REPORT FOR THE HEARING
in Joined Cases E-10/11 and E-11/11

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the cases between

Hurtigruten ASA (Case E-10/11),
Kingdom of Norway (Case E-11/11)

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service in Norway.

I Introduction

1. In each of these cases, the applicant seeks annulment of the Decision of the EFTA Surveillance Authority ("ESA") No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service in Norway by which the three measures provided for in the Supplementary Agreement on the Hurtigruten Service in Norway of 27 October 2008 were declared State aid incompatible with the functioning of the EEA Agreement insofar as they constitute a form of overcompensation for the public service (the "contested decision").

2. In Case E-10/11 *Hurtigruten* v *ESA*, Hurtigruten ASA ("Hurtigruten") bases its application on Article 59(2) and Article 61(1) and (3) EEA and certain procedural rules and principles, such as the obligation to state reasons provided for in Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

3. In Case E-11/11 *Kingdom of Norway* v *ESA*, the Kingdom of Norway ("Norway") relies on Articles 59(2) and 61(1) EEA and certain procedural rules

and principles, such as the obligation to state reasons established in Article 16 SCA.

4. The European Commission (the "Commission") supports ESA's views.

II Facts

Background

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

6. The operation of the service for the period 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, 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 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 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 different cruises outside the Bergen-Kirkenes route, 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) for 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 of accounting separation and on the provision of 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). The new agreement was concluded on 27 October 2008 (the "2008 agreement"). It contained three measures to expire with the main agreement on 31 December 2012. First, Hurtigruten was reimbursed a large part of the NOx tax[1] 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 the 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.

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

12. 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 covering the period 1 January 2012 to 31 December 2019 was signed with Hurtigruten on 13 April 2011.

13. 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.

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

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[1] The NOx tax system has the objective of encouraging undertakings to lower their NOx emissions and thereby reduce environmental pollution.

15. 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.

16. On 29 June 2011, ESA adopted the contested decision.

The contested decision

Introduction

17. 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 over-compensation for public service, and ordered the recovery of the aid.

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

> *1. reimbursement 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*
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> *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.*

19. 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".

20. 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.

The existence of State aid

21. 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.

22. 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".

23. 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.

24. 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.

25. It 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, could have triggered a call for a new tender procedure.

26. 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*", since it 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.

27. 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.

28. On page 7 of the contested decision, ESA noted 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."

29. 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 consultants' reports, one commissioned from PWC and two from BDO Noraudit.

30. 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. According to ESA, those reports,[2] the PWC Report of 14 October 2008, the BDO Noraudit report of 23 March 2009 and the BDO Noraudit report of 27 September 2010, indicated that the three measures involved over-compensation – 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.

31. 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.

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

33. 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 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 BDO Noraudit report of 27 September 2010 indicated that the measures also covered increased costs that did not reflect

[2] These reports are presented in detail on pp.7-9 of the contested decision.

radical changes that could not reasonably have been foreseen within the meaning of Article 8 of the 2004 agreement.

34. 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.

35. 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.

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

Compatibility of the State aid

37. In section 3 of the contested decision, "Compatibility of the aid", ESA made an assessment of the aid under Article 59(2) EEA (public service compensation) and Article 61(3)(c) EEA (restructuring, or "emergency" aid).

38. 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...*"

39. In its assessment of the public service compensation for the purposes of Article 59(2) EEA, ESA referred to the Maritime Cabotage Regulation,[3] ESA's

[3] Article 4 of 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), OJ 1992 L 364, p. 7.

Guidelines on aid to maritime transport,[4] and ESA's Guidelines for State aid in the form of public service compensation.[5]

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

41. In the contested decision, ESA identified the third condition that had to be satisfied. This specifies that the amount of compensation must be granted in a transparent manner and be proportionate inasmuch as it may not exceed what is necessary to cover the costs incurred in discharging the public service obligations including a reasonable profit.

42. In ESA's assessment, the 2008 agreement does not fulfil the third 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.

43. 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 Rescue and Restructuring Guidelines,[6] mainly due to the lack of a credible restructuring plan at the time when the aid was granted. The documents provided by the Norwegian authorities did not meet the requirements necessary for a restructuring plan.

44. On the basis of the information provided to it by the Norwegian authorities, ESA concluded that, when granting the measures in 2008, Norway did not take restructuring into account but was concerned only with the coverage of additional costs linked to the provision of a public service obligation.

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

Article 1

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[4] Section 9 of Part IV of the Guidelines of the EFTA Surveillance Authority on aid to maritime transport, published on ESA's website.

[5] Point 2 of Part VI of the Guidelines of the EFTA Surveillance Authority for state aid in the form of public service compensation, published on ESA's website.

[6] Rescue and Restructuring Guidelines of the EFTA Surveillance Authority.

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.

