


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION
Of 18 December 2000
On a Compensation Scheme for Express Bus Operators
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 49, 61 to 63 and to Annex XIII thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid³, in particular to chapters 5, 6 and 15 thereof,

WHEREAS:

I. FACTS

A. Procedure

By letter of 20 September 1999, registered by the Authority on 23 September 1999 (Doc. No. 99-7028-A), the Authority received a complaint alleging that express bus operators in Norway had received illegal aid under the so-called "*kompensasjonsordning for autodieselavgift*" (hereinafter referred to as the "compensation scheme"). By letter dated 3 May 2000 (Doc. No. 00-3440-D), the Authority informed the Norwegian Government of the receipt of the complaint and

¹ Hereinafter referred to as the "EEA Agreement".

² Hereinafter referred to as the "Surveillance and Court Agreement".

³ 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 EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision No. 78/00/COL of 12 April 2000, not yet published; hereinafter referred to as the "Authority's State Aid Guidelines".

asked the Norwegian authorities to provide all such information as may help to assess the compatibility of the compensation scheme with the State aid rules under the EEA Agreement.

By letter of 2 June 2000, registered by the Authority on 30 June 2000 (Doc. No. 00-4750-A), the Norwegian authorities provided part of the requested information. At a package meeting, which took place on 9 June 2000 in Oslo, the Authority emphasised that the Norwegian authorities had to provide the Authority with a justification for the aid. This request was reiterated in the letter of 27 July 2000 (Doc. No 00-5307-D), in which the Authority asked the Norwegian authorities to explain on which legal basis they considered the compensation scheme to be exempted from the general prohibition of aid. In their letter of response dated 22 September 2000, registered by the Authority on 3 October 2000 (Doc. No 00-6944-A), the Norwegian authorities contended that Article 61 (1) of the EEA Agreement was not applicable to the present case and that, in any case, the aid measure would have to be considered as existing aid. Again, no explanations as to the possible justification were provided.

Acknowledging receipt of that letter, the Authority stated in its letter of 6 October 2000 (Doc. No. 00-7060-D) the reasons why it considered the conditions of Article 61 (1) of the EEA Agreement to be fulfilled and why it considered the measures to constitute “new aid” within the meaning of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement. At the same time, the Authority drew the Norwegian Government’s attention to the fact that, pursuant to point 6.2 (2) of the Authority’s State Aid Guidelines, the Authority is empowered to proceed and take a decision on the basis of the information available, even in the absence of any submission to it from the EFTA State concerned. Finally, the Competition and State Aid Directorate of the Authority warned the Norwegian authorities that if no satisfactory answer was provided within 15 working days from receipt of that letter, it would be forced to propose to the Authority to open a formal investigation procedure in accordance with point 5.2 (1) of the Authority’s State Aid Guidelines.

The issues of concern were thoroughly discussed with the Norwegian authorities on the occasion of a meeting on 19 October 2000 in Oslo. After an extension of the deadline, the Norwegian authorities informed the Authority by letter dated 24 November 2000, registered by the Authority on 27 November 2000 (Doc. 00-8611-A), that the political parties representing a majority of seats in the National Assembly had agreed that no funds would be granted for the compensation scheme in connection with the State Budget for 2001. By letter dated 4 December 2000 (Doc. No. 00-8851-D), the Authority acknowledged receipt of this letter. The Authority observed that a possible abolition of the compensation scheme for the future was not sufficient to remove the doubts as to the compatibility of the scheme in the past. The Authority also informed the Norwegian Government that, due to the persisting doubts regarding the compatibility of the compensation scheme, it was obliged to open a formal investigation procedure.

By fax dated 11 December 2000, sent by the Ministry of Trade and Industry directly to the Authority, registered by the Authority on the same day (Doc. 00-9089-A), the Norwegian authorities submitted their views on the justification of the compensation scheme (enclosures, to which the letter makes reference, did not reach the Authority within the prescribed deadline). Furthermore, the Authority was informed that,

contrary to what had been said in the letter of 24 November 2000, the political parties representing the majority of the seats in the National Assembly had agreed to grant NOK 50 million under the compensation scheme in 2001. A final decision would be adopted on 13 December 2000.

