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II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2020/412

of 12 March 2020

approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications ('Cinta Senese' (PDO))

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ⁽¹⁾, and in particular Article 52(2) thereof,

Whereas:

- (1) Pursuant to the first subparagraph of Article 53(1) of Regulation (EU) No 1151/2012, the Commission has examined Italy's application for the approval of amendments to the specification for the protected designation of origin 'Cinta Senese', registered under Commission Implementing Regulation (EU) No 217/2012 ⁽²⁾.
- (2) Since the amendments in question are not minor within the meaning of Article 53(2) of Regulation (EU) No 1151/2012, the Commission published the amendment application in the *Official Journal of the European Union* ⁽³⁾ as required by Article 50(2)(a) of that Regulation.
- (3) As no statement of opposition under Article 51 of Regulation (EU) No 1151/2012 has been received by the Commission, the amendments to the specification should be approved,

HAS ADOPTED THIS REGULATION:

Article 1

The amendments to the specification published in the *Official Journal of the European Union* regarding the name 'Cinta Senese' (PDO) are hereby approved.

Article 2

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

⁽¹⁾ OJ L 343, 14.12.2012, p. 1.

⁽²⁾ Commission Implementing Regulation (EU) No 217/2012 of 13 March 2012 entering a name in the register of protected designations of origin and protected geographical indications (Cinta Senese (PDO)) (OJ L 75, 15.3.2012, p. 1).

⁽³⁾ OJ C 393, 20.11.2019, p. 3.

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

Done at Brussels, 12 March 2020.

*For the Commission,
On behalf of the President,
Janusz WOJCIECHOWSKI
Member of the Commission*

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION No 83/19/COL

of 28 November 2019

Trondheim Spektrum (Norway) [2020/413]

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), and in particular Articles 61 and 62,

Having regard to Protocol 26 to the EEA Agreement,

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'), and in particular Article 24,

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

Having regard to the Authority's Decision No 195/04/COL (amended),

Having called on interested parties to submit their comments and having regard to their comments,

Whereas:

I. FACTS

1. PROCEDURE

1.1. FIRST COMPLAINT

- (1) On 14 March 2017, the Authority received a complaint ⁽¹⁾ alleging that Trondheim municipality ('the Municipality') has granted unlawful state aid to Trondheim Spektrum AS ('TS'), a company that owns and operates Trondheim Spektrum, which is a multipurpose sport facility located in Trondheim, Norway. By letter dated 27 March 2017, the Authority invited the Norwegian authorities to comment on the complaint ⁽²⁾. The Norwegian authorities replied by letter dated 2 June 2017 ⁽³⁾.

1.2. SECOND COMPLAINT

- (2) On 27 July 2017, the Authority received a second complaint ⁽⁴⁾, also alleging that the Municipality has granted unlawful state aid to TS. By letter dated 24 August 2017, the Authority invited the Norwegian authorities to comment ⁽⁵⁾. In the same letter, the Authority requested further information from the Norwegian authorities concerning their comments to the first complaint. By letter dated 1 September 2017, the Authority forwarded to the Norwegian authorities additional information from the second complainant ⁽⁶⁾.

⁽¹⁾ Documents No 847105 and 848590 to 848601.

⁽²⁾ Document No 849708.

⁽³⁾ Documents No 859505, 859499, 859501 and 859503.

⁽⁴⁾ Documents No 867151, 868181 and 868182.

⁽⁵⁾ Document No 870428.

⁽⁶⁾ Document No 870360.

- (3) By letter dated 20 September 2017, the Norwegian authorities submitted their comments to the second complaint and provided the information requested by the Authority relating to the first complaint ⁽⁷⁾. On 29 September 2017, the case was further discussed during the annual package meeting in Oslo. The discussion was subsequently summarised in a follow-up letter ⁽⁸⁾.

1.3. REQUEST FOR INFORMATION

- (4) On 20 October 2017, the Authority sent an information request to the Norwegian authorities ⁽⁹⁾. On 22 November 2017, the Norwegian authorities and the Authority held a video-conference to discuss the information request. By letter of 8 December 2017, the Norwegian authorities responded ⁽¹⁰⁾.

1.4. ADDITIONAL INFORMATION FROM THE SECOND COMPLAINANT

- (5) On 19 September 2017, the second complainant submitted additional information ⁽¹¹⁾. On 6 November 2017, the second complainant submitted supplementary information ⁽¹²⁾. On 9 November 2017, the Authority informed the Norwegian authorities of additional information from one of the complainants ⁽¹³⁾. On 22 November and 13 December 2017, the Norwegian authorities and the Authority discussed the case in video-conferences. On 1 December 2017, the Norwegian authorities submitted further information to the Authority ⁽¹⁴⁾.
- (6) On 26 October 2018, the second complainant submitted further additional information ⁽¹⁵⁾.

1.5. FURTHER REQUEST FOR INFORMATION

- (7) On 16 January 2018, the Authority sent an information request to the Norwegian authorities ⁽¹⁶⁾, to which they replied by letters dated 1 and 5 February 2018 ⁽¹⁷⁾.

1.6. NOTIFICATION OF THE 2019 LEASE AGREEMENT

- (8) On 29 November 2018 ⁽¹⁸⁾, the Norwegian authorities notified a lease agreement ('the 2019 lease agreement'), which is intended to enter into force on 1 December 2019. By letter dated 28 January 2019, the Authority requested additional information from the Norwegian authorities. By letter of 21 February 2019, the Norwegian authorities responded ⁽¹⁹⁾.
- (9) On 13 March 2019, the Norwegian authorities and the Authority discussed the case in a videoconference. Following the meeting, the Norwegian authorities submitted further information ⁽²⁰⁾. On 18 March 2019, the Norwegian authorities submitted additional information ⁽²¹⁾. On 11 June, 15 July and 18 October 2019, the Norwegian authorities and the Authority discussed the case in videoconferences.

⁽⁷⁾ Documents No 874440 and 874442.

⁽⁸⁾ Document No 876728.

⁽⁹⁾ Document No 877379.

⁽¹⁰⁾ Documents No 887522, 887524 and 887526.

⁽¹¹⁾ Document No 874067.

⁽¹²⁾ Document No 881377.

⁽¹³⁾ Document No 888352.

⁽¹⁴⁾ Documents No 885827, 885829, 888351 and 888354.

⁽¹⁵⁾ Document No 936140.

⁽¹⁶⁾ Document No 888021.

⁽¹⁷⁾ Documents No 896723, 896725, 896727 and 896729.

⁽¹⁸⁾ Documents No 1040641, 1040643, 1040645, 1040647 and 1040649.

⁽¹⁹⁾ Documents No 1054292, 1054294, 1054296 and 1054298.

⁽²⁰⁾ Documents No 1059166, 1059170 and 1059171.

⁽²¹⁾ Documents No 1059842 to 1059848.

1.7. GBER INFORMATION SHEET REGARDING CAPITAL INCREASE

- (10) On 10 December 2018, the Norwegian authorities submitted a GBER ⁽²²⁾ information sheet ⁽²³⁾, concerning ad hoc aid to TS in the form of a NOK 55 million capital increase (approximately EUR 5,68 million), claiming that this measure was block exempted.

1.8. THE FORMAL INVESTIGATION PROCEDURE

- (11) By Decision No 32/19/COL ('the opening decision'), the Authority initiated the formal investigation procedure. By letter dated 2 May 2019 ⁽²⁴⁾, the Norwegian authorities requested an extension of the 20 May 2019 deadline to submit comments and provide all documents, information and data needed for the assessment of the measures. By letter dated 10 May 2019 ⁽²⁵⁾, the Authority agreed to extend the deadline to 20 June 2019. On 19 June 2019, the Norwegian authorities requested a further extension of the deadline to 30 August 2019 to which the Authority agreed on 20 June 2019 ⁽²⁶⁾.
- (12) By letter dated 30 August 2019 ⁽²⁷⁾, the Norwegian authorities responded to the opening decision.
- (13) On 23 May 2019, the opening decision was published in the *Official Journal of the European Union* and in the EEA Supplement ⁽²⁸⁾. The Authority received comments from one interested party, one of the complainants. By letter dated 27 June 2019 ⁽²⁹⁾, the Authority forwarded these to the Norwegian authorities, giving them the opportunity to respond. By letter dated 30 August 2019 ⁽³⁰⁾, the Norwegian authorities provided comments to the comments from the interested parties.

2. BACKGROUND

- (14) The Municipality's objective is to provide facilities for sports and leisure activities to the inhabitants of Trondheim. Trondheim Spektrum hosts small and large sports events as well as other events such as concerts, trade fairs and congresses. Trondheim Spektrum will, for example, host the European Championship in handball for women and men in 2020.
- (15) In 2004, the Municipality formalised a principle of cost-free facilities for the benefit of the Municipality's sports clubs. This facilitates participation of children and youth in sports activities, irrespective of the income level of individual families.
- (16) To be able to fulfil the objective of providing sports facilities to its citizens, the Municipality owns and operates numerous sport facilities but also rents facilities owned and operated by third parties. The Municipality purchases capacity from TS, sports clubs with own facilities, other state authorities (in buildings such as high schools) and to a very limited degree, from private facilities.
- (17) The Municipality rents capacity from such facilities under special rental agreements, and the joint capacity is distributed, free of charge, amongst the sports clubs. The task of distributing the capacity is entrusted to the local Sports Council (*Idrettsrådet*), which forms part of the organisational structure of the Norwegian Confederation of Sports (*Norges idrettsforbund*).
- (18) The total capacity available is put at the disposal of the local Sports Council. The Sports Council has established a committee with the purpose of distributing the capacity made available by the Municipality. The Committee distributes the hours made available on the basis of guidelines established by the Sports Council.

⁽²²⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), referred to at point 1j of Annex XV to the EEA Agreement, see Joint Committee Decision No 152/2014, published in OJ L 342, 27.11.2014, p. 63, and EEA Supplement No 71, 27.11.2014, p. 61, as amended by Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs (OJ L 156, 20.6.2017, p. 1), see Joint Committee Decision No 185/2017, published in the OJ L 174, 27.6.2019, p. 56, and the EEA Supplement No 52, 27.6.2019, p. 67.

⁽²³⁾ Case No 82883, GBER 30/2018/Sports.

⁽²⁴⁾ Document No 1067253.

⁽²⁵⁾ Document No 1068858.

⁽²⁶⁾ Document No 1079516.

⁽²⁷⁾ Document No 1085424.

⁽²⁸⁾ OJ C 177, 23.5.2019, p. 27 and EEA Supplement No 41, 23.5.2019, p. 1.

⁽²⁹⁾ Document No 1078019.

⁽³⁰⁾ Document No 1085424.

- (19) TS owns and operates Trondheim Spektrum, a multipurpose facility located in central Trondheim. The facility consists of eight multi-purpose halls. The halls are used as training venues for local sports clubs, small and large sports events and other events such as concerts, trade fairs and congresses.
- (20) TS's history goes back to the company Nidarøhallen and its establishment in 1961, for the purpose of carrying out the construction and operation of a sports and exhibition hall in Trondheim. On 5 June 2002, the company name was changed to Trondheim Spektrum AS.
- (21) The Municipality has been, and is at present, the majority shareholder in TS. The Municipality currently holds 99,68 % of the shares ⁽³¹⁾.
- (22) The construction of the first part of the facility was finished in 1963 (halls A and B). The facility has been expanded four times, in 1971 (hall C), 1980 (hall G), 1988 (halls D and E/H) and 2000 (hall F).
- (23) Since summer 2017, Trondheim Spektrum has been undergoing a significant renovation and extension.
- (24) The Municipality rents capacity from TS to make available to the Sports Council. Under the lease agreement, Trondheim Spektrum is mainly reserved for the youth sports activities from September to May ⁽³²⁾. Remaining capacity during the period September to May as well as the total capacity during the rest of the year are rented out by TS for other sports activities, trade fairs and concerts, etc. TS hosts a number of fairs, including an annual fisheries industry fair. Furthermore, TS generates income from the operation of a kiosk, café and a restaurant.
- (25) The future business plan of TS aims at achieving a similar and roughly equal respective share of income generated under the lease agreement with the Municipality, and from other activities, as what has been the case historically ⁽³³⁾.

3. DESCRIPTION OF THE MEASURES

3.1. EXISTING AID MEASURES

- (26) The opening decision concerned several alleged aid measure granted to TS. In the opening decision, the Authority did not assess the nature of measures that, if they would constitute aid, would constitute existing aid within the meaning of Article 1(b) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Protocol 3 SCA'). These measures are therefore not included in the scope of the present decision. These measures concerned (i) municipal loan (measure 1), (ii) municipal guarantee (measure 2), (iii) leasehold agreements (measure 3), and (iv) aid granted under the Gaming Fund Scheme (measure 8) ⁽³⁴⁾.

3.2. ALLEGED AID MEASURES

- (27) As stated in paragraph 120 of the opening decision, the scope of the formal investigation included the following measures:
- Measure 4 (in part): lease agreements between TS and the Municipality, which were concluded from 2007 to 2017;
 - Measure 5: the new lease agreement of 2019 between TS and the Municipality (notified);
 - Measure 6: capital increase linked to new and unexpected costs of the extension and renovation of Trondheim Spektrum;
 - Measure 7: financing of infrastructure costs;
 - Measure 9: implicit guarantee inherent in a loan agreement between Nordea and TS.

⁽³¹⁾ Document No 1085422, p. 11.

⁽³²⁾ TS has a right to make use of the facility for a total of 3 000 hours during this period.

⁽³³⁾ Document No 1040641, p. 4.

⁽³⁴⁾ Measures 1 to 3 and measure 8. See paragraph 120 of the opening decision for conclusion regarding new and existing aid.

- (28) For a more detailed description of the measures, the Authority refers to section 4 of the opening decision.

3.3. MEASURE 4 – LEASE AGREEMENTS CONCLUDED FROM 1999 TO 2017

- (29) Most of the capacity of Trondheim Spektrum has traditionally been used for the purpose of sports clubs on the basis of lease agreements concluded between TS and the Municipality. The Municipality has leased the facility since it opened in 1963. The Municipality rented the facilities from Trondheim Spektrum for approximately NOK 12 million per year from 1990 until 2002.
- (30) The complainants have argued that the rent is above market terms. That is, the rent is based on the needs of TS, and not the capacity needed by the Municipality. The complainants allege that the rental fee has never been based on arm's-length negotiations, but decided unilaterally by the municipal board of the Municipality.
- (31) According to the Norwegian authorities, the rent paid to TS by the Municipality has been market conform and thus does not entail state aid. Were the Authority to conclude differently, the Norwegian authorities argue that any new aid would, in any event, be compatible with the functioning of the EEA Agreement.
- (32) During the procedure up to the opening decision, the Norwegian authorities had claimed that the lease agreements form part of an existing aid scheme. In the opening decision, the Authority took the preliminary view that the lease agreements concluded from 1999 to 2017 do not constitute an aid scheme. The Norwegian authorities have not, in their comments to the opening decision, objected to the preliminary view of the Authority in this regard.
- (33) Pursuant to Article 15(1) of Part II of Protocol 3 SCA, the powers of the Authority to recover aid are subject to a limitation period of 10 years. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Authority, with regard to the unlawful aid shall interrupt the limitation period ⁽³⁵⁾.
- (34) In the opening decision, the Authority limited its assessment to the lease agreements for which the limitation period has not expired ⁽³⁶⁾. The Authority considered that the limitation period had been interrupted on 27 March 2017 ⁽³⁷⁾.
- (35) Accordingly, the lease agreements for which the limitation period has not expired would appear to be following:
- (a) Lease agreement 2007–2008;
 - (b) Lease agreement 2009–2010; and
 - (c) Lease agreement 2011 (which has been renewed annually).
- (36) This is because it would seem from the information provided by the Norwegian authorities that the lease agreement entered into force on 1 January 2008 ⁽³⁸⁾, which in the absence of any indication to the contrary should be taken as the day any aid was granted under the agreement.
- (37) The Authority stated in the opening decision, however, that it lacked information regarding the lease agreement in force during the year 2007 as the lease agreement listed by the Norwegian authorities as preceding the 2007–2008 agreement expired on 31 December 2006. Moreover, the Authority did not have information on when the lease agreement of 2007–2008 was signed, and on whether the date of signing could be the date that any aid was granted under the agreement.
- (38) The Norwegian authorities stated in their comments to the opening decision that they were unable to provide the lease agreement in force for 2007 as it appears that no written agreement was concluded. The Norwegian authorities stated that as the rent was paid in accordance with the lease agreement for the preceding period, this would indicate that the agreement was prolonged tacitly, in accordance with Norwegian contract law. In any event, the information provided by the Norwegian authorities indicate how much rent the Municipality paid for a specific amount of capacity.

