return on pension funds, etc). It appears from the abovementioned Ernst & Young memorandum that based on financial and insurance related parameters laid down by the Norwegian Credit Supervisory Authority ("Kredittilsynet"),<sup>14</sup> the pension fund in the AS Oslo Sporveier group was underfunded by about NOK 800 million in the period from 1998 to 31 December 2002.<sup>15</sup> AS Sporveisbussene's share of this underfunding was NOK 111 760 000.

In 2004 Oslo Municipality therefore contributed capital of NOK 800 million to the group of AS Oslo Sporveier which then paid the outstanding amount of underfunding to the pension fund. AS Oslo Sporveier thereby also paid 111 760 000 on behalf of AS Sporveisbussene. The same amount features as a capital injection in the accounts of AS Sporveisbussene for 2004.

However, in terms of the accounts, the underfunding of the pension funds had never been reflected in the accounts of AS Oslo Sporveier, or in the accounts of AS Sporveisbussene. The auditors have explained in their memorandum that the reason for this is an accounting principle entitled the "corridor solution".<sup>16</sup> This solution is based on the fact that a company sets some of the parameters for determining the amount owed in pension obligations on its own while some are based on public statistics etc. Due to the large uncertainty of the parameters there are often differences between the assumptions and reality which may ultimately result in an increase or decrease in the amount owed for pension obligations. Based on the principle of the "corridor solution" the amount of pension obligations related to such differences can be kept entirely outside the accounts of the company. The "corridor solution" is based on the assumption that there will be deviations every year between the long-term assumptions and reality and that, over time, such differences will even out.

In 2004 the Norwegian authorities decided, however, to change accounting principles and to include the outstanding balance in relation to underfunding of pensions by making use of the main accounting principle, i.e., to include, in the accounts, all costs over the period of assumed average employment. The pension costs of NOK 111 760 000 was therefore included in the accounts of AS Sporveisbussene as a cost item. However, in parallel, the amount of NOK 111 760 000 was included in the accounts of the company as a capital injection.

The inclusion of the costs of the pension obligations in the accounts of AS Sporveisbussene should in principle have reduced the capital injection with the same amount. However, it appears from the 2004 accounts that the equity in the company was only reduced with NOK 80 934 000 (under the item entitled "*estimatavvik*"). This left a remaining amount of NOK 30 000 000. However, the latter amount was not at the

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<sup>14</sup> The Credit Supervisory Authority (renamed the Financial Supervisory Authority "*Finanstilsynet*" in December 2009) is a government agency under the Ministry of Finance responsible for the supervision of financial companies (including pension funds) based on rules from the Parliament, the Ministry of Finance and international accounting standards.

<sup>15</sup> Memorandum entitled "*Redegjørelse vedrørende bakgrunn for kapitalendring i AS Sporveisbussene i 2004*", of 8.10.2006 (Event No. 392725).

<sup>16</sup> Memorandum entitled "*Redegjørelse vedrørende bakgrunn for kapitalendring i AS Sporveisbussene i 2004*", of 8.10.2006 (Event No. 392725).

company's disposition in the sense that the very same amount was included in the accounts as "paid pensions means". This reflects the fact that the capital injection was spent for the pension fund and is in line with the fact that the actual amount paid to the pension fund was the entire amount of NOK 111 760 000 (not only NOK 80 934 000).

## II. ASSESSMENT

### 1. The presence of aid

State aid within the meaning of Article 61(1) EEA Agreement

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.”*

#### 1.1. The allegations of the complainant.

The Authority recalls that the complainant has argued that AS Sporveisbussene received state aid contrary to Article 61(1) of the EEA Agreement on three accounts: (i) the State transferred via its 100% owned company, AS Oslo Sporveier AS, NOK 41 499 000 in new equity to AS Sporveisbussene; (ii) AS Sporveisbussene has been cross-subsidized via AS Oslo Sporveier, including via using AS Oslo Sporveiers negative tax position to reduce the tax burden on AS Sporveisbussene; and (iii) AS Sporveisbussene has passed on cross-subsidization to its subsidiaries by owning the busses used by the subsidiaries without receiving compensation.