B. Description of Aid Measure

On the basis of the information presently available, it appears that, until 1999, bus operators had been exempted from the autodiesel levy ("*autodieselavgift*") which was originally introduced as of 1 October 1993. In the Parliamentary Bill on green taxes (*St. prp. nr. 54 (1997-1998) "Grønne Skatter"*), the Norwegian Government considered the previous exemption for buses not to be justified on environmental grounds since it relieved buses of external costs arising from the use of roads, accidents and pollution and did not give these operators an economic incentive to reduce these costs. Consequently, the Norwegian Government proposed to abolish the exemption from the autodiesel levy for bus operators in order to give these undertakings an incentive to increase efficiency and to make environmentally oriented investment decisions.

However, in order to avoid a weakening of the competitiveness of public transport, it was proposed to compensate so-called "subsidised" bus operators for the costs resulting from the abolition of the exemption. With respect to the so-called "non-subsidised" bus operators, which are subject to the impending investigation procedure, no such compensation was considered appropriate. In this context, the Parliamentary Bill on green taxes stated that no compensation would be granted since these "non-subsidised" bus operators were considered to be able to cover the increased costs either through an increase in ticket prices or through a reduction in profits. It was further maintained that the abolition of the tax exemption would give the bus companies an incentive to enhance efficiency and make their operations more environmentally friendly. Therefore, it was argued that the actual rise in costs would be less than the rise in the levy.

Following this proposal, all bus operators were, as of 1st January 1999, subject to the autodiesel levy. However, with respect to the so-called "subsidised" bus operators ("*tilskuddberettiget bussdrift*") full compensation for the costs resulting from the abolition of the exemption from the autodiesel levy was provided according to the Norwegian Parliament's Decision on the State Budget for 1999 in December 1998. This compensation scheme, which is administered by the county municipalities ("*Fylkeskommunene*"), is not subject to the impending investigation procedure.

Although not initially foreseen under the Government's proposal regarding the green tax reform, a second compensation scheme for so-called "non-subsidised" bus operators ("*ikke-tilskuddberettiget bussdrift*") was adopted by the Norwegian Parliament in its Decision on the revised State Budget for 1999 in spring 1999 (*St. prp. nr. 67 (1998-1999)*). The amount allocated for this purpose was NOK 45 million. Apparently, this amount was later increased to NOK 71 million. However, it would appear that the actual payment of compensation remained well below that amount (the State Budget for 2001 refers to an amount of NOK 54,4 million for the year 1999). In the State Budget for 2000 the corresponding budget line was further increased to

NOK 75,4 million. The budgetary proposal for 2001 foresees an allocation of NOK 50 million for the compensation scheme. This scheme is under the Ministry of Transport's responsibility (cf. *St.prp.nr. 1 (1999-2000)*, chapter 1330, post 71 "*Tilskudd til ekspressbusser*"). It would, however, appear that applications for compensation have to be submitted to the county municipalities, which will then transmit them to the responsible Ministry.

In two letters dated 21 February 2000, "non-subsidised" bus operators were informed about further details regarding compensation payments for the years 1999 and 2000. Apart from these letters, no further information was furnished by the Norwegian Government to the Authority.

According to these letters, compensation is paid in four instalments during the year under a so-called "on account arrangement". In addition, a certain amount of money is reserved for the final accounts ("*sluttavregning*") which have to be presented at the end of the respective year. The payments made under the "on account arrangement" are based on historic figures, whereas payments following the submission of the final account are based on so-called "actual production" (the above-mentioned letters refer to "*produksjon*"; the Authority understands "production" to mean distance-related services operated by the bus operator under the licence according to a "route plan"). These final accounts have to be complemented by several forms containing the required detailed data on the production actually carried out during the respective year. Route production carried out in the respective year and which was not already included in the "on account arrangement", will be taken into consideration in the context of the final accounts.

The amount of compensation per company is calculated according to the distances operated under the "route plan", applying a certain rate per kilometre. This rate is not fixed in advance but will be determined once the total distances of all licensees have been established (this rate is apparently calculated by dividing the total amount earmarked for the purpose by the total kilometres for which applications for reimbursement have been submitted). The figures regarding route production are revised by an auditor. Where a particular route extends beyond the borders of one county municipality, the county municipality in which the bus operator is registered will have to co-ordinate claims regarding route production in other municipalities. All relevant claims should then be sent to the Ministry of Transport.

