JUDGMENT OF THE COURT
8 October 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Maritime transport – Article 61(1) EEA – Article 59(2) EEA – Services of general economic interest – Public service compensation – Overcompensation – Principle of good administration – Legal certainty – Obligation to state reasons)

In Joined Cases E-10/11 and E-11/11,

Hurtigruten ASA (Case E-10/11), ("Hurtigruten") represented by Siri Teigum and Odd Stemsrud, advocates, for Hurtigruten ASA, Oslo, Norway, and

Kingdom of Norway (Case E-11/11), represented by Ketil Bøe Moen, advocate, Attorney General (Civil Affairs), and Beate Gabrielsen, Adviser, Ministry of Foreign Affairs, acting as Agents,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Fiona Cloarec and Gjermund Mathiesen, Officers, Legal and Executive Affairs, acting as Agents,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten service,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the European Commission ("the Commission"), represented by Davide Grespan and Margarida Afonso, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of the Kingdom of Norway, represented by Magnus Schei and Ketil Bøe Moen; Hurtigruten ASA, represented by Siri Teigum; the EFTA Surveillance Authority ("ESA"), represented by Fiona Cloarec and Xavier Lewis; and the Commission, represented by Margarida Afonso and Davide Grespan, at the hearing on 18 April 2012,

gives the following

Judgment

Legal context

1 Article 59(2) EEA provides the following:

> *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

2 Article 61(1) EEA provides the following:

> *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 the Contracting Parties, be incompatible with the functioning of this Agreement.*

3 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

4 Article 5 of Part II of Protocol 3 to the SCA reads as follows:

1. Where the EFTA Surveillance Authority considers that information provided by the EFTA State concerned with regard to a measure notified pursuant to Article 2 of this Chapter is incomplete, it shall request all necessary additional information. Where an EFTA State responds to such a request, the EFTA Surveillance Authority shall inform the EFTA State of the receipt of the response.

2. Where the EFTA State concerned does not provide the information requested within the period prescribed by the EFTA Surveillance Authority or provides incomplete information, the EFTA Surveillance Authority shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned, or the EFTA State concerned, in a duly reasoned statement, informs the EFTA Surveillance Authority that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) of this Chapter shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the EFTA Surveillance Authority shall inform the EFTA State thereof.

Facts

5 Hurtigruten operates maritime transport services consisting of the combined transport of persons and goods along the Norwegian coastline from Bergen in the south to Kirkenes in the north.

6 The operation of the service from 1 January 2005 to 31 December 2012 was the subject of a tender procedure initiated in June 2004. The only bidders were Ofotens og Vesteraalens Dampskipsselskap ASA and Troms Fylkes Dampskipsselskap. These two companies signed a contract with the Norwegian authorities on 17 December 2004 for the provision of the public service of maritime transport (the "2004 Agreement"). The two companies merged in March 2006 to form Hurtigruten ASA, which now operates the service.

7 Under the 2004 Agreement, the public service obligation was defined. The operator of the service of general economic interest serves 34 predetermined ports of call throughout the year. It is required to operate 11 vessels approved by the Norwegian authorities in advance, and to observe certain maximum prices on the "distance passenger" routes. The ships must carry a minimum of 400

passengers and 150 europalettes of cargo and have at least 150 berths. The ships should offer catering including both hot and cold meals. In addition, Hurtigruten is also a commercial operator offering round trips, excursions and catering on the Bergen-Kirkenes route. Pursuant to the 2004 Agreement, Hurtigruten may not increase ticket prices for the service of general economic interest beyond increases in the consumer price index, but is free to set its prices for commercial activities, such as for round trips, cabins, catering and the transport of cars and goods. It also operates a number of other different cruises visiting various European countries.

8 For the services covered by the 2004 Agreement, the Norwegian authorities agreed to pay a total compensation of NOK 1 899.7 million (2005 prices) over the eight years of the agreement with an automatic increase based on a set price index.

9 Article 7 of the 2004 Agreement establishes an obligation to provide separate accounts and relevant information. Article 8 of the 2004 Agreement contains a revision clause. The revision clause reads as follows:

> *Official acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee are grounds for either of the contracting parties to demand a renegotiation about extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures. In such negotiations, the other party shall be entitled to access all necessary documentation*.

10 In the face of financial difficulties experienced by Hurtigruten, the 2004 Agreement was renegotiated. The Norwegian Government stresses that during these renegotiations of the 2004 Agreement, initiated by Hurtigruten, it became increasingly clear in the autumn of 2008 that the company faced severe financial difficulties and that there was a risk of non-performance of the public service obligation.

11 The new agreement was concluded on 27 October 2008 (the "2008 Agreement"). It contained three measures which were expected to expire with the main Agreement on 31 December 2012. First, Hurtigruten was reimbursed a large part of the NOx tax for 2007 and its contributions to the NOx fund for 2008 onwards. Second, it was granted general compensation of NOK 66 million for 2008 and onwards, provided that the company's profitability in connection with the service of general economic interest did not improve considerably and on condition that the general compensation would be necessary to ensure the coverage of costs related to the Norwegian State's acquisition of the service of general economic interest. Third, it was permitted to take one of the 11 vessels out of service during the winter without any reduction in the remuneration for the services provided under the Agreement.

12 By letter of 26 November 2008, the Norwegian authorities informed ESA about the renegotiation of the 2004 Agreement.

13 On 29 June 2010, the Norwegian authorities initiated a tender procedure for the Bergen-Kirkenes route for a period of eight years from 1 January 2013 at the latest. Subsequently, the Norwegian authorities informed ESA that a new contract for the provision of the service from 1 January 2012 to 31 December 2019 was signed with Hurtigruten on 13 April 2011.

14 By letter of 14 July 2010, ESA informed the Norwegian authorities that it had decided to open the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 to the SCA ("Protocol 3 SCA") in respect of the additional payments to Hurtigruten in 2008.

15 The decision to initiate the formal investigation procedure (Decision 325/10/COL) was published in the Official Journal of the European Union and the EEA Supplement thereto.

16 By letter of 30 September 2010, the Norwegian authorities forwarded their comments to ESA. Additional emails were sent by the Norwegian authorities on 15 April 2011, 4 May 2011 and 6 May 2011.

17 On 29 June 2011, ESA adopted Decision 205/11/COL ("the contested decision").

The contested decision

18 In the contested decision, ESA concluded that the three measures provided for in the 2008 Agreement constituted State aid that was incompatible with the functioning of the EEA Agreement in so far as they constitute a form of overcompensation for public service, and ordered the recovery of the aid.

19 The three measures in question are described in the contested decision as follows:

> *1. [R]eimbursement of 90% of the so-called NOx tax for 2007 and 90% of the contributions to the NOx Fund from January 2008 onwards for the remaining duration of the [2004] Agreement, i.e. until 31 December 2012;*
>
> *2. [A] "general compensation" NOK 66 million was granted for 2008 due to the weak financial situation of Hurtigruten resulting from a general increase in costs for the service provided. A general compensation is provided for annually for the remaining duration of the contract, i.e. until 31 December 2012, provided the financial situation of the company related to the public service does not significantly improve; and*
>
> *3. [A] reduction in the number of ships from 11 to 10 in the winter season (from 1 November to 31 March) until the [2004] Agreement expires, without reducing the remuneration for the service as foreseen under the*

> *provisions of the [2004] Agreement. This reduced service is intended to continue throughout the remaining duration of the [2004] Agreement, i.e. until 31 December 2012.*

20 On page 7 of the contested decision, ESA notes that "[t]he Norwegian authorities maintain that the measures taken in October 2008 were emergency measures adopted to remedy the acute difficult economic situation of Hurtigruten in 2008, to ensure continuous service in the interim period until a new tendering procedure could be finalised, and in doing so, they acted like a rational market operator ... . Alternatively, in case the Authority were to find that the three measures do constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian authorities put forward that the measures constitute necessary compensation for a public service obligation in accordance with Article 59(2) of the EEA Agreement".

21 In the contested decision, ESA concluded that the three measures taken together must be assessed as an aid scheme as "they entail an additional remuneration mechanism in favour of Hurtigruten that extends its application from 2007 until the expiry of the contract, originally foreseen for 31 December 2012".

22 On page 20 of the contested decision under the heading "procedural requirements", section 2 of ESA's assessment, ESA noted that the aid was not notified as required by Article 1(3) of Part I of Protocol 3 SCA.

23 In the contested decision, ESA found that the measures in question involved, at least in part, public service compensation. As such, the measures constituted an advantage conferred on an undertaking which could not be justified by the private investor principle.

24 ESA considered that the scheme did not satisfy the criteria laid down by the Court of Justice of the European Union ("ECJ") in Case C-280/00 *Altmark* [2003] ECR I-7747 which explicitly clarifies what can and cannot be considered as State aid within the realm of public service compensation.

25 In order to satisfy those criteria, ESA noted that the beneficiary had to be chosen in a public tender. Alternatively, the compensation could not exceed the costs of a well-run undertaking adequately equipped with the means to provide the public service. Moreover, this had to be read in the light of the requirement that the parameters for calculating the compensation payments must be established in advance in an objective and transparent manner.

26 ESA observed that Hurtigruten was chosen as a public service provider following a public procurement procedure in 2004 and concluded that the revision clause was part of the public tender procedure. However, on its assessment, the measures provided for in the 2008 Agreement based on the revision clause were not covered by the original tender.

27 ESA rejected the argument of the Norwegian authorities that the measures did not entail any substantial amendment to the 2004 Agreement and concluded that the State's remuneration in favour of Hurtigruten had been substantially increased, which, in principle, should have triggered a call for a new tender procedure.

28 On page 15 of the contested decision, ESA found that it "does not necessarily hold that any extraordinary compensation granted under a renegotiation clause of a contract that has been put out to tender will fail to clear the fourth *Altmark* criterion and hence involve state aid. However, Article 8 [of the 2004 Agreement] does not ... provide objective and transparent parameters on the basis of which the compensation in the form of the three measures was calculated in line with the requirement of the second *Altmark* criterion". That provision merely gave Hurtigruten the right to initiate renegotiations under certain conditions. Furthermore, according to ESA, the clause did not provide specific guidance on how extra compensation should be calculated. The application of the clause appeared to depend largely on the discretion of the Norwegian authorities and the negotiating skills of the parties concerned.

29 In that regard, ESA noted that the Norwegian authorities did not present any parameters for the calculation of the compensation granted by the three measures, but made reference to the weak financial position of Hurtigruten.

30 In order to substantiate its contention that, for the purposes of Article 59(2) EEA, Hurtigruten had not been excessively compensated for the provision of a public service, the Norwegian authorities provided ESA with three consultants' reports, the PWC Report of 14 October 2008 (the "PWC Report") and two from BDO Noraudit, its report of 23 March 2009 (the "first BDO Report") and its report of 27 September 2010 (the "second BDO Report").

31 ESA referred to the three reports presented by the Norwegian authorities in the course of the proceedings prior to the adoption of the contested decision. In the contested decision these reports form the basis for ESA's conclusion that the three measures involved overcompensation – that is, the compensation was not limited to the increased cost of providing the public services – and did not clarify the parameters used to determine those costs.

32 As regards the fourth *Altmark* criterion, ESA observed that the Norwegian authorities did not provide any information to substantiate that the compensation was calculated on the basis of costs that a typical undertaking would have incurred.

33 As a result, on page 17 of the contested decision, ESA concluded that neither the second nor the fourth *Altmark* criteria was satisfied.