...

III Procedure and forms of order sought by the parties

46. Case E-10/11 was registered at the Court on 6 September 2011, pursuant to an application by Hurtigruten brought under Article 36(2) SCA seeking annulment of the contested decision.

47. Case E-11/11 was also registered at the Court on 6 September 2011, pursuant to an application by Norway under Article 36(1) SCA seeking annulment of the contested decision.

48. By a decision of 10 February 2012 pursuant to Article 39 of the Rules of Procedure, and, having received observations from the parties, the Court joined the two cases for the purposes of the oral procedure and the final judgment.

49. ESA submitted a defence in Case E-10/11, registered at the Court on 12 December 2011. The reply from Hurtigruten was registered at the Court on 1 February 2012. The rejoinder from ESA was registered at the Court on 7 March 2012.

50. ESA also submitted a defence in Case E-11/11, registered at the Court on 12 December 2011. The reply from Norway was registered at the Court on 27 January 2012. The rejoinder from ESA was registered at the Court on 7 March 2012.

51. In Case E-10/11, Hurtigruten claims that the Court should:

(1) Annul the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service;

(2) In the alternative, declare void Articles 2, 3 and 4 of the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011, to the extent that they order the recovery of the aid referred to in Article 1 of that Decision; and

(3) Order the EFTA Surveillance Authority to bear its own costs and to pay those incurred by Hurtigruten ASA.

52. In Case E-11/11, Norway claims that the Court should:

(1) Annul the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011; and

(2) Order the EFTA Surveillance Authority to pay the costs of the proceedings.

53. ESA contends that the Court should:

(i) dismiss the applications as unfounded;

(ii) order the Applicants to pay the costs.

54. The Commission submits that the applications should be dismissed as unfounded.

IV Legal context

55. Article 59 EEA reads as follows:

> *1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.*

2. 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.

…

56. Article 61 EEA reads as follows:

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

...

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

…

57. Article 16 SCA reads as follows:

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

58. Article 10(3) of Part II of Protocol 3 SCA reads as follows:

Where, despite a reminder pursuant to Article 5(2), the EFTA State concerned does not provide the information requested within the period prescribed by [ESA], or where it provides incomplete information, [ESA] shall by decision require the information to be provided (hereinafter referred to as an 'information injunction'). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.

59. Article 13(1) of Part II of Protocol 3 SCA reads as follows:

The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

V Summary of the pleas in law and arguments

Introduction to the pleas in law

60. The applicants have put forward similar pleas in law. In order to present the arguments in the most efficient way, for the purposes of this report for the hearing, the Court will rearrange them slightly.

61. First, this report will present the pleas concerning the application of Article 59(2) EEA and ensuring the operation of a service of general economic interest (**the first plea of Hurtigruten**).

62. Second, this report will present the pleas which concern ESA's application of the *Altmark* criteria in the contested decision (**the third plea of Hurtigruten and the first plea of Norway**).

63. Third, this report will present the pleas on the compensation level and the requirements of Article 59(2) EEA (**second plea of Hurtigruten and the second plea of Norway**).

64. Fourth, the report will present the pleas on the compatibility of the aid in the light of Article 61(3) EEA (**the fourth plea of Hurtigruten**).

65. Finally, the report will present the pleas of the parties on procedural issues, such as the obligation to state reasons (**the fifth plea of Hurtigruten and the third plea of Norway**).

Article 59(2) EEA and ensuring the operation of a service of general economic interest (the first plea of Hurtigruten)

66. 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.[7]

67. Its main argument under the first plea 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.

68. Hurtigruten holds that ESA erred in the contested decision when it found that the notion of State aid in Article 61(1) EEA and the notion of compatible aid enshrined in Article 59(2) EEA have exactly the same scope. The choice of procurement model (tender or otherwise) has no bearing on the notion and scope of compatible State aid pursuant to Article 59(2) EEA. Furthermore, a procedural procurement "choice" (in this case a tender procedure previously imposed by ESA) cannot in itself limit what would otherwise have been considered as compatible State aid under Article 59(2) EEA where the public service in question had not been tendered.

69. Hurtigruten further submit that the correct question to be formulated under Article 59(2) EEA is whether the measure was necessary – in compensation level and time – for maintaining the public service.

70. 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 compensation is necessary in order to ensure the continued operation of this service. The fact that Hurtigruten was under an imminent threat of bankruptcy justifies the additional compensation provided for under the 2008 supplementary agreement.

