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II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) No 994/2013

of 16 October 2013

amending Regulations (EC) No 952/2006, (EC) No 967/2006, (EC) No 555/2008, and (EC) No 1249/2008 as regards the communication and the notification obligations within the common organisation of agricultural markets

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 192(2), in conjunction with Article 4 thereof,

Whereas:

- (1) Commission Regulation (EC) No 792/2009 ⁽²⁾, establishes common rules for notifying information and documents by Member States to the Commission. Those rules cover in particular the obligation for the Member States to use the information systems made available by the Commission and the validation of the access rights of the authorities or individuals authorised to send notifications. Regulation (EC) No 792/2009 also sets common principles applying to the information systems so that they guarantee the authenticity, integrity and legibility over time of the documents and provides for personal data protection. The obligation to use those information systems has to be provided for in each Regulation establishing a specific notification obligation.
- (2) The Commission has developed an information system that allows managing documents and procedures electronically in its own internal working procedures and in its relations with the authorities involved in the common agricultural policy.

(3) Several communication and notification obligations can be fulfilled via that system, in particular those provided for in Commission Regulations (EC) No 952/2006 ⁽³⁾, (EC) No 967/2006 ⁽⁴⁾, (EC) No 555/2008 ⁽⁵⁾ and (EC) No 1249/2008 ⁽⁶⁾.

(4) In the interest of efficient administration and taking account of the experience, some communications and notifications should be simplified, specified or deleted.

(5) Regulation (EC) No 555/2008 foresees in its Article 100(2) a simplified notification when only zero values have to be communicated. Since the information system includes a simplified procedure for sending these notifications, the notification procedure of this Article is no longer necessary.

(6) In Regulation 1249/2008, a supplementary notification on the slaughter of cattle with a view to calculate the weighing coefficient referred to in its Article 18 should be established.

(7) Regulations (EC) No 952/2006, (EC) No 967/2006, (EC) No 555/2008, and (EC) No 1249/2008 should therefore be amended accordingly.

⁽³⁾ Commission Regulation (EC) No 952/2006 of 29 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 318/2006 as regards the management of the Community market in sugar and the quota system (OJ L 178, 1.7.2006, p. 39).

⁽⁴⁾ Commission Regulation (EC) No 967/2006 of 29 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 318/2006 as regards sugar production in excess of the quota (OJ L 176, 30.6.2006, p. 22).

⁽⁵⁾ Commission Regulation (EC) No 555/2008 of 27 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector (OJ L 170, 30.6.2008, p. 1).

⁽⁶⁾ Commission Regulation (EC) No 1249/2008 of 10 December 2008 laying down detailed rules on the implementation of the Community scales for the classification of beef, pig and sheep carcasses and the reporting of prices thereof (OJ L 337, 16.12.2008, p. 3).

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ Commission Regulation (EC) No 792/2009 of 31 August 2009 laying down detailed rules for the Member States' notification to the Commission of information and documents in implementation of the common organisation of the markets, the direct payments' regime, the promotion of agricultural products and the regimes applicable to the outermost regions and the smaller Aegean islands (OJ L 228, 1.9.2009, p. 3).

- (8) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

Article 58 of Regulation (EC) No 952/2006 is replaced by the following:

'Article 58

Communications and notifications

The communications and notifications referred to in Article 5(3) and in Articles 12, 21 and 22 shall be made in accordance with Commission Regulation (EC) No 792/2009 (*).

(*) OJ L 228, 1.9.2009, p. 3.'

Article 2

In Article 21 of Regulation (EC) No 967/2006, the following paragraph 5 is added:

'5. The communications referred to in Article 4(3), in Articles 10 and 17 and in this Article shall be made in accordance with Commission Regulation (EC) No 792/2009 (*).

(*) OJ L 228, 1.9.2009, p. 3.'

Article 3

Article 100 of Regulation (EC) No 555/2008 is amended as follows:

- (1) the title 'Communications' is replaced by 'Communications and notifications';

- (2) paragraph 1 is replaced by the following:

'1. The communications and notifications to the Commission referred to in this Regulation shall be made in accordance with Commission Regulation (EC) No 792/2009 (*).

(*) OJ L 228, 1.9.2009, p. 3.;

- (3) paragraph 2 is deleted.

Article 4

Regulation (EC) No 1249/2008 is amended as follows:

- (1) in Article 19, the following point (d) is added:

'(d) the total number of adult bovine animals slaughtered in the previous calendar year broken down for each category, conformation and fat cover classes;'

- (2) the following Article 39a is inserted:

'Article 39a

Communications and notifications

The communications and notifications to the Commission referred to in this Regulation, with the exception of those referred to in Article 36 shall be made in accordance with Commission Regulation (EC) No 792/2009 (*).

(*) OJ L 228, 1.9.2009, p. 3.'

Article 5

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 October 2013.

For the Commission

The President

José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 995/2013**of 16 October 2013****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ⁽²⁾, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multi-lateral trade negotiations, the criteria whereby the

Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.

- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 October 2013.

*For the Commission,
On behalf of the President,*

*Jerzy PLEWA
Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 157, 15.6.2011, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MA	53,1
	MK	66,6
	ZZ	59,9
0707 00 05	MK	62,5
	TR	121,6
	ZZ	92,1
0709 93 10	TR	116,3
	ZZ	116,3
0805 50 10	AR	95,1
	CL	118,8
	IL	100,2
	TR	85,3
	ZA	111,0
	ZZ	102,1
0806 10 10	BR	235,6
	TR	143,3
	ZZ	189,5
0808 10 80	CL	94,7
	NZ	120,9
	US	158,5
	ZA	138,5
	ZZ	128,2
0808 30 90	TR	123,6
	US	162,0
	ZZ	142,8

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

DECISIONS

COMMISSION IMPLEMENTING DECISION

of 1 October 2013

on the European Union financial contribution to national programmes of 9 Member States (Belgium, Estonia, Ireland, Greece, France, Cyprus, Netherlands, Poland and Portugal) in 2013 for the collection, management and use of data in the fisheries sector

*(notified under document C(2013) 6255)***(Only the Dutch, English, Estonian, French, Greek, Polish and Portuguese texts are authentic)**

(2013/506/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 861/2006 of 22 May 2006 establishing Community financial measures for the implementation of the common fisheries policy and in the area of the Law of the Sea ⁽¹⁾, and in particular Article 24(1) thereof,

Whereas:

- (1) Regulation (EC) No 861/2006 lays down the conditions whereby Member States may receive a contribution from the European Union for expenditure incurred in their national programmes of collection and management of data.
- (2) Those programmes are to be drawn up in accordance with Council Regulation (EC) No 199/2008 of 25 February 2008 concerning the establishment of a Community framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy ⁽²⁾ and Commission Regulation (EC) No 665/2008 ⁽³⁾.
- (3) Bulgaria, Denmark, Germany, Italy, Latvia, Lithuania, Malta, Romania, Slovenia, Finland and Sweden have not amended their national programmes 2011-13 for the year 2013. The Commission will decide on the contribution to those national programmes, for the year 2013, by Commission Implementing Decision which is in the process of being adopted.
- (4) Belgium, Estonia, Ireland, Greece, France, Cyprus, Netherlands, Poland and Portugal submitted national programmes for the collection, management and use of data in the fisheries sector for the years 2011-13 as

provided for in Article 4(4) and (5) of Regulation (EC) No 199/2008. Those programmes were approved in 2011 in accordance with Article 6(3) of Regulation (EC) No 199/2008.

- (5) Ireland submitted amendments to their national programme for the year 2013, pursuant to Article 5(2) of Regulation (EC) No 199/2008. These amendments were adopted by the Commission in 2013 in accordance with Article 6(3) of Regulation (EC) No 199/2008.
- (6) Those Member States have submitted annual budget forecasts for the year 2013 according to Article 2(2) of Commission Regulation (EC) No 1078/2008 of 3 November 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 861/2006 as regards the expenditure incurred by Member States for the collection and management of the basic fisheries data ⁽⁴⁾. The Commission has evaluated Member States' annual budget forecasts, as laid down in Article 4 of Regulation (EC) No 1078/2008 by taking into account the approved national programmes.
- (7) Article 5 of Regulation (EC) No 1078/2008 establishes that the Commission is to approve the annual budget forecast and is to decide on the annual Union financial contribution to each national programme in accordance with the procedure laid down in Article 24 of Regulation (EC) No 861/2006 and on the basis of the outcome of the evaluation of the annual budget forecasts as referred to in Article 4 of Regulation (EC) No 1078/2008.
- (8) Article 24(3)(b) of Regulation (EC) No 861/2006 establishes that a Commission Decision is to fix the rate of the financial contribution. Article 16 of that Regulation provides that Union financial measures in the area of basic data collection are not to exceed 50 % of the costs incurred by Member States in carrying out the programme of collection, management and use of data in the fisheries sector.

⁽¹⁾ OJ L 160, 14.6.2006, p. 1.⁽²⁾ OJ L 60, 5.3.2008, p. 1.⁽³⁾ OJ L 186, 15.7.2008, p. 3.⁽⁴⁾ OJ L 295, 4.11.2008, p. 24.

- (9) This Decision constitutes the financing decision within the meaning of Article 84(2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union ⁽¹⁾.
- (10) The measures provided for in this Decision are in accordance with the opinion of the Committee for Fisheries and Aquaculture,

HAS ADOPTED THIS DECISION:

Article 1

The maximum global amounts of the Union financial contribution to be granted to each Member State for the

collection, management and use of data in the fisheries sector for 2013 and the rate of the Union financial contribution, are established in the Annex.

Article 2

This Decision is addressed to the Kingdom of Belgium, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Poland and the Portuguese Republic.

Done at Brussels, 1 October 2013.

For the Commission

Maria DAMANAKI

Member of the Commission

⁽¹⁾ OJ L 298, 26.10.2012, p. 1.

ANNEX

NATIONAL PROGRAMMES 2011-13

ELIGIBLE EXPENDITURE AND MAXIMUM UNION CONTRIBUTION FOR 2013

(EUR)

Member State	Eligible expenditure	Maximum Union contribution (Rate of 50 %)
Belgium	1 908 116,52	954 058,26
Estonia	419 817,33	209 908,67
Ireland	6 789 727,28	3 394 863,64
Greece	3 746 777,00	1 873 388,50
France	13 156 764,55	6 578 382,28
Cyprus	210 953,08	105 476,54
Netherlands	5 068 872,00	2 534 436,00
Poland	835 480,23	417 740,11
Portugal	2 847 270,00	1 423 635,00
Total	34 983 777,99	17 491 888,99

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 519/12/COL

of 19 December 2012

closing the formal investigation procedure into potential aid to AS Oslo Sporveier and AS Sporveisbussene (Norway)

THE EFTA SURVEILLANCE AUTHORITY ("THE AUTHORITY")

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Articles 49 and 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 ("the Surveillance and Court Agreement"), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(2) of Part I and Article 7(2) of Part II,

HAVING called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾,

Whereas:

I. FACTS

1. PROCEDURE

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

- (1) By letter dated 11 August 2006, the Authority received a complaint ("the complaint") from Konkurrenten.no AS ("the complainant") alleging that the Norwegian authorities had granted state aid to AS Oslo Sporveier and AS 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).
- (2) By letter dated 7 September 2006, the Authority forwarded the complaint to the Norwegian authorities and invited them to comment (Event No 387163). By

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

- (3) By letter dated 20 October 2006, the complainant submitted further comments. The letter was registered by the Authority on 23 October 2006 (Event No 394520).
- (4) By letter dated 29 November 2006, the Authority requested further information from the Norwegian authorities (Event No 394397). The Norwegian authorities replied by letter dated 11 January 2007. The letter was registered by the Authority on 12 January 2007 (Event No 406541).
- (5) By letter dated 19 June 2007, the Authority requested further information from the Norwegian authorities (Event No 425271). The Norwegian authorities replied by letter submitted electronically on 16 August 2007 (Event No 434326).
- (6) By e-mail dated 20 February 2008, the complainant submitted further information (Event No 466226).
- (7) By letter submitted electronically on 2 April 2008, the Authority requested yet further information from the Norwegian authorities (Event No 471926). The Norwegian authorities replied by letter submitted electronically on 29 April 2008 (Event No 475480).
- (8) The complainant submitted further information by e-mails dated 25 May 2008 (Event No 478132), 2 June 2008 (Event No 479743), 9 July 2008 (Events No 489623 and 489626), 14 August 2008 (Event No 489591), 15 August 2008 (Event No 488527), 20 January 2009 (Event No 505210) and 22 January 2009 (Event No 505503).

⁽¹⁾ OJ C 204 12.7.2012 p. 15 and EEA Supplement No 37 5.7.2012 p. 26.

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

(10) On 21 June 2010, the Authority adopted Decision No 254/10/COL closing the case on the grounds that the aid involved existing aid that had ceased. By letters dated 21 June 2010, the Authority forwarded copies of Decision No 254/10/COL to the Norwegian authorities (Event No 558824) and the complainant (Event No 561949).

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

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

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

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

(14) Secondly, the EFTA Court held that the Authority had infringed its obligation to open the formal investigation procedure in respect of aid granted during the period 1997 – 2000. It found that the Authority could not exclude the possibility that AS Oslo Sporveier and AS Sporveisbussene had received aid in excess of the losses associated with discharging the public service obligations, and that the Authority indeed considered that such over-compensation could have possibly occurred in the past. Thus, the EFTA Court concluded that the Authority should have opened the formal investigation procedure in order to become, to the extent possible, fully informed of the facts. The applicant's plea addressing the same issues with regard to the period 2000 – 2008 was also declared well founded ⁽³⁾.