⁽³⁵⁾ Article 15(2) of Part II of Protocol 3 SCA.

⁽³⁶⁾ See further section 5.1.6.4 in the opening decision.

⁽³⁷⁾ See the opening decision, section 5.1.6.

⁽³⁸⁾ Exhibit Q to Document No 859501.

- (39) The Authority did not request further information in this regard as the Norwegian authorities did not object to the Authority's assessment of the limitation period and due to the fact that information concerning the amount paid under the lease agreement has been provided by the Norwegian authorities. The lack of documentation would therefore not affect the Authority's assessment of the measure in the present decision.

3.4. MEASURE 5 – LEASE AGREEMENT OF 2019 – NOTIFICATION

- (40) As set out in recital 8 above, the Norwegian authorities notified the lease agreement of 2019. TS and the Municipality have concluded a new lease agreement, which is set to enter into force on 1 December 2019 ⁽³⁹⁾. The agreement will expire on 30 April 2035.
- (41) The Norwegian authorities have explained that this lease agreement is based on the principles underlying previous lease agreements. The Norwegian authorities have further explained that the new lease agreement represents a substantial increase in the capacity made available for the sports clubs. A total of 16 848 hours yearly is rented under the new lease agreement, compared to 12 500 hours in the past. The new lease agreement represents an increase in the rent per hours from approximately NOK 1 200 to 1 700 (approximately EUR 124 to 176). The reason for this increase is twofold. First, the historical rent paid by the Municipality was set on the basis of the level established in 1989 and 1990, and had not been subject to adjustments. Second, the construction costs associated with providing flexibility and allowing for multisport-use results in the operating costs per square metre exceeding by far the square metre cost of the existing venue.
- (42) Both complainants have argued that the rent in the new lease agreement is above market terms, because it is based on TS' needs and not the capacity needed by the Municipality. The complainants allege that the rental fee is not based on arm's-length negotiations, but set in order to cover the construction cost of the expansion of Trondheim Spektrum.
- (43) One of the complainants has further alleged that the main cost elements of the extension and renovation project are tied to requirements related to activities other than the activities covered by the lease agreements, such as concerts, professional sports events and fairs. One of the complainants claims that the division of costs between the different activities is therefore incorrect, as the needs of the sports clubs could have been met at a lesser cost.
- (44) According to the Norwegian authorities, the rent paid to TS by the Municipality under the new lease agreement is market conform, and thus does not entail state aid. Should the Authority be unable to exclude the presence of state aid in the new lease agreement, the Norwegian authorities have notified the lease agreement as compatible aid under Article 61(3)(c) of the EEA Agreement.

3.5. MEASURE 6 – CAPITAL INCREASE LINKED TO NEW AND UNEXPECTED COSTS – BLOCK EXEMPTION

- (45) As set out in recital 10 above, on 10 December 2018, the Norwegian authorities submitted a GBER information sheet ⁽⁴⁰⁾, concerning an ad hoc aid to TS amounting to NOK 55 million (approximately EUR 5,68 million) in the form of a capital increase. The Norwegian authorities have provided the capital increase to TS under Article 55 of the GBER.
- (46) Due, in particular, to a modification of the project in the project scope in 2018, the budget increased from NOK 536 to NOK 591 million (approximately EUR 61,05 million) ⁽⁴¹⁾. The Norwegian authorities have explained that TS cannot cover the additional costs through its existing means or through additional market financing. It therefore applied for the capital increase on 6 July 2018. The capital injection was granted on 5 December 2018.
- (47) The additional costs of NOK 55 million can be attributed as follows, according to the Norwegian authorities:
- New costs: modification to the project amount to NOK 40,5 million of additional costs
 - Unexpected costs: budget overruns of NOK 14,5 million.

⁽³⁹⁾ The new lease agreement is conditional upon being in line with market terms. The agreement allows for adaptations by the Municipality in order to confirm to the market economy investor principle, should the Authority so require. Article 12 of the 2019 lease agreement reads (in Norwegian): 'Denne avtalen forutsettes å være inngått på markedsmessige vilkår. Det tas forbehold om at avtalen vil – forut for og i avtaleperioden – justeres for å tilfredsstille eventuelle føringer/krav fra EFTAs overvåkningsorgan (ESA), og/eller andre offentlige myndigheter. Dette for at avtalen til enhver tid skal tilfredsstille markedsinvestorprinsippet.' Document No 887522, p. 7.

⁽⁴⁰⁾ Case No 82883, GBER 30/2018/Sports.

⁽⁴¹⁾ TS estimated that the total cost would be NOK 595,4 million. However, the Municipality agreed to provide no more than NOK 591 million.

- (48) The Norwegian authorities have explained that given that TS was already highly leveraged, fresh capital rather than additional loans were preferred in order to cover these additional expenses. Thus, it would have been difficult to obtain financing (in the sense of an additional loan) on the market. TS therefore looked to its owners to attain the necessary financing.
- (49) The Municipality was at that time the majority owner of TS (about 78 %), other owners did not indicate an intention to participate in the capital increase ⁽⁴²⁾. The Municipality was accordingly faced with a choice: provide the additional funds and see the completion of the project or accept that TS would not be able to finalise the project in accordance with the modified, final plans that had been established after the works on the original project had been initiated.
- (50) According to the Norwegian authorities, a number of considerations made the capital injection advantageous for TS's majority owner, the Municipality.
- (51) The extension of the hall with 3 200 seats will make it possible for TS to host larger events, which will make the venue more attractive for event managers. TS assumes it will be able to arrange four to six such large events per year. In addition to the rent, the large events generate increased income in the form of VIP events, catering and cloakroom income. As such, the extension was likely to lead to a significant increase in income for TS.
- (52) The Norwegian authorities have stated that works on the renovation had begun prior to TS's request for a capital increase. The works got underway before detailed plans for the execution of the project were finalised. The reason for the haste in launching the construction works was that it had to be ensured that the project would be finalised in time for TS to host the handball European championship for women and men in 2020.
- (53) TS receives large parts of its income not only from rent, but also from box-office takings. The extra seating of 3 200 was therefore likely to generate an increase in box-office takings, particularly as the extension made it possible for TS to host events such as 'Disney On Ice'.
- (54) The alternative to an extension was to install temporary seating for the handball European Championship and other large events. The installation and dismantling of temporary seating would take approximately 11 days, during which TS would have to close the hall for all sports activities. The use of temporary seating thus would have resulted in reduced income for TS.
- (55) Increased elevator capacity and storage will result in lower costs and higher efficiency. The increased elevator capacity means that equipment can be transported safely and efficiently to the different areas of the facilities. The efficiencies in themselves are likely to save costs for TS in the daily operations. The alternative was to transport the equipment manually around the stadium by car. This was considered a costly and inefficient solution, particularly in view of the upcoming championships.
- (56) The storage facilities were necessary to ensure good logistics and efficient operations of large events, including the handball championship. Moreover, the board considered that there was potential for lease of the storage facilities, for example between the large events, which again provided another secure possibility for income for TS.
- (57) Finally, the situation enabled the Municipality to become the quasi sole shareholder of TS. As a result of the capital increase which was granted on 5 December 2018, the Municipality's share increased to 99,68 % ⁽⁴³⁾. The stake of over 99 % of all shares enables the Municipality to purchase the remaining shares even without the consent of today's minority shareholders. Being the sole shareholder will put the Municipality in a favourable position under the Norwegian Limited Liability Companies Act ⁽⁴⁴⁾ as it can decide unilaterally how TS should be operated going forward.

⁽⁴²⁾ With the exception of a tennis club, who owns two shares. The tennis club eventually did not participate in the capital increase.

⁽⁴³⁾ The Norwegian authorities explained that the current shareholding is both the result of the capital injection and the ensuing dilution of other shareholders, and the purchase of the shares of the other larger shareholders Danske Bank, Sparebank 1 SMN and Nordea, who accepted to transfer their shares to the Municipality for NOK 1.

⁽⁴⁴⁾ *Lov om aksjeselskaper (aksjeloven)*, LOV-1997-06-13-44.

- (58) That implies also that the Municipality could decide to change the by-laws so that TS could make decisions without minority shareholders' approval. The capital injection therefore put the Municipality in a position that enables it to obtain a decent return on its investment in the long-term, or alternatively be the sole shareholder owner of a commercially attractive, modern multi-functional infrastructure ⁽⁴⁵⁾.
- (59) The counterfactual to that scenario would have been to remain majority-shareholder in a company whose sole assets would be commercially less attractive, inferior infrastructure, with an accordingly less positive outlook for the future ⁽⁴⁶⁾.
- (60) One of the complainants has alleged that the capital increase is not compliant with all of the conditions set out in Chapter I of the GBER.

3.6. MEASURE 7 – FINANCING OF INFRASTRUCTURE COSTS

- (61) On 14 March 2017, the City Council adopted a zoning plan for the area where Trondheim Spektrum is located and the surrounding park area. The process was initiated by TS with the aim of expanding the facility into a multi-function facility, feasible for concerts and large sport events, and with increased capacity for sports clubs, trade fairs and congresses.
- (62) The Norwegian authorities have explained that a zoning plan forms the basis for a project such as the expansion of Trondheim Spektrum ⁽⁴⁷⁾. The zoning plan – including use of procedural orders ⁽⁴⁸⁾ (In Norwegian: *rekkefølgekrav*) – does not impose any economic obligations on the developer, but provides for the use of the area relating to the project and indicates what (public) infrastructure needs to be in place prior to the implementation of the project ⁽⁴⁹⁾.
- (63) The Norwegian authorities have explained that property development agreements, such as the one entered into by the Municipality and TS in the present case, are a tool to assist the developer and municipalities to ensure that requirements under the zoning plan and in the form of procedural orders (*rekkefølgekrav*), including for general infrastructure measures, are met.
- (64) Property development agreements can, but do not necessarily have to entail provisions that impose some of the economic burdens relating to general infrastructure measures on the developer. Importantly, property development agreements are the result of a negotiation between a municipality and the developer ⁽⁵⁰⁾.
- (65) The Norwegian authorities have explained that general infrastructure measures are not the responsibility of the developer, but those of the municipalities. Furthermore, there is also no obligation to enter into a property development agreement, neither for the municipality nor for the developer ⁽⁵¹⁾.
- (66) However, if a property development agreement is concluded, the relevant legislation sets limits as to which costs can be imposed on the developer. The rationale for this is that there is an asymmetrical distribution of power regarding the negotiation and conclusion of development agreements, favouring the Municipality.
- (67) The City Council adopted the principle of full transfer of expenses in 1993, which sets out that building projects must carry all infrastructure costs that result from the project. However, when the Municipality applies this principle it has to take into consideration Section 17-3, third paragraph, of the Planning and Building Act, which regulates what a property development agreement must include ⁽⁵²⁾.
- (68) One of the complainants argues that the Municipality has relieved TS from infrastructure costs that a developer would normally have to bear in relation to this type of constructions, and has therefore granted an advantage to TS.

⁽⁴⁵⁾ Document No 1085433, section 3.2.

⁽⁴⁶⁾ Document No 1085422, pp. 10 to 15.

⁽⁴⁷⁾ The Norwegian authorities refer to Section 11 of the Planning and Building Act; *lov om planlegging og byggesaksbehandling (plan- og bygningsloven)*, LOV-2008-06-27-71.

⁽⁴⁸⁾ 'Procedural orders' are requirements relating to the order in which work shall be carried out to ensure the establishment of public services, technical infrastructure and green structures before use is made of areas and the point in time when areas may be used for building and construction purposes, including requirements relating to the order in which development works shall be carried out. See Section 11-9 of the Planning and Building Act.

⁽⁴⁹⁾ The Norwegian authorities refer to section 18 of the Planning and Building Act.

⁽⁵⁰⁾ Document No 1085422, p. 16.

⁽⁵¹⁾ Document No 1085422, p. 16.

⁽⁵²⁾ Document No 874440, p. 20. The detailed zoning plan for part of Nidarø was adopted by the City Council on 14 March 2017 in case 25/17.

- (69) The infrastructure costs that are (partly) paid by the Municipality concern the following elements:
- Water/waste water system in Klostergata
 - The Norwegian authorities have explained that the water/waste water system had to be replaced irrespective of the upgrade of Trondheim Spektrum.
 - It coincides with the Trondheim Spektrum related construction works.
 - TS pays a share of NOK 20 million.
 - Bridge connection from Nidarø to Ilen Church
 - The Norwegian authorities have explained that the bridge is part of a recreation area and network.
 - The current bridge is outdated and needs to be renovated.
 - The bridge will connect central parts of the city, and connect the important recreational and park areas, and therefore proved a benefit to all citizens and visitors of Trondheim.
 - Green structure and public park
 - The Norwegian authorities have explained that the green structure and the public park are intended to ensure that attractive locations are established for activity and recreation for the general public.
 - TS pays a share of NOK 26 million.

3.7. MEASURE 9 – IMPLICIT GUARANTEE INHERENT IN A LOAN AGREEMENT BETWEEN NORDEA AND TS

- (70) On 11 December 2017, TS signed a loan agreement for NOK 490 million with Nordea ⁽⁵³⁾. Nordea will provide the working capital during the construction period. The Norwegian authorities have explained that the Municipality is not a party to the loan agreement nor are there any contractual obligations that require the Municipality to provide financing or capital to TS ⁽⁵⁴⁾.
- (71) However, the loan agreement includes the following statements ⁽⁵⁵⁾:
- ‘Nordea has placed considerable weight on the fact that Trondheim Spektrum AS intends to make structural changes in the company or other measures that increase the possibility that the municipality of Trondheim, without acting contrary to the law, if necessary, can provide a guarantee to Nordea that reduces the risk of cost overruns.’
- ‘Nordea has also placed great weight on the ownership of Trondheim municipality and the Executive Board’s decision on 25 June 2015 in case 144/14, which states in paragraph two that the municipality of Trondheim, as the majority owner of Trondheim Spektrum, is ready to assume the necessary financial responsibility resulting from the renovation and development of Trondheim Spektrum.’
- (72) These statements relate to a clause in the loan agreement which states under ‘other terms’ ⁽⁵⁶⁾:
- ‘The risk resulting from any cost overruns occurring during the construction period and, which the credit customer himself cannot pay: Trondheim Spektrum AS will make structural changes in the company or take other measures, which will make it possible for Trondheim Municipality, without coming into conflict with the legislation, if necessary, to provide a guarantee to Nordea.’
- (73) Under the same heading, the following clause states ⁽⁵⁷⁾:
- ‘The lease agreement with Trondheim Municipality of 26 October 2017 cannot be changed/reduced without Nordea’s prior written consent.’