71. Hurtigruten refers to the Commission decision *NorthLink & CalMac*,[8] and submits that ESA should not have questioned the assessment that Hurtigruten was in an acute situation in 2008 and depended on reaching an agreement to avoid bankruptcy. It notes that the Commission decision 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

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[7] Reference is made to page 7 of the contested decision and section 3.3.1 in Part II and a letter from the Norwegian authorities to ESA of 4 March 2010. Hurtigruten maintains that at the latest by March 2010 the Norwegian authorities invoked the provision of a service of general economic interest within the meaning of Article 59(2) EEA as justifying the compensation paid to Hurtigruten were ESA to classify this payment as aid incompatible with the EEA Agreement pursuant to Article 61(1) EEA .

[8] Reference is made to Commission Decision 2011/98/EC of 28 October 2009 on the *State aid to CalMac and NorthLink*, Case C 16/08 (ex NN 105/05 and NN 35/07), OJ 2011 L 45, p. 33.

operation of the service of general economic interest and, thus, respected the State's discretion in the definition of the service.

72. Hurtigruten contends that the Norwegian authorities should be entitled to the same discretion in their assessment of the existence and significance of an emergency situation where additional funding is required to ensure the continued operation of a service of general economic interest as they enjoy in the definition of such a service.[9]

73. Further, according to Hurtigruten, ESA failed to apply two criteria concerning over-compensation and anti-competitive behaviour set out by the Commission in its *NorthLink & CalMac* decision. More generally, ESA failed to respect the discretion enjoyed by EEA States in the assessment of the existence and significance of an emergency situation.[10]

74. In its reply, Hurtigruten argues that the only substantive objection ESA seemed to have is that the time deemed necessary by the Norwegian authorities to launch a (re)tender for the public service was too long. Hurtigruten notes that ESA seems to disregard the factual point that an immediate retender would merely provide a *carte blanche* to Hurtigruten, as Hurtigruten in such a scenario would be the only company to submit an offer, most likely resulting in a more expensive public service than necessary. Furthermore, Hurtigruten notes that the Norwegian authorities in such a scenario would have failed to honour its obligation to assess the scope of the public service as required by Article 59(2) EEA itself and as held in the SGEI Guidelines and by the ECJ.[11] Hurtigruten refers extensively to ESA's 2001 decision on compensation for maritime transport services.[12] This decision shows, *inter alia*, that the requirement of an "immediate tender" in ESA's defence is manifestly erroneous as ESA in that decision not only accepted a market testing of the public service but indeed even imposed an obligation to market test the service. Hurtigruten argues that the time taken in the present case for the retendering of the contract, due regard taken to the fact that ESA did not issue any objections at the time, was appropriate to the effect that the three measures of the 2008 agreement are within the scope of Article 59(2) EEA. In support of this argument, Hurtigruten requests permission to lodge a copy of the Norwegian Government's notification of 11 November 2001 and a copy of the 2001 agreement entrusting the Hurtigruten companies with the provision of services of general economic interest.

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[9] Reference is made to Case T-289/03 *British United Provident Association Ltd (BUPA) and Others* v *Commission* [2008] ECR II-81, paragraph 220.

[10] Ibid.

[11] Reference is made to Case C-205/99 *Analir and others* [2001] ECR I-1271, paragraphs 34 and 68, and point 10 of the public service compensation Guidelines of the EFTA Surveillance Authority, cited above.

[12] Reference is made to Decision of the EFTA Surveillance Authority 417/01/COL of 19 December 2001 on compensation for maritime transport services under the Hurtigruten Agreement.

75. Finally, in its reply, Hurtigruten rejects the general proposition made by ESA that the present case would have the precedent effect that a State can choose to tender a public service, but at a later stage freely increase the compensation pursuant to Article 59(2) EEA. Generally, an increase in compensation would be necessary for maintaining the public service, and it is not disputed that in such a regular scenario non party can rely on Article 59(2) EEA. In the present case, however, the measures of the 2008 agreement were strictly necessary for maintaining the public service as that concept is enshrined in Article 59(2) EEA.

76. ESA considers Hurtigruten's arguments to be flawed as the 2004 agreement was concluded as the result of a tender. In those circumstances, it was understood that the market had put a correct price on the service. It later emerged that the price was insufficient to cover the costs. When the State decided to intervene, the market no longer determined the price of the Bergen-Kirkenes service. In that connection, ESA observes that there are two ways to determine the cost of a public service. The first is to have a public tender (which was the case here). The second is to calculate the public service compensation in line with Article 59 EEA (this was not the case here).

77. ESA submits that Norway and Hurtigruten in effect submit that a State can choose to tender a public service (thereby sheltering it from State aid scrutiny), but at a later stage freely increase the compensation by using Article 59 EEA, ESA submits that this approach, if correctly understood, is compatible neither with the tender rules nor Article 59(2) EEA. Accepting such an approach would allow an undertaking to offer a very low bid for a tender to win it and, at a later stage, to be additionally compensated on the basis of Article 59 EEA. In principle, ESA does not oppose the provision of support to maintain a service (or rescue the provider), but maintains that a newly tendered contract should be sought immediately. Consequently, while awaiting the conclusion of the new tender process, aid measures for a temporary period should be notified to ESA and approval requested.