⁽²⁾ Judgment, paragraphs 55–63.

⁽³⁾ *Ibid*, paragraphs 76–80.

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

1.3. Re-assessment of the complaint

(16) The complainant has alleged that the following measures may involve unlawful state aid:

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

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

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

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

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

(18) By letter dated 27 January 2012 (Event No 622888), the Authority requested further information from the Norwegian authorities ⁽⁶⁾. The Norwegian authorities responded by letter dated 22 February 2012 (Events No 625908, 625916, 625949, 626065 and 626066) and e-mails of 5 March 2012 (Events No 627096 and 627097).

⁽⁴⁾ *Ibid*, paragraphs 84–91.

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

⁽⁶⁾ By letter dated 8.2.2012 (Event No 624263), the complainant called upon the Authority to open the formal investigation procedure into the measures that had been subject to the procedure of the EFTA Court in the case E-14/10.

1.4. Formal investigation

- (19) By Decision No 123/12/COL of 28 March 2012 ("the opening decision") the Authority initiated the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of the potential aid to AS Oslo Sporveier and AS Sporveisbussene. By letter of the same date (Event No 627869), the Authority informed the Norwegian authorities of its decision and invited them to submit comments.
- (20) By letter dated 4 June 2012 (Event No 636738), the Norwegian authorities submitted comments to the opening decision. By e-mail of 28 June 2012 (Event No 639422), the Authority requested further information. By e-mail of 7 September 2012 (Event No 645982), the Norwegian authorities responded. By e-mails exchanged between 9 and 23 November 2012 (Events No 653229, 653257, 653526, 654300, 654332, 654345 and 654470), the Authority requested and received, from the Norwegian authorities, further information.
- (21) The opening decision was published in the *Official Journal of the European Union* and the EEA Supplement to it⁽⁷⁾. The Authority called on interested parties to submit their comments on the opening decision. The Authority received comments from two interested parties. By letter dated 2 August 2012 (Event No 643450), the Authority received comments from the complainant, Konkurrenten.no AS. By letter dated 6 August 2012 (Event No 643459), the Authority received comments from Risdal Touring AS, a sister company of the complainant. By letter dated 4 September 2012 (Event No 645575), the Authority forwarded those comments to the Norwegian authorities. By letter dated 3 October 2012 (Event No 648581), the Norwegian authorities informed the Authority that they had no comments to the observations from the two interested parties.

2. THE DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

- (22) The Norwegian authorities confirmed that AS Oslo Sporveier had not granted any guarantees⁽⁸⁾. Therefore, the Authority concluded that the allegation of the complainant concerning the guarantees were without object⁽⁹⁾.
- (23) The Authority did however have doubts concerning the remaining measures covered by the complaint. Therefore, it decided to initiate the formal investigation procedure with regard to the following three measures:

1. the compensation for scheduled bus services in Oslo paid to AS Oslo Sporveier and AS Sporveisbussene during the period 1 January 1994 – 30 March 2008 ("the annual compensation");
2. the capital injection paid by Oslo Municipality in 2004 ("the 2004 capital injection"), which covered an accrued pension fund shortfall related to:
 - a. the provision of public services ("the public service capital injection"), as well as to
 - b. commercial activities ("the commercial activities capital injection"); and
3. the application of the group taxation rules ("the group taxation measure").

3. BACKGROUND – THE CURRENT LEGISLATION ON LOCAL SCHEDULED BUS TRANSPORT

3.1. Commercial Transport Act 2002 and Commercial Transport Regulation 2003

- (24) At present, the local bus transport sector is regulated by the Commercial Transport Act of 2002 (the "CTA")⁽¹⁰⁾ and the Commercial Transport Regulation of 2003 (the "CTR")⁽¹¹⁾. The CTA repealed and replaced the Transport Act of 1976⁽¹²⁾. The CTR repealed and replaced two regulations⁽¹³⁾.
- (25) The Norwegian authorities have confirmed that the relevant provisions have not been significantly altered since the entry into force of the EEA Agreement in 1994.

3.2. Administrative responsibility of the counties

- (26) In Norway, the responsibility for providing local public transport services is conferred on the counties. However, the counties are not under any obligation to offer such services.
- (27) The counties can either administer local bus transport services through their own organisation or through an administrative company⁽¹⁴⁾ set up by the county. The CTA provides that when the county sets up an administrative company, the funds intended for the financing of the local bus transport services will be allocated to

⁽⁷⁾ OJ C 204 12.7.2012 p. 15 and EEA Supplement No 37 5.7.2012 p. 26.

⁽⁸⁾ See the opening decision at paragraphs 122–124.

⁽⁹⁾ See the operative part of the opening decision at Article 1.

⁽¹⁰⁾ Act of 21.6.2002 No 45 (e.i.f. 1.1.2003).

⁽¹¹⁾ Regulation of 26.3.2003 No 401 (e.i.f. 1.4.2003).

⁽¹²⁾ Act of 4.6.1976 No 63 (e.i.f. 1.7.1977). Repealed and replaced by the CTA on 1.1.2003.

⁽¹³⁾ Regulation of 12.8.1986 No 2170 (e.i.f. 1.1.1987) and Regulation of 4.12.1992 No 1013 (e.i.f. 1.1.1994). Both repealed and replaced by the CTR on 1.4.2003.

⁽¹⁴⁾ In Norwegian: *Administrasjonsselskap*.

that company⁽¹⁵⁾. The administrative companies can either obtain the bus transport services from a third party, or provide the services themselves.

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

- (28) The counties partly finance the local transport services with tax revenue. In addition, under the CTA the counties receive state funding by way of annual block grants⁽¹⁶⁾. The amount of the grants is determined on the basis of the extent to which the counties need contributions from the State. Therefore the counties have to provide the Ministry of Transport with budgets, accounts and other relevant information necessary to assess the need for contributions⁽¹⁷⁾. The Norwegian authorities have stated that in the event that a county reduced the amount of the block grant used for the financing of local scheduled transport costs, this would have consequences for future grants.

3.4. Concessions

3.4.1. Introduction

- (29) Under the CTA, concessions are required to carry out passenger transport services by bus for remuneration (i.e. for payment by the users (the passengers) of the transport services)⁽¹⁸⁾.
- (30) Both a general and a special concession are needed for operators of scheduled passenger transport services by bus for remuneration.

3.4.2. General concession for passenger transport

- (31) Undertakings providing passenger transport services for remuneration must have a general concession⁽¹⁹⁾. In order to obtain a general concession, the applicant must (i) provide a certificate of good conduct, (ii) have satisfactory financial means and abilities, and (iii) have satisfactory professional qualifications⁽²⁰⁾. General concessions are not time limited⁽²¹⁾.

3.4.3. Special concessions for scheduled passenger transport

- (32) In addition to the general concession, any undertaking wishing to carry out scheduled passenger transport for

remuneration must have a special concession⁽²²⁾. There are two types of special concessions: (i) area concessions, and (ii) route specific concessions. The area concession is of a residual nature, in that it permits its holder to operate scheduled bus transport services in the entire area covered, in so far as other route specific concessions have not been granted in the area. The holder of a route specific concession is the sole entity entitled to operate scheduled bus transport on that route.

- (33) The special concession confers upon the concessionaire both a right and a duty to carry out the transport service as set out in the concession⁽²³⁾. When applying for a special concession, a proposal for a transportation schedule and tariffs must be submitted⁽²⁴⁾. Schedules and tariffs are subject to the control of the counties⁽²⁵⁾. The counties can order changes in the schedules and tariffs⁽²⁶⁾.
- (34) The special concessions can either be awarded (i) through tender procedures (granted for the period determined in the tender procedure⁽²⁷⁾, which in any event will not be for a longer period than 10 years⁽²⁸⁾), or (ii) directly without the use of a tender (granted for a 10 year period)⁽²⁹⁾.

3.5. Ticketing systems

- (35) The concessionaires must deploy ticketing systems approved by the counties⁽³⁰⁾.

⁽²²⁾ Article 6(1) CTA.

⁽²³⁾ Article 25 CTR.

⁽²⁴⁾ Articles 28 and 29 CTR. These are the requirements the Authority considers to be the most relevant for the purposes of describing the national scheme, however, a number of other detailed requirements for a special concession are set out in the CTR.

⁽²⁵⁾ The Ministry of Transport has delegated its competence for setting the tariffs to the counties. However, some rebates are determined on the national level. In practice, the Ministry has instructed all the counties to ensure that local scheduled bus transport operators carrying out a public service offer a 50 % price reduction to children, senior and disabled citizens.

⁽²⁶⁾ Articles 28 and 29(2) CTR. On the basis of Article 28(3) CTR, the Ministry of Transport has the competence to give guidelines on the content and publication of the transportation schedules. The Ministry of Transport's Circular Letter N-1/2006 contains supplementary guidelines on the publication of route schedules. Before 2006, Article 28 CTR regulated certain aspects of the publication of route schedules. These aspects were taken out in 2006. In practice, the Circular Letter N-1/2006 refers to the old provision (Article 28 CTR) as it was before the amendment, and states that the requirements of the old provision, until further notice, shall be considered as a guideline for the content of the route schedule.

⁽²⁷⁾ Article 27(2) CTA.

⁽²⁸⁾ As stated in the preparatory works, chapter 10.1 of Prop. 113 L (2009–2010).

⁽²⁹⁾ Article 8 CTA. The possibility to tender the concessions was introduced by an amendment of the Transport Act of 1976 by Act of 11.6.1993 no 85 (e.i.f. 1.1.1994).

⁽³⁰⁾ Article 30(1) CTR. The Ministry of Transport has powers to give general guidelines for the use of electronic ticketing systems (Article 30(2) CTR). The Ministry has given such guidelines in the form of its Circular Letter N-1/2006. In that Circular Letter the Ministry has decided that the following document should serve as a standard for electronic ticketing systems – Part 3 of Handbook 206 by the Norwegian Public Roads Administration (in Norwegian: *Statens Vegvesen*).

⁽¹⁵⁾ Article 23 CTA.

⁽¹⁶⁾ Article 22(3) CTA.

⁽¹⁷⁾ Article 22(4) CTA.

⁽¹⁸⁾ Articles 4 and 6 CTA.

⁽¹⁹⁾ Article 4(1) CTA.

⁽²⁰⁾ Article 4(2) CTA and Chapter I of the CTR.

⁽²¹⁾ Article 27(1) CTA.

3.6. Contracts

- (36) To complement the concessions, the counties may enter into contracts with the concessionaires about the provision of the public service. The counties are free to determine the form of these contracts ⁽³¹⁾.

3.7. Compensation to the concessionaires

- (37) The counties are responsible for compensating the concessionaires ⁽³²⁾. Compensation is only granted to undertakings that operate unprofitable routes (i.e. where the revenue generated from the sale of tickets does not cover the cost of operating the service).
- (38) According to the Norwegian authorities, under Article 22 CTA the county is under the obligation to compensate the operators for the provision of the transport service on unprofitable routes it wishes to establish or maintain within its region ⁽³³⁾. The counties are free to determine the manner in which the concessionaires are to be compensated; the CTA and the CTR do not have any particular provisions on how the compensation is to be provided.
- (39) The Authority understands that Article 22 CTA is read as allowing for compensation to cover the cost of the public service (including a reasonable profit) minus the ticket revenues, and that compensation beyond that could not be based on the CTA.

⁽³¹⁾ Article 22(5) CTA. The 1997 Transport Agreement between AS Oslo Sporveier and AS Sporveisbussene, referred to below, is an example of such a contract.

⁽³²⁾ Article 22(1) CTA.

⁽³³⁾ The Norwegian authorities, in their comments to the opening decision, have confirmed this and explained, with reference to legal literature (*Norsk Lovkommentar*), that the preceding provision – Article 24a of the Transport Act of 1976 – was interpreted in the same way. In that regard, *Norsk Lovkommentar* to the Transport Act of 1976 (available on <http://www.rechtsdata.no/> (access requires a paid subscription)) on the issue of compensation states the following in note 43 (in Norwegian): “I rutetransporten vil det dog ofte være aktuelt å pålegge utøver en større rutetjeneste som sammenholdt med de takster som godkjennes, ikke gir et forsvarlig økonomisk grunnlag. I slike tilfeller kan plikten bare opprettholdes dersom det ytes tilskudd, jf. § 24 a”. Translation by the Authority: “For scheduled transport it will, however, frequently be appropriate to require the transport operator to provide a more comprehensive service that, in light of the set maximum prices, would not be of sound financial interest. Under such circumstances, the public service obligation can only be maintained against compensation, cf. Article 24a.”

4. FURTHER BACKGROUND –PRE-EEA LEGISLATION ON SCHEDULED PUBLIC TRANSPORT –TRANSPORT ACT OF 1976

4.1. Introduction

- (40) In response to the opening decision, the Norwegian authorities have provided more information on the history of the system of compensation for local scheduled transport services.

4.2. Centralised State responsibility for local scheduled transport

- (41) The Norwegian authorities have explained that the State (the Ministry of Transport) at the time of the entry into force of the Transport Act of 1976 ⁽³⁴⁾ was responsible for local scheduled transport services. State transport agencies managed the local scheduled transport in each county.