34 As regards the third *Altmark* criterion, which requires that compensation may not exceed the cost incurred in the discharge of the public service taking into account the revenues earned through the provision of the service and a reasonable profit

in that regard, ESA noted in the contested decision that the reports provided by the Norwegian authorities indicated that the three measures provided for in the 2008 Agreement also served to compensate the costs of activities outside of the public service remit. The second BDO Report indicated that the measures also covered increased costs that did not reflect radical changes that could not reasonably have been foreseen within the meaning of Article 8 of the 2004 Agreement.

35 Moreover, ESA noted that Hurtigruten did not implement separate accounts for the public service and commercial activities. It determined that the reports applied unrepresentative hypothetical costs and revenues where the real costs and revenues were known. Therefore, it concluded that the third *Altmark* criterion was not met.

36 Following its analysis of the *Altmark* criteria, ESA concluded in section 1.3.3.3 of the contested decision that, as three of the four *Altmark* criteria were not met and as only one of the criteria need not be satisfied for State compensation for the provision of a public service to constitute State aid, the three measures could not be held to not confer an advantage on Hurtigruten within the meaning of Article 61 EEA.

37 Finally, ESA found that the new agreement was a selective measure liable to distort competition and affect intra-EEA trade.

38 In section 3 of the contested decision, "Compatibility of the aid", on page 20, ESA noted that "[t]he Norwegian authorities invoke Article 59(2) of the EEA Agreement and maintain that the measures constitute necessary compensation for public service obligation within the framework of the Authority's guidelines on aid to maritime transport and the general principles of public service compensation. Furthermore, they have invoked Article 61(3)(c) and claim that the measures under scrutiny can be deemed compatible with the EEA Agreement as restructuring measures under the [guidelines on State aid for rescuing and restructuring firms in difficulty]."

39 In section 3.3.1 of Part II of the contested decision, ESA held that "[t]he Norwegian authorities have referred to the financial situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement ... ."

40 In its assessment of the public service compensation for the purposes of Article 59(2) EEA, ESA referred to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to

maritime transport within Member States (maritime cabotage), incorporated as point 53a in Annex XIII to the EEA Agreement, ESA's Guidelines on aid to maritime transport, and ESA's Guidelines for State aid in the form of public service compensation.

41 In that regard, ESA concluded that the Hurtigruten Service provided under the 2004 Agreement constitutes a service of general economic interest and that Hurtigruten had been entrusted with the provision of that service. Consequently, two out of three requirements for public service compensation are fulfilled.

42 Third, ESA noted, "the amount of compensation must be granted in a transparent manner, and be proportionate in the sense that it shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations including a reasonable profit".

43 ESA then noted that the Hurtigruten Agreement was concluded on the basis of a public tender, something which usually ensures that no aid is involved in the ensuing contract. However, when granting aid in the form of public service compensation, the Norwegian authorities must ensure that that aid is compatible with the rules applicable to such aid. Importantly, when the aided undertaking carries out activities falling outside the public service remit, the commercial activities must carry an appropriate share of the fixed costs common to both types of activities.

44 In ESA's assessment, the 2008 Agreement does not fulfil this criterion, as the amount of compensation for the operating costs of the public service shows an inconsistent approach to fixed common costs. There is no separation of the accounts for the public service and other commercial activities, and the compensation is based on unrepresentative hypothetical costs and revenues where the real costs and revenues are known.

45 On the inconsistent approach, ESA found that in cases where public service providers carry out commercial activities besides the public service, the commercial activities must, as a general principle, carry a proportionate share of fixed common costs. Only exceptional circumstances can justify deviations from this principle. ESA concludes that "[t]he Authority cannot see that Hurtigruten is in such an exceptional position. Even if it may be argued that separating the fixed common costs of Hurtigruten's activities inside and outside the public service remit may not always be a straightforward task, separation based on i.a. the revenue stemming from the turnover of the two forms of activities is indeed possible."

46 Further, ESA notes that, in the reports, "several categories of such costs are fully allocated to the public service side (i.a. harbour charges, maintenance, fuel [less the Geirangerfjorden consumption]) ... Due to the insufficient allocation of fixed common costs, the Authority cannot conclude that the two first methods of the PWC Report or the two BDO Reports demonstrate that the three measures do not involve over-compensation for the public service."

47 On page 24 of the contested decision, ESA concluded that "[t]he absence of separate accounts for public service activities and other commercial activities, the inconsistent approach to cost allocation and the reliance on unrepresentative hypothetical (and not actually incurred) costs, entails that the Authority cannot conclude that the three measures do not involve any over-compensation. On this basis, the Authority concludes that the three measures cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of its Article 59(2)."

48 As for the possibility that the aid constitutes restructuring aid under Article 61(3)(c) EEA, ESA concluded in section 3.3 of the contested decision that the measures did not fulfil the necessary criteria for restructuring aid under the guidelines on State aid for rescuing and restructuring firms in difficulty (the "Rescue and Restructuring Guidelines"), mainly due to the lack of a credible restructuring plan at the time when the aid was granted.

49 On page 25 of the contested decision ESA concludes:

"The Norwegian authorities have referred to the financial situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement. In the Authority's view, this argument cannot be assessed as rescue aid under Article 61(3)(c) and the Rescue and Restructuring Guidelines, as rescue aid under the guidelines is by nature a temporary and reversible assistance. The three measures are not."

50 As regards the restructuring plan, ESA takes the following view on page 27 of the contested decision:

"[T]he material existence of a restructuring plan at the time when an EFTA State grants aid is a necessary precondition for the applicability of the Rescue and Restructuring Guidelines. The EFTA State granting the aid has to possess 'when the disputed aid was granted, a restructuring plan meeting the requirements [of the Rescue and Restructuring Guidelines]'.

In line with the Rescue and Restructuring Guidelines, had the three measures been granted as restructuring aid, the Norwegian authorities should have had a restructuring plan for Hurtigruten at the latest when they made the payment of 125 million NOK in December 2008. The information provided by the Norwegian authorities does not show that the Norwegian authorities were in the position to verify whether a restructuring plan was viable or whether it was based on realistic assumptions, as required under the Rescue and Restructuring

Guidelines. The Authority thus concludes that the aid to Hurtigruten was granted without a restructuring plan being available to the Norwegian authorities."

51 Furthermore, ESA notes on pages 27 and 28 of the contested decision that "the documents submitted do not meet the condition set out in the Rescue and Restructuring Guidelines. In particular, they do not in any detail describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing the appropriateness of the aid measures, and the memoranda did not include a market survey as required by the Guidelines."

52 On the basis of its assessment, ESA considered that the three measures were incompatible with the EEA State aid rules.

53 Under the heading Recovery, on page 29 of the contested decision, ESA notes the following:

> *The Authority must respect the general principle of proportionality when requiring recovery. In accordance with the aim of the recovery and the principle of proportionality, the Authority will only require recovery of the portion of the aid that is incompatible with the functioning of the EEA Agreement. Part of the payments made under the three measures can be considered compatible as a compensation for the provision of a public service obligation. Thus, only the portion of the payments under the three measures that constitutes over-compensation shall be recovered.*
>
> *The Norwegian authorities are invited to provide detailed and accurate information on the amount of over-compensation granted to Hurtigruten. To determine how much of the payments can be held to be compatible with the functioning of the EEA Agreement on the basis of its Article 59(2) as public service compensation, due account must be taken of the general principles applicable in this field, and in particular the following:*
>
> > *(i) there needs to be a proper allocation of cost and revenue for the public service and the activities outside the public service remit,*
> >
> > *(ii) the public service compensation cannot cover more than a proportionate share of fixed costs common to the public service and the activities outside the public service remit, and*
> >
> > *(iii) the calculation of the public service compensation cannot be based on unrepresentative hypothetical costs where real costs are known.*
>
> *In this context, it is important to recall that in accordance with point 22 of the Public Service Compensation Guidelines, any amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the EEA Agreement on the basis of other provisions or guidelines unless authorised.*

54 Articles 1 to 4 of the operative part of the contested decision read as follows:

> *Article 1*
>
> *The three measures provided for in the Supplementary Agreement constitute state aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement in so far as they constitute a form of over-compensation for public service.*
>
> *Article 2*
>
> *The Norwegian authorities shall take all necessary measures to recover from Hurtigruten the aid referred to in Article 1 and unlawfully made available to Hurtigruten.*
>
> *Article 3*
>
> *Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Hurtigruten until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.*
>
> *Article 4*
>
> *By 30 August 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.*
>
> *By 30 October 2011, Norway must have executed the Authority's decision and fully recovered the aid.*

Procedure and forms of order sought

55 By an application lodged at the Registry of the Court on 29 August 2011 as Case E-10/11, Hurtigruten brought an action under the first paragraph of Article 36 SCA for annulment of the contested decision.

56 By an application lodged at the Registry of the Court on 29 August 2011 as Case E-11/11, the Kingdom of Norway likewise brought an action for the annulment of the contested decision.

57 Hurtigruten claims that the Court should:

> *(i) annul the contested decision;*

(ii) in the alternative, declare void Articles 2, 3 and 4 of the contested decision, to the extent that they order the recovery of the aid referred to in Article 1 of that decision; and

(iii) order the EFTA Surveillance Authority to bear its own costs and to pay those incurred by Hurtigruten.

58 The Kingdom of Norway claims that the Court should:

(i) annul the contested decision;

(ii) order the EFTA Surveillance Authority to pay the costs of the proceedings.

59 In its defence in Case E-10/11, registered at the Court on 8 December 2011, ESA claims that the Court should:

(i) dismiss the application as unfounded; and

(ii) order the applicant to pay the costs.

60 In its defence in Case E-11/11, registered at the Court on 8 December 2011, ESA claims that the Court should:

(i) dismiss the application as unfounded; and

(ii) order the applicant to pay the costs.

61 The Kingdom of Norway submitted a reply in Case E-11/11 which was registered at the Court on 27 January 2012. ESA's rejoinder was registered at the Court on 7 March 2012.

62 The reply from Hurtigruten in Case E-10/11 was registered at the Court on 1 February 2012. ESA's rejoinder was registered at the Court on 7 March 2012.

63 By a decision of 9 February 2012, pursuant to Article 39 of the Rules of Procedure ("RoP"), and, having received observations from the parties, the Court joined the two cases for the purposes of the written and oral procedures.

64 In both Cases E-10/11 and E-11/11, pursuant to Article 20 of the Statute of the Court, the Commission submitted written observations, registered at the Court on 22 February 2012.

65 On 30 March 2012, as a measure of organisation of procedure under Article 49 RoP, the Court addressed questions to the parties, to which they replied in April 2012.

66 On 30 March 2012, as a measure of inquiry under Article 50 RoP, the Court required the parties to produce certain information. The parties complied in April 2012.

67 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Law

I – *Admissibility of certain documents*

68 According to Article 25(2) RoP, English shall be used in the written and oral part of the procedure, unless otherwise provided in those rules. According to Article 25(3) RoP, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. According to the second subparagraph of that provision, in the case of lengthy documents, translations may be confined to extracts.

69 Compliance with Article 25 RoP is a procedural requirement which may be raised by the Court on its own motion (see Case E-12/11 *Asker Brygge* v *ESA*, judgment of 17 August 2012, not yet reported, paragraph 33).

70 Consequently, an annex submitted exlusively in Norwegian is inadmissible, unless the document which refers to it contains at least an extract in English as provided for in the second paragraph of Article 25(3) RoP (see Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115).