The Authority notes that the public funding granted to AS Oslo Sporveier and AS Sporveisbussene is based on the Concession for carrying out scheduled bus transport in Oslo and could therefore constitute compensation for costs that AS Oslo Sporveier and AS Sporveisbussene had to bear due to public service obligations imposed on them. Assuming this is the case, the complainants allegations of cross-subsidization will effectively amount to whether AS Oslo Sporveier and AS Sporveisbussene received any over-compensation for the carrying out of collective bus transport services in Oslo. This applies both to any means channelled by the Oslo Municipality directly to AS Oslo Sporveier, or to AS Sporveisbussene via AS Oslo Sporveier.<sup>17</sup> It applies therefore also to any transfer of equity to AS Sporveisbussene.

With respect to the complainant's allegation of tax benefits to AS Sporveisbussene resulting from a joint corporate tax filing at group level of AS Oslo Sporveier, the Authority points out that the complainant has not referred to any special tax arrangements

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<sup>17</sup> This is, of course, also the case with respect to any means from the State via AS Oslo Sporveier to AS Sporveisbussene where the latter might have passed such means on to its subsidiaries.



which favours the operation of bus transport services. Rather the complainant has taken issue with what appears to be an application of the general Norwegian rules on corporate taxation. In particular, the Authority notes that the complainant has neither alleged, nor submitted any information to support that the relevant tax rules are drafted in a manner which involves state aid. On this basis the Authority has decided not to investigate the tax-related allegation any further.

Finally, the Authority notes that the Norwegian authorities have made all contracts for scheduled bus transport services in Oslo subject to tenders as of 31 March 2008. The assessment of alleged state aid is therefore based on the period preceding that date.

## 1.2. Economic advantage

In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement the measure must confer an advantage that relieves an undertaking of charges that are normally borne from its budget.

### 1.2.1. Compensation for scheduled bus transport in Oslo

As mentioned above, the compensation to AS Oslo Sporveier and AS Sporveisbussene for carrying out bus transport services in Oslo could constitute compensation for costs based on public service obligations imposed on them. On this basis, the Authority has first considered whether the presence of a public service obligation would exclude the presence of state aid all together on the basis of the criteria established in the *Altmark* case law of the European Court of Justice.<sup>18</sup>

#### *Exclusion of aid based on Altmark*

In the *Altmark* judgment the Court of Justice held that compensation for public service obligations does not constitute state aid when four cumulative criteria are met.

- First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.
- Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- Fourth, and finally, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

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<sup>18</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747. See also Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81.; the European Court of Justice is hereinafter referred to as “Court of Justice”.

The Authority takes the view that it is appropriate first to examine the fourth criterion, namely whether the compensation is based on a tender or on the basis of the costs of an efficient and well-run company.

In the present case Oslo Municipality compensated AS Oslo Sporveier for bus transport based on the Concession. As of 1997 the compensation was passed on to AS Sporveisbussene which carried out bus transport based on the Concession on behalf of AS Oslo Sporveier. However, neither AS Oslo Sporveier nor AS Sporveisbussene have been selected in a public procurement procedure. Hence, neither the compensation from Oslo Municipality to AS Oslo Sporveier, nor the compensation passed on from AS Oslo Sporveier to AS Sporveisbussene has been based on prices resulting from public tenders. Furthermore, the Norwegian authorities have neither argued that (nor provided the Authority with information enabling a verification of whether) the costs incurred by AS Oslo Sporveier or AS Sporveisbussene correspond to the costs of a typical undertaking, well run and adequately equipped. On the contrary, the compensation method for carrying out collective bus transport in Oslo by AS Oslo Sporveier and AS Sporveisbussene was rather opaque: AS Oslo Sporveier received a lump sum to cover the difference between costs and ticket revenues based on *all* activities carried out by AS Oslo Sporveier. The amount is therefore not based on the identification of the specific costs for carrying out bus transport services. As to AS Sporveisbussene, the company received an annual subsidy in all the years between 1997 to 2004 to cover the gap between revenues and costs.<sup>19</sup> Even if the subsidy amount might have been intended to cover only the costs not covered by revenues, the subsidy amount was based on estimated costs (as opposed to real costs) and the amount was the subject of negotiation between the parties. The level of the compensation to AS Sporveisbussene was even more blurred by the fact that in one year (i.e., 2004) the company received “a quality bonus” over and above the subsidy.

On the basis of the above, the Authority considers that scheduled bus transport services in Oslo has, both in the case of AS Oslo Sporveier and AS Sporveisbussene, therefore not been discharged in accordance with the fourth criterion of the *Altmark* judgment, i.e. the compensation has not been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred. Already for that reason the presence of state aid can therefore not be excluded on the basis of the *Altmark* case law.