⁽⁵³⁾ Document No 1054294.

⁽⁵⁴⁾ Document No 1054298, p. 6.

⁽⁵⁵⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 1, paragraphs 5 and 6. Unofficial translation provided by the Norwegian authorities. Norwegian: ‘Nordea har lagt betydelig vekt på at Trondheim Spektrum AS har til hensikt å gjøre selskapsendringer eller andre tiltak som åpner muligheten for at Trondheim kommune, uten å komme i strid med lovverket, om nødvendig kan stille en garanti overfor Nordea som reduserer risikoen ifm kostnadsoverskridelser.’/‘Nordea har for øvrig lagt sterk vekt på eierskapet fra Trondheim kommune og vedtaket i formannskapet datert 25. juni 2014 i sak 144/14, hvor det blant annet fremgår av punkt 2 at Trondheim kommune, som største eier av Trondheim Spektrum AS, er innstilt på å ta det nødvendige økonomiske ansvaret som følger av rehabilitering og utvikling av Trondheim Spektrum.’

⁽⁵⁶⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 5, ‘Other terms’ – bullet point 3. Unofficial translation provided by the Norwegian authorities. Norwegian: ‘Risikoen som følge av at det oppstår kostnadsoverskridelser i byggeperioden og kredittkunden selv ikke kan betale disse: Trondheim Spektrum AS vil gjøre selskapsendringer eller andre tiltak som åpner muligheten for at Trondheim kommune, uten å komme i strid med lovverket, om nødvendig kan stille garanti overfor Nordea.’

⁽⁵⁷⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 5, ‘Other terms’ – bullet point 4. Unofficial translation provided by the Norwegian authorities. Norwegian: ‘Leieavtalen med Trondheim kommune av 26.10.2017 kan ikke endres/reduseres uten Nordeas forutgående skriftlige samtykke.’

- (74) Finally, under the heading ‘Change of ownership – mandatory early repayment’ ⁽⁵⁸⁾ the loan agreement states ⁽⁵⁹⁾:

‘It is a condition for entering into and maintaining the Construction Loan Agreement that Trondheim Municipality owns at least 77,93 % of the credit customer and maintains its ownership unchanged.

In the event that the ownership composition changes, without Nordea’s prior written consent, the Construction Loan and any outstanding amount shall be repaid as specified in clause 11 (early maturity of the construction loan).’

- (75) TS and Nordea had previously signed a loan agreement dated 27 July 2017. The agreement contained a condition that any construction cost excess during the construction period should be covered by either TS or the Municipality. The loan agreement was co-signed by the City Executive of Finance. That agreement therefore contained clauses regarding the Municipality’s responsibility in respect of any project overruns, as well as obligations in respect of the lease agreement which at that time had not been finalised ⁽⁶⁰⁾.
- (76) The co-signing of the loan agreement was later deemed a municipal guarantee pursuant to Section 51 of the Municipality Act ⁽⁶¹⁾. The City concluded that the guarantee, in order to be effective, required state approval. The guarantee would, for various reasons, probably not obtain such approval, and therefore the Chief City Executive was advised to promptly inform Nordea that the Municipality could not be party to the loan agreement. This agreement is void. TS and Nordea therefore signed the current loan agreement without the official involvement of the Municipality.

4. COMMENTS FROM INTERESTED PARTIES

- (77) On 12 June 2019, the Authority received comments from an interested party, one of the complainants in the case. The comments concerned the price paid by the Municipality to another sports venue, supporting the previously submitted allegations concerning the overpricing of the lease agreement.

5. COMMENTS BY THE NORWEGIAN AUTHORITIES TO THE COMMENTS FROM THE INTERESTED PARTY

- (78) The Norwegian authorities explained that the venue to which the third party comments relate is part of a school building, and fully owned by county in which it is located. The Municipality purchased more hours there in 2018 and 2019 as an interim solution to provide a sufficient amount of hall capacity to the sports clubs because parts of Trondheim Spektrum’s capacity was unavailable due to the ongoing construction works. After that period, there is neither a need nor the financial possibility for the Municipality to continue the agreement with this venue.
- (79) The Norwegian authorities do not consider that the interim arrangement is comparable to the lease agreement. The county, as owner of the venue, was ready to offer some hall capacity below market price, while the expansion of Trondheim Spektrum takes place. This arrangement was not meant to be, and was not, market conform and cannot be considered as an indication that the Municipality’s lease agreement with Trondheim Spektrum is not market conform.

⁽⁵⁸⁾ Norwegian: ‘eierskifte – obligatorisk førtidig tilbakebetaling’.

⁽⁵⁹⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 4. Unofficial translation provided by the Norwegian authorities. Norwegian: ‘Det er et vilkår for inngåelse og opprettholdelse av Byggekredittavtalen, at Trondheim Kommune eier minst 77,93 % av Kredittkunden, og opprettholder sin eierandel uendret. For det tilfellet at eiersammensetningen endres, uten Nordeas forutgående skriftlige samtykke, skal Byggekreditten og ethvert utestående tilbakebetales som angitt i klausul 11 (Førtidig forfall av byggekreditten).’

⁽⁶⁰⁾ Document No 1054298, p. 5.

⁽⁶¹⁾ *Lov om kommuner og fylkeskommuner (kommuneloven)*, LOV-1992-09-25-107. Section 51 states: ‘1. Vedtak om å stille kausjon eller annen økonomisk garanti for virksomhet som drives av andre enn kommunen eller fylkeskommunen selv, skal godkjennes av departementet. 2. Det kan ikke stilles kausjon eller annen økonomisk garanti knyttet til næringsvirksomhet som drives av andre enn kommunen eller fylkeskommunen selv.’ Unofficial translation: ‘1. Decision to provide security or other economic guarantee for activity which is carried out by others than the Municipality or the County itself, has to be approved by the Ministry. 2. Securities or other economic guarantees tied to economic activity which is carried out by others than the Municipality or the County cannot be provided.’

II. ASSESSMENT

6. PRESENCE OF STATE AID

6.1. INTRODUCTION

(80) 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.’

(81) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through state resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

6.2. THE NOTION OF UNDERTAKING

(82) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement, the measure must confer an advantage on an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ⁽⁶²⁾. Consequently, the public or private status of an entity or the fact that an entity is partly or wholly publicly owned has no bearing as to whether or not that entity is an ‘undertaking’ within the meaning of state aid law ⁽⁶³⁾.

(83) Economic activities are activities consisting of offering goods or services on a market ⁽⁶⁴⁾. Conversely, entities that are not commercially active in the sense that they are not offering goods or services on a given market do not constitute undertakings. In general, both the construction and operation of an infrastructure constitute an economic activity in itself (and are thus subject to state aid rules) if that infrastructure is, or will be used, to provide goods or services on the market ⁽⁶⁵⁾. State aid may be granted at several levels: construction, operation and use of the infrastructure ⁽⁶⁶⁾.

(84) Trondheim Spektrum is a multifunctional facility, hosting, inter alia, concerts, large sport events, fairs, and congresses. Further, Trondheim Spektrum is scheduled to host in 2020 the European Championship in handball for men and women. TS therefore carries out economic activities.

(85) TS also rents out facilities to the Municipality, which in turn makes them available to the sports clubs. The fact that the Municipality offers the capacity it rents from TS as cost-free facilities for the Municipality’s sports clubs does not affect the nature of the transaction between TS and the Municipality, which is an economic activity. TS is therefore an undertaking within the meaning of Article 61 of the EEA Agreement.

6.3. PRESENCE OF STATE RESOURCES

(86) For a measure to constitute state aid, it must be granted by the State or through state resources.

(87) The transfer of state resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies, and benefits in kind. State resources include all resources of the public sector, including municipalities ⁽⁶⁷⁾.

⁽⁶²⁾ Judgment in *Höfner and Elser v Macrotron*, C-41/90, EU:C:1991:161, paragraphs 21–23.

⁽⁶³⁾ Judgment in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 42.

⁽⁶⁴⁾ Judgment in *Cassa di Risparmio di Firenze and others*, C-222/04, EU:C:2006:8, paragraph 108.

⁽⁶⁵⁾ Judgment in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11 P, EU:C:2012:821, paragraphs 40–43.

⁽⁶⁶⁾ The Authority’s Decision No 496/13/COL of 11 December 2013 concerning the financing of Harpa Concert Hall and Conference Centre, paragraph 50.

⁽⁶⁷⁾ Judgment in *Germany v Commission*, C-248/84, EU:C:1987:437, and NoA, paragraph 48.

6.3.1. Measure 4 & 5 – the lease agreements concluded from 2007 to 2017 and the lease agreement of 2019

- (88) If the lease agreements between the Municipality and TS (measures 4 and 5) contain elements of state aid, such an aid measure would be granted by the State and through state resources within the meaning of Article 61(1) EEA as the funding would come directly from the Municipality.

6.3.2. Measure 6 – capital increase

- (89) The capital increase (measure 6) is paid directly by the Municipality to TS and therefore constitute state resources within the meaning of Article 61(1) EEA.

6.3.3. Measure 7 – financing of infrastructure costs

- (90) The financing of infrastructure cost, normally borne by the developer, by the Municipality would be paid directly by the Municipality and would therefore constitute state resources within the meaning of Article 61(1) EEA.

6.3.4. Measure 9 – implicit guarantee inherent in a loan agreement between Nordea and TS

- (91) On 11 December 2017, TS signed a loan agreement for NOK 490 million (approximately EUR 50,67 million) with Nordea ⁽⁶⁸⁾. Nordea will provide the working capital during the construction period ⁽⁶⁹⁾.
- (92) As described in section 3.7, the loan agreement contains clauses, which mention that TS intends to take measures to make possible for the Municipality, without acting contrary to the legislation, if necessary, to issue a guarantee for Nordea, in relation to the risk which follows any cost overruns in the construction period ⁽⁷⁰⁾.
- (93) The loan agreement further contains clause, which states that the lease agreement between TS and the Municipality cannot be changed, without Nordea's prior written approval ⁽⁷¹⁾. Furthermore, the loan agreement contains a condition that the Municipality owns at least 77,93 % of TS ⁽⁷²⁾.
- (94) The Norwegian authorities have argued that the section in the loan agreement stating that the lease agreement with the Municipality cannot be changed without Nordea's prior written consent, does not bind the Municipality. Were the lease agreement to be changed, it would be for TS to ensure that it obtains the consent of its creditor, i.e. Nordea.
- (95) As to the condition for granting and maintaining the construction loan that the Municipality own at least 77,93 % of TS, the Norwegian authorities recall that the board of TS, which entered into the loan agreement, does not have the authority to bind its shareholders and thereby the Municipality, including as to a potential future sale of shares. The loan agreement reflects that Nordea is well aware that the agreement cannot bind the Municipality, given that the second section provides that change in the ownership structure without consent implies a breach of contract by TS ⁽⁷³⁾.
- (96) The Norwegian authorities have provided further information regarding the loan agreement, emphasising that the Municipality is not a party to the loan agreement, and that TS's board cannot, in any way, bind the Municipality, its majority owner. The clauses concerning obligation on part of TS to conduct potential structural changes in the company and taking measures to make possible for the Municipality, if necessary, to issue a guarantee do not constitute a firm and concrete legal obligation that could bind the Municipality.
- (97) The Norwegian authorities have referred to a letter from the Municipality to the county governor (in Norwegian: *Fylkesmannen*). The letter was sent following the events which lead to the previous loan agreement being deemed null and void following a legal assessment stating that the Municipality could not be party to the loan agreement and could not issue a guarantee.

⁽⁶⁸⁾ Document No 1054294.

⁽⁶⁹⁾ Document No 1054298, p. 6.

⁽⁷⁰⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 5, 'Other terms' – bullet point 3.

⁽⁷¹⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 5, 'Other terms' – bullet point 4.

⁽⁷²⁾ Document No 1054294, Loan Agreement between Nordea and TS, dated 11 December 2017, p. 4, 'Change of ownership – mandatory mandatory early repayment' – first paragraph.

⁽⁷³⁾ Document No 1054298, p. 7.

- (98) In this letter, the Municipality informed the county governor that 'TS and Nordea are working on other financial solutions without the Municipality's involvement' ⁽⁷⁴⁾.
- (99) The Norwegian authorities have further stated that if the Municipality had been legally bound to intervene, TS would not have had to apply for an increase of capital ⁽⁷⁵⁾, and the Municipality would not have had the possibility to decide against or in favour of that measure.
- (100) The Norwegian authorities therefore submit that the loan agreement does not entail a contractual obligation on the Municipality amounting to a firm and concrete commitment to make state resources available.
- (101) The transfer of state resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A firm and concrete commitment to make state resources available at a later point in time is also considered a transfer of state resources ⁽⁷⁶⁾. The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 61(1) EEA ⁽⁷⁷⁾. Since State measures take diverse forms and must be analysed in terms of their effects, it cannot be ruled out that advantages given in the form of a State guarantee can entail an additional burden on the State ⁽⁷⁸⁾.
- (102) The Authority has assessed the nature of the described provisions of the loan agreement in light of the information provided by the Norwegian authorities.
- (103) It has been demonstrated by the Norwegian authorities that the Municipality is not formally a party to the current agreement ⁽⁷⁹⁾. The provisions of the loan agreement refer to the decision of 25 July 2015 of the Executive Board of the Municipality stating that it is ready to assume necessary financial responsibility resulting from the renovation and development of TS. However, the Norwegian authorities have provided documentation demonstrating that the Municipal executive, in 2016, stated that the Municipality will not finance the construction but only rent capacity ⁽⁸⁰⁾.
- (104) While the City Executive of Finance co-signed the first loan, in view of the Norwegian law which requires state approval for that type of guarantees, the signing was deemed void and parties informed accordingly.
- (105) In line with the requirements of the Norwegian law also in case of the current loan any provisions in the loan agreement referring to the Municipality would therefore not be enforceable before national courts.
- (106) In the light of the above, any statements in the loan agreement referring to what Nordea has placed weight on in their assessment of whether to grant TS a loan must be considered as a unilateral consideration on behalf of Nordea.
- (107) The provisions in the loan agreement stating that the lease agreement cannot be changed without Nordea's approval as well as the provision stating that it is a condition for the loan that the Municipality owns at least 77,93 % of TS cannot, without evidence demonstrating the formal involvement of the Municipality, be considered a firm and concrete commitment of state resources. TS is a limited liability company ⁽⁸¹⁾ which does not enjoy any additional rights compared to other companies under Norwegian law due to the Municipality's ownership.
- (108) In the absence of other information establishing a firm and concrete commitment on behalf of the Municipality, it cannot be demonstrated that these provisions of the loan agreement are such as to commit state resources.
- (109) No other provisions of the loan agreement having raised doubts on the part of the Authority in the opening decision, and in the light of Nordea being a private market operator, the Authority finds that the loan agreement between TS and Nordea does not entail state aid. This measure will thus not be further assessed in the following.

⁽⁷⁴⁾ Document No 1085428.

⁽⁷⁵⁾ Referred to as measure 6 in the present decision, see section 3.5.

⁽⁷⁶⁾ NoA, paragraph 51.