71 In the present case the parties, in particular the applicants, have submitted a large number of annexes in Norwegian only. Additionally, some annexes are in Norwegian and English but with the main body of text in Norwegian only.

72 Annexes A7, A10, A11, A12, A14, A19, A28, A39, A40, A44, and A45, submitted by Hurtigruten in Case E-10/11 are in Norwegian only. Annexes A23, A24, A26, A33, and C12 submitted by Hurtigruten are partly in Norwegian.

73 In Case E-11/11, Annexes A4, A7, A8, A9, A10, A11, A12, A13, A27 and A28 submitted by the Kingdom of Norway are in Norwegian only. Annexes A15 and A18 submitted by the Kingdom of Norway are partly in Norwegian.

74 In Case E-10/11, ESA submitted Annexes B2 and B3 which are solely in Norwegian. In addition, Annex B6 is partly in Norwegian. Annexes B2 and B3 submitted by ESA in Case E-11/11 are only in Norwegian while Annex B6 is in both English and Norwegian. The documents in the two cases are identical and will be treated together for the purposes of admissibility.

75 As regards the annexes submitted by Hurtigruten in Case E-10/11 in Norwegian only, the application contains an extract of Annexes A10, A19, A40 and A44. These annexes are therefore admissible in so far as they have been translated, even though they have been submitted in Norwegian only. However, there is no extract or any reference to the content of Annexes A7, A11, A12, A14, A28, A39 and A45. Consequently, these annexes are inadmissible. Moreover, there is no extract of the text in Norwegian in Annexes A23, A24, A26 and A33. Therefore, these annexes are inadmissible in so far as the Norwegian text is concerned.

76 In relation to the annexes submitted by the Kingdom of Norway in Case E-11/11 in Norwegian only, the application contains an extract of Annex A7 on page 8. This annex is therefore admissible in so far as it has been translated, even though it has been submitted in Norwegian only. However, there is no extract or any reference to the content of Annexes A4, A8, A9, A10, A11, A12, A13, A27 and A28. Consequently, these annexes are inadmissible. Moreover, there is no extract of the text in Norwegian in Annexes A15 and A18. Therefore, these annexes are inadmissible in so far as the Norwegian text is concerned.

77 As regards the annexes submitted by ESA, the Court notes that there is no extract of the text in Norwegian in Annex B6. Therefore, this annex is inadmissible in so far as the Norwegian text is concerned. Annexes B2 and B3 must be treated in a different way. English translations of these documents have been submitted by the applicants. Therefore, in the interests of procedural economy, it is unnecessary for the defendant to submit its own translation of a document already provided in the English language in the application. Therefore, Annexes B2 and B3 are admissible as such but the Court will rely on the translation submitted by the applicants.

78 Pursuant to Article 37 RoP, a party may offer further evidence in reply or rejoinder. The party must, however, give reasons for the delay in offering it.

79 Compliance with Article 37 RoP is a procedural requirement which may be raised by the Court on its own motion (*Asker Brygge* v *ESA*, cited above, paragraph 30).

80 In the rejoinder in Case E-10/11, ESA requests that Annex C12 to the reply of Hurtigruten should be declared inadmissible, since the evidence has been offered in the reply without valid reasons for the delay. Hurtigruten claims that it expected ESA to submit the document in the defence. ESA maintains that this argument cannot suffice to render that annex admissible.

81 In that respect, it must be noted that direct actions pursuant to Article 36 SCA are *inter partes.* According to Article 32 RoP, parties are obliged to annex a file to every pleading which contains the documents relied on in support of it. In the light of those rules, a party cannot invoke the failure of the opposing party to submit a certain document in its defence as a reason why further evidence is offered in reply.

82 It follows from the foregoing that Annex C12 to the reply of Hurtigruten is inadmissible.

83 Pursuant to Article 37 RoP, the references made by Hurtigruten in its reply to its 2007 Annual Report are inadmissible, as it was submitted in the reply without any reasons being given why it was submitted only at this stage of the written procedure.

84 Similarly, Annex C1 to the reply of Norway is inadmissible, since it has been submitted in the reply without any reasons being given why it was submitted only at this stage of the written procedure.

II – *Substance of the actions*

A – *Pleas in law alleging that Article 61(1) EEA is not applicable*

1. Introductory remarks

85 The derogation provided for by Article 59(2) EEA does not prevent a measure from being classified as State aid within the meaning of Article 61 EEA. Nor could it, once such a classification has been made, allow the EEA State concerned not to notify the measure pursuant to Article 1(3) of Part I of Protocol 3 SCA (see, for comparison, Case C-172/03 *Wolfgang Heiser* [2005] ECR I-143, paragraph 51).

86 Without prejudice to Articles 1, 49, 59 and 61 EEA and Part I of Protocol 3 SCA, in the light of the common values of the EEA States and the place occupied by services of general economic interest in promoting social and territorial cohesion, the EEA States have the right to ensure that such services are able to fulfil their missions when acting within the scope of the EEA Agreement.

87 It is common ground between the parties that the concept of public service obligation referred to in the *Altmark* judgment is fully applicable to the service of general economic interest addressed by the contested decision and that the latter constitutes a service of general economic interest in the meaning of Article 59(2) EEA.

88 In that judgment, the ECJ established that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, such that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 61(1) EEA.

89 However, for such compensation to escape classification as State aid in a particular case a number of conditions must be satisfied.

90 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (the "first *Altmark* criterion").

91 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

92 Payment by an EEA State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 61(1) EEA (the "second *Altmark* criterion").

93 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position (the "third *Altmark* criterion").

94 Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (the "fourth *Altmark* criterion").

95 In the present proceedings, it has not been contested that the first criterion was complied with when the Norwegian authorities signed the 2004 and 2008 Agreements conferring upon Hurtigruten the public service obligation to operate the Bergen-Kirkenes route and subsequently provided supplementary funding through the three measures in question.

96 However, in the contested decision, ESA found that the 2008 Agreement did not fulfil the second, third and fourth criteria.

97 Norway maintains that the 2008 Agreement complies with all *Altmark* criteria.

98 Although referring explicitly only to the second and fourth criteria, Hurtigruten maintains that the 2008 Agreement was a necessary measure to cover the costs of

the company to operate the service. Therefore, Hurtigruten's plea must be interpreted as meaning that it maintains that all the criteria were satisfied.

99 Finally, it must be noted that a failure to satisfy any one of the four criteria suffices for such a measure to fall within Article 61(1) EEA, and not Article 59(2) EEA.

2. The plea in law alleging that the measure satisfies the second and fourth *Altmark* criteria

(a) Arguments of the parties

100 Norway and Hurtigruten maintain that Article 8 of the 2004 Agreement provided objective and transparent parameters within the meaning of the *Altmark* caselaw for renegotiations of the agreement in the case of unforeseeable events. They assert that the purpose of the renegotiation clause is to restore the economic equilibrium of the contract, as if the unforeseeable events had not occurred.

101 Norway maintains that renegotiation as such is allowed, as shown by Commission Decision 2009/325/EC of 26 November 2008 on State aid C 3/08 (ex NN 102/05) – Czech Republic concerning public service compensations for Southern Moravia Bus Companies (OJ L 97, 16.4.2009, p. 14). In that case, renegotiation of the contract was accepted by the Commission. In Norway's view, ESA made a manifest error of assessment when it opted for a more formalistic approach than that taken by the Commission in the *Southern Moravia* decision.

102 According to Norway, this possibility to renegotiate is confirmed by national law, in particular Section 36 of the Norwegian Contract Act of 1918. Moreover, the compensation provided under the 2008 Agreement was limited to the actual increased costs. Were this not to be allowed, it would imply a prohibition on the use of all traditional renegotiation clauses. Therefore, in Norway's view, ESA made a manifest error of assessment when it found that the 2008 Agreement did not comply with the second *Altmark* criterion.

103 In their replies, Norway and Hurtigruten stress that Article 8 of the 2004 Agreement must be interpreted in accordance with Norwegian law, in particular Section 36 of the Norwegian Contract Act of 1918, and the UNIDROIT Principles of International Commercial Contracts 2010, in particular Articles 6.2.2 and 6.2.3.

104 According to the applicants, the purpose of these hardship provisions is to impose a duty to renegotiate a contract when certain conditions are met in order to re-establish the equilibrium between the parties. Under national law and the principles of international contract law, this is something that the parties to the contract need to negotiate between themselves in order to re-establish the balance between the parties. Moreover, not each and every provision in a contract must be entirely clear in the sense that the outcome is precisely determined.

105 In its reply, Norway claims that the relevant test must be whether the payments granted go beyond actual costs. If additional compensation does not exceed the actual cost of the unforeseeable event which triggers the renegotiation and those events do not relate to the efficiency of the company, the renegotiation clause and the compensation satisfy all the *Altmark* criteria. The decisive element is whether the compensation scheme as such provides the necessary objectivity and transparency. In Norway's view, the approach of ESA towards hardship clauses is stricter than that of the Commission in public procurement cases.

106 Moreover, Norway argues that the renegotiation clause is transparent in the sense that it specifies which conditions must be met in order for the right to require renegotiations to be triggered. Amongst other things, the provision stipulates that both parties are entitled to access all necessary documentation.

107 ESA, supported by the Commission, contests those arguments.

(b) Findings of the Court

Applicability of international contract law

108 That the contested decision is incompatible with international contract law and its principles is a new plea in law that must be distinguished from the allegation that ESA made an error of assessment concerning provisions of national contract law, since only the latter are mentioned in the application.

109 The same goes for the plea of Norway that the decision is vitiated by a manifest error of assessment because ESA adopted a stricter approach than the Commission does in public procurement cases.

110 According to Article 37(2) RoP, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

111 As a result, the pleas of Norway and Hurtigruten that the contested decision should be annulled because Article 8 of the 2004 Agreement is a standard hardship clause under the UNIDROIT Principles of International Commercial Contracts are inadmissible.

112 The plea of Norway that the decision is vitiated by a manifest error of assessment because ESA adopted a stricter approach than the Commission does in public procurement cases is inadmissible on the same grounds.

The second and fourth *Altmark* criteria

113 As the General Court held in Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 214, and in caselaw cited therein, a certain discretion is not in itself incompatible with the existence of objective and transparent parameters within the meaning of the second *Altmark* criterion, since

the determination of the compensation calls for an assessment of complex economic facts.

114 The Court holds that it is precisely because the determination of the compensation is normally subject to only restricted control by ESA, that the second *Altmark* criterion requires that ESA must be in a position to verify the existence of objective and transparent parameters, which must be defined in such a way as to preclude any incompatible or illegal State aid to an undertaking providing a service of general economic interest.

115 The applicants' complaint that in the contested decision ESA departed from its own practice and from that of the Commission must be rejected.

116 In that regard, it would suffice to observe that the question whether a measure constitutes State aid must be assessed solely in the context of Article 61(1) EEA and not in the light of an alleged earlier decision-making practice of ESA or the Commission (see, for comparison, Joined Cases C-106/09 P and C-107/09 P *Commission* v *Government of Gibraltar and United Kingdom*, judgment of 15 November 2011, not yet reported, paragraph 136).

117 However, that complaint also fails because the public service contract underlying the *Southern Moravia* decision is fundamentally different from the open-ended renegotiation clause in the 2004 Agreement. In *Southern Moravia*, the parameters had been established in advance, the final remuneration was based on evidence of losses and the costs actually incurred. This is clearly different from the situation in the present case where there has been no separation of accounts between the public service remit and Hurtigruten's commercial operations. The parameters for the calculation of the compensation were therefore not established beforehand in a transparent way. On the contrary, they were introduced only through the 2008 Agreement and without a direct link to the actual losses and costs incurred by Hurtigruten.