#### *Presence of economic advantage*

The next question is whether AS Oslo Sporveier and AS Sporveisbussene received an economic advantage by means of the compensation received in return for carrying out collective bus transport services based on the Concession.

The Authority observes that an economic advantage can be excluded if the compensation to AS Oslo Sporveier and AS Sporveisbussene matched market prices for carrying out bus transport. This is based on the application of the so-called "private market investor" principle which also applies when the State is purchasing goods and services. Thus, if the State enters into a contract for purposes of having services provided by an operator, no

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<sup>19</sup> Under the Transport Agreement AS Sporveisbussene was, however, entitled to a subsidy also between 2005 and 30.3.2008.

state aid will be involved if the State acts like a private market investor by paying market prices. Conversely, if the price is higher than the market price the contract may involve an economic advantage for the service provider, corresponding to the difference between the market price for providing similar services and the price at which such services are provided under the contract. One way for the State to obtain an indication of the market price is to launch a non-discriminatory public tender. Another way is to obtain an expert evaluation.

In the present case AS Oslo Sporveier was compensated under the Concession by receiving lump sums from Oslo Municipality to cover the costs of *all* activities. AS Sporveisbussene, in turn, was compensated under the Transport Agreement (linked to the Concession) by being allowed to keep ticket revenues and receiving a subsidy.<sup>20</sup> The amount of the subsidy was fixed on the basis of estimated costs and was then the subject of negotiations between the parties to the Transport Agreement. The compensation to AS Oslo Sporveier and AS Sporveisbussene did therefore not result from public tenders and was not based on expert evaluations. Moreover, the Authority considers that the method to determine the amount of the annual compensation to AS Oslo Sporveier and AS Sporveisbussene bears no relation to market prices. The Norwegian authorities have not brought forward any evidence that the compensation was put on a level equal to a public tender price or any other source representing a market price. Indeed, the grant of lump sums (in the case of AS Oslo Sporveier), or an annual subsidy to cover the gap between costs and revenues (in the case of AS Sporveisbussene) indicate the opposite. The grant of an additional bonus in one year (2004) to AS Sporveisbussene is yet another indication that the compensation level is not a market-oriented price.

On this basis the Authority concludes that the compensation by Oslo Municipality to AS Oslo Sporveier and AS Sporveisbussene for carrying out local scheduled bus transport in Oslo was not based on market prices. Therefore, the compensation (linked to the Concession) granted to AS Oslo Sporveier and AS Sporveisbussene by Oslo Municipality until 30 March 2008 involved an economic advantage within the meaning of Article 61(1) EEA.

#### *1.2.2. Alleged transfer of new equity NOK 41.5 million to AS Sporveisbussene*

First, the Authority observes that based on the annual accounts for AS Sporveisbussene for 2003 and 2004, the capital injection provided to AS Sporveisbussene in 2004 actually amounted to NOK 111 760 000. This amount exceeds therefore the complainant's estimate of NOK 41.5 million.

This finding is based on the fact that the Norwegian authorities' auditors, Ernst & Young, have clarified that the pension fund for the group of AS Oslo Sporveier group had been underfunded with NOK 800 million. AS Sporveisbussene's share of this amount was NOK 111760 000. The underfunding was identified by the Credit Supervisory Authority

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<sup>20</sup> As foreseen in the Transport Agreement the subsidy was paid by AS Oslo Sporveier to AS Sporveisbussene.

in Norway and is due to the inherent uncertainty in the parameters for determining the amount owed in pension obligations.<sup>21</sup>

It is also clear that in 2004 Oslo Municipality contributed capital of NOK 800 million to the group of AS Oslo Sporveier which then paid the outstanding amount of underfunding to the pension fund. The amount of NOK 111 760 000 was paid to the pension fund by AS Oslo Sporveier on behalf of AS Sporveisbussene and featured as a capital injection in the accounts of AS Sporveisbussene. Hence, as stated above, the Authority is of the opinion that the capital injection for AS Sporveisbussene for the year 2004 amounted to NOK 111 740 000.