⁽⁷⁷⁾ See judgments in *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 41, *Bouygues and Bouygues Télécom v Commission and others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 137–139.

⁽⁷⁸⁾ See to that effect *Ecotrade*, C-200/97, paragraph 43, and *Bouygues et Bouygues Télécom v Commission and Others*, C-399/10 and C-401/10 P, paragraph 107.

⁽⁷⁹⁾ Document No 1085428.

⁽⁸⁰⁾ Document No 87440, p. 21.

⁽⁸¹⁾ *Lov om aksjeselskaper (aksjeloven)*, LOV-1997-06-13-44.

6.4. ADVANTAGE

- (110) The measure must confer on TS an advantage that relieves it of charges that are normally borne from its budget

6.4.1. Measures 4 & 5 – the lease agreements concluded from 2007 to 2017 and the lease agreement of 2019**6.4.1.1. Introduction**

- (111) During the procedure up to the opening decision, the Norwegian authorities claimed that the lease agreements form part of an existing aid scheme. In the opening decision, the Authority took the preliminary view that the lease agreements concluded from 1999 to 2017 do not constitute an aid scheme. The Norwegian authorities have not, in their comments to the opening decision, objected to the preliminary view of the Authority in this regard. In the light of the above, and with reference to the assessment of the Authority in section 5.1 of the opening decision, the Authority finds that the lease agreement concluded from 1999 to 2017 do not constitute an aid scheme.
- (112) The Norwegian authorities have argued that the lease agreements concluded from 2007 to 2017, as well as the lease agreement of 2019, are market conform and therefore do not entail an advantage within the meaning of Article 61 (1) of the EEA Agreement.
- (113) The EEA legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of EEA States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to EEA state aid rules. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽⁸²⁾.
- (114) The Norwegian authorities have noted that given the different sizes, equipment, design and location of other venues in Norway, it is not possible to identify a fully equivalent venue to Trondheim Spektrum in Norway ⁽⁸³⁾. However, the Norwegian authorities have provided information about other venues rented for similar purposes for which the Municipality rents capacity from TS, and about other venues in Norway, to support its argument that the lease agreements have been market conform.

6.4.1.2. Benchmarks provided by the Norwegian authorities

- (115) The Municipality has provided information on how TS's pricing to third parties compares to other venues and information on prices for leasing hall capacity for sports and leisure purposes in other venues.
- (116) The Norwegian authorities have explained that Trondheim Spektrum disposes of two halls larger than 2 000 m² (hall D and hall F), which are particularly suited for larger fairs, concerts, conferences and similar events. Depending on the type of event, TS charges approximately NOK 70 000 to NOK 85 000 per day for the larger hall D (approximately EUR 7 230 to 8 780), and NOK 59 000 to NOK 70 000 for the somewhat smaller hall F (approximately EUR 6 100 to 7 230).
- (117) The Norwegian authorities made a comparison with leasing such facilities in other venues in Trondheim. The freemasons lodge in Trondheim, for example, charges a daily rate of only NOK 15 000 to NOK 18 000 (approximately EUR 1 550 to 1 860). This is a somewhat smaller venue, it can accommodate up to 600 persons, whereas hall F in Trondheim Spektrum has a capacity of more than 1 000 persons.
- (118) According to the Norwegian authorities, venues located in Norwegian cities of comparable sizes charge similar rates. In Stavanger, renting of capacity similar to that of hall F costs just above NOK 200 000 for four days, whereas Grieghallen in Bergen charges approximately NOK 300 000 for four days (approximately EUR 20 100 and 31 000). TS' prices are just below those of Bergen ⁽⁸⁴⁾.

⁽⁸²⁾ NoA, paragraphs 73 and 74.

⁽⁸³⁾ Document 859501, p. 17.

⁽⁸⁴⁾ Document 859501, p. 17. The Norwegian authorities have further referred to a management interview with Trondheim Messeselskap AS, a company that organises fairs all over Norway, in which the Municipality was informed that Trondheim Spektrum is not perceived as a particularly affordable location. The Norwegian authorities have referred to this interview for further details on price comparison.

- (119) The Norwegian authorities have further referred to Sotra Arena located in the municipality of Fjell, a 25 minutes' drive from the city of Bergen, a venue with 12 000 m² indoor capacity. In 2016, this venue was used for trade fairs charging approximately NOK 100 000 to 125 000 for three days (approximately EUR 10 300 to 12 900) for approximately 5 000 to 7 000 m².
- (120) In view of this comparison, the Norwegian authorities state that it would appear that TS's prices for hall capacity, when rented out to third parties, are in line with market prices.
- (121) The Municipality purchases capacity from TS, sports clubs with own facilities, other state authorities (in buildings such as high-schools) and to a very limited degree, from private facilities.
- (122) The hourly rate paid by the Municipality ranges between NOK 350 and 2 046 per hour (approximately EUR 36 and 211). The hourly rate paid to TS is NOK 1 174 (approximately EUR 121). Under the new lease agreement, the hourly rate is NOK 1 700. The Norwegian authorities note that the price differences can be explained by a variety of factors. Also, a number of these venues have been financed (partly) by the State, and are contractually bound to provide (some) capacity at fixed rates.
- (123) Other factors, which may explain the relatively large price differences, are that not all daytimes are similarly valuable and not all venues are as modern, well equipped and centrally located as Trondheim Spektrum. The Norwegian authorities have explained that all of the foregoing considerations are reasons why some of the capacity that the Municipality purchases from other venues is rented at a comparatively lower price ⁽⁸⁵⁾.
- (124) The Norwegian authorities have provided examples of the rates charged by Vestlandshallen, a sports centre in Bergen. According to the Norwegian authorities, this venue charges approximately the same price to (non-sports club) users as the Municipality pays to TS. This is based on a calculation whereby one of TS's 'hall hours' is for a surface area of 800 m² and comprises 60 minutes. A 'quarter hall' in Vestlandshallen would be approximately 440 m² and cost NOK 940 for 90 minutes (approximately EUR 97). This would result in a theoretical price of approximately NOK 626 for 60 minutes and hence NOK 1 252 for a slightly larger surface area than the equivalent in TS (approximately EUR 65 and 129).
- (125) Moreover, the Norwegian authorities argue that the City of Bergen charges non-preferential users NOK 1 150 for one hour in Haukelandshallen, a venue comparable to Trondheim Spektrum (approximately EUR 119). Furthermore, the City of Tromsø charges up to NOK 1 940 for one hour of similar surface area in Tromsøhallen (approximately EUR 200).
- (126) As to the lease agreement of 2019 specifically, the Norwegian authorities have explained that the new lease agreement represents an approximately 50 % increase in the rent per hour from approximately NOK 1 200 to NOK 1 700 (approximately EUR 124 to 176) ⁽⁸⁶⁾. The Norwegian authorities acknowledge that this is at the upper end of the hourly rates they have provided (hourly rates from a sample of sports facilities range from approximately NOK 350 to NOK 2046 (approximately EUR 36 to 211)) ⁽⁸⁷⁾.
- (127) According to the Norwegian authorities, Trondheim Spektrum will be, following the upgrade, a modern and very centrally located facility in one of Norway's largest and fastest growing cities. In the Norwegian authorities' view, for the Authority to conclude that the lease agreement entails an advantage, the hourly rate would have to be well above the price ranges observed in the market ⁽⁸⁸⁾.
- (128) The Norwegian authorities have further stated that the hourly rate for commercial users of Trondheim Spektrum was higher in the past (from NOK 1 000 to 1 800; approximately EUR 103 to 186) than under the municipal lease contract (NOK 1 200; approximately EUR 124). This is also expected to remain the case going forward, with an hourly rate of approximately NOK 1 700 under the new lease agreement (approximately EUR 176) and correspondingly higher hourly rate for the commercial users.
- (129) In the Norwegian authorities' view, if it were concluded that the Municipality paid a price above market levels, this would necessarily entail that the commercial users of TS would also do that. In the Norwegian authorities' view, there is no reason to assume that commercial users would pay a price above market level for the renting of hall space in Trondheim Spektrum ⁽⁸⁹⁾.

⁽⁸⁵⁾ Document No 859501, p. 18.

⁽⁸⁶⁾ Figures from 2017.

⁽⁸⁷⁾ See section 5.4.2 of this decision.

⁽⁸⁸⁾ Document No 1040641, p. 9.

⁽⁸⁹⁾ Document Nos 1040641, p. 10, and 1054298, p. 5.

(130) In the Norwegian authorities' view, the Authority could conclude that the lease agreements are free of aid. In order to assist the Authority in reaching that conclusion, the Norwegian authorities have in essence provided the following so far:

- External benchmarks, i.e. hourly rates for the rent or lease of hall time in comparable multifunctional infrastructures.
- 'Internal benchmarks', i.e. documentation showing that TS's other activities create approximately the same level of income while consuming less capacity.
- Documentation that TS does not sell its capacity to third-parties at artificially low prices, thus indicating that its 'commercial' activities are not cross-subsidised ⁽⁹⁰⁾.

6.4.1.3. The Authority's assessment of the lease agreements

(131) In order to establish whether a transaction conforms to market conditions, the transaction can be assessed in the light of the terms on which comparable transactions carried out by comparable private operators have taken place in comparable situations ⁽⁹¹⁾.

(132) Benchmarking may not be an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations, or if the existing prices are significantly distorted by public interventions ⁽⁹²⁾.

(133) Furthermore, as noted by the Norwegian authorities, there are important differences when it comes to comparing these venues, for example in the rental time ⁽⁹³⁾, amount of hours rented, the quality of the facilities, and the location of the venues within (or outside) the cities.

(134) The Authority considers that the benchmarks provided by the Norwegian authorities are not sufficiently comparable or appropriate to establish a market price to which the rent paid under the lease agreement can be directly compared, see further recitals 142 to 152 below.

(135) For the Authority to conclude that the lease agreements entail elements of aid and therefore confer an advantage on TS within the meaning of Article 61(1) of the EEA Agreement, the Authority must find that the price paid under the lease agreements deviates sufficiently from the market price to justify such a finding ⁽⁹⁴⁾.

(136) As described above, it is not possible to establish a precise market price in the case at hand, using the traditional methods of benchmarking as no comparable and appropriate benchmarks can be identified.

(137) Moreover, establishing a price by reference to the cost of providing the services under the lease agreement does not appear suitable in this case, as it is difficult to determine, in a meaningful way, the appropriate share of the investment cost that should be allocated to the lease agreement, or what those costs would have been in the absence of the other activities carried out by TS.

(138) As explained by the Norwegian authorities, the renovation and extension of Trondheim Spektrum was brought about partly because the Municipality lacked adequate facilities to accommodate larger sport and culture events. In this context, the Norwegian authorities have mentioned that Trondheim will host the handball EURO 2020 for both men and women. One aim of the upgrade has therefore been for the renovated venue to meet the requirements of the European handball federation and allow for a significant number of spectators.

⁽⁹⁰⁾ Document No 1085422, p. 5.

⁽⁹¹⁾ NoA, paragraph 98.

⁽⁹²⁾ NoA, paragraph 99.

⁽⁹³⁾ As explained by the Norwegian authorities, not all daytimes are equally valuable.

⁽⁹⁴⁾ See for example the Authority's Decision No 305/09/COL of 8 July 2009 on the power sales agreement entered into by Notodden municipality and Becromal Norway AS, p. 11.

- (139) In the Authority's view, it can be assumed that a private operator, renting capacity for the purposes of providing hall space to youth sports clubs, would not accept a price that would cover significant costs associated with renovation and extensions disproportionate to its needs under the lease agreement. If such an approach would be accepted, it would enable a mechanism whereby the Municipality could pay a price for renting the facilities for providing hall space to youth sports, which corresponds to the financial need to carry out an upgrade of the facilities in general, without notifying such contribution as state aid ⁽⁹⁵⁾.
- (140) The construction of venues for sport and other public events and support of different types of activities which benefit the general public can be considered as a state responsibility. In such circumstances, the State would not be acting as a market operator. It would be acting as public authority. The State can therefore, in certain circumstances, finance such activities by granting state aid. However, such a measure would have to fulfil all the relevant criteria set out in the GBER ⁽⁹⁶⁾ to be block exempted or, alternatively, would have to be notified and approved as compatible under Article 61(3)(c) EEA.
- (141) In the light of the above, the Authority must rely on other methods to assess whether the lease agreements entail elements of aid. Although not directly applicable, the Authority considers that the benchmarks provided by the Norwegian authorities can be of help to establish a range of prices found in the market in order to assess whether the price paid under the lease agreements is far from what seems to be the market conditions for a similar service.
- (142) The Norwegian authorities have provided the Authority with an overview of the prices paid by the Municipality to other venues for renting hall capacity for the same purposes as the Municipality purchases hall capacity from TS ⁽⁹⁷⁾. In the Authority's view, these would be the most comparable to the lease agreements assessed in the present decision.
- (143) The Authority considers that these venues are more appropriate as a comparison to the hall capacity leased by the Municipality than the examples of prices charged by venues in other cities ⁽⁹⁸⁾. The hourly rates provided for the other venues appear to concern situations where the venue is rented out for a limited period and for different events. These venues are also different in terms of the facilities.
- (144) The benchmarks provided by the Norwegian authorities where the Municipality rents hall space, also concern arrangements where larger amount of hours is leased for the same type of services – although none of them comes close to the amount of hours rented under the lease agreement between the Municipality and TS. These venues are also located in Trondheim ⁽⁹⁹⁾.
- (145) The Norwegian authorities have submitted that the price ranges between 350 NOK and 2 046 NOK per hour. The Norwegian authorities have stated that the hourly rates the Municipality pays under a large number of these individual contracts are certainly below market price and therefore not fully comparable as a number of these venues have been partly financed by the State, and are contractually bound to provide some capacity at fixed rates, in addition to the fact that the agreements may relate to day/week times of differing value ⁽¹⁰⁰⁾.

⁽⁹⁵⁾ The Norwegian authorities have provided a report from Norion consultancy (Document No 1085426) which seeks to establish what the hourly rental rate should be if TS required a reasonable return on its investment. However, the estimate does not differentiate between different types of services. Rather, it provides an overall estimate based on replicating the cost structure of other venues. Such an approach does not provide the necessary information for establishing whether the hourly rental price paid by the municipality to TS reflects the costs of providing the services covered by the lease agreements.

⁽⁹⁶⁾ See Article 55 GBER on aid for sport and multifunctional recreational infrastructures.

⁽⁹⁷⁾ Document No 859501, section 3.8.2.

⁽⁹⁸⁾ The Norwegian authorities referred to for example Vestlandshallen and Haukelandshallen in Bergen, and Tromsøhallen in Tromsø, as well as other venues for comparison of the price charged by TS to third-parties. See further section 1.2.1.2.

⁽⁹⁹⁾ The amount of hours rented from those venues range from 6 to 1 344 (information was provided for the hours rented in 2015).

⁽¹⁰⁰⁾ Document No 1085422, pp. 28–29.