118 The arguments put forward by Norway and Hurtigruten to the effect that the contested decision must be annulled in light of the interpretation of the renegotiation clause in Article 8 of the 2004 Agreement required by national legislation, in particular Section 36 of the Norwegian Contract Act of 1918, must be rejected.

119 Such an approach would go against the structure and the purpose of the State aid rules. It cannot be accepted, since it would render the control mechanisms established under the EEA Agreement ineffective (see, for comparison, Case C-404/04 P *Technische Glaswerke Ilmenau GmbH* v *Commission* [2007] ECR I-1*, paragraphs 44 and 45). Under Article 1 of Part I of Protocol 3 SCA, ESA has sole competence, subject to review by the Court, to assess the compatibility with the functioning of the EEA Agreement of a State aid measure.

120 Moreover, the arguments that the approach chosen by ESA would prohibit all traditional renegotiation clauses *per se* as it requires the outcome of a contractual

regime to be precisely predetermined cannot succeed. Nor can those arguments succeed which relate to the actual costs incurred or the conditions which Article 8 sets out for the right to renegotiations to be triggered and concerning the access to documentation.

121 The Court recalls that, under the second *Altmark* criterion, the parameters on the basis of which public service compensation is calculated must be established in advance in an objective and transparent manner.

122 It is only logical that the assessment of State aid granted under a renegotiation clause in a public service contract, such as Article 8 of the 2004 Agreement, gives due consideration to whether the parameters of the contract as a whole are established in an objective and transparent manner, since the clause is an inherent part of the public service contract.

123 Compensation is an important element of a public service contract. Amending the compensation during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principle of transparency.

124 None the less, the Court recalls that in the context of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, incorporated as point 2 in Annex XVI to the EEA Agreement, the adjustment of prices during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract provided the adjustment is minimal and objectively justified.

125 However, the renegotiation clause in question covers only “extraordinary adjustments of the state’s remuneration, changes in the service delivered or other measures” in the case of “[o]fficial acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee”. The other provisions of the 2004 Agreement establish no parameters whatsoever on the basis of which the public service compensation is calculated. There is no information on how the payments under the 2004 Agreement have been calculated.

126 This confirms ESA’s conclusion in the contested decision that the provision in question does not lay down any parameters for the calculation of any supplementary compensation should the compensation awarded through the initial contract be deemed insufficient.

127 Moreover, in the 2004 tender, no possibility of amending the conditions for payment of the successful tenderers was provided. However, Norway could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any supplementary compensation intended to cover unforeseen losses and costs.

That way, the principle of transparency would have been observed (see, for comparison, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 126).

128 In addition, as ESA found, the clause in question does not set out any limits to any compensation that might be agreed between the parties during a renegotiation of the original agreement (see page 15 of the contested decision).

129 Were such a clause to be regarded as providing an objective and transparent basis for recalculating the necessary compensation in order to offset an established loss or lack of funding for the operation of a service of general economic interest, control of whether EEA States fulfil their obligations under Articles 59 and 61 EEA would be rendered impossible.

130 Therefore, ESA was correct to conclude in the contested decision that the result of the specific application of the renegotiation clause in Article 8 of the 2004 Agreement cannot be considered objective and transparent as a matter of EEA law in the sense required by the second and fourth *Altmark* criteria. Consequently, the present plea must be rejected.

3. The pleas related to the margin of appreciation of an EEA State

(a) Arguments of the parties

131 Hurtigruten claims that ESA committed a manifest error of law and/or fact in relation to the possibility open to the Norwegian authorities to ensure the uninterrupted provision of a service of general economic interest within the meaning of Article 59(2) EEA. Its main argument is that ESA erred in concluding that the three measures provided for in the 2008 Agreement cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of Article 59 EEA.

132 Hurtigruten maintains that, under Article 59(2) EEA, a government must be entitled to award additional compensation to an undertaking entrusted with a service of general economic interest if this additional payment is necessary in order to ensure the continued operation of the service. The fact that Hurtigruten was under an imminent threat of bankruptcy justifies the additional compensation provided for in the 2008 Agreement.

133 Hurtigruten refers, *inter alia*, to Commission Decision 2011/98/EC of 28 October 2009 on State aid C 16/08 Subsidies to CalMac and NorthLink for maritime transport services in Scotland (OJ L 45, 18.2.2011, p. 33) and submits that ESA failed to respect the discretion enjoyed by EEA States in the assessment of the existence and significance of an emergency situation. It notes that the Commission did not question the Scottish Government’s assessment regarding the risk that the entrusted undertaking might become insolvent and the need to maintain the continued operation of the service of general economic interest and, thus, respected the State’s discretion in the definition of the service.

134 Further, according to Hurtigruten, ESA failed to apply the criterion concerning anti-competitive behaviour set out by the Commission in *NorthLink & CalMac*.

135 In its reply, Hurtigruten refers to Decision 417/01/COL of 19 December 2001 on compensation for maritime transport services under the "Hurtigruten agreement" ("Decision 417/01/COL") and claims that ESA failed to take this decision into account in its assessment. In that decision, ESA used a different approach to overcompensation, and approved the separation of accounts based on business areas, which was confirmed in the 2004 and 2008 Agreements. In Hurtigruten's view, the contested decision should have addressed why ESA chose a new approach in 2010. Moreover, the contested decision does not give any reasons why, in comparison with the present case, ESA allowed a longer period for a retendering of the Hurtigruten agreement in the 2001 decision.

136 ESA contests these arguments.

(b) Findings of the Court

137 The arguments related to Decision 417/01/COL have been raised only in Hurtigruten's reply. They must be rejected as inadmissible pursuant to the second paragraph of Article 37 RoP. They constitute new pleas in law introduced in the course of the proceedings, without being based on matters of law or of fact which have come to light in the course of the procedure.

138 A plea which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application must be considered admissible (see, for comparison, Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava and Others* v *Commission* [2009] ECR II-3029, paragraph 189).

139 However, although Hurtigruten submitted Decision 417/01/COL as Annex A2 to its application, the application itself does not contain any pleas or arguments which refer to that decision. As a consequence, this plea is inadmissible.

140 As regards the margin of discretion available to the Norwegian Government to award additional compensation, it appears from the contested decision that ESA did not deny that Hurtigruten was in a difficult financial situation. Consequently, this argument must be rejected.

141 As for the criterion of anti-competitive behaviour, which Hurtigruten claims should have been addressed by ESA in the contested decision in the assessment under Article 59(2) EEA, it must be noted that Hurtigruten cannot criticise the defendant for not having examined the specific effects on competition of the aid in question. That argument lacks any factual basis, as is apparent from pages 19 and 20 of the contested decision. It must also be noted that the 2004 Agreement gives Hurtigruten a full monopoly on the service in question.

142 ESA was not required to carry out a detailed economic analysis of the figures since it had explained the respects in which the effect on trade between EEA States was obvious. Nor was it required to demonstrate the real effect of aid which had not been notified. If it were required to demonstrate the real effect of aid which had already been granted, that would ultimately favour those EEA States which grant aid in breach of the duty to notify laid down in Article 1(3) of Part I of Protocol 3 SCA to the detriment of those which do notify aid at the planning stage (see, for comparison, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33). As a result, the argument must be rejected.

143 Consequently, the present plea must, in part, be declared inadmissible and, in part, be rejected.

4. The pleas in law alleging that the measure satisfies the third *Altmark* criterion and that there has been no overcompensation for the purposes of Article 59(2) EEA

144 In the contested decision, ESA refers to its findings in relation to Article 59(2) EEA to demonstrate that there has been overcompensation and that the third *Altmark* criterion has not been satisfied. The applicants contest that assessment. They contend that the third *Altmark* criterion is satisfied and deny any overcompensation for the purposes of Article 59(2) EEA. Consequently, the evidence and arguments relating to the pleas in law alleging that the measure satisfies the third *Altmark* criterion and that there has been no overcompensation for the purposes of Article 59(2) EEA will be assessed together.

(a) Arguments of the parties

145 Hurtigruten argues that the assessment in the contested decision is vitiated by a manifest error in law, since the additional compensation provided under the 2008 Agreement reflects the cost changes which may be addressed by means of the renegotiation clause.

146 Moreover, in its view, when assessing whether the 2008 Agreement can be declared compatible State aid under Article 59(2) EEA, it is irrelevant whether or not the Hurtigruten service was tendered. Otherwise, the legal procedure chosen to conclude the 2004 Agreement would determine whether the 2008 Agreement may be regarded as compatible aid under Article 59(2) EEA.

147 As regards the issue of overcompensation itself, Hurtigruten maintains that ESA incorrectly interpreted the allocation models in the three reports and contends that the reports contain a proper allocation method. Taken together, these circumstances demonstrate that there is no overcompensation. In any case, Hurtigruten claims that the absence of overcompensation is clear from the BDO Report of 16 August 2011 providing a financial analysis of the coastal route 2005-2010 (the “third BDO Report”), which provides an allocation model accepted by ESA.

148 Norway, on the other hand, maintains that the requirement established in the 2004 Agreement, namely, that in the event of renegotiation both parties must have access to all necessary documentation, ensures that it is only the actual costs which are reimbursed under the renegotiation clause. In addition, as regards the assessment of overcompensation by ESA in the contested decision, Norway argues that ESA made a manifest error of assessment in regard to the allocation models presented in the reports.

149 ESA, supported by the Commission, contests these arguments.

(b) Findings of the Court

150 Normally, EEA States enjoy a discretion in defining a service of general economic interest mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts. The scope of the control which ESA is entitled to exercise in that regard is limited to one of manifest error. It follows that the Court's review of ESA's assessment in that regard must observe the same limit and that, accordingly, its review must be confined to ascertaining whether ESA properly found or rejected the existence of a manifest error by the EEA State (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 220, and caselaw cited).

151 In the present case, it appears from the contested decision, however, that ESA found the 2008 Agreement not to comply with the criterion of transparency.

152 Moreover, it is clear from the case-file that at Hurtigruten there was never any clear separation of accounts between the public service operations and the commercial operations. Thus, there was no complete, transparent and objective information available as to the costs and revenues of the public service operations. This has not been contested by the applicants.

153 Such a modus operandi cannot be considered consistent with the purpose and the spirit of the third *Altmark* condition in so far as the compensation is not calculated on the basis of elements which are specific, clearly identifiable and capable of being controlled (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 237).

154 As a result of this lack of transparency, ESA must be allowed to make its own assessment as to the existence of any overcompensation in order to be able to exercise its supervisory function under Article 61 EEA and Part I of Protocol 3 SCA. In assessing these complex economic facts, ESA enjoys a wide discretion for evaluating additional public service costs when assessing whether the third *Altmark* criterion is satisfied.

155 This is particularly so where the EEA State involved has invoked different grounds on which the aid may be regarded as compatible. The Court also notes

that Norway and Hurtigruten stress the obligation on ESA to make a substantive assessment of the compatibility of the measures in question.

156 This implies that the Court will only determine whether the evidence adduced by the applicants is sufficient to render the assessment of the complex economic facts made in the contested decision implausible. Under this plausibility review standard, it is not the Court's role to substitute its assessment of the relevant complex economic facts for that made by the institution which adopted the decision. In such a context, the review by the Court consists in ascertaining that ESA complied with the rules governing the procedure and the rules relating to the duty to give reasons and also that the facts relied on were accurate and that there has been no error of law, manifest error of assessment or misuse of powers (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 221, and caselaw cited).