Secondly, according to the explanation provided by Ernst & Young that while the underfunding had not been reflected in the accounts of AS Oslo Sporveier, nor in the accounts of AS Sporveisbussene, based on the principle of the “corridor solution”, the Norwegian authorities decided to change accounting principles in 2004. The Norwegian authorities included therefore the outstanding balance of NOK 111 760 000 of underfunding in the accounts of AS Sporveisbussene. In parallel, the amount of NOK 111 760 000 was included in the accounts as a capital injection. The pension underfunding “ate” NOK 80 934 000 of the capital injection. The remainder of NOK 30 000 000 was included in the accounts as “paid pension means” and was therefore unavailable to the company. The Authority therefore concludes that the accounts of AS Sporveisbussene do reflect the fact that the capital injection of NOK 111 760 000 covered the payment for underfunding of the pension obligations.

On the basis of the above the Authority considers that AS Sporveisbussene received a capital injection in 2004 to cover underfunding of pension obligations in respect of costs accrued until the end of 2002.

However, in this context the Authority points out that the pension obligations of AS Sporveisbussene did not constitute new costs but were costs accrued in the past which had just technically been kept outside the general accounts of the company. The only reason the specific costs of the pension obligations in question were paid later than when they accrued was a change in the accounting principles. Since all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality.<sup>22</sup> Hence the payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene. On this basis the Authority concludes that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene.

However, as established in Part II, section 1.2.1 above, the overall compensation to AS Sporveisbussene did not correspond to market prices and involved therefore an economic advantage.

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<sup>21</sup> The amount of NOK 800 million covered under-funding until the end of 2002 in respect of acquired pension rights.

<sup>22</sup> Via Oslo Sporveier.

### 1.3. Presence of state resources

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

As a preliminary point, both local and regional authorities are considered to be equivalent to the State.<sup>23</sup> Hence Oslo Municipality is equivalent to the State for the purposes of the EEA state aid rules.

In the present case it is clear that the State, in the capacity of Oslo Municipality, provided funding to AS Oslo Sporveier for carrying out bus transport on the basis of the Concession.

As regards AS Sporveisbussene, the State, in the capacity of Oslo Municipality, financed outstanding pension obligations of NOK 111 760 000 for AS Sporveisbussene. In addition, compensation from the State was passed on (via AS Oslo Sporveier) to AS Oslo Sporveisbussene. In this regard the Authority observes that state aid may be granted through the intermediary of public undertakings or financial institutions,<sup>24</sup> provided the actions of the public undertaking in this regard are imputable to the State. AS Oslo Sporveier was 98.8% state controlled until 2006, after which AS Oslo Sporveier became a 100% owned subsidiary to Kollektivproduktjon, which is 100% state owned. AS Oslo Sporveier qualifies therefore as a public undertaking. Moreover, since Oslo Municipality is involved in all commercial issues relating to bus transport, including the financing<sup>25</sup> of AS Sporveisbussene, the actions of AS Oslo Sporveier are imputable to the State.<sup>26</sup> The Authority concludes therefore that both the financing of outstanding pension obligations of NOK 111 760 000 and the compensation to AS Sporveisbussene (via AS Oslo Sporveier) for carrying out bus transport services in Oslo was granted by the State.

### 1.4. Favouring certain undertakings or the production of certain goods

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

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<sup>23</sup> Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings, OJ L 318, 17.11.2006, p. 17, incorporated by means of Annex XV to the EEA Agreement.

<sup>24</sup> This also follows from the Commission Directive 2006/111/EC of 16.11.2006 on the transparency of financial relations between Member States and public undertakings ( the "Transparency Directive") OJ L 318, 17.11.2006 p. 17. The Transparency Directive has been incorporated in to the EEA Agreement by means of Article 1a of Annex XV; Decision No. 55/2007/COL of 8.6.2007, OJ L 266, 11.10.2007 p. 15 and EEA Supplement no. 48, 11.10.2007, p.12.

<sup>25</sup> I.e., the compensation.

<sup>26</sup> For purposes of the Transparency Directive a public undertaking is defined as an undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ownership or financial participation.

The Court of Justice has held that in order to determine whether a measure is selective, the question is whether the undertaking(s) in question are in a legal and factual situation that is comparable to other undertakings in the light of the objective pursued by the measure.<sup>27</sup>

In the present case, the compensation, including the payment of outstanding pension obligations of NOK 111 760 000, for carrying out scheduled bus transport services in Oslo on the basis of the Concession favoured AS Oslo Sporveier and/or AS Sporveisbussene to the exclusion of other bus transport operators. Such other bus operators operate scheduled bus transport services in Norway or elsewhere in the EEA and were therefore in a similar legal and factual situation compared to AS Oslo Sporveier and AS Sporveisbussene.