- (146) Moreover, out of the eleven rental contracts for which the price is provided, only two venues, Heimdal and Utleira, come close to the price paid by the Municipality to TS ⁽¹⁰¹⁾. The Norwegian authorities have acknowledged that the rates for these two venues are higher than what is paid to the other venues for which information is provided. The Norwegian authorities have explained that the rates may not reflect market price – as the Municipality, when setting the rate of the lease, has taken into account also the municipal interest in supporting the activities of membership-based volunteer sports clubs. The market price for these venues may therefore be slightly lower than indicated ⁽¹⁰²⁾.
- (147) Publicly available information on Heimdal's website state that hourly rates range from NOK 275 to NOK 550, depending on the type of contract made. It therefore appears that the rate the venue charges to the market is significantly lower than what the Municipality pays under that lease.
- (148) Under the remaining nine rental contracts, the venues charge a price that is between 77 % and 242 % ⁽¹⁰³⁾ lower than what the Municipality pays to TS under the old lease agreements and 154 % to 385 % lower than the price paid by the Municipality to TS under the lease agreement of 2019.
- (149) Out of the eleven venues for which the price is provided, four of the venues are rented from private operators ⁽¹⁰⁴⁾. The prices for these four venues range from NOK 425 to NOK 677.
- (150) The Authority therefore considers that the benchmarks provided by the Norwegian authorities rather demonstrate that the price paid by the Municipality under the lease agreements has been considerably higher than the price paid to and charged by other venues both for the agreements in the past and, in particular, after the increase in the price paid for the lease of the hall capacity under the lease agreement of 2019.
- (151) In the Authority's view, such differences in price between the hourly rates of these venues and the hourly price paid by the Municipality under the lease agreement with TS – which are all rented by the Municipality for the same purposes – cannot be explained entirely by the fact that some of these venues may have been partly financed by the State, or may have committed to provide some capacity at fixed rates. The fact that these agreements may relate to times of the day or the week which differ in value is equally applicable to all venues which have been provided by the Norwegian authorities as possible benchmarks.
- (152) In the light of the aforementioned considerations, the Authority cannot exclude that the lease agreements from 2007 to 2017 and the lease agreement of 2019 have conferred an advantage on TS. However, given that such aid would be compatible with the functioning of the EEA Agreement, pursuant to its Article 61(3)(c), it is not necessary to make a definite finding about the existence of aid ⁽¹⁰⁵⁾.

6.4.2. Measure 6 – capital increase linked to new and unexpected costs – GBER

- (153) The Norwegian authorities granted TS a capital increase for an amount of NOK 55 million (approximately EUR 5,68 million) under Article 55 GBER. The Norwegian authorities have explained that TS cannot cover these additional costs through its existing means or through additional market financing.
- (154) The Norwegian authorities have submitted that the capital increase does not confer an advantage for TS. According to the Norwegian authorities, a number of considerations made the capital injection advantageous for the Municipality as the owner of TS.
- (155) The Norwegian authorities have stated that all in all, the modifications were likely to have a significant impact on TS's profitability, in particular if compared with the counterfactual, i.e. if individual modifications to the seating, elevators and storages plans would not have been made. All the measures would have resulted in an increase of income/lower costs, while the alternatives resulted in the opposite ⁽¹⁰⁶⁾.

⁽¹⁰¹⁾ These venues are Heimdal and Utleira, for which the price is stated to be NOK 2 046 and NOK 1 302 per hour.

⁽¹⁰²⁾ Document No 1096774.

⁽¹⁰³⁾ The hourly rate paid under the old lease agreement was NOK 1 200 and NOK 1 700 under the new lease agreement compared to the hourly price of the other venues which ranges from NOK 350 to NOK 677.

⁽¹⁰⁴⁾ These are Autronica – hallen (NOK 472), KVT – hallen (NOK 677), Utleirahallen (NOK 600) and Charlottenlund (NOK 425).

⁽¹⁰⁵⁾ For this line of reasoning, see e.g. Commission Decision 2013/452/EU of 2 May 2013 on State aid SA.33618 (12/C) which Sweden is planning to implement for Uppsala arena (OJ L 243, 12.9.2013, p. 19).

⁽¹⁰⁶⁾ Document No 1085422, p. 10.

- (156) The Norwegian authorities have further explained that the capital increase made the Municipality the *quasi* sole shareholder of TS, which enables the Municipality to purchase the remaining shares even without the consent of today's minority shareholders. Being the sole shareholder will put the Municipality in a favourable position under the Norwegian Limited Liability Companies Act ⁽¹⁰⁷⁾ as it can decide unilaterally how TS should be operated going forward.
- (157) According to the Norwegian authorities, a market economy operator faced with a choice between these two scenarios would likely have acted as the Municipality did. In any event, the Norwegian authorities consider there not to be sufficient indications to conclude that the market economy operator test is not met ⁽¹⁰⁸⁾.
- (158) The Norwegian authorities have submitted that the value of shares in TS – which is intrinsically linked to the infrastructure TS owns – will be higher if linked to a completed Trondheim Spektrum, than it would have been had the renovation project been stopped. The modifications that the capital increase financed will contribute to TS's profitability going forward, saving costs and strengthening the infrastructure's revenue generating capacity.
- (159) In addition, the Municipality has significantly increased its stake in TS. That entails first and foremost an increase in value of its stake. The Municipality purchased, in essence, an 18 % stake in a company owning an infrastructure, whose expansion alone costs almost NOK 600 million, for NOK 55 million. Moreover, the position of being the (quasi) sole owner of TS will allow the Municipality to exert more direct and immediate influence over the operation and future of the company.
- (160) The Norwegian authorities note that in the medium to long term, it is by no means improbable that Trondheim Spektrum could be sold for a price that would entail an acceptable return on investment for the capital injection. If Trondheim Spektrum is not sold, the value of owning it will most probably increase significantly with the completion of the expansion, and the implementation of the business plan and strategy that will gradually see a greater part of its income stemming from commercial activities.
- (161) If a state argues that it acted as market economy operator it must, where there is doubt, provide evidence showing that the decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have carried out to determine the profitability or economic advantage of the transaction ⁽¹⁰⁹⁾.
- (162) The level of sophistication of such an *ex ante* assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved. Normally, such *ex ante* evaluations should be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by public policy considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.
- (163) In order to establish that a measure grants an economic advantage, it is necessary to consider whether, in similar circumstances, a market economy operator of a size comparable to that of the undertaking concerned would have made a capital contribution of the same amount, particularly in the light of the information available, and foreseeable developments, at the time of the investment.
- (164) The market economy operator principle has been developed with regard to different economic transactions. The EEA Courts have developed the 'market economy investor principle' to identify the presence of state aid in cases of public investment (in particular, capital injections). In determining, based on this principle, whether a public body's investment constitutes state aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question ⁽¹¹⁰⁾.

⁽¹⁰⁷⁾ Lov om aksjeselskaper (*aksjeloven*), LOV-1997-06-13-44.

⁽¹⁰⁸⁾ Document No 1085422, pp. 10 to 15.

⁽¹⁰⁹⁾ NoA, paragraph 79. See judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraphs 82 to 85. See also judgment in *Land Burgenland v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 61.

⁽¹¹⁰⁾ NoA, paragraph 74.

- (165) Compliance with the market economy investor principle can be demonstrated by an *ex ante* business plan on the basis of which the decision to invest was made ⁽¹¹¹⁾. A state can only invoke objective and verifiable elements taken into account prior to or at the time of the decision to make an investment.
- (166) It must thus be shown that the investment is based on an economic assessment equivalent to what a rational private investor in a comparable situation would have made before such an investment in order to determine its future profitability.
- (167) It is not sufficient to rely on economic assessments made after the (potential) advantage was conferred, on a retrospective finding that the investment made was actually profitable, or on subsequent justifications of the course of action actually chosen, to conclude that a state had decided on the investment in the same way as a private investor in a market economy ⁽¹¹²⁾.
- (168) The fact that a capital contribution is allegedly necessary for the undertaking to continue its operations, or to ensure the adequate capitalisation of the business, in accordance with prudential rules or an estimation of the risks involved, is not a sufficient basis on which to conclude that the requirements of the market economy investor principle have been satisfied.
- (169) A private investor operating under normal market conditions would make such a capital contribution only if the expected profitability was deemed sufficient, at the time of the contribution, based on the available information and the developments that were foreseeable at that particular time.
- (170) In the application of the market economy operator principle, it is assumed that a private investor will try to maximise its profits ⁽¹¹³⁾. As stated by the General Court in *Westdeutsche Landesbank Girozentrale v Commission*, 'Normally, a private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. It will seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, and long-term interests, even where he is investing in an undertaking of which he is already a shareholder' ⁽¹¹⁴⁾.
- (171) The Norwegian authorities have stated that the Municipality assessed whether, as the majority shareholder in Trondheim Spektrum, and based on objective criteria, it should make further investments in the form of a capital increase. Further, that there were good, market economic reasons for the Municipality to carry out the capital increase, in particular in the view of the counterfactual ⁽¹¹⁵⁾.
- (172) However, again according to the information provided by the Norwegian authorities, it appears that no *ex ante* economic evaluation was carried out by the Municipality before deciding to grant the capital injection. It cannot be considered sufficient that an economic operator faced with the choice between finishing the renovations and the alternative, would likely have acted as the Municipality did ⁽¹¹⁶⁾ without any concrete assessment of expected profitability of the investment.

⁽¹¹¹⁾ See for example judgments in *Commission v EDF*, C-124/10 P, EU:2012:318, paragraphs 83 to 85 and 105, *France v Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraphs 70 to 72, and *Cityflyer Express v Commission*, T-16/96, EU:T:1998:78, paragraph 76. See also the decision in the Shetland Shellfish case (Commission Decision 2006/226/EC, OJ L 81, 18.3.2006, p. 36), in which the Commission rejected two reports produced by the Shetland Islands authorities containing a projected profit-and-loss account, a projected balance sheet, and a projected cash-flow statement for 2000, 2001 and 2002. The United Kingdom contended that the studies were *ex ante*, and that the assumptions on which they were based were 'conservative and prudent', but the Commission concluded that they would have been considered insufficient by a market economy investor despite the fact that relatively small amounts were involved.

⁽¹¹²⁾ See for example judgment in *Commission v EDF*, C-124/10 P, EU:2012:318, paragraphs 82 to 86 and 105, and Commission Decision 2014/274/EU of 20 March 2013 on State Aid No SA.23420 (11/C, ex NN40/10) implemented by Belgium for SA Ducroire/Delcredere NV (OJ L 144, 15.5.2014, p. 29), paragraphs 150 to 151.

⁽¹¹³⁾ See judgments in *Italy v Commission*, C-303/88 EU:C:1991:136, and *Westdeutsche Landesbank Girozentrale v Commission*, T-228/99 and T-233/99, EU:T:2003:57.

⁽¹¹⁴⁾ See judgment in *Westdeutsche Landesbank Girozentrale v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 314 and 315.

⁽¹¹⁵⁾ Document No 1096774.

⁽¹¹⁶⁾ Document No 1085422, pp. 10 to 15.

- (173) The explanations provided by the Norwegian authorities do not demonstrate that the investment was sufficiently profitable for a market investor ⁽¹¹⁷⁾. This applies to both the new cost and the cost overrun. The assessment cannot be based on such general explanations as those provided by the Norwegian authorities. No estimates are provided, for example, in terms of expected increase in revenue due to the additional seats, nor the expected efficiency gains from the larger elevators and the increased storage area.
- (174) The Authority has provided the Norwegian authorities with the opportunity to present any such documents related to the transaction. The Norwegian authorities have not provided any economic evaluations comparable to those that a rational private investor in a comparable situation would have made before such an investment in order to determine its future profitability. The Norwegian authorities have therefore not provided evidence demonstrating that the expected future profitability was satisfactory from a private investor's point of view ⁽¹¹⁸⁾. At the time when TS requested the additional capital, the Municipality owned 78 % of the shares in TS. Other owners of TS did not show interest in participating in the capital increase. On the contrary, several minority shareholders agreed to transfer their shares to the Municipality for NOK 1.
- (175) The fact that other shareholders were not willing to participate in the capital increase and, in fact, transferred their shares for NOK 1 to the Municipality, may be taken as indicating that the transaction was not viewed by market operators as profitable.
- (176) In conclusion, the Authority finds that the capital increase constitutes an advantage to TS, corresponding to the full amount of the capital increase.

6.4.3. *Measure 7 – financing of infrastructure costs*

- (177) The precise form of the measure is irrelevant in establishing whether it confers an economic advantage on the undertaking. Not only the granting of positive economic advantages is relevant for the notion of state aid, also relief from economic burdens can constitute an advantage. The latter is a broad category, which comprises any mitigation of charges normally included in the budget of an undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities ⁽¹¹⁹⁾.
- (178) The notion of an advantage also covers situations where operators do not have to bear costs that other comparable operators normally do under a given legal order, regardless of the non-economic nature of the activity to which the costs relate ⁽¹²⁰⁾.
- (179) The construction of infrastructure used for activities that the state carries out in the exercise of its public powers, and which is not commercially exploited, is in principle excluded from the application of state aid rules ⁽¹²¹⁾.
- (180) A selective advantage in respect of infrastructure such as assessed in this case, which is financed through state resources and is not commercially exploited could still be found to exist:
- If the rules normally applicable to the project impose on project developers to bear part of the costs, then there can be a selective advantage if the developer pays less than legally required;
 - If the infrastructure is not of general character but serves only one or a limited number of undertakings known in advance, and if it is tailored to their needs in such a way that the undertaking(s) should normally have borne the costs of the infrastructure themselves ⁽¹²²⁾.

⁽¹¹⁷⁾ See e.g. judgment *Westdeutsche Landesbank Girozentrale v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 255, and Decision 2014/274/EU, paragraph 153.

⁽¹¹⁸⁾ Decision 2014/274/EU, paragraphs 150 to 151.

⁽¹¹⁹⁾ NoA, paragraph 68.

⁽¹²⁰⁾ NoA, paragraph 68.

⁽¹²¹⁾ See for example Commission Decision of 8 January 2016, SA.36019, paragraph 36, and the Commission's infrastructure analytical grid for roads, bridges, tunnels and inland waterways, available at: https://ec.europa.eu/competition/state_aid/modernisation/grid_roads_en.pdf

⁽¹²²⁾ See for example Commission Decision of 8 January 2016, SA.36019, paragraphs 38 and 46, and the case law cited there.