157 It appears from the case-file that, in order to calculate Hurtigruten's financial situation with a view to verifying whether for the discharge of its public service obligations any overcompensation had occurred under the 2008 Agreement, ESA carried out a complex economic analysis on the basis of three studies supplied by the Norwegian Government during the formal investigation procedure.

158 After assessing those reports, ESA concluded that the three measures did not only cover the increased costs of the public service, but also served to compensate the costs of the activities outside the public service remit.

159 Moreover, ESA found that no separate accounts had been implemented and that there was no allocation of proportionate shares of fixed common costs allocated to the commercial activities and thus deducted when determining the State's compensation for the service. In particular, ESA criticised the use of unrepresentative hypothetical costs and revenues where real costs and revenues were known.

160 As for ESA's assessment of the three reports submitted by Norway during the investigation procedure, it must be noted that the applicants also rely on these reports in their applications and that they do not contest the substance of these reports.

161 In addition, it must be observed that the information submitted by Hurtigruten in answer to the measures of inquiry has not been expressly contested by the defendant.

162 As a result, under the present plea, the assessment of the Court is limited to ascertaining that there has been no error of law, manifest error of assessment or misuse of powers by ESA.

163 In this regard, the applicants contest two main aspects of the decision. First, they allege that the compensation did not constitute overcompensation because it was covered by Article 8 of the 2004 Agreement and, second, they contend that ESA

made a manifest error of assessment in relation to the cost allocation models in the three reports.

164 Neither of these arguments can be accepted.

165 As regards the application of Article 8 of the 2004 Agreement, the arguments of the applicants must be understood to allege that the Norwegian authorities enjoyed a certain margin of appreciation in order to renegotiate the original agreement such that a continuous service on the Hurtigruten route was ensured.

166 However, as stated above, since Article 8 of the 2004 Agreement, invoked by Norway to justify the increase in compensation for the public service, cannot be considered transparent and objective within the meaning of the ECJ's *Altmark* caselaw, that EEA State cannot invoke the normal margin of appreciation of a State as regards the assessment of costs and cost increases related to a public service.

167 Moreover, the renegotiation provision does not contain any parameters whatsoever for the calculation of any subsequent increase in compensation. On the contrary, the provision does not limit the right to compensation to the actual costs inherent in the provision of the public service in question.

168 Since the renegotiation clause does not contain transparent and objective parameters which could be applied in order to calculate costs and revenues and establish the size of the alleged losses, the applicants cannot rely upon it in order to prove that costs and revenues have been incorrectly calculated.

169 Consequently, the argument of the applicants to the effect that the compensation did not constitute overcompensation because it was covered by Article 8 of the 2004 Agreement must be considered irrelevant for the purposes of assessing whether the contested decision must be annulled.

170 If it is shown that the compensation paid to the undertaking operating the public service does not reflect the costs actually incurred by that undertaking for the purposes of that service, such a system does not satisfy the requirement that compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (see, for comparison, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 37 to 40).

171 In the contested decision, ESA relies on the three reports submitted by the Norwegian authorities. These reports are presented in the initial section of the contested decision and ESA comes to the conclusion, on page 17, that the reports indicate that the three measures did not only cover the increased costs of the public service, but also served to compensate the costs of activities outside the public service remit.

172 The arguments of the applicants do not serve to render this assessment implausible.

173 Hurtigruten considers that the conclusion of ESA, namely that the "fixed costs common to the public service and the commercial activities tend to be allocated to the public side", is incorrect and that ESA was wrong to dismiss a capacity-based allocation model.

174 Hurtigruten also claims that ESA failed to recognise the *lex specialis* qualities of Article 59(2) EEA and that the purpose of the provision is to "cut through" the market-oriented rules of the EEA Agreement when the application of such rules obstructs the performance of the service of general economic interest.

175 However, Hurtigruten did not keep separate accounts distinguishing between the commercial services and the public service remit. The applicants also admit that for that very reason it was difficult to present the actual costs and revenues for the public service. Therefore, some of the information which has been submitted by the Norwegian authorities and Hurtigruten, in particular the allocation models, have to be considered as based on assumptions. They are therefore hypothetical.

176 The PwC Report served to analyse cost increases which were considered relevant for the purposes of Article 8 of the 2004 Agreement and which could justify renegotiation within the combined terms of that provision and the *Altmark* criteria. The complementing report, to which Hurtigruten refers, was equally limited in scope.

177 At the same time, it is clear from the case-file that in the report certain fixed costs, such as harbour charges, are fully allocated to the public service remit. As a result, it cannot be considered a manifest error of assessment for ESA to conclude that there was a tendency to allocate these costs to the public service under the 2004 Agreement.

178 Hurtigruten maintains that ESA erroneously failed to explain the limited scope of the first BDO Report, submitted as an answer to a question from ESA.

179 This argument does not concern cost allocation as such. Instead, it is an attempt to use the history of the report as a means of questioning ESA's conclusions on the cost allocation model put forward in the report. Such an argument does not bear any relation to the actual plea of the applicant and must therefore be rejected as irrelevant.

180 The second BDO Report concerns the allocation of fixed and variable costs. They are allocated according to two different models. One is based on "minimum commitment government purchase passenger kilometres" and "actual capacity passenger kilometres", whereas the other is based on "delivered passenger kilometres distance passengers" and "delivered passenger kilometres other passengers". The two allocation models lead to different allocation rates biased towards the public service. Moreover, the numbers are in part based on

assumptions such as a "minimum commitment", which must be considered hypothetical as long as the actual government purchase is not known.

181 As a result, it cannot be considered that ESA committed a manifest error of assessment when it concluded that fixed costs common to the public service and the commercial activities tend to be allocated to the public side.

182 As regards the choice of allocation model, Hurtigruten claims that the use of a revenue-based allocation model, as suggested by ESA, is inconsistent with the notion of a service of general economic interest, since the Norwegian Government has used its discretion to define the service according to capacity. Hurtigruten also argues that, in any case, ESA did not apply the correct test in this regard, because it failed to assess whether in total the revenues under the 2004 Agreement and the 2008 Agreement and the public service revenues were higher than was necessary to cover the costs and to make a reasonable profit in performing the public service.

183 This argument cannot succeed.

184 As far as the allocation model is concerned, it is clear that due to the lack of transparency in the original measure, ESA was left with no other option than to make its own assessment whether Hurtigruten has been overcompensated. It cannot be considered inconsistent to an extent creating a manifest error on the part of ESA to make an assessment of the situation based on costs – at least to the extent that they are known – in order to verify whether the service has been overcompensated.

185 As a result, Hurtigruten's argument that the information which has been submitted in the course of the proceedings fulfils the requirements for a proper allocation of costs set out in the contested decision must also be rejected.

186 The subsequent assessments allegedly confirming the accuracy of the cost allocation and demonstrating an absence of overcompensation must be rejected as irrelevant. Assessment of the legality of the contested decision must be made based on the information available to ESA at the moment it adopted the decision in question. As a result, these arguments cannot be taken into account in assessing the legality of the contested decision.

187 The Norwegian Government also contests the cost allocation models, even though, in principle, it claims to agree with the test of cost allocation set out in the contested decision. Referring to point 15 of the ESA State aid guidelines on public service obligations, the Norwegian Government makes three claims. It asserts, first, that, on page 23 of the contested decision, ESA made an incorrect assessment of the allocation model set out in the Norwegian authorities' letter to ESA of 30 September 2010. Second, ESA was wrong to reject the suggested allocation model, since it lies within the discretion of the Norwegian Government to choose the appropriate model. Third, ESA made an incorrect assessment in

relation to possible overcompensation in failing to acknowledge that the measures were necessary to provide the service in question.

188 The Norwegian Government criticises the conclusion of ESA on page 23 of the contested decision, namely that "several categories of [common costs] are fully allocated to the public service side", which ESA reached on the basis of the PwC Report as well as the two BDO Reports mentioned on pages 7 to 8 of the contested decision.

189 This argument must be rejected. The calculations concerning the financial situation of the Hurtigruten service in the second BDO Report do indeed allocate a large part of the fixed costs to the public service remit. Such costs include port costs, oil and fuel and insurance costs. In view of the lack of transparency, however, ESA cannot be criticised for making an assessment on the basis of the reports submitted by Norway and drawing a general conclusion based on this information.

190 Having regard to the analysis undertaken in the second BDO Report, the Norwegian Government submits that if a comparison is made with the overall financial result of the Hurtigruten service not all of these fixed costs appear to have been allocated to the public service. This argument cannot be accepted. The presentation of the overall financial result of the Hurtigruten service is based on figures taken from the Hurtigruten Annual Reports 2007 and 2008. The presentation of the financial results of the Vesterålen vessel – used in the second BDO Report to allocate costs – is based on the same sources. At the same time, when the figures concerning Vesterålen are multiplied by a factor of 11 (to reflect the overall fleet size) these do not correspond in any of the entries to the figures in the table showing the overall financial results of Hurtigruten. This indicates that the calculations based on the Vesterålen vessel are neither representative nor sufficiently clear to explain the possible discrepancies. As a result, it cannot be considered that ESA made a manifest error of assessment in relation to cost allocation.

191 As regards ESA's supposed rejection of a capacity-based model, Norway argues that the State should enjoy a wide margin of appreciation when calculating additional compensation for a public service. In its view, the minimum capacity model was in principle compatible with EEA law and ESA made a manifest error in not adopting the model as such. Finally, it asserts that the third BDO Report shows that the service was underfunded and confirms the findings in earlier reports.

192 This argument must be rejected as unfounded. The measures adopted by the Norwegian authorities in the present case did not fulfil the transparency criterion of *Altmark*. As a result, the margin of appreciation available to ESA in assessing the calculation of the compensation for a public service cannot be limited to a manifest error of assessment as it would have been had the State complied with the transparency requirement.

193 ESA did not reject the capacity-based allocation model as such in the contested decision. It found that, in order to determine whether or not the service in question was overcompensated, it would be more appropriate to analyse the actual costs and revenues of Hurtigruten and the vessels operating the Bergen-Kirkenes route than to employ an allocation model that it considered to appear incorrect. In the light of the above, in particular having regard to the findings on the second BDO Report, the Court holds that, in adopting that approach, ESA did not make a manifest error of assessment.

194 The same must be held, *a fortiori*, in relation to the actual revenues of Hurtigruten. It is for the beneficiary to prove that ESA made a manifest error in assessment in concluding that there was overcompensation under the 2008 Agreement. In a situation such as the present, a beneficiary cannot rely on a measure which is not transparent and on its own lack of transparency in bookkeeping in order to argue that ESA has failed to show the actual revenues of the company.

195 The third BDO Report cannot be used to question the legality of the contested decision. The concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which ESA takes its decision.

196 The contested decision was adopted on 29 June 2011, whereas the third BDO Report is dated 16 August 2011. It is therefore irrelevant for the assessment of the legality of the contested decision.

197 Therefore, this argument must be rejected.

198 Finally, Norway and Hurtigruten claim that the compensation awarded to Hurtigruten under the 2008 Agreement was necessary in order to ensure the performance of the service and that the measures were justified under Article 59(2) EEA. Norway further claims that ESA incorrectly applied Article 59(2) EEA and that this is a manifest error which must lead to the annulment of the contested decision. Finally, Norway argues that the margin of appreciation of the State under Article 59(2) EEA is wide and that ESA committed a methodological error when it made its assessment of the compensation under the 2008 Agreement.