4.3. De-centralisation process

4.3.1. Introduction

- (42) Shortly after the entry into force of the Transport Act of 1976, a de-centralisation process was initiated. From 1 January 1979, the powers of the Ministry of Transport could be delegated to the county. At the same time, the State transport agencies were turned into county administrative bodies.
- (43) In 1981, with the introduction of Article 24a to the Transport Act of 1976, by providing funding to the counties, the State could confer the responsibility for financing local scheduled transport to the counties ⁽³⁵⁾. In Oslo, Article 24a became applicable in 1983, when Oslo Municipality (which is also a county) ⁽³⁶⁾ first received such funding.

4.3.2. The 1980 Regulation

- (44) Another important element of the de-centralisation process was the Regulation of 19 December 1980 on compensation for providing local scheduled transport (“the 1980 Regulation”). Article 1 of the 1980 Regulation states that the county has the responsibility to finance local scheduled transport. Pursuant to Article 3, the amount of the compensation shall be decided on an annual basis, based on the difference between estimated income according to the decided tariffs and discounts, and reasonable costs.

⁽³⁴⁾ Act of 4.6.1976 No 63 (e.i.f. 1.7.1977). Repealed and replaced by the CTA on 1.1.2003.

⁽³⁵⁾ See the preparatory works to the amendment of the Transport Act of 1976 – Ot.prp. nr. 16 (1980–81) at page 2.

⁽³⁶⁾ Oslo Municipality is a county, as well as a municipality. In the following, it is referred to as Oslo Municipality.

- (45) The 1980 Regulation also contains rules on control and access to information and clarifies the roles of, on the one hand, the Ministry of Transport and, on the other, the counties. Article 7 provides the legal basis for the Ministry to issue further rules and guidelines for the compensation of local scheduled transport.

4.3.3. *The 1982 Regulation and the KS and NABC Standard Main Agreement*

- (46) On 1 January 1983, the 1980 Regulation was replaced by the entry into force of a new regulation – Regulation of 2 December 1982 on compensation for providing local scheduled transport (“the 1982 Regulation”). Article 4 of the 1982 Regulation imposes the obligation on the counties to enter into agreements with the concessionaires on the compensation for the provision of the scheduled public transport. On this basis, the organisation KS (the Norwegian Association of Local and Regional Authorities) and the Norwegian Association of Bus Companies (“the NABC”) ⁽³⁷⁾, concluded a standard main agreement (“the KS and NABC Standard Main Agreement”) and a standard yearly compensation agreement to be used by each county when concluding agreements for the provision of scheduled bus transport services. As regards the calculation of the compensation, the standard agreement was based on the same principles as Article 3 of the 1980 Regulation. The standard main agreement also provided for a separation of costs between the public transport services and other commercial services.

4.3.4. *The 1985 Regulation*

- (47) With the adoption of a new income system for the counties, a new Regulation on Compensation for Local Transport was adopted in 1985 (“the 1985 Regulation”). The new income system for the counties (and municipalities) entailed that the central contribution for local transport was given as a lump sum. The main focus of the 1985 Regulation was the relationship between the Ministry of Transport and the counties. The 1985 Regulation was repealed on 1 January 1987.

5. ORGANISATION OF THE LOCAL SCHEDULED BUS TRANSPORT IN OSLO

- (48) As noted above, the responsibility for providing local scheduled public transport services is conferred on the counties.
- (49) Before 1994, all public transport administration in Oslo was carried out by AS Oslo Sporveier ⁽³⁸⁾, as Oslo

Municipality has delegated to the company the task of planning and administering public transport in Oslo ⁽³⁹⁾. At the same time, AS Oslo Sporveier operated an in-house department ⁽⁴⁰⁾ carrying out most ⁽⁴¹⁾ of the scheduled bus transport in Oslo. This activity was carried out on the basis of an area concession awarded on 16 November 1992, permitting AS Oslo Sporveier to operate scheduled bus transport services in the entire Oslo grid, in so far as other route specific concessions had not been granted.

- (50) The concession was granted for a 10-year period, with retroactive effect from 1 January 1990.
- (51) Additionally, since 1994, AS Oslo Sporveier operated small-scale tour bus services outside its public service remit.
- (52) On 23 April 1997, the bus department, including the small tour bus division, separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveibussene. Since then AS Sporveibussene carried out the scheduled local bus transport in accordance with the concession awarded to AS Oslo Sporveier.
- (53) The companies entered into a Transport Agreement, signed on 23 April 1997, with retroactive effect from 1 January 1997 (“the Transport Agreement”). The Transport Agreement was due to expire at the date of expiry of the existing concession (i.e. 31 December 1999), but it would be prolonged automatically for one year at a time as long as AS Oslo Sporveier’s area concession would be renewed. Under this Transport Agreement, AS Sporveibussene assumed the public service activities of AS Oslo Sporveier and received the annual compensation directly from AS Oslo Sporveier for these services.
- (54) The area concession was renewed for another 10 years on 20 September 2001, with retroactive effect from 1 January 2000.

⁽³⁹⁾ 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 Sporveibussene) or other third parties. Oslo Municipality was involved via the management board of AS Oslo Sporveier.

⁽⁴⁰⁾ Additionally, AS Oslo Sporveier had other departments operating *inter alia* underground, tram and ferry services.

⁽⁴¹⁾ Three other operators, ING. M.O. Schøyens Bilcentraler A/S, Norgesbuss AS/Oslo, and Follo Busstrafikk A/S also held concessions for scheduled bus transport on a few specified routes in Oslo. Norgesbuss AS/Oslo acquired Follo Busstrafikk A/S in 1996 and with that took over its concessions.

⁽³⁷⁾ In Norwegian: Norsk Rutebilerforbund.

⁽³⁸⁾ Since 1934 Oslo Municipality has practically been the sole owner of AS Oslo Sporveier (with 98,8 % ownership). The Norwegian authorities have explained that in 2002, Oslo Municipality acquired the remaining shares and thus became the 100 % owner of AS Oslo Sporveier.

- (55) In 2001, Oslo Municipality decided that all scheduled bus transport in Oslo should be tendered out. On this basis, scheduled bus transport was gradually put up for public tender in five lots during the period 2003–2008. The respective contracts entered into force the year following that in which they had been tendered out. The last lot was tendered in 2007, and the last contract entered into force on 30 March 2008.
- (56) Due to its residual nature, the scope of the area concession would be reduced in accordance with the gradual tendering of the routes that once were covered by the area concession. Thus, the area concession awarded to AS Oslo Sporveier expired on 30 March 2008 (when all scheduled bus transport in Oslo had been tendered out). As the concession lapsed, so did the Transport Agreement.
- (57) As set out above, in 1997 AS Sporveisbussene took over the small tour bus division from AS Oslo Sporveier.
- (58) In 2003, AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005, AS Sporveisbussene acquired the company Arctic Express AS and its subsidiary Lavprisexpressen.no, engaged in airport express services and regional bus transport. In 2006, the tour bus division was separated from AS Sporveisbussene into a newly established company, Sporveisbussenenes Turbiler AS, owned 100 % by AS Sporveisbussene.
- (59) From 1 July 2006 to 1 January 2007, the administration of the public transport in Oslo was reorganised. A new company was established under the name AS Oslo Sporveier (the “new AS Oslo Sporveier”). The former AS Oslo Sporveier changed its name to Kollektivtransportproduksjon AS (“KTP”). The administrative functions of the former AS Oslo Sporveier were transferred to the new AS Oslo Sporveier.
- (60) KTP retained the operative part of AS Oslo Sporveier and the ownership of AS Sporveisbussene. The latter turned into a parent company with three subsidiaries. The subsidiaries were renamed (from Nexus Trafikk AS to Unibuss AS; Sporveisbussenenes Turbiler AS to Unibuss Tur AS; and Arctic Express AS to Unibuss Ekspress AS).
- (61) AS Sporveisbussene merged with Unibuss AS in 2009. That company kept the name Unibuss AS and took over as the parent company retaining ownership of Unibuss Tur AS and Unibuss Ekspress AS.
- (62) As noted above, Oslo Municipality is responsible for compensating operators of public services it wishes to establish or maintain within its region ⁽⁴²⁾.
- (63) In Oslo, there is a common ticketing system that applies to all operators for bus, tram, underground and ferry. The public service operators are not responsible for the ticketing system. The ticketing system is the responsibility of KTP (formerly AS Oslo Sporveier), and the ticket prices are subject to the control of Oslo Municipality.
- (64) The concessionaire is allowed to keep the ticket income generated by the operation of the scheduled bus transport ⁽⁴³⁾. When the ticket income is not sufficient to cover the cost of the operations, the concessionaire is eligible to receive public service compensation from Oslo Municipality.
- (65) In Oslo, since the 1980s, and until the contracts were tendered out, the compensation under the directly awarded contracts was determined in accordance with the procedure described in the following. In essence, a lump sum that covered the difference between the estimated costs of operating the public service in question and the income from sale of tickets was determined by Oslo Municipality and the concessionaire ⁽⁴⁴⁾. This was done as part of the general budget process in Oslo Municipality. According to the Norwegian authorities, the budget process can be outlined as follows:

January/February	The City Government (Byrådet) decides the budget limits for the next year.
March	The municipal departments and undertakings are informed of the budget limits and the time limit for submission of budget proposals.
March/April	The municipal undertakings deal with the budget of the following year.
May	The municipal departments and undertakings submit their budget proposals based on previous years income and costs, activity level, budget limits and assumptions on future cost developments and efficiency gains.

6. COMPENSATION FOR THE PUBLIC SERVICE OBLIGATION IN OSLO

6.1. Administrative practice

- (62) As noted above, Oslo Municipality is responsible for compensating operators of public services it wishes to establish or maintain within its region ⁽⁴²⁾.

⁽⁴²⁾ Article 22 CTA.

⁽⁴³⁾ All ticket revenue generated by direct sale on their own buses, plus a share of the ticket revenue stemming from AS Oslo Sporveier, Stor-Oslo Lokaltrafikk (the predecessor to Ruter AS, a publicly owned company responsible for the management of local scheduled transport in Oslo) and Norges Statsbaner AS (a publicly owned company responsible for rail transport in Norway).

⁽⁴⁴⁾ Since 1983, on the basis of Article 24a of the Transport Act of 1976, the 1982 Regulation and the KS and NABC Standard Main Agreement. The Norwegian authorities have explained that the practice essentially remained unchanged on the basis of Article 22 CTA after its entry into force on 1 January 2003.

June – August	Discussions between the departments/undertakings and the responsible governmental unit are carried out in order to clarify the budget and the activities covered by it.
September	The budget proposal is announced by the City Government.
October	The different committees of the City Council (<i>Bystyret</i>) deal with the different parts of the budget.
October/November	The City Government proposes a revised budget.
December	The budget is approved by the City Council.

- (66) Based on the budget proposals (and possible amendments during the budget discussions in the City Council), the compensation was granted by budget decisions within certain assumptions that were specified in each decision, *i.e.* to achieve certain efficiency gains and maintain the preceding year's transport services to the public. The decisions also contained certain goals with respect to, *inter alia*, the volume of produced transportation services and costs per travel.
- (67) The assessment of the amount of compensation was based on the costs incurred in the preceding years, corrected for efficiency gains, the development of the Norwegian consumer price index, salaries, taxes, and laws and regulations that would affect the costs.
- (68) According to the Norwegian authorities, separate accounts were kept for the public service and commercial activities (*i.e.* the tour bus service) carried out by AS Oslo Sporveier. Also, the cost of the commercial activities of AS Oslo Sporveier was not taken into account for the calculation of the annual compensation for public services.
- (69) According to the Norwegian authorities, under the Transport Agreement concluded in 1997, which lapsed on 30 March 2008 when all public service contracts had been tendered out and the area concession itself lapsed, the calculation of the compensation was carried out on an annual basis in accordance with the principles described above.
- (70) Thus, the public service compensation was determined in accordance with the same procedure. The amount was calculated on the basis of the difference between cost and revenue on the public service and adjusted in accordance with the same correction factors throughout the entire period under assessment. Separate accounts were kept for the public service activities and the commercial activities.

6.2. Profitability of the public service

- (71) According to an overview of the annual results of the bus activities of AS Oslo Sporveier and AS Sporveisbussene submitted by the Norwegian authorities, the average annual profit of the companies was 0,49 % in the period from 1994 to 2008. This figure, however,

includes revenues from commercial activities from 2005 onwards. The average annual return for the period 1994 to 2005, for which the data submitted by the Norwegian authorities relates exclusively to the public service, was 1,98 % ⁽⁴⁵⁾.