- (181) The Norwegian authorities have submitted that the infrastructure in question is a public infrastructure of general character, and that TS has not paid less than legally required. The financing of the infrastructure concerns three measures.
- (182) First, concerning the bridge connecting the Nidarø peninsula to the mainland where the Ilen Church is situated. According to the Norwegian authorities, the current bridge is outdated. The bridge is fully financed by the Municipality. The bridge will connect central parts of the city, and connect the important recreational and park areas, and therefore benefit all citizens and visitors of Trondheim.
- (183) Second, works on Klostergata concern a water and waste system that the Municipality had to replace in any case. The construction coincides with the works on Trondheim Spektrum. Pursuant to the Main Plan for Sewage and Water Environment 2013–2024, the Main Plan for Water provision 2004–2012 and the Municipal sub-plan for Water provision 2017–2028, the Municipality must separate grey water and surface water, and renew old water pipes. It is recommended that these measures are carried out within 10 years (from 2014). The Municipality endeavours to coordinate its works with the works of other actors. The water pipes in Klostergata were installed in the period 1895–1915. The Norwegian authorities have explained that the Municipality always replaces such pipes when other work is carried out in or along the road. TS will pay a share of NOK 20 million ⁽¹²³⁾.
- (184) Third, the green structure and public park are indented to ensure that attractive locations are established for activity and recreation for the general public. The Municipality has plans to plant vegetation close to the river in order to create a good environment for plant and animal life. The Norwegian authorities have explained that the green structure and public park are not necessary for the project but rather an infrastructure which will benefit all citizens and visitors of Trondheim ⁽¹²⁴⁾.
- (185) For the assessment of whether a measure constitutes state aid, the Authority is to analyse the effect of the measures concerned, rather than the objectives pursued. Even if the infrastructure plan had been adopted in connection with plans of the development in question, the Authority would need to assess whether the infrastructure benefits the community as a whole or only the development in question. It is only in the latter case that the infrastructure should be funded by the developer for there to be no aid ⁽¹²⁵⁾.
- (186) The Norwegian authorities have explained that the measures financed (partly) by the Municipality do not have a direct factual relationship with the development, but are the result of the Municipality's public policy to provide this type of generally accessible infrastructure and public-zoned green structure ⁽¹²⁶⁾. The zoning area is part of an important recreation area situated along the banks of the river Nidelva with very diverse plant and animal life. Nidarø is part of a network of walking paths that are popular with the City's inhabitants for recreation and outdoor life ⁽¹²⁷⁾.
- (187) In light of the information provided by the Norwegian authorities, the Authority considers that the infrastructure measures in question are for the use and benefit of the public in Trondheim. Even though some increase in traffic in the area may be due to the development, the work carried out benefits everyone living there ⁽¹²⁸⁾.
- (188) As described above, the Municipality and TS entered into a development agreement relating to the development ⁽¹²⁹⁾. The Norwegian authorities have explained that there is no obligation to enter into a development agreement, neither for the Municipality nor for the developer.
- (189) Development agreements are a tool to assist the developer and the municipalities to ensure that requirements under the zoning plan and procedural orders, including for general infrastructure measures, are met. They can, but do not necessarily have to entail provisions that impose some of the economic burdens relating to general infrastructure measures on the developer. Importantly, development agreements are the result of a negotiation between a municipality and a developer.

⁽¹²³⁾ Document No 874440, p. 24.

⁽¹²⁴⁾ Document No 1085422, p. 15 and Document No 1059170.

⁽¹²⁵⁾ See for example Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in "Terra Mítica SA", a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), paragraphs 62–67, and Commission Decision (EU) 2015/508 of 1 October 2014 on the alleged infrastructure aid implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.36147 (C 30/10) (ex NN 45/10; ex CP 327/08) (OJ L 89, 1.4.2015, p. 72).

⁽¹²⁶⁾ Document No 1059846.

⁽¹²⁷⁾ Document No 874440, p. 23.

⁽¹²⁸⁾ See for example Decision 2003/227/EC, paragraphs 62–67.

⁽¹²⁹⁾ Document No 1059848.

- (190) There are no provisions in the law that would require the municipalities to impose any such costs on the developer. However, if a development agreement is entered into between the Municipality and the developer, the relevant legislation sets limits as to which cost can be imposed on the developer. The rationale for this is that there is an asymmetrical distribution of power regarding the negotiation and conclusion of development agreements, favouring the Municipality.
- (191) The Norwegian authorities have, in this regard, referred to a recent judgment from the Oslo District Court, where the Court considered that 'The rationale for Section 17-3 of the Planning and Building Act was, inter alia, the need to limit what municipalities could include in a development agreement, given that the municipality's authority to permit or prohibit projects puts it in a powerful position. The provision therefore entails a requirement for necessity, appropriateness and proportionality' ⁽¹³⁰⁾.
- (192) The Norwegian authorities have explained that the Municipality's margin of manoeuvre is therefore limited by the legal framework, and the case law referred to above as regards the necessity and proportionality tests. Even so, the Municipality attempts to impose as many costs on the developers as possible. While the Municipality has adopted a principle of full cost transfer, this principle is somewhat mitigated in practice by the limitations under the national legal framework.
- (193) There is no formula or pre-determined calculations used for the cost allocation between municipalities and a developer under a development agreement. According to the Norwegian authorities, nor would such calculations be required by law or be useful in practice. Projects, developers and economic capacity of different projects are too heterogeneous to employ mathematical models.
- (194) The Municipality assesses the proposals by the developer. In doing so, and in order to ensure the proportionality of the cost allocation, the total costs that the developer must bear are benchmarked against other projects and practice (cost of the contribution to public infrastructure per m² BRA (i.e. area of use)). For a typical housing development, which tends to be a highly profitable development, an acceptable expense per m² BRA is around NOK 2 000 or lower. According to the Norwegian authorities, commercial projects, or public service projects, tend to have a lower profitability, and thus generally sustain a lower cost per m² BRA.
- (195) Under the development agreement with TS which was entered into following this practice, the cost for TS is NOK 2 226 per m² BRA.
- (196) As requested by the Authority, the Norwegian authorities have provided further information regarding recent, relatively large, construction projects in Trondheim where a development agreement was concluded. None of the projects bear a substantially higher cost per m² BRA than TS's project. The projects are residential housing projects and commerce/public services projects. Some of the projects belong to one of those categories and some are mixed.
- (197) The cost imposed on TS in the development agreement is higher than in most of the examples provided. The Norwegian authorities have noted that even highly profitable commercial projects such as the expansion of a hotel and establishment of a shopping centre bear lower or only marginally higher costs than TS per m² BRA.
- (198) In a response to the Authority's inquiry, the Norwegian authorities have submitted that, to their knowledge, there are no nation-wide or Trondheim specific statistics on costs per m² BRA. However, there are publicly available documents that indicate that the cost TS has to bear is at the upper end of what other construction projects contribute. For example, a report by Norsk Eiendom from August 2018 found that the cost per m² BRA for a sample of large developments in Oslo ranges from NOK 975 to 2 167, with most projects contributing around NOK 1 400 to 1 500 ⁽¹³¹⁾.

⁽¹³⁰⁾ Judgment of the Oslo District Court, 18-132587TVI-OTIR/07, p. 8. 'Bakgrunnen var blant annet et behov for å sette begrensninger for hva kommunene kunne inngå avtale om, da kommunen i kraft av sin myndighet til å gi eller ikke tillatelser har en sterk maktposisjon i forhandlingene. Bestemmelsen oppstiller derfor både et krav om nødvendighet, og krav om rimelighet og forholdsmessighet.' The judgment has been appealed. The Norwegian authorities further refer to two new judgments from Oslo District Court: 18-104016 (Mortensrud) and 18-132587 (universitetet).

⁽¹³¹⁾ The Norwegian authorities have explained that the previously reported costs of NOK 2 081 per m² BRA changed in the final version of the development agreement. The final correct amount is NOK 2 226 per m² BRA.

- (199) The Norwegian authorities state that the submitted benchmarks on the cost per m² BRA are comparable. Under the Norwegian legal order, in the proportionality assessment particular account must be taken of the economic sustainability of the cost allocation. In order to determine whether TS's development agreement deviates from normal practice, housing developments can be used as a benchmark, even if they can, as a rule, bear more costs than projects such as TS's. In any event, also the development agreements for commerce/public services developments entered into by the municipalities, have a lower cost per m² BRA than TS.
- (200) In addition, there are clear indications from the relevant legislation (requiring a proportionality assessment) and Norwegian courts ⁽¹³²⁾, that the Municipality could not have imposed more costs on TS without coming into conflict with the law ⁽¹³³⁾.
- (201) The Norwegian authorities have provided information on the practice of negotiating of development agreements in Trondheim as well as an explanation of the requirement of the relevant national legislation. The information provided by the Norwegian authorities do not indicate that the usual practice of negotiating division of costs has been deviated from in TS's case. The benchmarks provided, although for a different type of projects, do not indicate that TS has paid less than what is usually required in terms of contribution to public infrastructure related to a development project in Trondheim.
- (202) The Authority thus cannot demonstrate that the case at hand deviates from the normal practice of division of costs in public infrastructure projects.
- (203) Having assessed the information provided by the Norwegian authorities, the Authority therefore cannot conclude that the division of the infrastructure costs, with regard to the renovation and extension of TS, has granted TS a selective advantage. Accordingly, the measure is deemed not to constitute aid, and it will thus not be further assessed in the following.

6.5. SELECTIVITY

- (204) A measure to classify as aid must be selective in that it favours 'certain undertakings or the production of certain goods'.
- (205) The measures at issue are individual measures addressed only to TS. They are therefore selective within the meaning of Article 61(1) of the EEA Agreement.

6.6. EFFECT ON TRADE AND DISTORTION OF COMPETITION

- (206) An aid measure must be liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.
- (207) The mere fact that a measure strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, is considered sufficient to conclude that the measure is likely to affect trade between EEA States and distort competition between undertakings established in other EEA States ⁽¹³⁴⁾.
- (208) The capital injection has conferred an advantage on TS, which strengthens its position compared to other undertakings that it competes with on an EEA wide market. The same applies to any advantage conferred on TS by the potential aid element inherent in the lease agreements.
- (209) The Authority must further consider whether the measures are liable to affect trade between EEA States. In this regard, the Court of Justice has ruled that 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid' ⁽¹³⁵⁾.

⁽¹³²⁾ Section 17-3 of the Planning and Building Act, and judgment of the Oslo District Court, 18-132587TVI-OTIR/07.

⁽¹³³⁾ Document No 1085422, pp. 15 to 20.

⁽¹³⁴⁾ Case E-6/98 *Norway v ESA* [1999] EFTA Ct. Rep. 76, paragraph 59, and judgment in *Philip Morris v Commission*, 730/79, EU:C:1980:209, paragraph 11.

⁽¹³⁵⁾ Judgment in *Eventech*, C-518/13, EU:C:2015:9, paragraph 66.

- (210) Trondheim Spektrum has the capacity to host mid-sized and large international events, which may also be held outside the region ⁽¹³⁶⁾.
- (211) The Authority notes that an effect on trade cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between EEA States, based on the foreseeable effects of the measure ⁽¹³⁷⁾.
- (212) The Authority and the Commission have in a number of decisions considered that certain activities and measures, in view of their specific circumstances, have a purely local impact and consequently no effect on trade between EEA States. In those cases, the Authority and the Commission ascertained, in particular, that the beneficiary provided services to a limited area within an EEA State and was unlikely to attract customers from other EEA States, and that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishments. Some of these decisions concerned sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other EEA States ⁽¹³⁸⁾.
- (213) In the case at hand, even though some of the activities carried out by TS are of local character, TS also hosts events such as trade fairs and other international events, which attract foreign customers. Moreover, TS will host the European handball Championship in 2020, which can be assumed to attract foreign customers.
- (214) Finally, the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities that are subject to trade between EEA States ⁽¹³⁹⁾.
- (215) In light of the above, the Authority considers that the measures at issue threaten to distort competition and are liable to effect trade between EEA States.

6.7. CONCLUSION ON THE EXISTENCE OF AID

- (216) In the light of the above, the Authority concludes as follows:
- (a) It cannot be excluded that the lease agreements from 2007 to 2017 (measure 4) and the new lease agreement of 2019 (measure 5) contain elements of aid. As will be demonstrated below, such aid would be compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c), and it is therefore not necessary to make a definite finding about the existence of aid;
 - (b) measure 6 – the capital injection – entails state aid;
 - (c) measure 7 – financing of infrastructure costs – does not entail state aid;
 - (d) measure 9 – the loan agreement between Nordea and TS does not entail state aid.

7. PROCEDURAL REQUIREMENTS

- (217) Pursuant to Article 1(3) of Part I of Protocol 3 SCA: ‘The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision.’

⁽¹³⁶⁾ Document No 859501, p. 22.

⁽¹³⁷⁾ See, for instance, judgment in *AITEC and others v Commission*, T-447/93, T-448/93 and T-449/93, EU:T:1995:130, paragraph 141.

⁽¹³⁸⁾ See, for instance, Commission Decisions in cases N 258/2000 Leisure Pool Dorsten (OJ C 172, 16.6.2001, p. 16); 2004/114/EC of 29 October 2003 on measures in favour of non-profit harbours for recreational crafts, the Netherlands (OJ L 34, 6.2.2004, p. 63); SA.37963 – United Kingdom – Alleged State aid to Glenmore Lodge (OJ C 277, 21.8.2015, p. 3); SA.38208 – United Kingdom – Alleged State aid to UK member-owned golf clubs (OJ C 277, 21.8.2015, p. 4); as well as the Authority’s Decision No 459/12/COL of 5 December 2012 on aid to Bømlabadet Bygg AS for the construction of the Bømlabadet aqua park in the Municipality of Bømlo; and Decision No 20/19/COL of 2 April 2019 Leangbukten Båttforenings Andelslag.

⁽¹³⁹⁾ See to that effect the Authority’s Decision No 496/13/COL of 11 December 2013 concerning the financing of Harpa Concert Hall and Conference Centre, paragraph 75.

- (218) The Norwegian authorities submit that the new lease agreement is conditional upon being in line with market terms ⁽¹⁴⁰⁾. It explicitly enables adaptations to bring the conditions of the agreement in line with market terms should the Authority so require. In light of this, the Authority finds that the Norwegian authorities have respected the requirement set out in Article 1(3) of Part I of Protocol 3 SCA with regard to the lease agreement of 2019 provided the lease agreement contains element of aid.
- (219) The Norwegian authorities did not notify the lease agreements concluded between 2007 to 2017 to the Authority. The Authority therefore concludes that the authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 with regard to that measure provided the lease agreements contain elements of aid.

7.1. MEASURE 6 – CAPITAL INJECTION IS NOT COMPLIANT WITH THE GBER

- (220) According to Article 3 GBER, aid schemes, individual aid granted under aid schemes and *ad hoc* aid shall be compatible with the internal market within the meaning of Article 61(3)(c) EEA, and shall be exempted from the notification requirement of Article 1(3) of Part I of Protocol 3 SCA provided that such aid fulfils all the conditions laid down in Chapter I of the GBER, as well as the specific conditions for the relevant category of aid laid down in Chapter III of the GBER.
- (221) Article 6(1) GBER states that the Regulation shall only apply to aid, which has an incentive effect. According to Article 6(2) GBER: 'Aid shall be considered to have an incentive effect if the beneficiary has submitted written application for the aid to the EU Member State or EFTA State concerned before work on the project or activity starts. The application for the aid shall contain at least the following information: a) undertaking's name and size; b) description of the project, including its start and end dates; c) location of the project; d) list of project costs; e) type of aid (grant, loan, guarantee, repayable advance, equity injection or other) and amount of public funding needed for the project'.
- (222) The Norwegian authorities state that it is not clear how Article 6(2) GBER should be applied to ongoing projects, which are modified, increased, or whose finalisation becomes uncertain. The Norwegian authorities have stated that it seems logical that 'work on the project' in Article 6(2) GBER does not necessarily need to be the start of the project as a whole, but could also refer to a later point in time, in particular in situations in which 'the project' or 'the activity' in reality is a modification, increase or similar, and should in particular be interpreted as to also cover situations in which a new 'decision point' arises.
- (223) The Norwegian authorities have submitted that it is not uncommon that projects are modified, and that budget estimates turn out to be insufficient. In the case of infrastructure projects, this might rather be the rule than the exception.
- (224) Such an interpretation could lead to unintended discrimination between the upgrade of an existing infrastructure and an infrastructure that is currently being built. Furthermore, projects that may already have consumed a considerable amount of public resources may have to be stopped or significantly down-sized half way.
- (225) In addition, the Norwegian authorities have noted that such an interpretation could have unintended and undesirable consequences in the form of cautious budget planning, which could lead to the granting of higher aid amounts.
- (226) Finally, the Norwegian authorities note that the Authority in a number of cases has approved aid applied for after the launch of a project. The Norwegian authorities consider that Article 6 GBER can be interpreted in a manner that allows for this situation to be covered as well ⁽¹⁴¹⁾.
- (227) The Norwegian authorities have confirmed that works on Trondheim Spektrum had started prior to TS's request for a capital increase from the Municipality. The Court of Justice has taken a strict approach when interpreting the GBER. The Court has found that failure to fulfil the conditions of the GBER would mean that the exemption to notify would not apply to the measure ⁽¹⁴²⁾.