199 Hurtigruten claims that the question whether the Hurtigruten service had been tendered or not must be irrelevant for the purposes of Article 59(2) EEA when assessing whether the 2008 Agreement can be declared compatible State aid.

200 These arguments must be rejected.

201 A State measure which does not comply with one or more of the *Altmark* conditions must be regarded as State aid (compare *Altmark*, cited above, paragraph 94).

202 It is also clear that Article 59(2) EEA does not cover an advantage enjoyed by undertakings entrusted with the operation of a public service in so far as that advantage exceeds the additional costs of performing the public service (compare Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 33).

203 The 2008 Agreement entails overcompensation and does not satisfy the third *Altmark* criterion. In such a situation, the EEA State concerned cannot rely on Article 59(2) EEA and invoke the necessity test in order to have the aid in question declared compatible with the functioning of the EEA Agreement. The overcompensation of a service of general economic interest by definition entails a compensation that covers more than is necessary in order to ensure the operation of the service.

204 As regards the relevance of the tender, it must be noted that the 2008 Agreement concerned additional compensation for the Hurtigruten service. The question of whether such an aid measure providing additional compensation may be covered by a previous tender procedure can only be determined by objective criteria related to the measure itself and having regard to whether it entails a substantial modification of the original measure.

205 In the contested decision, ESA concludes that the three measures contained in the 2008 Agreement cannot be held to be covered by the original tender, since the substantial adjustments to the original contract normally would have required a new tender procedure. This is supported by the preliminary findings of the Court above that the measure in question is unlawful new aid because of the substantial alterations to the original measure. Therefore, this argument must be rejected.

206 Consequently this plea must be rejected.

B – *Pleas in law alleging that the measure can be justified under Article 61(3) EEA (Case E-10/11)*

1. Arguments of the parties

207 Hurtigruten admits that no restructuring plan was formally notified to ESA before the measure was implemented. Since the Norwegian authorities assumed that the measure in question did not constitute State aid, they simply informed ESA about the results of the renegotiations by a letter of 28 November 2008 in which the critical financial situation of Hurtigruten was set out. By letter of 30 July 2010, the measures were formally notified to ESA under the Rescue and Restructuring Guidelines.

208 Hurtigruten observes that the non-notification of the measures appears to be the main reason why ESA declined to apply those Guidelines in the case at hand. In that regard, Hurtigruten refers to ESA's statement in the decision to open the formal investigation procedure that the Norwegian authorities did not "follow up with a proper restructuring plan" and inviting them "to provide any documentation deemed necessary for such an assessment". Hurtigruten submits

that ESA's conclusion on that point is wrong, since the measures were notified by letter of 4 March 2010 and a restructuring plan was adopted and successfully implemented. Moreover, at the time of adoption of the decision to open the formal investigation procedure, ESA had not even analysed the information provided. However, according to Hurtigruten, information was provided by the Norwegian authorities in their letter of 30 September 2010.

209 Hurtigruten asserts that, irrespective of the information submitted by the Norwegian authorities and received by ESA, ESA has not, with one single exception, submitted any substantive or specific question to the Norwegian authorities on the applicability of these Guidelines.

210 Hurtigruten invites the Court to consider the Guidelines *prima facie* applicable. First, it asserts that, contrary to what is stated in the contested decision, the Guidelines do not include any unconditional criterion to the effect that a State has to possess a restructuring plan when granting aid. It observes that, in the present case, there was a restructuring plan. Second, the objective of the 2008 Agreement was to downsize and not expand market presence. In Hurtigruten's view, existing caselaw from the ECJ implies that, when a real restructuring plan exists, the substantial applicability of the Guidelines and the compatibility of the aid must be assessed by ESA regardless of when this plan was submitted.

211 According to Hurtigruten, the renegotiation of the 2004 Agreement was an integral and instrumental part of the restructuring plan. If the renegotiations had not succeeded, the private placement of NOK 314 million and instalment of a syndicate loan of NOK 3.3 billion with the banks would not have been successful. The banks and private shareholder participation depended on each other; one action would not have taken place without the other.

212 Hurtigruten claims that the contested decision is vitiated by a manifest error of assessment in relation to Article 61(3) EEA and the Guidelines. It cannot be the case that the Norwegian authorities had to present the restructuring plan exactly at the time when the aid was granted. It suffices that the renegotiations were part of the overall restructuring plan and the plan was fleshed out in parallel. In this respect, Hurtigruten refers to Case C-17/99 *France* v *Commission* [2001] ECR I-2481 and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

213 ESA submits that there were both procedural and substantive reasons not to apply the Guidelines. On the issue of procedure, ESA refers to the comments from the Norwegian authorities of 30 September 2010, which invited ESA to consider the previous letter of 4 March 2010 as a notification *ex post*.

214 In substance, ESA refers to pages 26 to 28 of the contested decision and reiterates its finding that no restructuring plan existed at the time when the aid was granted and that the documents subsequently sent by the Norwegian authorities do not satisfy the conditions set out in the Guidelines. The existence of a restructuring plan is, however, a precondition for restructuring aid.

215 The Commission supports ESA's position and submits that since Article 61(3) EEA constitutes a derogation from the prohibition on State aid, the burden of proof lies with the State invoking this provision. In substance, the Commission concurs with ESA's finding that the Rescue and Restructuring Guidelines are not applicable. The aid measures provided for in the 2008 Agreement were not linked to a corresponding obligation on the beneficiary to implement a restructuring plan. Moreover, the documents provided at a later stage did not meet the substantive requirements set out in the Guidelines. In particular, the alleged restructuring plan did not include any compensatory measures.

2. Findings of the Court

216 According to Article 1(3) of Part I of Protocol 3 SCA, ESA shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. Moreover, an EEA State may not put an aid measure into effect until a notification procedure has resulted in a final decision.

217 This standstill obligation is detailed in Article 3 of Part II of Protocol 3 SCA, which specifies that notifiable aid shall not be put into effect before ESA has taken, or is deemed to have taken, a decision authorising such aid.

218 This standstill obligation is equally applicable to aid to undertakings operating a service of general economic interest (compare Case C-332/98 *France* v *Commission* [2000] ECR I-4833).

219 The aim of Article 1(3) of Part I of Protocol 3 SCA is to prevent the EEA States from implementing aid contrary to the EEA Agreement. The final sentence of Article 1(3) of Part I of Protocol 3 SCA is the means of safeguarding the machinery for review laid down by that article which, in turn, is essential to ensure the proper functioning of the common market. It follows that even if an EEA State takes the view that the aid measure is compatible with the EEA Agreement, that fact cannot entitle it to defy the clear provisions of Article 1(3) of Part I of Protocol 3 SCA (compare Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4).

220 The purpose of Article 1(3) of Part I of Protocol 3 SCA is not a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of that provision. It does not therefore, have the effect of disjoining the obligations laid down therein, that is to say, the obligation to notify any new aid and the obligation to suspend temporarily the implementation of that aid.

221 Further, with regard to new aid, Article 1(3) of Part I of Protocol 3 SCA provides that ESA is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. It then undertakes an initial examination of the planned aid. If, following that examination, it considers that any such plan is not compatible with the functioning of the EEA Agreement, it must without delay initiate the procedure provided for in paragraph 2 of that article. In such

circumstances, the EEA State concerned must not put its proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to a precautionary review by ESA and may not, in principle, be put into effect until such time as the latter has declared it compatible with the Agreement.

222 Even though, in the present proceedings, the character of the 2008 Agreement has not been expressly addressed by the parties, the renegotiations of the 2004 Agreement with the subsequent additions in funding, change to the number of ships required to operate the service and the NOx tax exemption mean that the 2008 Agreement must be considered as new aid for the purposes of Article 1(3) of Part I of Protocol 3 SCA.

223 Hurtigruten concedes that no restructuring plan was formally notified to ESA by the Norwegian Government when the 2008 Agreement was concluded and entered into force. Moreover, the payments had started when ESA was informed of the Agreement. As a result, the 2008 Agreement must be considered unlawful aid within the meaning of Article 1(f) of Part II of Protocol 3 SCA. The fact that Norway subsequently stopped the payments to Hurtigruten pending the outcome of the investigation cannot change this classification. Any interpretation which would have the effect of according favourable treatment to an EEA State which has disregarded its obligations under Article 1(3) of Part I of Protocol 3 SCA must be avoided.

224 Finally, when ESA finds that an aid measure has not been notified and issues a request to the State concerned to provide all documents, information and data needed for the assessment of the compatibility of the aid and the State complies in full with this request, ESA is obliged to examine the compatibility of the aid with the functioning of the EEA Agreement, in accordance with the procedure laid down in Article 1(2) and (3) of Part I of Protocol 3 SCA.

225 It is in the light of these considerations that the Court will assess Hurtigruten's arguments concerning the alleged incorrect application of Article 61(3) EEA and the Rescue and Restructuring Guidelines.

226 Hurtigruten contends that ESA was incorrect to conclude in the decision to open the formal investigation procedure that Hurtigruten did not follow up with a proper restructuring plan. It avers that a restructuring plan for the company was adopted and successfully implemented. The measures in question were notified to ESA on 4 March 2010. Also, Hurtigruten argues, ESA erred in its assumption that the material existence of a restructuring plan at the time when an EFTA State grants an aid is a necessary precondition for the applicability of the Rescue and Restructuring Guidelines. Neither the Rescue and Restructuring Guidelines nor caselaw establishes a strict condition to the effect that the EEA State granting the aid has to possess a restructuring plan when the disputed aid is granted.

227 The Court notes that ESA's decision to open the formal investigation procedure is not the subject-matter of the present action. As a consequence, any alleged error in that decision cannot lead to the annulment of the contested decision. It

follows that this argument must be rejected as irrelevant for the purposes of determining whether the contested decision must be annulled.

228 As for the argument that Norway did not have to possess a restructuring plan at the time when the aid was granted in order to have it treated as restructuring aid under the Rescue and Restructuring Guidelines, it must be recalled that, in a significant individual case, the restructuring plan must be notified to ESA in advance, a rule confirmed and made more explicit in the Rescue and Restructuring Guidelines. These Guidelines expressly require that a viable restructuring/recovery programme be submitted with all relevant detail to ESA (paragraph 34 of the Rescue and Restructuring Guidelines) and that the company fully implement the restructuring plan accepted by ESA (paragraph 46 of the Rescue and Restructuring Guidelines). The Guidelines also provide for the proper implementation of the restructuring plan by requiring the submission of regular detailed reports to ESA (paragraph 48 of the Rescue and Restructuring Guidelines).

229 In the present case, the measures in question were put in place and the first contributions were paid out before the measures were sent to ESA for information and before the measures were formally notified as restructuring aid under the Rescue and Restructuring Guidelines.

230 In the absence of a credible restructuring plan at the time the aid was granted, ESA did not commit a manifest error of assessment when refusing to authorise the aid.

231 Hurtigruten refers to two judgments of the ECJ in order to show that there is no requirement that the Norwegian Government had to possess a restructuring plan when the aid was granted, *France* v *Commission* and *Spain* v *Commission*, both cited above.

232 However, *France* v *Commission* concerned notified aid. In the present case, the Norwegian authorities granted the aid and did not notify ESA, which means that any cooperation between ESA and the Norwegian authorities on a restructuring plan for the undertaking in difficulties was impossible.

233 *Spain* v *Commission* did not concern the applicability of the Guidelines, but an assessment in substance of potential compatibility of the aid by the Commission under Article 107(3)(c) TFEU – the parallel provision to Article 61(3)(c) EEA – even though the aid in that case had not been notified. Consequently, Hurtigruten cannot invoke this judgment in order to show that a restructuring plan is not a precondition for the application of the Guidelines.