6.3. Introduction of a quality bonus/malus system

- (72) As explained above, in 1997 AS Sporveisbussene started providing local scheduled bus transport services in Oslo in accordance with the concession awarded to AS Oslo Sporveier. Moreover, the Transport Agreement between AS Oslo Sporveier and AS Sporveisbussene was concluded. The Norwegian authorities have explained that the Transport Agreement introduced the concept of a model, to be defined by AS Oslo Sporveier, under which the quality of the bus services should be measured. The intention was to find a model to incentivise AS Sporveisbussene to provide quality bus transport services. The Transport Agreement provided that the system should be in place 1 January 2008 at the latest.
- (73) In 2004, the specific model of a bonus/malus system was agreed on ⁽⁴⁶⁾. According to that system, the performance of AS Sporveisbussene is assessed in accordance with the following criteria: (i) total customer satisfaction, (ii) punctuality, (iii) level of safety and comfort, and (iv) the driver being forthcoming. Customer satisfaction is measured on the basis of surveys. Punctuality is measured on the basis of objective data.
- (74) AS Oslo Sporveier granted a quality bonus to AS Sporveisbussene of NOK 3,9 million in 2004. This represents 0,8 % of the revenue of AS Sporveisbussene that year (NOK 483,5 million). The Norwegian authorities have explained that they view the quality bonus as a part of the reasonable profit. The Norwegian authorities have not informed the Authority of any other quality bonuses being granted.

6.4. Intra-group services and allocation of common costs

- (75) According to the Norwegian authorities, the commercial bus services operated by AS Sporveisbussene have only to a limited extent required services from AS Oslo Sporveier. Mostly such intra-group services have been exchanged between the subsidiaries in the Oslo Sporveier Group.
- (76) Since 1994, intra-group services were exchanged primarily on the basis of agreements between the companies of the group. The costs of the services were based on market prices, if external companies were involved in the provision of the services. Examples of such services with external providers included indicatively: joint purchase of diesel oil, motor oil or

⁽⁴⁵⁾ Calculation by the Authority.

⁽⁴⁶⁾ The system is described in the annex to the protocol defining the detailed compensation for bus services that AS Sporveisbussene was entitled to for 2004.

frost fluids, sublease of busses, lease of property from private companies etc. For these services the internal price included also a proportional share of fixed costs, as well as additional costs to cover administration fees, where relevant.

(77) As regards intra-group services provided by AS Oslo Sporveier to AS Sporveisbussene and its subsidiaries or amongst the subsidiaries, the Norwegian authorities have explained that the prices paid for such services were based on the actual costs (e.g. rent of buses and drivers on specific occasions, cleaning of buses) or on the volume used (e.g. issuing of ID-cards) or even per hour according to the complexity of the service rendered. The actual price included the cost of the service, meaning marginal costs, external/efficiency effects, as well as a proportional share of fixed costs and profit. The Norwegian authorities have explained that such cost-based prices equal the market prices.

(78) As explained above, AS Sporveisbussene established a subsidiary in 2003, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport services in Oslo. The establishment of the subsidiary created a situation where the companies (AS Sporveisbussene and Nexus Trafikk AS), due to the fact that they both provided bus services, shared certain common costs. The Norwegian authorities explained that this led the companies to establish a new system for allocating (the new) common costs. The new system applied from 2004 onwards. According to the new system, common costs such as IT and communication infrastructure, general PR costs, certain corporate staff, consultancy services related to general contracts, audit, pension, insurance, accounting and salary services were covered by all relevant companies of the group with a certain percentage of each company's turnover. The method to calculate those overhead rates is based on the identification of all common costs through the budget process each year. The amount of those costs is then summed up and the general overhead rate is estimated by dividing the identified common costs on the total turnover of AS Sporveisbussene and its subsidiaries. The sum of budgeted overhead costs for each company shall cover the common costs included in the total budget. The rate was [...] ⁽⁴⁷⁾ % for 2004, [...] ⁽⁴⁸⁾ % for 2005 and 2006, and [...] ⁽⁴⁹⁾ % for 2007 and 2008.

⁽⁴⁷⁾ The exact figure is covered by the obligation of professional secrecy. It is in the range of 2 % - 7 %.

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7. CAPITAL INJECTION OF 2 APRIL 2004

7.1. The complaint

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

(80) The Norwegian authorities have confirmed that Oslo Municipality injected new capital into the Oslo Sporveier Group on 2 April 2004, and that this measure related to a one-time contribution to the pension fund of the Group (Oslo Sporveiers Pensjonskasse) ⁽⁵⁰⁾ to cover an accumulated shortage of funds in the existing pension fund accounts. The amount of this capital injection allocated to AS Sporveisbussene was NOK 111 760 000. The Norwegian authorities have furthermore explained that at the same time as the capital injection took place, AS Sporveisbussene changed accounting principles for estimating future pension obligations with the result that from 2004 onwards such obligations were recognized in their accounts ⁽⁵¹⁾.

(81) In light of the information submitted by the Norwegian authorities, the Authority can only understand that the complainant, when referring to the transfer of NOK 41 499 000 in its correspondence with the Authority,

⁽⁵⁰⁾ Oslo Sporveiers Pensjonskasse was the pension fund for the employees of the Oslo Sporveier Group. The 2004 capital injection covered the underfunding related to the pension obligations of Oslo Sporvognsdrift AS (a company responsible for the operation of tram services in Oslo), Oslo T-banedrift AS (a company responsible for the operation of metro services in Oslo), AS Oslo Sporveier and AS Sporveisbussene.

⁽⁵¹⁾ The Norwegian authorities have explained that prior to the 2004 capital injection, AS Sporveisbussene recorded its pension obligations using the so called "corridor solution". Using this accounting method, the company amortised adjustments in calculated pension obligations over a period of ten years. The "corridor solution" was based on the assumption that there will be deviations every year between the long-term assumptions and realities and that, over time, such differences will even out. In 2004, the Norwegian authorities decided to change the accounting method used for recording pension obligations. Annual adjustments that included, in the accounts, all costs over the period of assumed average employment were made. As a consequence, AS Sporveisbussene recorded in 2004 a reduction in equity of NOK 80 934 000 (under the item "estimatavvik"), which reflects this change in accounting methods. These changes resulted in an increase in the obligations recognized in the balance sheet and a corresponding reduction of the equity capital of the company. This change in accounting principles did not have an impact on the amount of capital needed to offset the underfunding of the pension fund, but rather explains some of the changes in the accounts of AS Sporveisbussene from 2003 to 2004 to which the complaint referred.

has compared the 2003 and 2004 accounts of AS Sporveisbussene, and deducted NOK 39 501 000 (total equity in 2003) from NOK 81 million (total equity in 2004). In this Decision, the Authority will assess the actual capital injection of NOK 111 760 000, which is the amount allocated to cover the pension obligations of AS Sporveisbussene (as opposed to NOK 41 499 000 referred to by the complainant).

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

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

- (83) 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⁽⁵²⁾.
- (84) By the mid-1990s, it had become clear that the pension fund of the Oslo Sporveier Group was underfunded. The underfunding had accumulated over several years as the payments of premiums to the pension fund did not take adequate account of increased pension obligations resulting from factors such as increases in the employees' salaries, longer life expectancy, changes in expected rates of disability etc. According to the Financial Supervisory Authority of Norway (*Kredittilsynet*), the pension fund of AS Oslo Sporveier had coverage of only 46,9 % per 31 December 1995. Municipal pension funds with coverage below 95 % must be increased with a minimum of 1,5 % per year⁽⁵³⁾. Oslo Municipality, as its owner, was therefore obliged by law to cover the underfunding of the Oslo Sporveier Group⁽⁵⁴⁾. Thus, as resolved by decision of 23 December 1996, AS Oslo Sporveier had to submit a plan on how to make up for the shortfall. Consequently, a payment plan to eliminate the shortfall by 2020 was laid down. This plan was approved by the Financial Supervisory Authority on 9 July 1997.
- (85) In accordance with the payment plan, Oslo Municipality adjusted upwards the annual public service compensation so as to cover the increased pension premiums.

7.3. Capital injection into Oslo Sporveiers Pensjonskasse

- (86) According to the Norwegian authorities, Oslo Municipality decided in 2003 to cover the pension fund

shortfall at the Oslo Sporveier Group with a one-time payment. As a result, on 2 April 2004, AS Oslo Sporveier injected NOK 802,5 million⁽⁵⁵⁾ in Oslo Sporveiers Pensjonskasse to cover the current total shortfall⁽⁵⁶⁾. The capital injection covered the underfunding of the pension liabilities relating to the employees of Oslo Sporvognsdrift AS, Oslo T-banedrift AS, AS Oslo Sporveier and AS Sporveisbussene.

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

- (88) Of the NOK 802,5 million, NOK 111 760 000 covered the pension obligations of AS Sporveisbussene. According to the Norwegian authorities the full amount was paid directly from AS Oslo Sporveier to the Oslo Sporveiers Pensjonskasse and was not transferred as cash to AS Sporveisbussene. In the annual accounts of AS Sporveisbussene for 2004, the pension contribution of NOK 111 760 000 was recorded as an injection of new share capital.

7.4. Underfunding of the pension liabilities for the tour bus employees

- (89) According to the Norwegian authorities, a part of the capital injection transferred to AS Sporveisbussene covered pension liabilities for employees in the tour bus operation for the period 1994 (when the tour bus operations commenced) until 1 January 1997.
- (90) The Norwegian authorities have submitted calculations according to which approximately NOK 430 300 of the total capital injection was related to pension liability underfunding in the tour bus division.

7.5. Change of pension funds to Vital Forsikring ASA

- (91) The payment of NOK 111 760 000 also enabled AS Sporveisbussene to transfer its pension fund from Oslo Sporveiers Pensjonskasse to Vital Forsikring ASA, a

⁽⁵²⁾ Given that Norwegian national insurance would provide a basic pension between 40 % and 50 %, the employer provided the remaining part through either pension funds or life insurance companies. The Oslo Sporveier Group organised their pension fund as a municipal pension fund (Oslo Sporveiers Pensjonskasse), in accordance with chapter 7 of the Insurance Act of 10.6.2005 No 44.

⁽⁵³⁾ Regulation of 19.2.1993 no 117, section 28 A.

⁽⁵⁴⁾ Not complying with this obligation could have had several legal consequences for Oslo Sporveier Group, for instance it may have been declared bankrupt.

⁽⁵⁵⁾ Of which NOK 800 million were transferred from Oslo Municipality.

⁽⁵⁶⁾ The amount paid to Oslo Sporveiers Pensjonskasse was NOK 711 980 000 (NOK 90 519 282 (14,1 % of the total amount NOK 802,5 million) was employment tax).

life insurance company. The change took effect on 1 June 2004. Under the then applicable Norwegian law, all premiums intended to cover the shortfall had to be paid in full, before AS Sporveisbussene could transfer its pension obligations from one fund to another ⁽⁵⁷⁾.

8. TAXATION OF THE OSLO SPORVEIER GROUP

8.1. Allegations of the complainant

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

(93) According to the Norwegian authorities, and in the Authority's view, it appears that the complainant refers to the tax rules regarding contributions between companies belonging to the same group (group contributions). AS Sporveisbussene has apparently transferred parts of its profits, thus avoiding the payment of income tax on the amount transferred.

8.2. The relevant provisions of the Norwegian Tax Act

(94) According to the Norwegian Tax Act ⁽⁵⁸⁾, companies within a group shall be taxed as single entities; there is, at the outset, no consolidation of groups of companies for tax purposes, which means that a company may only deduct its own losses and is liable to pay tax only on its own profits.

(95) However, under certain conditions, the tax rules permit a company to deduct from its taxable income a unilateral contribution of capital made to another company within its group as a so called "group contribution".

(96) Group contributions are allowed ⁽⁵⁹⁾ when the granting company and the receiving company are limited liability

companies ⁽⁶⁰⁾ and belong to the same group ⁽⁶¹⁾. In addition, the parent company has to own more than 90 % of the subsidiary, as well as hold an equivalent share of the votes ⁽⁶²⁾. The Norwegian authorities have explained that these requirements must be met at the end of the relevant financial year in which the group contribution is made.

(97) The granting and the receiving companies must, as part of their annual tax return, disclose the contributions to the tax authorities by submitting complete information on designated forms.

(98) A group contribution may consist of money, working capital or other financial contributions ⁽⁶³⁾.

(99) A group contribution is deductible for the granting company to the extent that the contribution is covered by its taxable income ⁽⁶⁴⁾. When a company grants a group contribution exceeding its taxable income, it cannot deduct the excess amount ⁽⁶⁵⁾. The receiving company, on the other hand, is liable for paying taxes on the group contribution ⁽⁶⁶⁾, but the excess, non-deductible amount does not constitute a taxable income on the hand of the recipient company. The contribution is considered as income for the receiving company in the same year as the granting company

⁽⁶⁰⁾ According to Article 10-1 in the Tax Act, the rules governing group contributions are applicable for "aksjeselskap, allmennaksjeselskap samt likestilt selskap og sammenslutning".

⁽⁶¹⁾ As provided by Act of 13.6.1997 no 44, Articles 1-3 and 1-4.

⁽⁶²⁾ Article 10-4(1) of the Tax Act.

⁽⁶³⁾ The actual payment does not necessarily need to take place in the same year as the income is made, provided that it will be effected by a real transfer of wealth at a later date. Accordingly, it is sufficient that the granting company undertakes an unconditional obligation to make the contribution.

⁽⁶⁴⁾ Article 10-2(1) of the Tax Act.