### 1.5. Distortion of competition and effect on trade between Contracting Parties

In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement the aid measure must distort or threaten to distort competition and affect trade between Contracting Parties. According to the EFTA Court case law, this requires the Authority to examine whether such aid is *liable* to affect trade and to distort competition.<sup>28</sup>

The Authority observes that before the EEA Agreement entered into force in Norway in 1994, most collective scheduled local bus transport services in Norway were provided on the basis of concessions which were usually not tendered, thereby excluding competition for the market. In 1994, the Norwegian legislation made it possible to subject scheduled bus transport services to public tenders, thereby effectively opening up for competition in these services in Norway. In any event, as explained in section 2 below, the Court of Justice stated in the *Altmark* judgment, that since several EU Member States started to open wholly or partially transport markets to competition from undertakings established in other EU Member States, the market for bus transport has been open for competition in the EEA since 1995.<sup>29</sup> The Authority therefore concludes that the public funding made available to AS Oslo Sporveier and/or AS Sporveisbussene in order to provide scheduled bus transport services in Oslo was liable to distort competition.

With respect to effect on trade and the fact that the present case concerns a local market for bus transport in Oslo, the Authority recalls that in the *Altmark* judgment, which also concerned regional bus transport services, the Court of Justice held that "*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.*" and then that "*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>30</sup>

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<sup>27</sup> Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* ECR [2001] I-8365, paragraph 41.

<sup>28</sup> Joined Cases E-5/04, E-6/04 and E-7/04, *Fesil and Finn fjord and Others v EFTA Surveillance Authority* [2005] EFTA Court Report, 117 at paragraph 93.

<sup>29</sup> Paragraphs 77-82 of the *Altmark* judgment.

<sup>30</sup> Paragraphs 77 and 82 of the *Altmark* judgment.

This means that even if – as in the present case - only the local bus transport market (Oslo) is concerned, public funding made available to one operator in such a local market is liable to affect trade between the Contracting Parties.<sup>31</sup> Consequently, the Authority considers that the public funding made available to AS Oslo Sporveier and/or AS Sporveisbussene in order to provide scheduled bus transport services in Oslo was liable to affect trade between the Contracting Parties.

### 1.6. Conclusion

Based on the above, the Authority concludes that the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement are met with respect to the compensation to AS Oslo Sporveier and AS Sporveisbussene for carrying out scheduled bus transport in Oslo on the basis of the Concession. With respect to the amount of NOK 111 760 000 for outstanding pension obligations to AS Sporveisbussene all the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement have also been met for this amount.

## 2. Evolution of the market and existing aid

As a preliminary point, the Authority recalls that it has been concluded above that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) is considered to constitute part of the overall costs to be covered by the compensation to AS Sporveisbussene.

The Authority also observes that the compensation for carrying out bus transport in Oslo is inherently linked to the Concession awarded by Oslo Municipality for this purpose. Both AS Oslo Sporveier and AS Sporveisbussene have carried out tasks on the basis of the Concession granted initially to AS Oslo Sporveier in 1990 on the basis of the 1976 Transport Act. The fact that the Concession (and the compensation linked to it) was granted in 1990 means that it is relevant to consider whether the Concession is an existing, as opposed to a new aid measure. In this regard it is also relevant to consider whether the bus transport sector was open for competition.

Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement defines existing aid to constitute not only all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, but also

*“aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the EFTA State.”*

When the Concession was granted in 1990 there was no competition in the market for local scheduled bus transport neither in Norway. However, this changed, at least in Norway, in 1994 when the Norwegian Transport Act opened up for the possibility to tender out local bus transport. While the transport sector, including bus transport, has not yet been opened for competition on the basis of EEA law, the Court of Justice stated in the Altmark Judgment, that since several EU Member States started to open wholly or partially transport markets to competition from undertakings established in other EU

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<sup>31</sup> See also Case 102/87 *France v Commission* [1988] ECR 4067, paragraph 19; Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

Member States, the market for bus transport has been open for competition in the EEA since 1995.<sup>32</sup>

On this basis the Authority considers that the compensation linked to the Concession to AS Oslo Sporveier did not involve state aid until the opening of the EEA bus transport sector for competition which was in 1995. However, as of 1995 compensation based on the Concession evolved into state aid due to the opening up for competition of that sector.