234 The Court must therefore examine whether ESA committed a manifest error in concluding that the aid was not conditional on the implementation of a restructuring plan such as to satisfy the requirements of the Rescue and Restructuring Guidelines.

235 In the contested decision ESA concluded that there was no information demonstrating that the restructuring of Hurtigruten was a condition to the aid measures.

236 The evidence put forward by Hurtigruten does not render this conclusion implausible. The company relies on a letter from the Norwegian authorities to ESA of 4 March 2010 which includes a memo of 24 February 2010 on Hurtigruten's restructuring measures, minutes from the board meeting of the company of 22 August 2008, and a presentation by Carnegie and Pareto Securities prepared in September 2008. As the Court has found in paragraph 74 above, Hurtigruten's prospectus of 5 March 2009, Annex A45, is inadmissible.

237 In the contested decision, ESA contends that the granting of the aid in question was not linked to the restructuring plan presented by the company.

238 While it must be acknowledged that the documents together show an attempt to come to terms with the financial difficulties of Hurtigruten, it is apparent from the case-file that the 2008 Agreement was a condition for the implementation of the other measures considered necessary and was requested by the private investors.

239 What is decisive is that the letter from the Norwegian authorities of 4 March 2010 was sent after the aid had been granted. None of the other documents submitted by the applicant show that the aid through the 2008 Agreement was linked to the condition of a successful restructuring of the company.

240 Therefore, ESA did not commit a manifest error of assessment when it found that the granting of the aid was not linked to a restructuring plan and concluded that the conditions of the Guidelines on restructuring were not fulfilled in the present case.

241 As a result, this plea must be rejected.

C – *Pleas in law alleging infringement of the duty to state reasons (Cases E-10/11 and E-11/11)*

1. Arguments of Hurtigruten (Case E-10/11)

242 Hurtigruten submits that, in adopting the contested decision, ESA has infringed its obligation to state reasons as required by Article 16 SCA. In its view, the contested decision does not even answer the essential question, whether the 2008 Agreement includes unlawful State aid, in a clear and unequivocal manner.

243 Hurtigruten criticises the fact that, in Article 1 of the operative part of the contested decision, ESA identifies the existence and amount of aid only in so far as the measures constitute overcompensation. Similarly, it contends that the wording on page 29 of the contested decision "the three measures may entail over-compensation" and "[p]art of the payments made under the three measures can be considered compatible" cannot be considered clear and unequivocal.

244 Hurtigruten also contends that, in the contested decision, ESA does not provide real and effective additional guidance to the Norwegian authorities on whether and to what extent Hurtigruten was overcompensated for operating the service of general economic interest. The contested decision provides even less guidance than the overall framework for services of general economic interest. The criteria laid out on page 29 of the contested decision do not state anything beyond what is already stated in the Guidelines on State aid in the form of public service compensation.

245 According to Hurtigruten, the decision should at least have sketched how a proper allocation of costs and revenues should be understood and what ESA regards as fixed common costs. For the contested decision to have any meaning, it should have addressed the issue of justifiable compensation, *i.e.* whether this involves simply compensation of additional costs covered by the 2008 Agreement or allows for the possibility of compensating the necessary total costs incurred in the provision of a service of general economic interest, as Hurtigruten alleged in its pleas concerning Article 59(2) EEA.

246 Finally, in its reply, Hurtigruten observes that the contested decision fails to mention the second and third parts of what it alleges to be ESA's reasoning on recovery, communicated in a subsequent e-mail, and which Hurtigruten refers to as "ESA logic". Consequently, in its view, the decision must be annulled.

2. Arguments of Norway (Case E-11/11)

247 Norway submits that ESA failed to provide adequate reasoning in the contested decision in three respects.

248 First, the conclusion that the allocation model presented by the Norwegian authorities did not appropriately allocate common costs between the service of general economic interest and commercial activities has not been sufficiently reasoned. The statements are an insufficient basis on which to conclude that a disproportionate share of the common costs has been allocated to the commercial activities. Norway suggests that ESA may have confused the different reports submitted during the administrative procedure and asserts that ESA failed to assess the refined model presented in response to its decision to open the formal investigation procedure. Norway concedes that in section 4.2.3 of the contested decision ESA attempts to rebut the method of allocation based on the operation of a minimum capacity fleet. However, in its view, the arguments advanced by ESA are based on an erroneous understanding of the cost allocation model.

249 Second, the contested decision does not offer any reasons why, as a matter of law, there was no need for ESA to assess whether the three measures were necessary for Hurtigruten to continue the provision of the public services, *i.e.* whether there was overcompensation. At the same time, the contested decision does not provide any yardstick for the assessment of any possible overcompensation. In Norway's view, the relevant test requires an assessment of the results of the activities performed in providing the service of general

economic interest in order to determine whether Hurtigruten was overcompensated for its task. However, ESA did not carry out this test and does not explain why the submissions of the Norwegian authorities in this respect should not be convincing. Instead, ESA appears to focus on purely formal requirements. Norway submits that ESA cannot base its decision to order the recovery of overcompensation on an alleged failure to separate accounts and to provide information, since it was possible for ESA to examine all the legal and economic conditions governing the additional payment and, consequently, impossible, without such an examination, to take a valid decision on whether the measures were necessary.

250 Third, Norway contends that the guidance offered on page 29 of the contested decision does not allow it to calculate the amount to be recovered without overmuch difficulty. The insufficiency of that guidance is all the more evident given the lack of clarity on the question whether the contested decision actually considers Hurtigruten to have been overcompensated at all as a result of incompatible aid.

251 ESA contends that these complaints should be rejected.

3. Findings of the Court

(a) General remarks on the duty to state reasons

252 The statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see Joined Cases E-4/10, E-6/10 and E-7/10 *Reassur* [2011] EFTA Ct. Rep. 22, paragraph 171).

253 In that respect it must be noted that ESA is not required to state the reasons why it made a different assessment of a particular aid regime in previous decisions. The concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which the ESA takes its decision (see, for comparison, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137).

254 Moreover, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Reassur*, cited above, paragraph 172).

255 In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see *Reassur*, cited above, paragraph 173).

(b) The complaint of Hurtigruten based on the allegation that the decision is neither clear nor unequivocal (Case E-10/11)

256 Hurtigruten's argument raised in its first plea to the effect that ESA has not properly reasoned the contested decision in regard to the application of Article 59(2) EEA cannot be upheld.

257 First, in relation to the right of a State to pay additional compensation to an undertaking entrusted with a service of general economic interest, when such payment comes in addition to the compensation for that service under a contract won after a public tender, it must be recalled that ESA concluded that the measure in question lacked transparency and amounted to overcompensation of the public service in violation of Articles 61(1) and 59(2) EEA. Under such circumstances, the question whether the supplementary compensation was necessary for the continued operation of the service of general economic interest is irrelevant for the conclusion that the measure in question constitutes State aid. Since ESA's findings in that respect have been upheld, it cannot be considered a lack of reasoning if ESA does not address this particular argument, as it is under no obligation to do so.

258 Second, as regards the argument that ESA failed to assess the effect the supplementary compensation may have had in terms of anti-competitive behaviour, it suffices to note that Hurtigruten is the sole operator of the service. The company has not provided any information on how an assessment of its potential violation of competition should have been assessed in the contested decision, and ESA seems to have accepted its role as a monopoly providing the service. As a result, this assessment would have been irrelevant to the findings in the present proceedings and ESA did not violate its obligation to state reasons by leaving this aspect aside.

(c) The complaint of Hurtigruten and Norway based on the allegation that the contested decision was inadequately reasoned in relation to recovery (Cases E-10/11 and E-11/11)

259 The contested decision, on pages 28 and 29, provides sufficient information for the beneficiary and the EEA State concerned to determine, without overmuch difficulty, the amount of aid to be recovered. The argument of Hurtigruten and Norway that the contested decision was inadequately reasoned in relation to recovery must therefore be rejected.

260 Norway claims, moreover, that the contested decision is inadequately reasoned as regards the proposed allocation of costs between the public service and the commercial side. The statements are said to be inadequate to form the basis for

the conclusion that a proportionate share of the common costs has not been allocated to the commercial activities. However, as the applicants both admit, this question was addressed in section 4.2.3. of the contested decision. Moreover, on pages 7 to 9 of the contested decision, ESA presents tables and substantive details from the reports in question in order to explain how it reached its conclusion that there was a lack of clarity in the allocation of costs in relation to the Hurtigruten service. As a result, this argument must be rejected.

261 It is necessary to distinguish a plea based on an absence of reasons or inadequacy of the reasons stated from a plea based on an error of fact or law. This last aspect falls under the review of the substantive legality of the contested decision and not the review of an alleged violation of infringement of essential procedural requirements within the meaning of Article 16 SCA (see Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 165).

262 A plea alleging absence of reasons or inadequacy of the reasons stated goes to the issue of infringement of essential procedural requirements within the meaning of Article 16 SCA. As a matter of public policy is involved, this may be raised by the Court on its own motion (Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 268, paragraph 46). By contrast, a plea based on an error of fact or law, which goes to the substantive legality of the contested decision, is concerned with the infringement of a rule of law relating to the application of the EEA Agreement within the meaning of Article 36 SCA. It can be examined by the Court only if raised by the applicant (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 166).

263 Norway's argument that the contested decision is inadequately reasoned as regards the "overall test" to calculate the amount to be recovered concerns the calculation of the compensation for the public service and, as such, the material assessment in the contested decision.

264 As a consequence, this plea must be rejected.

D – *The plea based on the alleged obligation to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA (Case E-11/11)*

1. Arguments of the parties

265 Norway observes that ESA could have issued an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. The decision is said to show that the lack of documentation was the essential reason why ESA could not reach a different conclusion other than to find that Hurtigruten had been overcompensated. Since it did not use all its powers, in Norway's view, ESA cannot base its decision on the fragmentary nature of the information provided. In particular, no specific information request has been submitted to Norwegian authorities. Therefore, the contested decision must be annulled.

266 ESA contends that this plea should be rejected.

2. Findings of the Court

267 In order to make a proper assessment of this plea it is necessary to recall the purpose of the information injunction.

268 Article 10 of Part II of Protocol 3 SCA is applicable in cases concerning unlawful aid, that is new aid put into effect in contravention of the standstill obligation in Article 1(3) of Part I of Protocol 3 SCA.

269 Under Article 10(1) of Part II of Protocol 3 SCA, where ESA has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay. According to the second paragraph of the same provision, ESA shall, if necessary, request information from the EEA State concerned. Under Article 2(2) of Part II of Protocol 3 SCA, which applies *mutatis mutandis*, the EEA State concerned shall provide all information necessary in order to enable ESA to take a decision.

270 It is only if the EEA State concerned does not comply with such an information request that ESA might be under the obligation to issue an information injunction. According to Article 5(1) and (2) of Part II of Protocol 3 SCA, which also apply *mutatis mutandis*, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete. If the EEA State does not comply, ESA has to send out a reminder.

271 It is only after this stage has been reached that ESA shall issue an information injunction under Article 10(3) of Part II of Protocol 3 SCA.

272 It is undisputed between the parties that there was no separation of accounts between the public service side and the commercial side of the operations in question. In its reply, Hurtigruten places great emphasis on the fact that there was a separation of accounts between the different business areas but admits that it did not separate the accounts between the public service side and the commercial operations. This means that the information which Norway alleges is missing and should have given rise to an information injunction is information which the other applicant claimed repeatedly not to exist.