⁽⁶⁵⁾ Article 10-3(1) of the Tax Act. The Norwegian authorities have explained that a parent company may grant a contribution to a subsidiary in the same year as the same subsidiary grants a group contribution to the parent. The two contributions would be viewed as separate transactions, to be treated separately for tax purposes, see Advance Ruling 22/05 by the Norwegian Directorate of Taxes, available online (in Norwegian): <http://www.skatteetaten.no/Templates/BindendeForhandsuttalelse.aspx?id=28885>. This entails that under certain circumstances, group contributions could be made and tax consolidation could be achieved without altering the grantors' net equity. This would be the case if a parent company has incurred a tax loss of at least the same proportions as the taxable profits of its subsidiary. The subsidiary could grant a contribution to its parent company and claim a deduction for this. The parent company could set off the contribution received against its own tax loss. Simultaneously, the parent company could grant its own separate group contribution to the subsidiary. The latter group contribution would not be taxable for the receiving subsidiary as the parent company due to its own tax losses would not be in a position to deduct it. In effect, the two group contributions would imply that the subsidiary could eliminate its tax base without eroding its net equity.

⁽⁶⁶⁾ Article 10-3(1) of the Tax Act.

⁽⁵⁷⁾ Act of 10.6.1988 no 39 (repealed), Article 8c-11 in conjunction with Article 8c-10 at paragraphs 1 and 3.

⁽⁵⁸⁾ The Tax Act of 26.3.1999 no 14, Article 2-2.

⁽⁵⁹⁾ Articles 10-2 to 10-4 of the Tax Act.

deducts the contribution in its tax assessment. Provided that the recipient suffers a deficit, the contribution may be set off against any losses, also those incurred in previous years. Moreover, the requirements related to a limited liability company's distribution of dividends must be met ⁽⁶⁷⁾.

- (100) The Norwegian authorities have explained that the group contribution rules apply indiscriminately to all corporate entities that are subject to Norwegian income tax. The application of the rules does not require any form of government permit, licence or similar consent by any public authority. The rules apply regardless of who controls the group, whether it is of domestic or foreign origin, or privately or publicly owned.

8.3. The rationale of the group contribution rules

- (101) The Norwegian authorities have explained that the purpose of the rules is to establish similar tax treatment and tax neutrality between (i) companies organised as a group structure and (ii) companies that operate several businesses as a single company. This purpose is attained by allowing groups of companies to offset the losses made by one (or several) of its companies against profits made by other companies in the same group, thus in effect allowing the taxation of the group on the basis of its consolidated net taxable profits. The Norwegian authorities have explained that the purpose or aim of the group contribution rules has never been to provide benefits to particular businesses on the basis of who owns the companies or what kind of business the companies engage in.

8.4. Application of group contribution rules by the Oslo Sporveier Group

- (102) The Norwegian authorities have explained that AS Sporveisbussene granted NOK 4 068 000 in group contributions in 2000 and NOK 8 365 000 in 2001 to AS Oslo Sporveier, whereas there were no contributions in the years 2002–2004 due to tax losses ⁽⁶⁸⁾.

9. COMMENTS TO THE OPENING DECISION FROM THE NORWEGIAN AUTHORITIES

9.1. More detailed factual information and the Asplan Viak Report

- (103) In their comments to the opening decision the Norwegian authorities provided more factual information

relevant for the assessment of the measures subject to the formal investigation. This information has been incorporated in the sections above.

- (104) In addition to those facts, the Norwegian authorities have provided the Authority with a report dated 25 May 2012 on the efficiency of AS Sporveisbussene for the years 1999 and 2002 commissioned by the Norwegian authorities from an independent consultant by the name of Asplan Viak AS ("the Asplan Viak Report") ⁽⁶⁹⁾. In the report, Asplan Viak AS compared the costs of AS Sporveisbussene to the costs of other scheduled bus operators in Norway. The report concludes that for the years 1999 and 2002, the costs of AS Sporveisbussene were at the level of, or below, the costs of a typical well run and adequately equipped provider of scheduled bus transport services in Norway ⁽⁷⁰⁾.

- (105) The Norwegian authorities have provided the Authority with information about the financial viability of the commercial bus operations. Except for a minor deficit of NOK 29 000 in 1998, the operations had run with a profit since the start up in 1994. The Norwegian authorities have furthermore provided the Authority with a strategy document from 2003 for the commercial bus operations run by AS Sporveisbussene ("the 2003 strategy document"), where the stated goal for 2003 was to generate a gross profit of NOK 1,5 million (before overhead costs) and a turnover of NOK 14,1 million.

9.2. Legal arguments

9.2.1. A scheme

- (106) The Norwegian authorities maintain that the financing of local scheduled bus transport in Oslo has been carried out on the basis of an aid scheme based on the CTA and the CTR.
- (107) They firstly stress that the purpose for which grants under Article 22 CTA can be given is clearly defined – compensation can only be awarded to cover the loss incurred on operating scheduled transport services that the county commissions. In that regard, the Norwegian authorities argue that the measure at hand differs from the Finnish measure assessed by the European Commission in *Åland Industrihus* ⁽⁷¹⁾.

⁽⁶⁹⁾ "Standard cost calculation for the scheduled bus operations of AS Sporveisbussene", report by Asplan Viak AS dated 25.5.2012, enclosed as Annex 13 to the letter from the Norwegian authorities of 4.6.2012 (Event No 636738).

⁽⁷⁰⁾ It must be pointed out that despite the findings in the Asplan Viak Report, the Norwegian authorities, in their comments to the opening decision, do not argue that the compensation granted to AS Sporveisbussene meets the Altmark criteria, see the assessment below.

⁽⁷¹⁾ Case SA.21654 (ex NN-69/2007 and C-6/2008) *Public Commercial Property Åland Industrihus*, OJ L 125 12.5.2012 p. 33. The Decision has been challenged before the General Court (see Case T-212/12).

⁽⁶⁷⁾ Article 10-2(1) of the Tax Act.

⁽⁶⁸⁾ The Norwegian authorities have confirmed that no circular contributions involving AS Sporveisbussene were carried out in 2000–2004.

- (108) Secondly, they stress that the discretion of Oslo Municipality in calculating the public service compensation is limited by the national guidelines under the CTR. The Norwegian authorities' reasoning is that this limitation of county discretion by the government supports the conclusion that the compensation is granted on the basis of an aid scheme. The compensation to a large extent stems from State (as opposed to county) funds, and the Ministry of Transport (i) has the power to give guidelines on the content and publication of route schedules, (ii) has the power to approve tariffs, (iii) sets national rebates, (iv) can give guidelines for the use of ticketing systems, and (v) has the authority to approve general terms and conditions for scheduled transport.
- (109) Finally they argue that the consistent administrative practice in Oslo demonstrates that the aid has been disbursed on the basis of a scheme.

9.2.2. *The quality bonus/malus system*

- (110) The Norwegian authorities argue that the quality bonus/malus system is part of the general public service compensation for the provision of local scheduled bus transport in Oslo, and that consequently, it is an integrated part of the aid scheme. They add that the bonus payment of 2004 amounted to NOK 3,9 million, which represents 0,8 % of the revenue of AS Sporveisbussene that year (NOK 483,5 million). It is additionally argued that this, in any event, represents a part of the reasonable profit on the hand of AS Sporveisbussene.

9.2.3. *Allocation of common costs and intra-group services*

- (111) The Authority understands that, on the basis of the information provided, the Norwegian authorities claim that there is no state aid involved as regards the allocation of common costs and the payment of intra-group services, given that the transactions between the companies of the group and to a lesser extent between companies of the group and AS Oslo Sporveier are based on normal commercial terms and principles.

9.2.4. *Commercial activities capital injection*

- (112) The Norwegian authorities argue that the approximate NOK 430 300 part of the 2004 capital injection that went to cover the pension costs related to purely commercial activities outside the public service remit (the commercial activities capital injection), does not

represent state aid, but rather an investment on market terms in accordance with the market economy investor principle ("MEIP"). Within that context, they stress that, contrary to the presentation of the facts in the opening decision⁽⁷²⁾, Oslo Municipality had actually become the sole owner of AS Oslo Sporveier in 2002, before the capital injection was carried out in 2004. In addition, the Norwegian authorities have provided the Authority with information about the financial viability of the commercial bus operations. Except for a minor deficit of NOK 29 000 in 1998, the operations had run with a profit since the start up in 1994. According to the 2003 strategy document for the commercial bus operations, the goal for 2003 was to generate a gross profit of NOK 1,5 million (before overhead costs) and a turnover of NOK 14,1 million. On this basis, and with reference to the market economy investor test as drawn up by the Authority in the opening decision⁽⁷³⁾, the Norwegian authorities argue that the commercial activities capital injection was globally more profitable than liquidating the company and investing the same amount elsewhere, given the high costs involved in such liquidation that would well exceed the cost of the capital injection.

- (113) In their observations to the opening decision, the Norwegian authorities furthermore explain that both the employees engaged with the public service activities and the ones engaged with the commercial activities were employed in the same legal entity and were members of the same pension fund. Also, under Norwegian law, it is not allowed to exclude certain members of a pension fund when covering the deficit in that fund. According to the Norwegian authorities, this substantiates that a private investor in the same situation would have had to implement the same capital increase.
- (114) The Norwegian authorities furthermore argue that the capital injection for the commercial activities does not constitute state aid as it falls below the *de minimis* threshold.

9.2.5. *Taxation of the Oslo Sporveier Group*

- (115) It is inferred from the comments submitted by the Norwegian authorities that the group contribution rules exclude any state aid, due to the fact that these rules apply to all companies that have their residence in Norway and aim to achieve tax consolidation within the group.

⁽⁷²⁾ The information available to the Authority at the time of the opening decision indicated that Oslo Municipality did not become the sole owner of AS Oslo Sporveier until July 2006 (see the opening decision at footnote 27). In their observations to the opening decision, the Norwegian authorities clarified that Oslo Municipality actually bought the holdings of the minority share holders in 2002.

⁽⁷³⁾ See the opening decision at paragraphs 103–108, in particular paragraph 105.

9.2.6. *Compatible aid*

- (116) The Norwegian authorities argue that the compensation granted for the provision of the public service has not led to overcompensation and is therefore compatible under Article 49 of the EEA Agreement.

10. COMMENTS FROM INTERESTED PARTIES

- (117) The Authority received comments from two interested parties, the complainant (Konkurrenten.no AS) and Risdal Touring AS, a sister company of the complainant.
- (118) The complainant refers to a series of documents submitted to the Authority and the EFTA Court in which it has explained its position on the case at hand. The complainant objects to the Authority, (i) relying almost exclusively on information provided by the Norwegian authorities, provided in an informal manner, (ii) separating the measures identified by the complainant in two different cases, and (iii) allegedly rejecting the complainant public access to the case file. The complainant calls into question the Authority's willingness to conduct an impartial and exhaustive investigation.
- (119) Risdal Touring AS is part of the same corporate group as the complainant. It accedes to the concerns raised by the complainant. In particular, the company expresses its regret concerning the Authority's alleged decision to deny public access to the case file and the length of the proceedings in the case at hand. The company stresses that these circumstances call into question the Authority's ability and willingness to conduct an impartial and exhaustive investigation.

II. ASSESSMENT

1. THE PRESENCE OF STATE AID

- (120) 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."

- (121) Firstly, the Authority assesses whether the group taxation measure involves state aid.
- (122) Secondly, the Authority assesses the state aid nature of the commercial activities capital injection. As explained above, this is a part of a larger measure (the 2004 capital

injection that was injected to remedy the underfunding of the pension accounts). However, in contrast to the rest of the 2004 capital injection, the commercial activities capital injection went to cover non-public service costs, namely the underfunding of the pension accounts of the employees in the commercial arm of AS Sporveisbussene. For the purposes of assessing the state aid nature of both parts of the 2004 capital injection, a distinction needs to be drawn between them, given the different legal bases they have to be assessed on. Thus, whilst public service compensation measures are assessed on the basis of the principles drawn up by the European Court of Justice (the "Court of Justice") in the *Altmark* judgment⁽⁷⁴⁾, the assessment of measures that do not constitute public service compensation is not based on those principles.

- (123) Thirdly, the Authority assesses whether the annual compensation and the public service capital injection constitute state aid.

1.1. Taxation of the Oslo Sporveier Group

- (124) The complainant has argued that AS Oslo Sporveier's negative tax position has been used to reduce the tax burden on AS Sporveisbussene. It appears to the Authority that the complainant refers to the taxation rules regarding contributions between companies belonging to the same corporate group ("group contributions").
- (125) The Authority observes that these rules are applicable to AS Oslo Sporveier and AS Sporveisbussene, as the latter is a wholly-owned subsidiary of the former. Thus, AS Oslo Sporveier or any of its subsidiaries could in principle offset taxable profits by distributing contributions within the group.
- (126) The Authority points out that the complainant seems to have taken issue with what appears to be an application of the general Norwegian rules on corporate taxation. The Authority notes that the complainant has neither alleged, nor submitted any information sustaining that the relevant tax rules are drafted in a manner which could lead to state aid being granted to specific companies.
- (127) According to established case law, in order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure confers an advantage to certain undertakings in comparison with others that are in a comparable legal and factual situation⁽⁷⁵⁾. It may

⁽⁷⁴⁾ Case C-280/00 *Altmark* [2003] ECR I-7747.

⁽⁷⁵⁾ See among others Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 47; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54.

thus be the case that a particular national taxation system does not involve state aid even though it does not correspond to the general system of corporate taxation in a given EEA State.

(128) With respect to the contributions concerned, companies within a group are not in a legal and factual situation comparable to that of companies outside a group. When a parent company grants a contribution to a subsidiary and thereby reduces its taxable income, this contribution does not aim to maximise profits for one party at the expense of the other but merely allows for similar tax treatment, as that of a single company that operates several businesses, and ensures tax neutrality between the companies organised as a group and the single company operating several businesses.