According to article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement a measure which became aid due to the evolution of the common market is existing aid only if it has not been altered by the EFTA State afterwards. Hence existing aid may become new aid if it has been altered within the meaning of the Surveillance and Court Agreement. The question is therefore whether the Concession has been altered within the meaning of the rules.<sup>33</sup> The Authority observes that the Concession granted to AS Oslo Sporveier in 1990 was renewed at the end of 1999. However, the Authority observes that there has been no changes made to the Concession – not even in the context of the renewal in 1999. Moreover, the Authority considers that the fact that the bus transport division was separated from AS Oslo Sporveier in April 1997 into a separate company, AS Sporveisbussene, and that the latter subsequently carried out the bus transport services based on the Concession, does not imply that the Concession should be considered as altered within the meaning of the state aid rules. This conclusion, which is in line with the approach of the European Commission in similar cases,<sup>34</sup> is based on the fact that AS Sporveisbussene simply took over the activities of the existing bus transport division of AS Oslo Sporveier. It was therefore merely an administrative act which did not involve any changes in the nature of the bus transport activities nor the way that they were being carried out.

On the basis of the above the Authority considers that the Concession has not been altered within the meaning of the state aid rules since 1990 until its full expiry on 30 March 2008. Hence, in line with Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement the Authority considers that the compensation granted on the basis of the Concession to AS Oslo Sporveier and AS Sporveisbussene qualifies as existing aid.

### 3. Procedural requirements

Pursuant to Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement, the Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. The Authority shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

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<sup>32</sup> The Commission came to the same conclusion in its decision on public transport in France, State aid C 42/07 (ex N 428/06) on the reform of the method by which the RATP pension scheme is financed, OJ C 9, 15.1.2008, p. 13.

<sup>33</sup> Case C-44/93 *Namur-les Assurances du Cr dit* [1994] ECR I-3829, paragraph 13.

<sup>34</sup> In State aid NN 73/2008 (ex N 240/08) – Hungary – Sharing of loans (involving transfer of guarantee to a new undertaking without any change in the activities); State aid E 14/2005 (ex-NN 133/2001, NN 85/A/2001 and NN 94/A/99) Portugal (involving a restructuring).



#### 4. Compatibility of the aid

The Authority has considered whether the state aid in favour of AS Oslo Sporveier and AS Sporveisbussene constituted compensation for costs due to public service obligations imposed on them.

Article 49 of the EEA Agreement contains specific rules on the compatibility of state aid in the area of public service obligations in transport. Article 49 is *lex specialis* in relation to Articles 59(2) and 61(2) and (3) of the EEA Agreement.

However, Article 49 cannot be applied directly but only by means of Regulations 1191/69 and 1107/70.<sup>35</sup> However, as of 3 December 2009 both of these regulations were replaced by Regulation 1370/2007 on public transport services by rail and road.<sup>36</sup>

The present case involves existing aid measures which have been terminated by 30 March 2008 when the Norwegian authorities made all collective bus transport in Oslo subject to public tender. The Authority has decided to assess the compatibility of the aid on the basis of Regulation 1370/2007 which represent the rules in force at the time the aid is assessed. This approach is in line with that adopted by the European Commission in a similar case, the *DSB* case.<sup>37</sup> The *DSB* case also involved existing transport aid which had been abolished prior to the entry into force of Regulation 1370/2007. In this case the European Commission presented five reasons for basing the assessment of already abolished existing aid on Regulation 1370/2007 rather than on Regulations 1191/69 and 1107/70:

Firstly, Regulation 1370/2007 entered into force on 3 December 2009. On the same day Regulations 1191/69 and 1107/70 were repealed and no longer in force. They can therefore not be used as a basis for assessing the compatibility of aid at a later date than 3 December 2009.

Secondly, Article 8(3) of Regulation 1370/2007 contain rules on public service contracts which have been entered into prior to the entry into force of the Regulation. This shows that Regulation 1370/2007 applies also to “old” contracts existing prior to the entry into force of the Regulation.