273 Therefore, the present plea must be dismissed.

E – *Pleas in law alleging infringement of the principles of legal certainty*

1. Arguments of the parties

274 According to Hurtigruten, since ESA relies on an unclear, ambiguous and confusing frame for the contested decision, and since it does not provide a clear framework for the national authorities to calculate the amount of aid and recover any unlawful aid, ESA has violated the principle of legal certainty.

275 Hurtigruten and Norway claim that the wording of Article 1 of the contested decision violates this principle as ESA concludes that the aid is incompatible "in so far as" it constitutes overcompensation.

276 Moreover, according to Norway, the contested decision does not meet the required standard to enable the addressee without overmuch difficulty to determine how much aid must be recovered from the beneficiary. The contested decision is a hypothetical or empty decision which cannot be considered adequate to satisfy the principle of legal clarity.

277 Finally, Norway observes that, if there is not enough information, ESA can issue an information injunction. In the present case, however, it did not issue such an injunction and, moreover, avoided taking a final decision, leaving it for the Norwegian authorities to make an assessment of compatibility. This constitutes a breach of procedure, since the Norwegian authorities have fulfilled their duty to cooperate with ESA during the administrative procedure.

278 In its reply, Norway observes that during the recovery procedure ESA appears to have added two supplementary requirements, not included in the contested decision, to its understanding of Article 59(2) EEA. First, only radical and unforeseeable cost increases can be considered under Article 59(2) EEA. Second, additional compensation may indeed be granted under Article 59(2) EEA, provided that a new tender is immediately announced. In Norway's view, this confirms the lack of clarity of the contested decision.

279 ESA contests these arguments.

2. Findings of the Court

280 Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 141).

281 The principle of legal certainty requires that rules of EEA law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by EEA law (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 142).

282 No provision of EEA law requires ESA, when ordering the recovery of aid declared incompatible with the functioning of the EEA Agreement, to fix the exact amount of the aid to be recovered. It is sufficient for ESA's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount (see, for comparison, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29).

283 The recovery of aid which has been declared incompatible with the functioning of the EEA Agreement is to be carried out in accordance with the rules and

procedures laid down by national law (see, for comparison, Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 90, and the caselaw cited).

284 Further, the obligation on an EEA State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation incumbent upon ESA and the EEA States of sincere cooperation in the implementation of rules concerning State aid in the EEA Agreement.

285 Thus, ESA could legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid.

286 However, if ESA, pursuant to its obligation to conduct a diligent and impartial examination of the case under Article 1 of Part I of Protocol 3 SCA, does decide to order the recovery of a specific amount, it must assess as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary. In restoring the situation existing prior to the payment of the aid, ESA is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and it must thus order recovery of the aid in full. ESA may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, ESA is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid (see, for comparison, Case T-366/00 *Scott* [2007] ECR II-797, paragraph 95).

287 It is to be noted in this regard that ESA may not be faulted because its assessment is approximate. In the case of non-notified aid, it may be that the circumstances of the case are such that ESA has difficulty in determining the precise value of the aid, particularly where the aid measure does not fulfil the second *Altmark* criterion and the allocation of costs is unclear. Those circumstances must be borne in mind when reviewing the legality of ESA's decision.

288 It is apparent from page 5 of the contested decision that ESA calculated the amount of aid which had been granted at the time it adopted the contested decision. This amount has not been contested by the applicants in the current proceedings.

289 It follows that this amount must be considered the minimum aid amount to be recovered in accordance with Article 2 of the contested decision. The operative part of a decision relating to State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see, in particular, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

290 It is uncontested that, in Article 4 of the contested decision, ESA ordered Norway to inform it of the total amount (principal and recovery interest) to be recovered

from the beneficiary as well as of the measures planned or taken to recover the aid and ordered the aid to have been fully recovered by 30 October 2011. However, it also stated in section 5 of the contested decision that the amount would be determined by the Norwegian authorities in collaboration with ESA, within the framework of the recovery procedure. Implementation of the recovery procedure did not therefore depend on fixing the said amount. Therefore, the fact that the exact amount of aid to be recovered had not been laid down definitively cannot prevent the authorities from implementing the recovery procedure for the minimum amount of aid or from cooperating effectively in determining the final amount of the aid to be recovered.

291 As regards the argument that ESA did not provide a reliable calculation method with which to determine the amount of aid to be repaid, it must be pointed out that, on page 29 of the contested decision, ESA lays down parameters for the calculation of the aid to be recovered that would allow the Norwegian authorities to make a definitive proposal. It states in a clear and unequivocal fashion that aid which constitutes overcompensation of the Hurtigruten service must be recovered.

292 The national authorities accordingly have the information enabling them to propose to ESA an exact amount reflecting the overcompensation to Hurtigruten. The national authorities are in fact in the best position, not only to determine the appropriate means to recover the State aid unduly paid, but also to determine the exact amounts to be repaid (see, for comparison, Case C-441/06 *Commission* v *France*, cited above, paragraph 39).

293 ESA's decision contains the appropriate information to enable Norway to determine itself, without too much difficulty, the final aid amount to be recovered, and that amount has to be somewhere within the range established by ESA.

294 It follows that the argument of Norway and Hurtigruten to the effect that ESA did not provide a sufficiently reliable calculation method to determine the amount of aid to be recovered cannot be accepted.

F – *Pleas in law alleging infringement of the principles of good administration, due diligence and Article 10 of Part II of Protocol 3 SCA*

1. Arguments of the parties

295 Hurtigruten refers to pages 27 to 28 of the contested decision and submits that, given its financial position at the time of conclusion of the 2008 Agreement, the Rescue and Restructuring Guidelines should be assessed to have been of immediate relevance to ESA, as ESA was of the opinion throughout the procedure that the agreement involved State aid. Furthermore, ESA was informed in detail about the applicability of the rescue and restructuring Guidelines in March 2010. Moreover, during the administrative procedure, ESA

adopted only one request for information apart from the decision to open the formal investigation procedure.

296 Hurtigruten also refers to Articles 13(1) and 10(3) of Part II of Protocol 3 SCA, authorising ESA to take a decision on the basis of the information available where a State has not complied with an information injunction. In that regard, Hurtigruten claims that, if the information available to ESA is incomplete, it cannot take a decision without issuing an information injunction specifying the information required. In the present case, ESA adopted the contested decision without requesting sufficient information and the contested decision should therefore be annulled since it was adopted in breach of the principle of good administration and of ESA's duty to exercise due diligence.

297 In the alternative, Hurtigruten invites the Court to assess the contested decision as a decision taken on the basis of the information available pursuant to Article 13(1) of Part II of Protocol 3 SCA. In that regard, the contested decision can only be lawful if adopted in the wake of an information injunction issued by way of a decision pursuant to Article 10(3) of Part II of Protocol 3 SCA. However, no such injunction was issued.

298 Hurtigruten contends that ESA has admitted that it did not receive from the Norwegian authorities all the information necessary to undertake the substantive assessment. No information injunction was issued. Therefore, the decision must be considered as taken on the basis of the information available pursuant to Article 13(1) of Part II of Protocol 3 SCA.

299 Finally, Hurtigruten refers to the ECJ's judgment in Case C-520/07 P *Commission* v *MTU* [2009] ECR I-8555 and submits, in the light of that judgment, that the contested decision should be considered a hypothetical decision. In its view, ESA adopted the decision on the basis of an unlawful negative presumption and, consequently, the decision must be annulled.

300 ESA contests these arguments.

2. Findings of the Court

301 The principle of good administration is a fundamental principle of EEA law (Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22).

302 It includes, in particular, the duty on ESA to examine carefully and impartially all the relevant aspects of the individual case (see, for comparison, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 14 and 26, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62).

303 Where the competent institutions have a power of appraisal, respect for the rights guaranteed by the legal order of the EEA in administrative procedures is of even more fundamental importance.

304 It is in the light of these considerations that the present arguments must be assessed.

305 Hurtigruten claims that ESA violated the principle of good administration and the duty to exercise due diligence by not issuing an information injunction before it took the contested decision. Hurtigruten bases its claim on the fact that since ESA did not ask any questions directly about the applicability of the Rescue and Restructuring Guidelines, the contested decision must be considered a decision taken on incomplete information. This argument cannot be accepted.

306 As the applicants themselves admit, on pages 25 to 28 of the contested decision, ESA made a material assessment on the applicability of the Rescue and Restructuring Guidelines and came to the conclusion that they are not applicable. It is clear that ESA considered that it had enough information to make that assessment. In such a situation, ESA is not under an obligation to issue an information injunction pursuant to Articles 13 and 10 of Part II of Protocol 3 SCA.

307 In the light of the foregoing, Hurtigruten's contention that ESA acted in breach of the duty to exercise due diligence in regard to an alleged "negative presumption" must also be rejected.

308 Finally, whilst it is true that the decision states that the Norwegian Government did not submit a restructuring plan, that statement forms part of a lengthy discussion specifically concerned with the compatibility of the disputed aid with Article 61(3)(c) EEA. Accordingly, far from expressing the idea that ESA did not have the information needed to enable it to carry out that assessment, it emphasises that the conditions to be met if restructuring is to be approved in accordance with the Rescue and Restructuring Guidelines, in particular the very existence of a sound restructuring plan when the aid is granted, were not fulfilled in this case.

309 In those circumstances, it was not appropriate for ESA, which was in a position to make a definitive assessment as to the compatibility of the disputed aid with the common interest on the basis of the information available to it, to require Norway, by means of an information injunction, to provide it with further information to clarify the factual information before it adopted the contested decision.

310 It follows, therefore, that the plea must be rejected.

G – *Pleas in law alleging infringement of the principle of proportionality (Case E-10/11)*

1. Arguments of the parties

311 In its application, Hurtigruten submits that, in relation to the recovery of any aid, correct application of the proportionality principle, as enshrined in Article 14 of

Part II of Protocol 3 SCA, will take account of the arguments presented on the assessment of whether the aid is compatible with Article 59(2) EEA, that is, compatible aid may not be recovered from the applicant.

312 In its reply, Hurtigruten claims that the stricter approach in relation to overcompensation, applied allegedly by ESA, accepting compensation only where it covers the additional costs in performing the service of general economic interest specified in the renegotiation provision, is in breach of the proportionality principle.

2. Findings of the Court

313 Pursuant to Article 33(1)(c) RoP, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to give a ruling, if necessary without other supporting information.

314 However, this is not the case here. In its application, Hurtigruten only refers to the principle of proportionality without linking it to any arguments or explaining how this principle has been violated. Since an alleged error of assessment of Article 59(2) EEA and an alleged violation of the principle of proportionality must be seen as two distinct pleas in law, the present plea is inadmissible.

315 The conclusion must be the same in relation to the plea alleging a violation of the principle of proportionality, claimed by Hurtigruten in its reply. In this case, it must be noted that the claim relating to proportionality is linked to the assessment by ESA of the renegotiation clause.

316 According to Article 37(2) RoP, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

317 This is not the case here, as the renegotiation clause was included in the 2004 Agreement and also the subject of the contested decision. Therefore, this plea must also be dismissed as inadmissible.

318 Consequently, the applications must be dismissed in their entirety.

Costs

319 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicants to be ordered to pay the costs. Since the latter have been unsuccessful in their applications, they must be ordered to do so. Those costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**

2. **Orders the applicants to pay the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 8 October 2012.

Gunnar Selvik
Registrar

Carl Baudenbacher
President