(129) As underlined at section 3.1 of the Authority's Guidelines on the application of state aid rules to measures relating to direct business taxation, state aid rules do not restrict the power of EFTA States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production.

(130) The Authority agrees with the Norwegian authorities that the measure is genuinely open to any undertaking resident in Norway that is subject to corporate income tax, including thus foreign companies with subsidiaries in Norway. The statutory capital requirement for the establishment of a limited liability company, namely NOK 100 000 during the period of investigation, allowed an individual company to create a second company in Norway, and hence a group. As a result, the formation of a group could have been made by an individual company without requiring significant capital resources. The scope of potential beneficiaries of such a scheme is thus broad; and its purpose is to ensure similar tax treatment regardless of company size or structure.

(131) In view of the above, the Authority considers that the offsetting of taxable income by making a group contribution would not confer an economic advantage on AS Sporveisbussene when it, as a condition for benefiting from the tax deduction, was obliged to make the contribution to another company in the group, and at the same amount as the tax base reduction obtained in this manner. Thus, this tax treatment does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

1.2. The commercial activities capital injection

1.2.1. *De minimis*

(132) As set out above approximately NOK 430 300 of the 2004 capital injection appears to have been related to underfunding of pension accounts in the tour bus division. As this part of the injected capital does not relate to public service cost, it is not assessed on the basis of *Altmark*.

(133) In addition, Commission Regulation (EC) No 1998/2006 of December 2006 on the application of Articles 87 (now 107 TFEU) and 88 (now 108 TFEU) of the EC Treaty to *de minimis* aid is not applicable in this particular case⁽⁷⁶⁾. The amount of approximately NOK 430 300 was part of the overall amount of NOK 111 760 000 that was paid to cover the cost of the public service and constitutes therefore an integral part of it. It cannot thus be considered as an individual measure that satisfies the conditions of the *de minimis* Regulation⁽⁷⁷⁾.

(134) Furthermore, as the Regulation explicitly states in Article 2, paragraph 2, that "when an overall aid amount provided under an aid measure exceeds this ceiling (of EUR 200 000 or EUR 100 000 in the road transport sector), that aid amount cannot benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation cannot be claimed for this aid measure either at the time the aid is granted or at any subsequent time"⁽⁷⁸⁾.

1.2.2. Market economy investor principle

(135) According to settled case-law, it is necessary for the Authority to establish whether the recipient undertaking, AS Sporveisbussene, received an economic advantage which it would not have obtained under

⁽⁷⁶⁾ OJ L 379 28.12.2006 p. 5, incorporated in the EEA agreement at point 1ea of Annex XV.

⁽⁷⁷⁾ See Commission Decision of 21.9.2005 on the implementation of an aid scheme N 192/1997 by Italy – Autonomous Province of Bolzano (OJ L 383 28.12.2006 p. 1, paragraphs 129-133); Commission Decision of 27.7.2011 concerning the State aid for financing screening of transmissible spongiform encephalopathies TSE in bovine animal implemented by Belgium (OJ L 274 19.10.2011 p. 36), part 6, Article 1, paragraph 133.

⁽⁷⁸⁾ In this regard, it has to be pointed out that the general *de minimis* Regulation in force at the time this capital injection took place was Commission Regulation (EC) No 69/2001 of 12.1.2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid. This Regulation however did not apply to the transport sector. As stated in Article 5, paragraph 1, of Commission Regulation (EC) No 1998/2006 "[...] this Regulation shall apply to aid granted before its entry into force to undertakings active in the transport sector [...]".

normal market conditions⁽⁷⁹⁾. In doing so, the Authority has to apply the market economy investor test⁽⁸⁰⁾, which in essence provides that state aid is granted whenever a State makes funds available to an undertaking, which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature⁽⁸¹⁾.

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

(137) In assessing whether the capital injection was carried out on conditions that would be acceptable to a private investor, the Authority points out that a private investor in a similar situation – i.e. with the option to either (a) inject fresh capital into the company, or (b) liquidate the company and invest the same amount elsewhere, would choose strategy (a) only if it was globally more profitable than strategy (b). This means that it is not sufficient to choose the “cheapest” solution in order to meet the market economy investor benchmark, but that it is necessary to demonstrate an acceptable rate of future return for the price of this “cheapest solution”.

(138) In the decision to open the formal investigation⁽⁸²⁾, the Authority expressed doubts as to the applicability of the

market economy investor test, due to lack of adequate information, such as profitability forecasts that a private investor would have made.

(139) Responding to that request, the Norwegian authorities have explained that in 2004, when the capital injection was made, the tour bus operations of AS Sporveisbussene had remained profitable since the start-up in 1994, with the one exception of 1998 when they suffered a very small loss of NOK 29 000. It is further evident from the 2003 strategy document for tour bus operations for the years 2003 to 2006 that the aim was to keep the tour bus operations running and to generate a 2003 turnover of NOK 14,1 million and a profit of NOK 1,5 million (before overhead costs). Liquidating AS Sporveisbussene, or separating out the tour bus operations and liquidating this part, could not be considered a reasonable alternative for Oslo Municipality given the large costs entailed, which would well exceed the cost of covering the underfunding of pensions allocated to the tour bus division. Given the relatively small size of the amount injected, the fact that the tour bus operations of AS Sporveisbussene generally were profitable and also were projected profitable at an apparently reasonable rate in the years to come, and with due account taken of the higher costs involved in such liquidation, a hypothetical private investor would also have chosen the capital injection alternative.

(140) The Authority therefore takes the view that the capital injection of approximately NOK 430 300 must be regarded as complying with the MEIP. The Authority concludes that it did not confer an advantage on AS Sporveisbussene that it would not have received under normal market conditions. Thus, it does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

⁽⁷⁹⁾ Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, at paragraph 60.

⁽⁸⁰⁾ This principle is explained in the Authority's guidelines Part VI Rules on public service compensation, state ownership of enterprises and aid to public enterprises, application of state aid provisions to public enterprises in the manufacturing sector.

⁽⁸¹⁾ Cf. for example Opinion of Advocate General Jacobs, Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, at paragraph 28. See also Case 40/85 *Belgium v Commission* (Boch) [1986] ECR 2321, at paragraph 13; Case C-301/87 *France v Commission* (Boussac) [1990] ECR I-307, at paragraphs 39–40; Case C-303/88 *Italy v Commission* (Lanerossi) [1991] ECR I-1433, at paragraph 24. See also the Authority's Guidelines on the application of state aid rules on public service broadcasting, where at point 93 it is stated that: “(w)hen carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. EFTA States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding”.

⁽⁸²⁾ Paragraphs 105–108.

1.3. The annual compensation and the public service capital injection

1.3.1. Introduction

(141) Concerning the complaint that cross-subsidisation has occurred between the public service activities and the commercial activities of AS Oslo Sporveier, AS Sporveisbussene, Arctic Express AS and Sporveisbussenes Turbiler AS, the Authority understands the allegation to be that

the annual compensation for the provision of the local scheduled transport service and the public service capital injection have subsidised the commercial activities carried out by the Oslo Sporveier Group.

- (142) It is evident that cross-subsidisation (for the purposes of state aid control) can only occur if the cross-subsidising undertaking receives state aid within the meaning of Article 61(1) of the EEA Agreement. Thus, in respect of this part of the complaint, the Authority must first assess if the financing measures, i.e. (i) the annual compensation and (ii) the public service capital injection, entail state aid.

1.3.2. Presence of state resources

- (143) 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.
- (144) As a preliminary point, both local and regional authorities are considered to be equivalent to the State⁽⁸³⁾. Hence, Oslo Municipality is equivalent to the State for the purposes of the EEA state aid rules.
- (145) In the present case it is clear that the State, in the capacity of Oslo Municipality, with the annual compensation, provided funding to AS Oslo Sporveier for carrying out scheduled bus transport until 1997. For the period 1997–2008 it is undisputed that AS Oslo Sporveier passed on the annual compensation to AS Sporveisbussene, according to the terms of the Transport Agreement, which appears in essence to have formalised the previous unwritten administrative practice of calculating the annual compensation⁽⁸⁴⁾.
- (146) As regards the public service capital injection into AS Sporveisbussene to cover the underfunding of the pension fund, it is undisputed that the State, in the capacity of Oslo Municipality, contributed NOK 111 760 000 as capital for AS Sporveisbussene.

⁽⁸³⁾ Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings (OJ L 318 17.11.2006 p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

⁽⁸⁴⁾ As regards, in particular, the quality bonus from AS Oslo Sporveier to AS Sporveisbussene of NOK 3,9 million, the Authority understands that the funds stem from state resources, or that the payment is imputable to the State. As Oslo Municipality is involved in all issues of commercial importance relating to the provision of scheduled bus transport in the Oslo region, and AS Oslo Sporveier is a publicly-owned company, the Authority concludes that the transaction must be held to be imputable to the State and thus represent state resources within the meaning of Article 61(1) of the EEA Agreement.

- (147) The Authority therefore comes to the conclusion that the annual compensation and the public service capital injection were granted by the State and financed by state resources.

1.3.3. Undertaking

- (148) Only advantages favouring “undertakings” qualify as state aid within the meaning of Article 61(1) of the EEA Agreement. An undertaking is any entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed⁽⁸⁵⁾. Also, any activity consisting in offering goods and services on a given market is an economic activity⁽⁸⁶⁾.
- (149) In the relevant period (1994–2008) AS Oslo Sporveier and later AS Sporveisbussene provided scheduled bus transport services as well as tour bus services in the Norwegian market. On this basis the Authority concludes that both AS Oslo Sporveier and AS Sporveisbussene, in the relevant period, were undertakings.

1.3.4. Economic advantage

- (150) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must confer an economic advantage on an undertaking, for example by relieving it of charges that are normally borne from its budget.
- (151) As mentioned above, the annual compensation to AS Oslo Sporveier and AS Sporveisbussene for carrying out bus transport services in Oslo constitutes, *prima facie*, compensation for costs incurred in providing a public service. Public service compensation does not entail an economic advantage if the criteria established in the *Altmark* case-law of the Court of Justice are met⁽⁸⁷⁾.
- (152) Furthermore, as regards the public service capital injection, the Authority considers that AS Sporveisbussene received the capital injection to cover the underfunding of pension obligations that had accrued before 1997. It appears that the entire capital injection was used for this purpose. It is also worth noting that whilst certain changes to the capital position of AS Sporveisbussene were recorded in the accounts, the full amount was paid directly from AS Oslo Sporveier to the pension fund and was not transferred as cash to AS Sporveisbussene.

⁽⁸⁵⁾ Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62 at paragraph 78.

⁽⁸⁶⁾ Case C-35/96 *Commission v Italy* [1998] ECR I-3851 at paragraph 36.

⁽⁸⁷⁾ Case C-280/00 *Altmark* [2003] ECR I-7747. See also Case T-289/03 *BUPA* [2008] ECR II-81.

- (153) The public service capital injection does not relate to new costs but to costs accrued in the past which had technically not been reflected in the general accounts of the company. However, these liabilities were already present at the time of the capital injection, which was paid to make up for the shortfall in the pension funds. Therefore, the public service capital injection can be considered to form part of the cost that Oslo Municipality had to bear in exchange for AS Oslo Sporveier and AS Sporveisbussene (via AS Oslo Sporveier) providing the public service. Instead of injecting this capital, Oslo Municipality could have paid out a higher annual public service compensation. Thus the public service capital injection constituted an integral part of the public service compensation granted to AS Sporveisbussene, as it had been since the mid-1990s until the capital injection was made (and as it would have been if carried out in accordance with the amortisation plan until 2020).
- (154) In the *Altmark* judgment the Court of Justice held that compensation for a public service does not constitute state aid when four cumulative criteria are met.
- First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
 - Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
 - Fourth, and finally, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred⁽⁸⁸⁾.
- (155) The Authority will first examine the fourth criterion, namely whether the compensation was based on a tender or on the basis of the costs of an efficient and well-run company.
- (156) Since before 1994, Oslo Municipality paid an annual compensation to AS Oslo Sporveier for scheduled bus transport services, which from 1997 was passed on to AS Sporveisbussene. However, with regard to the routes operated under the area concession, neither AS Oslo Sporveier nor AS Sporveisbussene were selected in a public procurement procedure. Hence, neither the compensation from Oslo Municipality to AS Oslo Sporveier nor the compensation subsequently passed on from AS Oslo Sporveier to AS Sporveisbussene were based on prices resulting from public tenders.
- (157) Furthermore, the Norwegian authorities have not provided the Authority with sufficiently detailed information enabling a verification of whether the costs incurred by AS Oslo Sporveier or AS Sporveisbussene corresponded to the costs of a typical undertaking, well run and adequately equipped, nor have they, as stated above, argued that this criterion is met. The Asplan Viak Report, provided by the Norwegian authorities, merely covers the compensation granted for two years of operations (1999 and 2002) of the relevant 15 years in which compensation was granted to the companies (1994–2008). The Authority considers that the second alternative of the fourth *Altmark* criterion requires that it shall be substantiated that the compensation in question was determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in the entire period. Even if the Asplan Viak Report could be taken to demonstrate that AS Sporveisbussene for the two years satisfied this requirement, it still leaves thirteen years unaccounted for. Therefore, the opinion of the Authority is that the fourth *Altmark* criterion is not met.
- (158) On the basis of the above, the Authority considers that the scheduled bus transport services carried out under the area concession in Oslo have, both in the case of AS Oslo Sporveier and AS Sporveisbussene, not been discharged in accordance with the fourth criterion of the *Altmark* judgment. Consequently, as the *Altmark* criteria must be satisfied cumulatively for public service compensation not to constitute state aid⁽⁸⁹⁾, the Authority's conclusion is that the annual compensation, including the public service capital injection, confers an economic advantage on AS Oslo Sporveier and AS Sporveisbussene.