Thirdly, the State aid Guidelines on applicable rules for the assessment of unlawful state aid provide that the general rule, i.e., that aid should be assessed on the basis of the rules in force when the aid was granted, is without prejudice to regulations incorporated into the EEA Agreement. Regulation 1370/2007 therefore supersedes the State aid Guidelines in this respect.

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<sup>35</sup> Regulation 1191/69 on public service in transport by rail, road and inland waterway, OJ L 156, 8.6.1969, p. 8 and Regulation 1107/70 on the granting of aids for transport by rail, road and inland waterway, OJ L 130, 15.6.1970, p., both incorporated by means of Annex XIII of the EEA Agreement.

<sup>36</sup> Regulation 1370/2007 of the European Parliament and of the Council of 23.10.2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJ L 315, 03/12/2007 p.1, incorporated in the EEA Agreement by means of section 4(a) of Annex XIII to the EEA Agreement; hereinafter referred to as “Regulation 1370/2007”.

<sup>37</sup> Case C-41/2008 (ex NN 35/2008) on public service contracts between the Ministry of Transport and Danske Statsbaner (“DSB”), paragraphs 300-321.

Fourthly, the Court of Justice has confirmed the principle that a new rule is applicable to future effects of a situation which took place while the old rule was applicable.<sup>38</sup>

Fifthly, the Court of Justice has confirmed that the material rules of EU law are to be interpreted in a manner that they address situations which took place prior to their entry into force where it is clear from the wording, objective and the structure of the rules that this was the intention. In the case of Regulation 1370/70 these conditions are met.

As stated above, in view of these arguments, the Authority has therefore carried out its assessment on the basis of Regulation 1370/2007. However, the Authority notes that even if the compatibility of the aid in the present case would have been assessed on the basis of the regulations in force at the time when the aid was granted, namely Regulations 1191/69 and 1107/70 the material outcome would be the same.

The Authority observes first that the Concession in the present case involves a service concession as defined in Article 8(1) of Regulation 1370/2007, that is, a concession granted to provide bus transport services. Article 8(1) provides that a service concession must fulfil the requirements of Regulation 1370/2007.

Article 4 of Regulation 1370/2007 provides that the public service obligations with which the public service operator is to comply, shall be clearly defined, including specifying the geographical area concerned.

The Authority considers that AS Oslo Sporveier and AS Sporveisbussene have been subject to genuine and clearly defined public service obligations which have been entrusted in an instrument specifying the relevant obligations.

The obligation to carry out scheduled bus transport has been imposed on AS Oslo Sporveier and on AS Sporveisbussene respectively based on three measures: (i) The 1976 Transport Act and the implementing Royal Decree state that the grant of concessions involves an obligation to carry out the transport services stipulated in the concession;<sup>39</sup> (ii) the Concession, granted initially to AS Oslo Sporveier, refers to the carrying out of collective bus transport services in Oslo; and (iii) the Transport Agreement delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the Concession to AS Sporveisbussene. The Authority considers that the duties are clearly identified and described in the Concession with respect to the public service task and the geographical area concerned, namely Oslo.<sup>40</sup> Moreover, the obligation to carry out bus transport services was clearly entrusted to (i) AS Oslo Sporveier as of 1990; and (ii) AS Sporveisbussene as of April 1997 on the basis of the Transport Agreement.

Article 4 of Regulation 1370/2007 requires furthermore that the public service concession establishes in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment is to be calculated in a way that prevents overcompensation. Moreover the arrangements for allocating costs to the provision of the

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<sup>38</sup> Case C-334/07 *Commission v Freistaat Sachsen* ECR [2008] I-9465, paragraph 43.

<sup>39</sup> Section 7 Royal Decree (“*forskrift*”) no. 2170 of 8.12.1986 issued on the basis of the Transport Act.

<sup>40</sup> The operation of local scheduled bus transport is a legitimate public service task of the State and in line with the Commission’s decision practice on bus transport, see for example Commission Decision State aid No NN 53/2006 – Malta.

services should be clear so that only the costs associated with public service obligation is taken into consideration.

Article 6 and Annex 1 of Regulation 1370/2007 require that all compensation connected to a public service contract, awarded on the basis of a general rule, cannot exceed “*an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator.*” It is further explained in Annex 1 to Regulation 1370/2007 that the net financial effect is calculated by taking into account costs incurred in relation to a public service obligation, minus any positive financial effects generated within the network operated under the public service obligation, minus receipts from revenues generated while fulfilling the public service obligation, plus a reasonable profit. This means that the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account a reasonable profit for discharging those obligations.