Domestic transport services provided in the course of international transport ("cabotage services") are also included in the compensation scheme. In this respect, it is assumed that foreign operators providing such cabotage services are doing so in a pool with Norwegian operators. It is further assumed that the Norwegian operators act on behalf of the foreign operators when claiming compensation. When submitting claims the Norwegian operators would have to declare the share of total production carried out by the Norwegian and the foreign operators. The distribution of the compensation payment between the Norwegian and the foreign operators is considered to be a matter between them.

C. Beneficiaries

So-called “non-subsidised” bus operators are eligible for aid under the compensation scheme under scrutiny. It would appear that both “non-subsidised” and “subsidised” bus operators are providing regular passenger transport services. However, “non-subsidised” bus operators, in contrast to “subsidised” bus operators, do not receive State subsidy for the purpose of operating regular transport services. According to the Norwegian authorities, “non-subsidised” regular bus operators may apply for a licence to run regular services on specified routes, where expectations about commercial transport possibilities are good. In addition, the same bus operators may also offer “subsidised” regular as well as occasional transport services. According to the complainant, “non-subsidised” bus operators are in competition with tourist coaches. This view is confirmed by the Norwegian authorities which acknowledged that “*both regular services and occasional services...compete to some extent on the same market*”. This may be explained by the fact that, according to the complainant, express bus operators are allowed to reschedule their destinations in the wintertime, and to provide transport services to tourist sites. In addition, these express bus operators may reschedule their transport routes if a group of people so requires.

II. APPRECIATION

A. Notification requirement and Stand-still obligation

Pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, “[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid...The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”.

The notification obligations have been partly modified in the transport sector. According to Article 17 (2) of the legal act referred to in point 4 of Annex XIII⁴ to the EEA Agreement, “[c]ompensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement...”. In all other cases not covered by Regulation No. 1191/69, the notification requirement under Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement remains unaffected.

On the basis of the information supplied by the Norwegian authorities, it would appear that the compensation for “non-subsidised” bus operators does not fall within the scope of Regulation No. 1191/69, since the eligible operators do not seem to be subject to public service obligations within the meaning of Article 2 of that Regulation. The Norwegian authorities have not contested the Authority’s conclusion

⁴ Council Regulation (EEC) No. 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as last amended by Council Regulation (EEC) No. 1893/91 of 20 June 1991; hereinafter referred to as “Regulation No. 1191/69”.

in this respect. Furthermore, on the basis of the rules regarding compensation payments, as laid down in the two letters of 21 February 2000, it is apparent that the compensation awarded to the bus operators in question has not been determined in accordance with the procedure laid down in Regulation No. 1191/69 (in particular Art. 9 *et seq.*). Consequently, on the basis of the information available to it, the Authority considers that Article 17 (2) of the Regulation No. 1191/69 is not applicable in the present case and that the compensation scheme should have been notified as new aid.

The Norwegian authorities have initially contested the qualification of the compensation scheme as new aid and, accordingly, their obligation to notify the aid pursuant to Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement. They have argued that the compensation scheme, which was adopted in order to offset the costs resulting from the abolition of the exemption from the autodiesel levy, represented a continuation of the existing tax system, *i.e.* the original exemption from the autodiesel levy.

In the Authority's view, the compensation scheme cannot be regarded as 'existing aid' within the meaning of point 7.2 (1) first bullet point, of the Authority's State Aid Guidelines, since the payment foreseen is not based on a legal act which was in operation at the time of the entry into force of the EEA Agreement. The exemption from the autodiesel levy for bus operators was abolished as of 1 January 1999. The existing tax concession was terminated with effect from that date. A compensation scheme for so-called "subsidised" bus operators was established to offset the effects of the abolition. Later, in the context of the revised Budget, presented on 10 May 1999, the Parliament decided to establish an additional compensation scheme for so-called "non-subsidised" bus operators. The compensation is determined according to specific rules, part of which were communicated to the bus operators concerned in two letters dated 21 February 2000. These rules constitute a new legal framework for the provision of aid to certain regular bus operators. Therefore, the compensation cannot be considered to be a continuation of a tax concession which was laid down in a different legal act. In this context, it must also be observed that the compensation is different in nature from the tax exemption under the previous Act. In addition, it would appear that the bodies responsible for the administration and implementation of the compensation scheme are different from the authorities responsible for the collection of the autodiesel levy.