⁽⁸⁸⁾ Case C-280/00 *Altmark* [2003] ECR I-7747, paragraphs 89–93.

⁽⁸⁹⁾ Case C-280/00 *Altmark* [2003] ECR I-7747, paragraphs 94–95.

1.3.5. *Favouring certain undertakings or the production of certain goods*

- (159) 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.
- (160) 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 ⁽⁹⁰⁾.
- (161) In the present case, the annual compensation and the public service capital injection favoured AS Oslo Sporveier and/or AS Sporveisbussene to the exclusion of other bus transport operators. Such other bus operators operate scheduled bus transport services in Norway or elsewhere in the EEA and were therefore in a similar legal and factual situation compared to AS Oslo Sporveier and AS Sporveisbussene. For these reasons, the Authority concludes that these two measures are selective.

1.3.6. *Distortion of competition and effect on trade between Contracting Parties*

- (162) 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 EFTA Court case-law, this requires the Authority to examine whether such aid is *liable* to affect trade and to distort competition ⁽⁹¹⁾.
- (163) Since before the entry into force of the EEA Agreement in Norway several undertakings have provided scheduled bus services in Oslo. The Authority thus concludes that the annual compensation and the public service capital injection were liable to distort competition since then ⁽⁹²⁾.
- (164) With respect to the effect on trade and the fact that the present case concerns a local market for bus transport in Oslo, the Authority recalls that in the *Altmark* judgment, which also concerned regional bus transport services, the Court of Justice held that:

“a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States ... The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.” ⁽⁹³⁾

- (165) This means that even if – as in the present case – only the local bus transport market (Oslo) is concerned, public funding made available to one operator in such a local market is liable to affect trade between Contracting Parties ⁽⁹⁴⁾. Consequently, the Authority considers that the annual compensation and the public service capital injection were liable to affect trade between Contracting Parties.

1.3.7. *Conclusion on the annual compensation and the public service capital injection*

- (166) On the basis of the assessment above, the Authority concludes that the annual compensation to AS Oslo Sporveier and (thereafter) to AS Sporveisbussene and the public service capital injection to cover the underfunding of the pension fund constitute state aid within the meaning of Article 61 of the EEA Agreement.

2. CLASSIFICATION OF THE STATE AID MEASURES AS EXISTING AID OR NEW AID – THE ANNUAL COMPENSATION AND THE PUBLIC SERVICE CAPITAL INJECTION

2.1. **Introduction – the EFTA Court’s Judgment in Case E-14/10**

- (167) Article 1(b)(i) of Part II of Protocol 3 provides that “existing aid” shall mean:

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

- (168) The Authority notes that AS Oslo Sporveier, at the time of the entry into force of the EEA Agreement in Norway (1 January 1994), was compensated for carrying out

⁽⁹⁰⁾ Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* ECR [2001] I-8365, paragraph 41.

⁽⁹¹⁾ 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.

⁽⁹²⁾ Moreover, the Court of Justice observed in the *Altmark* judgment that since 1995 several EU Member States had voluntarily opened up certain urban, suburban or regional transport markets to competition from undertakings established in other EU Member States. The risk to inter-Member State trade was thus not hypothetical but real, as the market was open to competition (paragraphs 69 and 79).

⁽⁹³⁾ Paragraphs 77 and 82 of the *Altmark* judgment.

⁽⁹⁴⁾ 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.

scheduled bus transport in Oslo in accordance with the provisions of the transport legislation and established administrative practice (pre-dating the EEA Agreement), as described in detail above.

- (169) In its judgment in Case E-14/10 annulling the Authority's Decision No 254/10/COL, the EFTA Court stated the following:

“Whether the aid granted [...] constitutes “existing aid” [...] depends upon the interpretation of the provisions of Protocol 3 SCA [...]

[...] to qualify as an “existing aid measure” under the EEA State aid rules, it must be part of an aid scheme that was put into effect before the entry into force of the EEA Agreement.”⁽⁹⁵⁾

2.2. Definition of an aid scheme

- (170) Article 1(d) of Part II of Protocol 3 provides that an “aid scheme”:

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

- (171) Article 1(e) of Part II of Protocol 3 provides that “individual aid”:

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

- (172) This distinction is of particular importance in the context of existing aid, as Protocol 3 provides the Authority with the competence to keep under constant review existing

systems of aid⁽⁹⁶⁾. Likewise, Section V of Part II of Protocol 3 applies only to existing aid schemes⁽⁹⁷⁾.

- (173) The Authority notes that this definition was incorporated into the EEA Agreement in 2001 with the insertion of Part II of Protocol 3. Prior to 2001, when Protocol 3 was brought in line with the Procedural Regulation⁽⁹⁸⁾, there was no similarly precise definition in EEA law determining what an aid scheme was. Moreover, the rationale for the concept of existing aid – in principle that of providing EEA States and beneficiaries of state aid with some legal certainty regarding arrangements that predate the entry into force of state aid control in their legal systems whilst providing the Authority with the possibility of bringing such systems in line with EEA law – must in the Authority's view be borne in mind.

- (174) Furthermore the Authority notes that the case-law of the European Courts does not provide detailed guidance as regards the interpretation of this definition. The Authority has thus reviewed its own case practice and that of the European Commission and found that existing “aid schemes” have been held to encompass non-statutory customary law⁽⁹⁹⁾ and administrative practice related to the application of statutory⁽¹⁰⁰⁾ and non-statutory law⁽¹⁰¹⁾. In one case, the European

⁽⁹⁶⁾ Cf. Article 1.1 of Part I of Protocol 3.

⁽⁹⁷⁾ The terms “aid schemes” and “systems of aid” are to be treated as synonyms in the Authority's view. Cf. Sinnavee/Slot, *The new Regulation on State aid Procedures*, *Common Market Law Review* 36/1999, p. 1153, footnote 28.

⁽⁹⁸⁾ Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83 27.3.1999 p. 1).

⁽⁹⁹⁾ See the Authority's Decision No 405/08/COL HFF (OJ L 79 25.3.2010 p. 40 and the EEA Supplement No. 14, 25.3.2010, p. 20), Chapter II.2.3.1, p. 23: “The State guarantee on all State institutions for all their obligations follows from general unwritten rules of Icelandic public law predating the entry into force of the EEA Agreement. The guarantee is applicable to all State institutions, regardless of when they are established, or of their activities, or changes in those activities. This possible aid measure must be regarded as a scheme falling within the definition in Article 1 (d) in part II of Protocol 3 to the Surveillance and Court Agreement.”

⁽¹⁰⁰⁾ See Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37 11.2.2004 p. 13).

⁽¹⁰¹⁾ From the Authority's Decision No 491/09/COL Norsk Film group (OJ C 174 1.7.2010 p. 3), Chapter II.2 p. 8: “the yearly payments made by the Norwegian State since the 1970s to Norsk FilmStudio AS/Filmparken AS for the production of feature films and to maintain an infrastructure necessary for the production of films were based on an existing system of aid. The Authority considers that in this case, where regular payments were consistently made over a very long period of time, the practice shows that state support was an essential element in the financing of the company. The Authority considers on that basis that the annual grants were made under an existing system of state aid within the meaning of Article 62 EEA.” In that case, the Authority opened the formal investigation into a payment of NOK 36 million that had been made in addition to the regular payments and an alleged preferential tax measure. With Decision No 204/11/COL (OJ L 287 18.10.2012 p. 14 and the EEA Supplement No. 58, 18.10.2012, p. 1) the Authority closed the procedure on the basis that the NOK 36 million payment was made on the basis of the existing aid scheme and that the tax measure did not constitute state aid.

⁽⁹⁵⁾ Paragraphs 50 and 53.

Commission found that an aid scheme relating to *Anstaltslast* and *Gewährträgerhaftung* was based on the combination of an unwritten old legal principle combined with widespread practice across Germany ⁽¹⁰²⁾.

2.3. The measures under investigation

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

(176) Moreover, according to the Norwegian authorities, Article 22 CTA entails that Oslo Municipality is under the obligation to compensate the operators for the provision of the transport service on unprofitable routes, where the revenue generated from the sale of tickets does not cover the cost of operating the service. Article 22 CTA allows for compensation to cover the cost of the public service minus the ticket revenue.

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

(178) In order to conclude on the existence of an aid scheme, it is necessary to examine whether the legal framework for the financing of scheduled bus transport in Oslo can be considered to be “an act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner” ⁽¹⁰³⁾. This definition includes three criteria: (i) an act on the basis of which aid can be awarded, (ii) the act shall not require any further implementing measures, and (iii) the act shall define the potential aid beneficiaries in a general and abstract manner.

(179) As for the *first* criterion, the Authority notes that the CTA and the CTR are acts on the basis of which Oslo Municipality awarded the compensation.

(180) As for the *second* criterion, it is noted that the administration of any aid scheme requires a certain decision-making process that allows for individual awards of aid without the adoption of further implementing measures.

(181) A mere “technical application”, as indicated above, of the provisions providing for the scheme would thus not be an implementing measure ⁽¹⁰⁴⁾. Moreover, the mere fact that a decision awarding aid under an aid scheme has implications for the budget of the authority administering that scheme, cannot, in the Authority’s view, mean that such decisions are to be regarded as implementing measures ⁽¹⁰⁵⁾.

(182) In a similar vein, considering acts of entrustment, such as the award of a concession, this, as any entrustment, specifies one particular undertaking, and cannot by definition thus relate to a group of undertakings “defined in a general and abstract manner” (compare the third criterion).

(183) The Authority is of the view that “implementing measures” should be understood as entailing a certain degree of discretion, that would influence to a significant degree the amount, characteristics or conditions under which the aid is granted. In particular, it would seem that every scheme determines the purpose aid can be awarded for. Thus, where a public body for example is empowered to use different instruments to promote the local economy and grants several capital injections thereof, this implies the use of considerable discretion

⁽¹⁰⁴⁾ See Commission Decision in Case E 4/2007 (France) *Charges aéroportuaires*, paragraph 56 (OJ C 83 7.4.2009 p. 16).

⁽¹⁰⁵⁾ See to that effect, the judgment of the EFTA Court in Case E-14/10 *Konkurrenten*, at paragraphs 74-75, where the EFTA Court states as follows:

“In the case at hand, the City of Oslo was entitled, under the provisions of the 1976 Transport Act and the implementing regulations, to provide financial support in order to enable the operation of non-profitable scheduled bus services. The fact that the level of the compensation was “negotiated” does not, as such, entail that the payments did not cover actual losses incurred in the operation of those services and were per se not covered by the scheme. The Court considers that in so far as the compensation payments were indeed used to finance the operation of non-profitable scheduled bus services, the defendant may correctly have classified those payments as existing aid.

The argument that the aid must be considered as new aid because it was granted on an annual and discretionary basis under the city budget must (...) be rejected.”

⁽¹⁰²⁾ See Commission Decision in Case E-10/2000 (Germany) *State guarantees for public banks in Germany* (OJ C 150 22.6. 2002 p. 6).

⁽¹⁰³⁾ Article 1(d) of Part II of Protocol 3.

as to the amount, characteristics or conditions and purpose for which the aid is granted, and is hence not to be regarded as an aid scheme ⁽¹⁰⁶⁾.

(184) In the case at hand, it is clear that no further legislative measures needed to be adopted for the compensation payments to AS Oslo Sporveier and AS Sporveisbussene. The Authority thus is of the opinion that the CTA and CTR limited the discretion of Oslo Municipality, and the Municipality's administrative practice appears all along to have been in line with this.

(185) Moreover, the compensation was not based on discretionary budget allocations. Oslo Municipality, after choosing to maintain the public service, was not free to decide whether to cover the loss of AS Oslo Sporveier and AS Sporveisbussene. It was obliged to do so every year until 2008. It is also evident that the compensation was and could only be granted for the purpose of financing local scheduled bus transport in Oslo. The municipality could not have awarded aid for different purposes on the basis of the provisions described above.

(186) The State and the Ministry of Transport are responsible for the coordination and development of public transport in Norway and exercise this prerogative in a way that restricts the counties' powers. The amount of the compensation granted is limited, as mentioned above, by the national guidelines under the CTR, and the administrative practice relating to the method of calculation has remained unchanged since the early 1980s.

(187) As for the *third* criterion, the compensation system in Oslo applies to all concessionaires that are entrusted with the provision of bus services on unprofitable routes.

(188) In view of the above, the Authority concludes that an aid scheme was in place in Oslo. The provisions providing for that aid scheme were the CTA, the CTR and the relevant administrative practice in Oslo.

2.4. Definition of existing aid

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

⁽¹⁰⁶⁾ Cf. Case SA.21654 (ex NN-69/2007 and C-6/2008) *Public Commercial Property Åland Industrihus* (OJ L 125 12.5.2012 p. 33) paragraphs 107–109 in particular.