⁽¹⁴⁰⁾ Article 12 of the new lease agreement of 2019 states (in Norwegian): 'Denne avtalen forutsettes å være inngått på markedsmessige vilkår. Det tas forbehold om at avtalen vil – forut for og i avtaleperioden – justeres for å tilfredsstille eventuelle føringer/krav fra EFTAs overvåkningsorgan (ESA), og/eller andre offentlige myndigheter. Dette for at avtalen til enhver tid skal tilfredsstille markedsinvestorprinsippet.'

⁽¹⁴¹⁾ Document No 1085422, p. 10 to 15.

⁽¹⁴²⁾ Judgments in *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, *Dilly's Wellnesshotel (II)* C-585/17 EU:C:2019:969, *Eesti Pagar*, C-349/17, EU:C:2019:172, and *Bayerische Motoren Werke v Commission and Freistaat Sachsen*, C-654/17 P, EU:C:2019:634.

- (228) As regards a possible later starting point of the project, the Authority notes that the additional construction cost financed by the capital injection cannot be considered a separate project from the renovation and extension of the infrastructure. These additional constructions are a continuation of the original renovation and extension works on Trondheim Spektrum, and would not have been implemented had it not been for the original project. In the Authority's view, to assess the additional construction as a 'new decision point' would amount to consider it as a new 'project'. Any such artificial split of an infrastructure project would risk undermining the strict incentive effect criterion found in Article 6 GBER, and would go against the objective of the GBER.
- (229) In the light of the above, the Authority concludes that the capital injection was not granted in line with the GBER. State aid within the meaning of Article 61(1) EEA not covered by the GBER remains subject to the notification requirement. The Norwegian authorities did not notify the capital injection to the Authority. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 SCA. The granting of the aid on 5 December 2018 was therefore unlawful. In the following, the Authority will assess the compatibility of the measure directly under Article 61(3)(c) of the EEA Agreement.

8. COMPATIBILITY OF THE AID MEASURES

- (230) The Authority can declare state aid compatible with the functioning of the EEA Agreement under its Article 61(3)(c) provided that certain compatibility conditions are fulfilled.
- (231) For most cases, these compatibility conditions are outlined in the Authority's state aid guidelines. However, in this case there are no existing state aid guidelines applicable to the measure at hand. The Authority will therefore assess the lease agreements (measures 4 and 5) and the capital injection (measure 6) directly under Article 61(3)(c) of the EEA Agreement.
- (232) The Authority's assessment is based on the common assessment principles:
- contribution to a well-defined objective of common interest;
 - need for state intervention;
 - appropriateness of state aid as a policy instrument;
 - existence of an incentive effect;
 - proportionality of the aid amount (aid limited to the minimum necessary);
 - avoidance of undue negative effects on competition and trade; and
 - transparency.

8.1. OBJECTIVE OF COMMON INTEREST

- (233) State aid must aim at a well-defined objective of common interest that has been recognised by the Contracting Parties.
- (234) The promotion of sport is not directly mentioned in the EEA Agreement as a common objective. However, promoting sport can be considered as part of the promotion of education, training and youth, as well as social policy. Closer cooperation in these fields is considered an aim of the EEA, as set out notably in Articles 1 and 78 of the EEA Agreement. The modalities of this closer cooperation are further defined in Protocol 31 to the EEA Agreement on cooperation in specific fields outside the four freedoms. Article 4 of this Protocol is headed 'Education, training, youth and sport', and foresees for example the participation of the Contracting Parties in the European Year of Education through Sport 2004.
- (235) This illustrates the close link between the promotion of sport and the aims set out in the EEA Agreement. Promotion of sport, including through the financing of sport infrastructure, has been recognised by the Authority as an objective of common interest ⁽¹⁴³⁾.

⁽¹⁴³⁾ See the Authority's Decisions No 225/15/COL of 10 June 2015 raising no objections to aid in the form of a transfer of land to Vålerenga Fotball AS; No 357/15/COL of 23 September 2015 on State aid in favour of Sandefjord Fotball AS; No 178/15/COL of 7 May 2015 on the aid to the Municipality of Tromsø for the construction of a swimming and bathing facility called Templarheimen in the Municipality of Tromsø; and No 13/18/COL of 29 January 2018 on aid for the construction and operation of the sports facility Templarheimen.

- (236) In addition to sports events, the venue will also be used for cultural events, and as such contribute to the promotion of cultural diversity. The EEA Agreement does not include a provision corresponding to Article 107(3)(d) of the Treaty on the Functioning of the European Union. The Authority nevertheless acknowledges that State aid measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement ⁽¹⁴⁴⁾.
- (237) The Commission has authorised a number of aid measures in support of sports and multipurpose facilities. The Commission has acknowledged that the construction and operation of venues for sports and other public events benefitting the general public can be considered as a responsibility of the State ⁽¹⁴⁵⁾.
- (238) As Trondheim Spektrum will ensure the general public's access to and practice of sports, culture and recreation, particularly considering the arena's multifunctional character and the lack of capacity for and adequate infrastructure for different events in Trondheim, the Municipality will be fulfilling its responsibility to the general public by making such a facility available. The realisation of Trondheim Spektrum must therefore be regarded as satisfying policy objectives of common interest.
- (239) Furthermore, the financing of sport and multifunctional infrastructure could have also benefited from Article 55 of the GBER if certain conditions of that regulation were fulfilled. This further demonstrates that state aid to such infrastructure can represent an objective of common interest.
- (240) Accordingly, the measures in question pursue an objective of common interest.

8.2. NEED FOR STATE INTERVENTION

- (241) In order to assess whether state aid is effective in order to achieve the identified objective of common interest, it is necessary first to identify the problem that needs to be addressed. State aid should be targeted towards situations where aid can bring a material improvement that the market alone cannot deliver, for example by remedying a market failure or addressing an equity or cohesion concern.
- (242) The Norwegian authorities have explained that the Municipality lacks adequate facilities to accommodate larger sport and cultural events. Trondheim Spektrum will enable the Municipality to host different kind of events, for example the handball EURO 2020 for men and women. The public interest objective pursued would not be attained in the absence of the measures in question.
- (243) Moreover, the local Sports Council has reported significant lack of capacity for the activities of youth sports in Trondheim. This is supported by estimates made by the Municipality indicating the need for minimum of between 8 and 22 halls before 2030 and 2050 respectively ⁽¹⁴⁶⁾. The need for indoor sports facilities is rising in the Municipality as more activities for children and youth are developing towards a year-round activities as opposed to in the past when activities were of a more seasonal nature ⁽¹⁴⁷⁾.
- (244) The Norwegian authorities submit that it is well established that there is a general underinvestment in infrastructures such as Trondheim Spektrum. The need of the facility cannot be met by private operators, since, given the economies of the project, it is unlikely that a private investor would invest in projects satisfying the same needs in Trondheim ⁽¹⁴⁸⁾. TS did attempt to seek financing from other shareholders than the Municipality, without success.
- (245) The Municipality has adopted the principle of cost free facilities for the benefit of the Municipality's youth sports clubs. The idea behind this is to facilitate participation in sports activities irrespective of the income level of individual families.

⁽¹⁴⁴⁾ See the Authority's Decision No 496/13/COL of 11 December 2013 concerning the financing of Harpa Concert Hall and Conference Centre, and the Authority's Guidelines on State aid for films and other audiovisual works, paragraph 10.

⁽¹⁴⁵⁾ See Decision 2013/452/EU, and Commission Decision of 15 May 2013, *Multiarena in Copenhagen*, SA.33728.

⁽¹⁴⁶⁾ Document No 1040641, p. 3.

⁽¹⁴⁷⁾ Document No 859501, p. 12.

⁽¹⁴⁸⁾ Document No 1054298.

- (246) The purchase of hall capacity from TS by the Municipality through the lease agreements and the subsequent distribution of that capacity to the youth sports clubs, enables those clubs to offer sports activities to citizens for free. Since these clubs do not have the financial capacity to finance this offer out of their own means, the financial cost of renting hall capacity would have to be borne by the ultimate users, the citizens of the Municipality.
- (247) The absence of the potential aid granted through the lease agreements would therefore reduce the offer significantly, and could lead to the exclusion from amateur sports of citizens with only limited financial means. Market forces alone could therefore not provide the same level of sports activities in Trondheim.
- (248) According to the Norwegian authorities, the aid, both in the form of the lease agreements (measures 4 and 5) and the capital injection (measure 6), addresses a market failure. It is the Municipality's intention to provide its inhabitants with access to such an infrastructure which meets the needs of the citizens of Trondheim ⁽¹⁴⁹⁾.
- (249) The Norwegian authorities have explained that TS will not break even without the lease agreements with the Municipality. The lease agreements are therefore fundamental to TS's operation. Furthermore, in the absence of the capital injection, the renovation and extension of Trondheim Spektrum could not have been finalised as planned.
- (250) Accordingly, there is a demonstrated need for the measures in question, and for state intervention.

8.3. APPROPRIATENESS OF STATE AID

- (251) State aid must be an appropriate instrument to address the identified objective of common interest. An aid measure is not compatible with the functioning of the EEA Agreement if the same positive contribution to the common objective is achievable through other less distortive policy instruments, or other less distortive types of aid instruments.
- (252) Through the lease agreements, and the capital injection, the Municipality can grant access to hall capacity for the youth sports clubs in Trondheim in compliance with its decision to award free access to sport infrastructure to all youth sports clubs. The same applies, in general, as regards access for the general public of Trondheim to a multifunctional infrastructure suitable for hosting different kinds of sporting and cultural events. The Norwegian authorities submit that there is no other policy instrument that would have been equally suited to attain the objective of common interest and be less distortive.
- (253) The Norwegian authorities have demonstrated a need for new hall capacity in Trondheim, and that the lease agreements merely enable TS to break even. Furthermore, the renovation and extension of Trondheim Spektrum could not have been finalised in the absence of the capital injection. The Authority further notes that the largest share of the cost of the upgrade of the infrastructure is financed through a private loan.
- (254) The Norwegian authorities state that while generally speaking investment aid is considered less distortive than operating aid, granting investment aid would not have been appropriate for the purchase of hall capacity. Renting the capacity for a price close to market price was and remains the most appropriate, economical and least distortive realistic option to attain the objective.
- (255) The Authority notes that investment aid is generally preferable to and less distortive than operating aid. However, operating aid may in certain circumstances be necessary as a tool to pursue an objective of common interest ⁽¹⁵⁰⁾.
- (256) Aid inherent in the lease agreements could be classified as operating aid. However, as the Norwegian authorities have explained, it cannot be said with finality that any aid would exclusively be operating aid. This is because the income from the lease agreements can also cover costs relating to the financing of Trondheim Spektrum's upgrade (depreciation, interest and down payment of loans) ⁽¹⁵¹⁾.

⁽¹⁴⁹⁾ Document No 859501, p. 24.

⁽¹⁵⁰⁾ See the Authority's Decision No 13/18/COL of 29 January 2018, on aid for the construction and operation of the sports facility Templarheimen and the Authority's Decision No 145/17/COL of 25 July 2017 not to raise objections to an aid scheme for hydrogen refuelling stations in Akershus.

⁽¹⁵¹⁾ Document No 1040641, p. 11.

- (257) The Authority considers that, although formally speaking the potential aid could be categorised as operating aid, it does in fact support the investment in the renovation and extension of the infrastructure. The measure allows TS to invest in this construction. The effect of the potential aid inherent in the lease agreements has, in that way, the characteristics of investment aid ⁽¹⁵²⁾.
- (258) In the light of the above, the Authority considers that such aid, in the circumstances of this case, is appropriate to attain the objective of common interest. Furthermore, it appears that the objective of common interest – to ensure the general public's access and practice of sports, culture and recreation – could not be reached to the same extent with other policy instruments or types of aid. The Authority therefore concludes that the measures are appropriate instruments to address the identified objective of common interest.

8.4. INCENTIVE EFFECT

- (259) State aid is only compatible with the functioning of the EEA Agreement if it has an incentive effect. An incentive effect occurs when the aid induces the beneficiary to change its behaviour to further the identified objective of common interest, a change in behaviour which it would not undertake without the aid.
- (260) The Norwegian authorities submit that in the absence of the lease agreements the youth clubs would not be able to offer their members the same amount, range and spectrum of activities under the same conditions in line with the common objective pursued by the measure. Further, even a lower level of rent under the lease would likely have that result as it could put the entire operation of TS at risk.
- (261) Furthermore, the Norwegian authorities have demonstrated that TS could not finance the renovation and extension of Trondheim Spektrum absent the revenue stream from the new lease agreement of 2019 ⁽¹⁵³⁾. On the basis of the above, the Authority therefore finds that the requirement of incentive effect is fulfilled for any aid inherent in the lease agreements.
- (262) As for the investment aid, the Authority notes that the capital injection, applied for on 6 July 2018, was granted after the works on the renovation and extension of the infrastructure had started in summer of 2017. The Norwegian authorities have explained that Trondheim Spektrum would not have been extended and renovated, at least not according to the then current plan and scope, without the capital increase. There was thus a clear, demonstrable counterfactual, showing that the granting of aid has an incentive effect.
- (263) As the capital injection was granted after works on the project had started, the Authority cannot rely on the presumption for the existence of an incentive effect for aid requested prior to the start of the works ⁽¹⁵⁴⁾. The Authority has, in certain circumstances, approved aid for projects where the construction work had already started, following a thorough assessment of the circumstances ⁽¹⁵⁵⁾.

⁽¹⁵²⁾ See this line of reasoning in judgment in *Austria v Commission (Hinkley Point C nuclear power station)*, T-356/15, EU:T:2018:439, paragraphs 577–586 and paragraphs 610–614 and 617. The General Court also stated in paragraph 583 of the judgment that 'there is nothing to preclude an aid measure which pursues a public interest objective, which is appropriate to and necessary for the attainment of that goal, which does not adversely affect trading conditions to an extent contrary to the common interest and which therefore satisfies the requirements of Article 107(3)(c) TFEU from being declared compatible with the internal market under that provision, irrespective of whether it must be characterised as investment aid or operating aid. It should, moreover, be recalled that even operating aid may be declared compatible with the internal market if those conditions are satisfied'. See also judgments in *Magic Mountain Kletterhallen v Commission (sports infrastructure, indoor climbing hall)* T-162/13, EU:T:2016:341, paragraphs 116–117, and *Scor SE v Commission* T-135/17, ECLI:EU:T-2019:287, paragraph 115.

⁽¹⁵³⁾ Document No 1040641, p. 14, and Document No 1085422, pp. 26–27.

⁽¹⁵⁴⁾ Judgment in *HGA and others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 106 and onwards.

⁽¹⁵⁵⁾ See the Authority's Decision No 178/15/COL of 7 May 2015, on the aid to the Municipality of Tromsø for the construction of a swimming and bathing facility called Templarheimen in the Municipality of Tromsø, and the subsequent Decision No 13/18/COL of 29 January 2018, on aid for the construction and operation of the sports facility Templarheimen. In that case, the Authority approved public funding of NOK 179 million in the form of grants to cover costs which were not taken into account in the previous decision (No 178/15/COL). These were unexpected cost increases for the finalisation of the swimming and bathing part of the sports facility, and new costs relating to a cafeteria and construction of a climbing hall as part of the sports facility. The Authority found that the construction of the sports facility would not have been completed without the aid.