In light of the foregoing considerations, the Authority concludes that the compensation scheme constitutes new aid within the meaning of Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement. Consequently, the Norwegian authorities were under an obligation to notify the compensation scheme in advance. Furthermore, the Norwegian authorities have confirmed, in the course of the meeting on 19 October 2000, that payments have been made for the years 1999 and 2000. The Authority observes that these payments are contrary to the stand-still obligation laid down in Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement. The compensation scheme is therefore unlawful on procedural grounds, according to point 6.1 of the Authority's State Aid Guidelines. In this respect, the Authority draws the Norwegian Government's attention to the fact that, pursuant to point 6.2.3. of Chapter 6 of the Authority's State Aid Guidelines, the aid may have to be recovered from the recipients, should the Authority find the aid to be incompatible with the EEA

Agreement. In addition, and in relation to the continuation of the compensation scheme in 2001, the Authority reminds the Norwegian authorities of their obligation not to put the aid into effect. This means that no payments shall be made under the compensation scheme before the Authority has adopted a final decision in this respect.

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

Article 61 (1) of the EEA Agreement stipulates: "*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, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of the Agreement.*"

Support measures under the compensation scheme are financed through the State budget. Bus operators eligible under the compensation scheme receive a financial benefit they would not have obtained in the normal course of business.

The Norwegian authorities have argued that the compensation scheme did not distort international trade since regular cabotage services provided by foreign operators were also eligible for aid.

In general, measures of support will affect competition and trade between the Contracting Parties, provided that the recipient firm carries on an activity involving trade between the Contracting Parties and that the aid strengthens the firm's position compared with that of competing firms. Therefore, aid favouring enterprises providing transport services in a liberalised market is susceptible to affecting competition and trade. The legal act referred to in point 33a of Annex XIII to the EEA Agreement⁵ has fully liberalised special regular services, occasional services and regular transport services, to the extent they are provided in the course of international regular transport. Furthermore, it should be added that public procurement rules to a certain extent and, in particular national legislation in several States within the EEA, enhance EEA wide market access. Foreign companies show increasing interest in entering domestic markets and have, to a certain extent, already acquired shares in national operators or operate public service transport outside their home markets.⁶

⁵ Council Regulation (EEC) No. 2454/92 of 23 July 1992 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State, as amended by Council Regulation (EC) No 12/98 of 11 December 1997; incorporated into Annex XIII to the EEA Agreement by Decision No 121/98 (OJ No L 297, 18.11.1999, p. 50 and EEA Supplement); entry into force 1.8.1999; hereinafter referred to as "Regulation No 12/98".

⁶ See in this context the Commission decisions regarding State aid N 575/A/1999- Germany and State aid N 694/99 – Spain regarding aid for the modernisation of urban and regional transport: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transport/n694-99.pdf (in Spanish only); see also the explanatory memorandum regarding the Commission's Proposal for a Regulation on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, COM(2000) 7 final, Brussels, 26.7.2000 (http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0007.pdf)

Undertakings benefiting from the compensation scheme may, according to the Norwegian authorities, provide both regular and occasional services within the meaning of Regulation No. 12/98. It cannot, therefore, be excluded that payments made under the compensation scheme are employed to provide occasional transport services. Even in cases where bus operators exclusively provide regular services, distortive effects on competition may not be excluded since, according to both the complainant and the Norwegian authorities, “non-subsidised” bus operators are – if only to a certain extent - in competition with occasional bus services. With respect to international regular transport services, the Norwegian authorities have maintained that carriers with permission to temporarily provide “cabotage services” (domestic regular passenger transport services provided in the course of regular international services) are also entitled to receive compensation payments under the scheme. In the Authority’s view it is, however, doubtful whether the compensation is actually open to foreign operators on a non-discriminatory and transparent basis. Considering that the rules for compensation payments were apparently only distributed by way of a letter to the “non-subsidised” bus operators, which appear to include only Norwegian operators, there are doubts as to whether foreign operators have been sufficiently informed about the possibility to claim compensation. Furthermore, under the same rules, it is not clear whether foreign operators not acting in a pool with Norwegian operators are entitled to file applications for compensation on their own behalf. The wording of the provisions submitted to the Authority seems to indicate that foreign operators would have to act through Norwegian companies. Therefore, the Authority is not convinced that foreign operators are treated in an equal manner.