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

(191) Further, Article 1(c) of Part II of Protocol 3 provides that “new aid” is:

“all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;”

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

“[...] the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amounts in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.” ⁽¹⁰⁷⁾

(193) Moreover, as Advocate-General Trabucchi pointed out in his Opinion in *Van der Hulst*, modifications are substantial if the main elements of the system have been changed, such as the nature of the advantage, the purpose pursued with the measure, the legal basis, the beneficiaries or the source of the financing ⁽¹⁰⁸⁾.

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

2.4.1. 1997 internal reorganisation

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

(196) Purely formal or administrative changes to an aid scheme do not lead to the reclassification of existing aid as new ⁽¹⁰⁹⁾. The question is whether this reorganisation brought with it a change to the existing aid scheme involving new aid.

⁽¹⁰⁷⁾ Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28.

⁽¹⁰⁸⁾ Opinion of Advocate-General Trabucchi in Case 51/74 *Van der Hulst* [1975] ECR 79.

⁽¹⁰⁹⁾ See Article 4(1) of the consolidated version of the Authority's Decision No 195/04/COL of 14.7. 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 (available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>). See also the opinion of Advocate General Lenz in *Namur*.

(197) The Norwegian authorities explained that, in essence, the change from AS Oslo Sporveier to AS Sporveibussene as the provider of the service was a change of a formal nature. By establishing AS Sporveibussene, AS Oslo Sporveier created a subsidiary for operating public bus services that it formerly ran itself. AS Oslo Sporveier – in its position as the mother company – remained, however, the primary recipient of the compensation and holder of the concession, and simply underwent an internal re-organisation that led to AS Sporveibussene being in charge of providing the services in accordance with the concession. For this it received compensation from its mother company. The administrative practice relating to the financing of the transport service remained substantially unchanged under the Transport Agreement concluded in 1997. Additionally, the reorganisation did not involve any changes to the CTA or CTR.

(198) In a case concerning the transfer of guaranteed loans between companies, the Commission stated the following:

“the guarantees provided in connection with loans taken out prior to 1 May 2004 (accession of Hungary to the European Union) were granted before accession and notified to the Commission in compliance with Annex IV.3 of the Accession Treaty. Although they have been transferred to a new undertaking the Commission considers that this was a purely administrative act since existing loans covered by already approved guarantees were transferred to a new undertaking. The transfer was the consequence of a mere reorganization of MÁV Zrt. without any change in the activities involved or the content of the aid measures. Thus the Commission comes to the conclusion that despite the transfer the guarantees are still considered as existing aid”.⁽¹¹⁰⁾

(199) On the basis of the above, the Authority finds that the reorganisation of 1997 cannot be held to have involved a substantive change to the aid scheme. Consequently, the scheme remained in the Authority's view an existing aid scheme after the reorganisation.

2.4.2. Renewal of concession

(200) As mentioned above, it follows from the legal provisions providing for the aid scheme that the provider of scheduled bus services needs both a general concession and a special concession. Article 27 of the CTA moreover stipulates that special concessions may be granted for a period of 10 years at the time. Also as mentioned above, the relevant provisions of the CTA

and CTR have not been materially changed compared to the Transport Act and the then applicable regulations. Thus, the statutory provisions governing the scheme have with regard to the concessions not been materially altered after the entry into force of the EEA Agreement.

(201) The individual concessions that have been granted in line with the above mentioned statutory provisions constitute the acts of entrustment under the existing aid scheme. The entrustments in essence determine the route(s) for which the concessionaire has a right and obligation to provide a scheduled service against public service compensation. The entrustments are therefore not part of the provisions providing for the aid scheme. Thus, the existing public service compensation scheme would not be considered altered by the award of a new concession. Rather, such concessions simply implement the provisions of a legal act, namely the CTA and the CTR, on the basis of which they are awarded.

(202) In a case concerning compensation payments to the public service broadcaster RTP in Portugal the Commission stated:

“Furthermore, the conclusion of new concession agreements does not alter the qualification of the annual financing regime as existing aid, given that they only implement the provisions concerning the financing of RTP as previously established, including modifications of a technical nature”.⁽¹¹¹⁾

(203) Other than the temporal prolongation, no changes with regard to the public service mission or its remuneration were made to the concession renewed with effect from 1 January 2000. AS Sporveibussene simply continued, on the same terms, to carry out the public service on behalf of AS Oslo Sporveier on the basis of the concession, that merely constitutes an administrative act that implemented the provisions of the CTA concerning the operation and financing of the public scheduled services and which did not involve any changes in the way these services were to be carried out. Thus, the renewal of the concession did not alter the existing aid scheme.

2.4.3. Introduction of a quality bonus/malus system

(204) AS Oslo Sporveier introduced a new bonus/malus system in 2004. The Norwegian authorities have explained that this system constitutes part of the public service compensation for the provision of local scheduled bus transport in Oslo. It aimed at increasing the quality of the services provided and was implemented within the CTA

⁽¹¹⁰⁾ State aid NN 73/2008 (ex N 240/08) – Hungary – *Sharing of loans between MÁV Zrt. and MÁV-TRAKCIÓ Zrt.* (OJ C 109 13.5.2009 p. 5) at paragraphs 59-60.

⁽¹¹¹⁾ Case E 14/2005 (Portugal) *Compensation payments to public service broadcaster RTP*, at paragraph 79 (unofficial translation).

on 1 January 2008. As explained above, for the period 1994 to 2005 the average annual return for the public service was 1,98 %. The introduction of the bonus additionally provided incentives to possibly maximise the annual return within the remit of reasonable profit.

- (205) It is thus concluded that such a bonus system did not affect the substance of the compensation granted and constituted an integral part of the existing aid scheme.

2.5. Aid granted on the basis of the provisions providing for the scheme

2.5.1. Judgment in Case E-14/10

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

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

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

However, (...) any aid granted to Oslo Sporveier in excess of the losses actually incurred in connection with the services in question cannot be regarded to constitute, on the basis of that aid scheme, existing aid (...)”⁽¹¹²⁾

- (207) It follows from the judgment of the EFTA Court that only payments made on the basis of the existing aid scheme can be considered as existing aid disbursed under that scheme. Payments not made on the basis of the provisions providing for the scheme cannot be protected by the existing aid nature of that scheme⁽¹¹³⁾.
- (208) Therefore, to determine whether the aid granted is existing or new, the Authority must assess whether it was granted in accordance with the scheme providing for it.
- (209) The scheme was based on the CTA and the CTR; and there was established administrative practice in Oslo in line with the rules laid down in the CTA and the CTR. The scheme only provided for cost coverage (the difference between cost and revenue) of the unprofitable scheduled bus services that the concessionaires provided.

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

2.5.2. Annual compensation

- (211) As set out above, Article 22 CTA allows for compensation to cover the cost of the public service minus the ticket revenue. In order to ensure that compensation is restricted to cover the cost of the public service, such a scheme would appear to presuppose the separation of accounts, an appropriate allocation of common costs and arms-length intra-group transactions for undertakings, which in addition to providing public services also engage in commercial activities. Thus, complying with these principles seems necessary to avoid that aid is granted outside the scheme.

- (212) The Authority has assessed all the information provided by the Norwegian authorities and verified that separate accounts were kept for the public service activities for the entire period (1994-2008). In addition, the Authority has found that the profit earned through the operation of the public service was relatively low and did not entail payment of overcompensation.

- (213) Before 2004 common costs were shared through intra-group transactions, the costs of which were based on market prices. The system for allocating common costs for the services between AS Sporveisbussene and its subsidiaries changed in 2003 and a new system based on overheads was put in effect as from 2004. Under that system, the bus companies carried a proportionate share of common costs based on their turnover.

- (214) The Authority considers that this ensured that aid was not granted outside the scheme.

- (215) Thus, on the basis of the information provided by the Norwegian authorities it can be concluded that the annual payments were restricted to cover only costs that could be covered in accordance with the legal framework of the scheme.

2.5.3. Public service capital injection

- (216) Already since the mid-nineties, it was clear that the pension fund of AS Oslo Sporveier was underfunded. Thus, a payment plan to remedy the fund's shortfall by 2020 was implemented. In accordance with that plan,

⁽¹¹²⁾ Paragraphs 73, 74 and 76.

⁽¹¹³⁾ The same logic applies for schemes that have been approved by the Authority or the European Commission. See for example Case C-47/91 *Italy v Commission* [1994] ECR-4635, paragraphs 25–26.

Oslo Municipality increased the public service compensation for AS Oslo Sporveier in order to cover all the costs incurred by the provision of the public service.

compensation and the public service capital injection, no payments were made outside the remit of the existing aid scheme.

(217) In 2004, the remaining shortfall was covered by the public service capital injection. Although it was not granted as part of the annual lump sum to AS Sporveisbussene but was paid directly to the pension fund from AS Oslo Sporveier, the payment was made on the basis of the existing aid scheme, in that it went to cover a cost incurred whilst providing the public service.

(218) As noted above, the CTA and the CTR do not have any particular provisions on how the concessionaire is to be compensated for the public service. In practice, the compensation has simply been awarded annually in the form of lump sums in accordance with the established administrative practice. The EFTA Court has held⁽¹¹⁴⁾ that when an existing aid scheme does not have any particular provisions on how the aid is to be provided, a divergence from the usual procedure cannot in and of itself lead to the finding that the aid was not granted on the basis of that scheme. The fact that the public service capital injection was not made in accordance with the normal annual block grant procedure thus does not mean that it was not made on the basis of the scheme.

(219) The pension costs covered with the public service capital injection were linked to the provision of the public service, which Oslo Municipality was obliged to cover in accordance with their obligation to cover the cost of the public service. Instead of continuing with the annual payments until 2020, it was decided that the public service capital injection should cover the remaining share of the underfunding, thus eliminating the need for further annual payments to cover the historic underfunding.

(220) On this basis, the Authority is of the opinion that the public service capital injection was carried out in accordance with the provisions providing for the aid.

2.5.4. Conclusion

(221) On the basis of the assessment above, the Authority concludes that the annual compensation and the public service capital injection were made on the basis of the existing aid scheme. Thus, with regard to the annual

2.6. Period subsequent to 30 March 2008

(222) In the early 2000s, Oslo Municipality decided to tender out all public service contracts for scheduled bus transport in the Oslo region. By 30 March 2008, the system described above was brought to an end and AS Oslo Sporveier's concession was thus without object, as all services were provided on the basis of tendered contracts. Therefore, from 30 March 2008 onwards, the new concessionaires have been remunerated on the basis of the tendered contracts.

2.7. Conclusions on the existing or new aid nature of the aid

(223) On the basis of the above, the Authority has come to the conclusion that the annual compensation and the public service capital injection in full were disbursed on the basis of an unaltered existing aid scheme. These measures therefore, in full, constitute existing aid.

(224) As set out above, the Authority concludes that (i) the application of the group taxation rules and (ii) the commercial activities capital injection do not entail state aid within the meaning of Article 61(1) of the EEA Agreement.

(225) Furthermore, the Authority concludes that the remaining measures, (i) the annual compensation and (ii) the public service capital injection, constitute aid that has, in full, been granted on the basis of an existing aid scheme. With regard to those two measures, no compensation in excess of the losses actually incurred for the discharge of the public service obligations has been granted⁽¹¹⁵⁾. As of 30 March 2008, the two latter state aid measures have ceased. Thus, there is no need for the Authority to examine their compatibility with the functioning of the EEA Agreement.

3. CONCLUSION

(226) In light of the above, the Authority has come to the conclusion that the group taxation rules do not confer

⁽¹¹⁴⁾ Paragraph 87 of the judgment of the EFTA Court in Case E-14/10 *Konkurrenten*.

⁽¹¹⁵⁾ For clarity, the Authority notes that, the commercial activities capital injection was not granted on the basis of the existing aid scheme. Had it represented state aid, that aid would consequently have been new aid. In the assessment above, the Authority has however concluded that that measure did not constitute state aid, as it was made in accordance with the market economy investor principle.

an advantage on AS Sporveisbussene and that the application of those rules does not entail that AS Sporveisbussene received state aid within the meaning of Article 61 of the EEA Agreement.

- (227) The Authority has also come to the conclusion that the commercial activities capital injection do not confer an advantage on AS Sporveisbussene and that it therefore does not represent state aid within the meaning of Article 61(1) of the EEA Agreement.
- (228) The Authority has come to the conclusion that the annual compensation and the public service capital injection represent state aid within the meaning of Article 61 of the EEA Agreement. However, the Authority concludes that this aid has been granted, in full, on the basis of an existing aid scheme that has now been terminated and, therefore, the Authority sees no need, and has no basis, for further action.

HAS ADOPTED THIS DECISION:

Article 1

The application of the group taxation rules to the Oslo Sporveier Group does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. The formal investigation into that measure is therefore closed.

Article 2

The commercial activities capital injection does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. The formal investigation into that measure is therefore closed.

Article 3

The formal investigation procedure with regard to the annual compensation is without object since the measure represents existing aid that has now been terminated. The formal investigation into that measure is therefore closed.

Article 4

The formal investigation procedure with regard to the public service capital injection is without object since the measure represents existing aid that has now been terminated. The formal investigation into that measure is therefore closed.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English language version of this decision is authentic.

Done at Brussels, 19 December 2012.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sverrir Haukur GUNNLAUGSSON
College Member

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