- (264) The Authority does not exclude the incentive effect of aid to a project that has started when the grant of aid unequivocally ensures the completion of projects that would otherwise not have been completed. In assessing the incentive effect of the aid in this light, the counterfactual situation, i.e. what the undertaking would do without the aid, needs to be closely examined ⁽¹⁵⁶⁾.
- (265) The Norwegian authorities have explained that the intention was for the renovation and expansion of Trondheim Spektrum to be financed entirely through debt obtained in the market. This approach resulted in the balance sheet of TS having a critically high long-term-debt to equity ratio. However, the risk stemming from the high leverage itself was considered to be offset by the safe-long term income from the lease agreement.
- (266) The additional costs which were covered by the capital injection could not be paid by taking on additional debt, as a further increase in the leverage of TS would appear economically unjustifiable based on estimated future income. Furthermore, TS's lender, Nordea, had called for a renewed credit assessment of TS in the light of these developments, and did not appear willing to provide additional financing.
- (267) As a result, TS's board requested additional capital from its owners given that there were no alternatives to obtain the necessary financing, and TS was facing a situation where they could not complete the renovation and expansion.
- (268) The Norwegian authorities have submitted that the incentive effect is present if the project that the investment pertains to could not be realised, in the desired scope or form, in the absence of the capital injection.
- (269) In that regard, the Norwegian authorities recall that TS has little if any financial margin – it will just about manage to finance the upgrade, and break even over time. Any reduction in income, for example from the lease agreement, or increase in cost – including due to a greater share of infrastructure costs – would have left TS in a situation where they could not cover their costs. The upgrade of Trondheim Spektrum thus could not have been realised in the absence of these measures.
- (270) The Norwegian authorities note that in the absence of the capital injection covering new and unexpected costs, TS would have had to stop the upgrade, or complete the project in suboptimal, undesirable form that would not have met or would meet the objective of common interest, including for example the needs of various kinds of amateur sports, or the Municipality's objective to host events such as the European handball championships. In the view of the Norwegian authorities, this is sufficient to prove that the measure had an incentive effect ⁽¹⁵⁷⁾.
- (271) On the basis of the information provided by the Norwegian authorities, the Authority considers that in the absence of the capital injection, TS would have been unable to finalise the upgrade of Trondheim Spektrum. According to the Norwegian authorities, TS could not raise financing for the project which meant that the construction work would have to be stopped. Accordingly, the counterfactual situation in the case would have been to abandon the renovation and extension of the infrastructure. It was in these circumstances that the Norwegian authorities considered the capital injection to be necessary.
- (272) In the light of this, the Authority considers that it has been demonstrated that the capital injection induced a change in TS's behaviour in such a way that it engaged in additional activity – finalising the upgrade of Trondheim Spektrum – which it would not have been able to do without the aid ⁽¹⁵⁸⁾.

⁽¹⁵⁶⁾ In this context, see judgment in *Kronoply v Commission*, T-162/06, EU:T:2009:2, paragraph 85, upheld on appeal in *Kronoply v Commission*, C-117/09 P, EU:C:2010:370. See also the Authority's Decisions No 110/15/COL of 8 April 2015 *Finnjord AS*, paragraphs 67–68; No 178/15/COL of 7 May 2015 on the aid to the Municipality of Tromsø for the construction of a swimming and bathing facility called *Templarheimen* in the Municipality of Tromsø; No 13/18/COL of 29 January 2018 on aid for the construction and operation of the sports facility *Templarheimen*; and No 344/09/COL of 23 July 2009 on the *Helgøyvik Aluminium Smelter*.

⁽¹⁵⁷⁾ Document No 1040641, p. 14, and Document No 1085422, pp. 26–27.

⁽¹⁵⁸⁾ Document No 930813.

(273) Accordingly, the measures in question fulfil the requirement of incentive effect.

8.5. PROPORTIONALITY

8.5.1. *Lease agreements (measures 4 and 5)*

(274) State aid is proportionate if the aid is limited to the minimum needed to achieve the identified objective of common interest.

(275) As stated in recital 216 above, it cannot be excluded that the lease agreements from 2007 to 2017 and the lease agreement of 2019 have granted TS an advantage. To assess the compatibility of these measures, the Authority must quantify the aid inherent in the measures to a sufficient degree to enable it to assess whether they are proportionate.

(276) The Norwegian authorities submit that any aid element inherent in the lease agreement is small and thereby proportionate. The rent that the Municipality pays TS under the lease agreement is merely sufficient to allow TS to break even. Absent the lease payments, TS could not continue its operation.

(277) The Norwegian authorities further submit they have submitted evidence demonstrating that no cross-subsidisation of the commercial activities of TS occurs. The separation of accounts that has been introduced in TS's operations acts as safeguard to ensure the proportionality of the aid, ensuring that it is used to achieve the objective of common interest ⁽¹⁵⁹⁾.

(278) According to the Norwegian authorities, the measures at stake (the lease agreements and the capital injection) cumulatively cover the funding gap, i.e. TS's operating losses. On that basis alone, the measures are necessary and proportionate. This conclusion is corroborated by the fact that approximately half of TS's capacity is used by amateurs, with professional users paying market price for its use.

(279) The Norwegian authorities further submit that even if the benchmarks submitted would not be suitable for the exclusion of aid in the case, the benchmarks prove that the lease agreements pricing falls within the range of what is customary in this market in Norway.

(280) The rent under the lease agreement is based on a fixed amount of capacity annually of 16 848 hours, and an hourly rate of NOK 1 700. The previous lease agreement had an hourly rate of NOK 1 200 of, on average, 12 000 hours annually.

(281) The amount of lease paid by the Municipality to TS annually amounts to NOK 30 million. The maximum aid amount that could be conferred upon TS under the new lease agreement would accordingly be NOK 30 million. However, that would assume that the market price for the hourly rent would be NOK 0. The calculation of the aid amount inherent in the new lease agreement would be equivalent to the difference between NOK 30 million and the market price.

(282) The benchmarks provided by the Norwegian authorities, although not sufficiently comparable to exclude the existence of aid, can be of use to approximate the aid amount inherent in the lease agreements ⁽¹⁶⁰⁾.

(283) According to information provided by the Norwegian authorities, the average hourly rate that the Municipality pays under the 11 lease agreements provided as benchmarks by the Norwegian authorities, is approximately NOK 688. However, the contracts cover different capacity rented so a weighted average rate which is approximately NOK 908 is more appropriate for these purposes ⁽¹⁶¹⁾. This is similar to the Authority's own calculations.

⁽¹⁵⁹⁾ Document No 1040641, pp. 14–15, and Document No 1085422, pp. 27–31.

⁽¹⁶⁰⁾ This is in line with the Authority's approach in e.g. Decision No 225/15/COL of 10 June 2015 raising no objections to aid in the form of a transfer of land to Vålerenga Fotball AS, paragraph 75.

⁽¹⁶¹⁾ The Norwegian authorities have emphasised that the hourly rates the Municipality pays under a large number of these individual contracts are certainly below market price because a number of these venues have been partly financed by the State, and are contractually bound to provide some capacity at fixed rates.

- (284) The average rate can be used to approximate the maximum aid amount which could be involved in relation to the lease agreements. For the old lease agreement, the approach would entail an hourly aid element equal to NOK 1 200 – NOK 908 = NOK 292. The annual aid amount would then be approximately NOK 3,6 million ⁽¹⁶²⁾. For the new lease agreement, that would entail that the hourly aid element would be NOK 1 700 – NOK 908 = NOK 792. The annual aid amount would then be approximately NOK 17 million.
- (285) According to information from the Norwegian authorities, the annual costs and expenses of TS amount to approximately NOK 60 million in 2020. That would lead to an operating aid intensity of approximately 28 %.
- (286) The annual operating aid allows TS to cover its operating losses. Any reduction of the aid inherent in the lease agreement would have led to TS not breaking even, currently and in the past.
- (287) The Norwegian authorities have submitted that the income from the lease agreements finance in part TS's construction. The Norwegian authorities cannot attribute a fixed portion to a specific category of expenses but consider that one could assign the total aid element under the lease agreement to TS's financial expenses, which predominantly relate to the construction loan from Nordea. Those are projected to be between NOK 19,8 and NOK 15,3 million in the period 2020 to 2026, thus almost completely absorbing any aid element in the new lease agreement ⁽¹⁶³⁾.

8.5.2. *Capital injection (measure 6)*

- (288) As stated in recital 216 above, the Authority finds that the capital injection constitutes an advantage to TS, corresponding to the full amount of the capital increase. In addition, TS has received NOK 27,5 million investment aid under the Gaming Fund scheme ⁽¹⁶⁴⁾. The total amount of investment aid granted to TS is therefore NOK 82,5 million.
- (289) According to information from the Norwegian authorities, the renovation and extension of Trondheim Spektrum could not have been finalised in the absence of the capital injection. The Authority further notes that the largest share of the cost of the upgrade of the infrastructure is financed through a private loan.
- (290) The Authority further notes that according to Article 55 GBER, aid to sports and multifunctional recreational infrastructures is deemed to be compatible with the EEA Agreement and exempt from notification given that all relevant conditions are fulfilled under the Regulation. However, the GBER is not applicable in the present case as described in section 8.1.1.
- (291) Nevertheless, the aid intensities allowed under Article 55 GBER can be viewed as guidance to some extent, supporting the Authority's assessment regarding the proportionality of the measures assessed in the present decision.
- (292) Under Article 55 GBER, both sport and multifunctional recreational infrastructures can receive investment aid of up to EUR 30 million (approximately NOK 315 million), and sport infrastructure is eligible to receive EUR 2 million (approximately NOK 21 million) per year in operating aid. For aid not exceeding that amount, the maximum amount of aid may be set at 80 % of eligible cost ⁽¹⁶⁵⁾.
- (293) The investment aid of NOK 82,5 million granted to TS would therefore be within what is permitted under the GBER for multifunctional infrastructure.
- (294) Trondheim Spektrum is considered to be multifunction recreational infrastructure and would therefore not be eligible for operating aid under the GBER. However, as stated above, the maximum aid amount and intensities under the GBER can be of help in the proportionality assessment directly under Article 61(3)(c) of the EEA Agreement.

⁽¹⁶²⁾ As stated in paragraph 120 of the opening decision, the Authority's assessment in the decision is limited to potential aid granted through the lease agreements concluded from 2007 to 2017.

⁽¹⁶³⁾ Document No 1040641, pp. 14–15, and Document No 1085422, pp. 27 to 31.

⁽¹⁶⁴⁾ As stated in paragraphs 90 to 91 of the opening decision, the Authority considers that the funds granted to TS under the Gaming funds are existing aid. However, the Authority will take into account the contribution from the Gaming funds in a compatibility assessment it may carry out in relation to the measures included in the scope of the opening decision.

⁽¹⁶⁵⁾ As long as the total costs of the project does not exceed EUR 100 million per project in line with Article 4(1)(bb) GBER.

- (295) The estimation of any aid element inherent in the lease agreements would be within the limits of operating aid that could be granted to sport infrastructure under Article 55 GBER, and would cover less than 80 % of the eligible cost ⁽¹⁶⁶⁾. The same would apply for the new and the past lease agreements.
- (296) Accordingly, the Authority considers that the measures assessed – the capital injection (measure 6) and any aid inherent in the lease agreements (measures 4 and 5) – are limited to the minimum necessary to achieve the objective of common interest, and are therefore proportionate.

8.6. AVOIDANCE OF UNDUE NEGATIVE EFFECTS ON COMPETITION AND TRADE

- (297) For state aid to be compatible with the functioning of the EEA Agreement, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Contracting Parties must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest.
- (298) The Norwegian authorities submit that Trondheim Spektrum is in its present form a cornerstone of the sports and cultural offer available in Trondheim, in particular as regards free amateur sports, which the Municipality provides through equipping the youth sports clubs with hall capacity free of cost.
- (299) Furthermore, the Norwegian authorities have submitted reports demonstrating, by the separation of accounts between the activities under the lease agreements and other commercial activities, that any aid is used to finance activities of a local character.
- (300) The Norwegian authorities have noted that private investment into facilities such as Trondheim Spektrum is rare and in any event insufficient, and the aid would therefore not be able to crowd out private investment. The Norwegian authorities have further provided information demonstrating that TS does not undercharge its commercial users ⁽¹⁶⁷⁾.
- (301) Trondheim Spektrum has the capacity to host mid-sized and large international events, which may also be held outside the region ⁽¹⁶⁸⁾.
- (302) However, the Authority notes that the measures are limited to cover the funding gap at issue. Further, large parts of the capacity of the infrastructure are dedicated to providing youth sports clubs with free access to facilities which encourages the participation of children and youth in sport activities, irrespective of the income level of individual families ⁽¹⁶⁹⁾.
- (303) Trondheim Spektrum will ensure the general public's increased access to and practice of sports and culture, particularly considering the infrastructure's multifunctional character and the lack of capacity and adequate alternative facilities for sports and cultural events in Trondheim. The Municipality will be fulfilling its responsibility to the general public by making the infrastructure project possible and thereby attracting additional cultural, musical and sports events to Trondheim.
- (304) In the light of the above, the Authority finds that the measures do not cause undue negative effects on competition and trade.

8.7. TRANSPARENCY

- (305) The Norwegian authorities will publish the required information regarding the measures in the Norwegian aid register: <https://data.brreg.no/rofs/eng>. The transparency requirement is thus fulfilled.

9. CONCLUSION ON COMPATIBILITY

- (306) On the basis of the foregoing assessment, the Authority considers that the capital injection granted on 5 December 2018 constitutes state aid with the meaning of Article 61(1) of the EEA Agreement. This aid is compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c).

⁽¹⁶⁶⁾ According to the Norwegian authorities, TS's operating expenses amount to approximately NOK 25 million.

⁽¹⁶⁷⁾ Document No 1040641, pp. 15–16, and Document No 1085422, p. 31.

⁽¹⁶⁸⁾ Document No 859501, p. 22.

⁽¹⁶⁹⁾ The lease agreement accounts for approximately 57 % of TS's use of available capacity. Document No 1040641, p. 7.

(307) On the basis of the foregoing assessment, the Authority cannot exclude that the lease agreements concluded between 2007 and 2017 and the new lease agreement of 2019 constitute state aid with the meaning of Article 61(1) of the EEA Agreement. However, such aid is compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c),

HAS ADOPTED THIS DECISION:

Article 1

Any aid inherent in the lease agreements from 2007 to 2017 and the new lease agreement of 2019 is deemed compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c). The implementation of the new lease agreement of 2019 is authorised accordingly.

Article 2

The capital injection granted on 5 December 2018 constitutes state aid within the meaning of Article 61(1) of the EEA Agreement. The aid measure is deemed compatible with the functioning of the EEA Agreement, pursuant to its Article 61(3)(c).

Article 3

The financing of infrastructure costs related to the renovation and extension of Trondheim Spektrum does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

Article 4

The loan agreement between Trondheim Spektrum AS and Nordea does not entail state aid within the meaning of Article 61(1) of the EEA Agreement.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English language version of this decision is authentic.

Done in Brussels, 28 November 2019.

For the EFTA Surveillance Authority,

Bente ANGELL-HANSEN
The President
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