In addition, it should be stressed that the mere fact that the aid scheme is applied without discrimination on grounds of nationality or establishment does not exclude it from the scope of Article 61 (1) of the EEA Agreement. Such non-discriminatory treatment of foreign operators on the Norwegian market would not exclude effects on trade since Norwegian bus operators benefiting from the compensation payments may compete outside Norway for both occasional and regular transport services.

Based on all the foregoing considerations, it cannot be excluded that the compensation scheme has as its effects to reinforce the competitive position of companies that operate passenger transport services both inside and outside Norway and therefore distorts competition and affects trade between the Contracting Parties.

Therefore, the Authority regards the compensation scheme to contain aid within the meaning of Article 61 (1) of the EEA Agreement.

C. Compatibility of Aid Measures

The Authority takes the view that the compensation scheme relieves the eligible bus operators from costs related to their day-to-day business. Therefore, aid granted under this scheme constitutes operating aid⁷ not normally allowed under the EEA Agreement. Nevertheless, the Authority has examined, on the basis of the information available, whether the aid may benefit from an exemption under Article 61 (3)(c) of the EEA Agreement in connection with Chapter 15 of the Authority's State Aid

⁷ As defined in the judgment of the ECJ of 8 June 1995, Case T-459/93, *Siemens SA v. Commission*, ECR 1995, II-1675, para. 48.

Guidelines regarding aid for environmental protection. Pursuant to point 15.4.3 of the Authority's State Aid Guidelines, operating aid may be acceptable in the fields of waste management and relief from environmental taxes. Application of the strict conditions laid down in the Authority's State Aid Guidelines implies that, in principle, compensation should be limited to extra production costs and the aid should be temporary and in principle degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly. Such temporary relief from new environmental taxes may be authorised where it is necessary to offset losses in competitiveness, particularly at international level. A further factor to be taken into account is what the firms concerned have to do in return to reduce their pollution.

Compensation limited to extra production costs

In this context, the Norwegian authorities have referred to the fact that the “*compensation scheme is based on the company’s scheduled traffic “en route” and that it therefore only compensates for higher fuel costs linked to certain ordinary scheduled traffic*”. This implies, according to the Norwegian authorities, that “*the new compensation system encourages the operators to economize on their use of autodiesel, i.a. by shifting to less fuel-consuming engines and buses, and consequently to reduce the global pollution at the same time. An alternative compensation scheme implying payments distributed according to i.a. fuel consumption would, on the other hand, award companies using more fuel per kilometre than the average.*”

The Authority cannot see how this approach ensures that no operator receives more in compensation payments than his costs resulting from the autodiesel levy. In fact, it is not excluded that operators who receive payments on the basis of the “route plan” (according to the distances they operate) and who reduce their consumption of autodiesel on these routes could benefit from compensation exceeding their actual costs resulting from the autodiesel levy.

In light of the foregoing, the Authority is of the opinion that the conditions for granting compensation, as contained in the letters dated 21 February 2000, do not guarantee that bus operators will not benefit from compensation exceeding their actual costs resulting from the autodiesel levy. In the absence of clear rules or guidelines laying down the maximum level of compensation under the scheme, it is doubtful whether the compensation scheme is designed in such a way as to ensure that compensation is limited to the extra production costs.

The Norwegian authorities have further maintained that the requirement to limit compensation to the extra production costs would be satisfied if the compensation scheme would “*not exceed the higher amount of autodiesel levies compared to the previous tax scheme*”. In this respect, the Norwegian Government stated that the magnitude of the compensation scheme, in 2000, was less extensive than the increase of autodiesel revenues after 1 January 1999. As to the situation in 2001, the Norwegian authorities referred to a reduction in the amounts allocated for the purpose of the compensation scheme of 33% compared to the situation in 2000.

The Authority acknowledges that a decrease in compensation as compared to the relief previously granted under the exemption from the autodiesel levy might indicate

that compensation remains below costs resulting from the autodiesel levy. However, this circumstance alone does not provide the required proof that express bus operators are not over-compensated. For this reason, the Norwegian Government's statement regarding a reduced scope and reduced amounts allocated for the purpose of the compensation scheme, as compared to the situation in the past, does not show that the above requirement is satisfied.