Finally, Annex 1 provides that the public service provider must have separate accounts for the provision of public services as opposed to any other commercial services carried out by the public service operator.

First, the Authority notes that as regards AS Oslo Sporveier, the company received a lump sum without any reference to costs incurred in the past or in the future. As regards Sporveisbussene, the Authority notes that besides keeping ticket revenues, in all years between 1997 and 2004, the company received a subsidy to cover the gap between revenues and costs.<sup>41</sup> Although the subsidy amount was based on an initial cost estimate, the subsidy was not based on a determination of real costs and the amount was subsequently the subject of negotiations between the parties to the Transport Agreement. Moreover, in 2004 a bonus was granted. The Authority considers that under such circumstances the compensation to AS Oslo Sporveier and AS Sporveisbussene cannot be considered to be cost-based. Secondly, the Authority notes that the Norwegian authorities have not submitted information showing that AS Oslo Sporveier and AS Sporveisbussene had arrangements for allocating costs nor that the accounts for carrying out collective bus transport services in Oslo was kept separate from any other commercial activities carried out by AS Oslo Sporveier and AS Sporveisbussene, such as operating tour busses.

On the basis of the above, the Authority considers that the conditions of Regulation 1370/2007 are fulfilled as regards the existence of a public service obligation and the entrustment thereof in relation to the provision of collective bus transport services in Oslo. However, the Authority considers that the Norwegian authorities have not demonstrated that the amount of compensation received by AS Oslo Sporveier and AS Sporveisbussene prior to 31 March 2008 did not exceed what was necessary to cover the costs associated with discharging the public service obligation, nor that a cost separation was made between public services and other commercial activities. The Authority concludes therefore that the Norwegian authorities failed to demonstrate that the compensation granted by the State to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not excessive. As a consequence the compensation granted from the State

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<sup>41</sup> Furthermore, the Transport Agreement entitled AS Sporveisbussene to receive subsidies also in the years between 2005 and 30.3.2008.

to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not proportional.

On this basis the Authority concludes that the compensation linked to the Concession to AS Oslo Sporveier and AS Sporveisbussene was not compatible with the EEA Agreement on the basis of Regulation 1370/2007 and Article 49 of the EEA Agreement.

## **5. No measures required**

Pursuant to Article 1 of Part I of Protocol 3 Surveillance and Court Agreement, the Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

Prior to proposing any appropriate measures, Article 17(2) of Part II of Protocol 3 to the Surveillance and Court Agreement provides that “[w]here the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. ...”

However, in the present case, the Norwegian authorities, between 2003 and 2008, gradually phased out the Concession for the provision of scheduled bus transport services in Oslo and subjected all such services to public tenders by 30 March 2008. The conclusion of this process automatically terminated both the Concession, the Transport Agreement and the compensation in favour of AS Oslo Sporveier and AS Sporveisbussene. The Authority observes that such a reform requires that all contracts on the relevant services are subject to public tenders and therefore appears to comply with Article 5(3) of Regulation 1370/2007 which states that contracts shall be awarded on the basis of non-discriminatory open tender procedures.

Given the termination of the existing state aid measures by the Norwegian authorities the Authority considers that no further measures are required in this case.

## **6. Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority considers that the Concession and the compensation linked to it in favour of AS Oslo Sporveier and AS Sporveisbussene involved existing state aid within the meaning of Article 61(1) of the EEA Agreement and Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement. The Authority considers that this existing state aid was not compatible with the EEA Agreement on the basis of Article 49 of the EEA Agreement and Regulation 1370/2007 because the compensation granted for public service obligations was not proportional. However, in view of the termination of the incompatible existing state aid on 30 March 2008, the Authority considers that no further measures are required in this case. Consequently, the case is closed.

HAS ADOPTED THIS DECISION:

*Article 1*

The case on the grant of state aid by the Norwegian authorities to AS Oslo Sporveier and AS Oslo Sporveisbussene for the provision of scheduled bus transport services in Oslo is hereby closed.

*Article 2*

This Decision is addressed to the Kingdom of Norway.

*Article 3*

Only the English version is authentic.

Done at Brussels, 21 June 2010.

*For the EFTA Surveillance Authority*

Per Sanderud  
*President*

Sverrir Haukur Gunnlaugsson  
*College Member*