As regards the situation in the years 1999 and 2000, the Authority observes that, despite its letter of 4 December 2000, in which it had expressed its doubts as to the compatibility of the compensation scheme in the past, no information was submitted by the Norwegian authorities which would have shown that express bus operators have not received more compensation than required to cover costs resulting from the autodiesel levy. In addition, and in particular as to the continuation of the compensation scheme in 2001, the Authority observes that the compensation scheme has not established a control mechanism which would allow the aid awarding body to verify that the benefits stemming from the compensation scheme do not exceed the additional costs resulting from the autodiesel levy in the respective year. Without such control it cannot be excluded that express bus operators might be over-compensated.

Against this background, the Authority concludes that the Norwegian authorities have not demonstrated that payments under the compensation scheme are limited to the extra production costs.

Incentive effect for reducing fuel consumption

The Norwegian authorities have maintained that, since the compensation scheme was less extensive than the previous tax exemption, it would represent a more efficient system to protect the environment and to promote the environmental objectives. In this respect, the Norwegian authorities stated that, when stipulating the compensation payments for i.a. 2000, a 6% deduction was made according to efficiency potential regarding reduced fuel consumption. They further claim that the exemption of occasional services from compensation and this 6% deduction made the magnitude of the compensation scheme less extensive than the increase of autodiesel revenues after 1 January 1999. As to the continuation of the compensation scheme in 2001, the Norwegian authorities have claimed that the amount of NOK 50 million allocated for this purpose constituted a reduction of 33% compared to 2000.

The Authority observes, however, that the Norwegian authorities have not submitted the relevant information, which would have enabled the Authority to ascertain that compensation awarded under the scheme decreased continuously since its introduction and compared to the situation before the abolition of the tax exemption in 1999.

They have, in particular, not provided figures regarding tax losses resulting from the exemption of express bus operators from the autodiesel levy prior to the abolition of the exemption as from 1 January 1999, which would have enabled the Authority to verify the Norwegian authorities' statements regarding the scope of the compensation scheme in 1999, as compared to the previous tax regime. Furthermore, and with respect to the situation in 2000, the Authority observes that the amount of money allocated for the compensation scheme was increased in the State Budget for 2000 as

compared to 1999. This would seem to be in contradiction to the statement from the Norwegian Government, referring to a deduction of 6% due to efficiency potential. The increased amount allocated in the State Budget for 2000 could be interpreted as indicating that the actual consumption of autodiesel has increased rather than decreased after the abolition of the exemption from the autodiesel levy. Without further explanations as to the reasons for this increase, it is difficult to establish possible effects on the incentive to express bus operators to reduce their consumption of autodiesel.

In addition, even assuming that the amount of compensation decreased since the introduction of the compensation scheme in 1999, such a decrease is not inherent to the compensation scheme. The amounts allocated for the purpose of the compensation scheme depend entirely upon the discretion of the Norwegian Parliament when adopting the annual budget. The scheme as such contains no guidelines as to the calculation of the future compensation payments. Thus, there is no clear signal as to the future reduction of State support which would oblige bus operators to reduce their fuel consumption.

The Authority also lacks detailed information regarding the calculation of the amounts allocated for the purpose of the compensation scheme (in particular, to what extent the amounts were determined with the aim of significantly reducing consumption of autodiesel) and information about possible changes regarding scheduled bus services eligible under the compensation scheme. Without such information, it cannot be ascertained whether a possible overall decrease of money allocated to the compensation scheme actually results in reduced compensation per express bus operator and thus gives these bus operators an incentive to reduce their fuel consumption. Against this background, the reduction of 33% for the compensation scheme in 2001, referred to by the Norwegian authorities, is not in itself sufficient in order to verify whether and to what extent express bus operators received less compensation under the scheme.

Finally, without information on the level of compensation granted under the scheme, it is difficult to ascertain whether and to what extent the scheme has a sufficient incentive effect. The Authority considers that, in principle, only a level of compensation which is lower than the costs (resulting from the autodiesel levy), bus operators would incur without undertaking any effort to reduce fuel consumption, would give express bus operators a sufficient incentive to reduce fuel-related costs. In this context, the Authority observes that no information was submitted which would have enabled the Authority to determine the level of compensation granted to express buses in the respective years since the introduction of the compensation scheme.

Due to the lack of information regarding a possible decrease of the compensation payments since the introduction of the compensation scheme and regarding the level of compensation for the eligible bus operators, the Authority has doubts as to whether the compensation scheme gives the beneficiaries a sufficient incentive to invest in equipment and reorganise business processes so as to keep the consumption of fuel as low as possible.

Temporary relief from new environmental taxes necessary to offset losses in competitiveness

As to the environmental objectives of the compensation scheme, the Norwegian authorities have referred to the Government's proposal on green taxes ("*Grønne Skatter*", *St. prp. nr. 54 (1997-98)*). The Norwegian authorities have further claimed that the compensation scheme was necessary to maintain the competitiveness of the bus operators concerned, without however elaborating further on this point.

However, the Authority observes that, according to the above-mentioned proposal from the Government, "non-subsidised" bus operators were considered to be able to cover the additional costs due to the abolition of the exemption from the autodiesel levy with revenues from the operation of regular transport services. Therefore, the Norwegian Government did apparently not consider compensation for "non-subsidised" bus operators to be necessary. In their submissions, the Norwegian authorities have not provided a satisfactory explanation why, contrary to the conclusions in the Government's proposal to Parliament, compensation for "non-subsidised" bus operators was necessary. Furthermore, the Authority observes that the Norwegian authorities have not submitted any background document which could have illustrated the reasons for introducing a compensation scheme also for these bus operators.

In addition, the Authority observes that express bus operators were relieved from the autodiesel levy since its introduction in October 1993. This means that, at the time the exemption was abolished and the compensation scheme adopted, bus operators had already had five years to adapt their businesses in order to reduce tax-related costs. Without further explanations on the part of the Norwegian authorities as to why this period of time was not sufficient for bus operators to adapt themselves to the new economic framework conditions, the Authority is not in a position to verify that the aid measure is necessary and proportional. In this respect, it would also be interesting to receive information showing whether and to what extent express bus operators exempted from the autodiesel levy during this period made efforts to reduce their fuel consumption.

As to the temporary nature of the scheme, the Norwegian authorities have not submitted any comments or information. The Authority observes in this respect, that the scheme as such contains no limitation in time. Therefore, the Authority has doubts whether such a scheme of unlimited duration may give the eligible operators an incentive to adapt to the new tax environment.

Therefore, the Norwegian authorities have not demonstrated, in the Authority's view, that the compensation scheme is only temporary and degressive, pursues environmental objectives and that compensation is necessary to offset losses in competitiveness.

Conclusions

For the above reasons, the Authority has doubts as to the compatibility of aid contained in the compensation scheme for express bus operators. Due to the lack of information, these doubts could not be removed in the course of the preliminary

investigation pursuant to point 6.2 of Chapter 6 of the Authority's State Aid Guidelines. Consequently, and in accordance with point 5.2 of Chapter 5 of the Authority's State Aid Guidelines, the Authority is obliged to open the procedure provided for in Article 1 (2) of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the aid is compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority requests the Norwegian authorities to provide all necessary information to assess the compatibility of the compensation scheme with the State aid rules under the EEA Agreement. If the Norwegian Government fails to provide the requested information within the time limit specified below, the Authority will take a decision under Article 1 (2) of Protocol 3 of the Surveillance and Court Agreement on the basis of the information available.

Finally, the Authority draws the Norwegian Government's attention to the fact that, according to point 6.2.1. of Chapter 6 of the Authority's State Aid Guidelines, the Authority "*may request by an interim decision the EFTA State to suspend payment of the aid pending the outcome of the investigation*". Since, the Authority has concluded in the present decision that the aid was granted unlawfully, it may take a decision, pursuant to point 6.2.1. (2) of the Authority's State Aid Guidelines, requiring the Norwegian Government to suspend immediately the payment of the aid, should the Norwegian authorities not provide a satisfactory guarantee that the compensation scheme will not be applied until the Authority has reached a final decision.

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement.
2. The Norwegian Government is invited, pursuant to point 5.3.1. (1) of Chapter 5 of the Authority's State Aid Guidelines, to submit its comments on the opening of the formal investigation procedure within six weeks from the notification of this decision.
3. The Norwegian Government is given the opportunity, pursuant to point 6.2.1. (2) of Chapter 6 of the Authority's State Aid Guidelines, to submit its comments regarding the immediate suspension of payment of the aid pending the outcome of the investigation within six weeks from the notification of this decision.
4. The Norwegian Government is requested to submit all information enabling the Authority to examine the compatibility of the compensation scheme with the EEA Agreement within six weeks from the notification of this decision.

Done at Brussels, 18 December 2000
For the EFTA Surveillance Authority

Knut Almestad
President

Hannes Hafstein
College Member