78. ESA argues that it was not entitled to recognise possible losses incurred by Hurtigruten in the past, as the level of compensation awarded under the 2004 agreement to cover the public service during that period had been contractually agreed following an open tender procedure.[13] It considers this approach to be supported by *Combus*[14] in which underbidding during the public tender led the Commission to take the view that the undertaking received State aid.

79. ESA submits that, on its assessment, the 2008 agreement involved increased compensation that went far beyond payments agreed under the tender procedure. First, the costs covered did not relate to radical and unforeseeable increase in costs. Second, whereas the tendered (2004) agreement concerned the

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[13] Reference is made to Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197 and Case T-157/01 *Danske Busvognmænd* v *Commission* (*Combus*) [2004] ECR II-917.

[14] *Combus*, cited above.

payment for the provision of a public service, the 2008 agreement concerned Hurtigruten's activities more generally, effectively including its commercial operations.

80. ESA contends that generally accepted cost accounting principles require an allocation model to be objective and transparent (thereby permitting the model to be verified and avoiding any abuse of discretion). This "objectivity criterion" requires the allocation model to have unbiased principles by which it is determined which costs are allocated to each activity. The "transparency criterion" requires the model to show why the common costs have been allocated in a particular manner.

81. ESA claims that it was never been presented with an appropriate cost allocation model of that kind during the administrative procedure. The Norwegian authorities never provided figures showing the costs actually incurred by Hurtigruten in providing the public service. This was an obstacle for ESA in assessing the extent to which the 2008 agreement over-compensated for Hurtigruten's costs in relation to the public service. The absence of separate accounts also complicated ESA's task in assessing whether cross-subsidisation had taken place.

82. ESA refers to the four consultants' reports, the PWC report of 14 October 2008, the BDO Noraudit report of 23 March 2009, the BDO Noraudit report of 27 September 2010 (hypothetical minimum fleet model) and the BDO Noraudit of 16 August 2011 (the passenger kilometres model). It asserts that the different cost allocation models used in the reports show that no adequate cost allocation model had been submitted by the Norwegian authorities before it adopted the contested decision.

83. Inasmuch as the notion of "necessity" is relevant to the assessment under Article 59(2) EEA, ESA submits that the concept is not unlimited and may not be abused. In that connection, ESA refers to the Guidelines and notes that it is not enough that the compensation is necessary. Rather, it may not exceed what is "necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations". [15] Contrary to the argument advanced by Hurtigruten, the test is not whether the compensation was necessary to prevent the bankruptcy of that undertaking.

84. ESA stresses that the 2004 agreement had been tendered. The necessary compensation to cover the costs had been set by the market. On the other hand, this did not exclude the possibility that unforeseen and radical increases in cost might require additional compensation to cover the operator's costs in providing the public service. However, it has not been shown that the three measures

[15] Reference is made to point 13 of the public service compensation Guidelines of the EFTA Surveillance Authority, cited above.

provided for in the 2008 agreement were necessary in that regard. The Norwegian authorities could have acted differently. They could have contacted ESA, notified aid measures for a temporary period and immediately arranged for a new tender procedure as in *NorthLink & CalMac*.

85. ESA considers it necessary to distinguish the facts of the *NorthLink & CalMac* decision from those of the present case. First, in the Scottish case, there was an urgent need to rescue the service, not the operator. Second, those measures were precise, structured and audited. Moreover, the additional compensation was handled in a way that allowed any impact on the market to be measured by the Commission, to be kept to a strict minimum and the service adequately ensured in the short term. In comparison, the manner in which the Norwegian authorities increased Hurtigruten's compensation in the present case simply did not allow ESA to exercise the relevant control over the State aid.

86. As for the arguments on respect for the State's margin of discretion, ESA refers to a draft Commission Communication concerning public service compensation.[16] It notes that there is a wide margin of discretion for States to define public service obligations, subject to verification by ESA whether the State has made a manifest error in defining the service as a service of general economic interest and whether the service involves State aid or not. In this case, ESA respected the Norwegian authorities' discretion to define the service on the Bergen-Kirkenes route as a public service. However, according to ESA, this discretion cannot be extended to permit the State to grant incompatible State aid on the basis that the operator faces bankruptcy.

87. As for an assessment of possible anti-competitive behaviour, ESA submits that there was no requirement to analyse Hurtigruten's activities in this regard. In any event, Hurtigruten would have failed such a test since it was over-compensated.

88. In the rejoinder, ESA claims that the documents from 2001 referred to by Hurtigruten in its reply should not be admitted as they have been introduced at too late a stage in the proceedings.[17]

89. ESA adds that, in any event, the arguments relating to the 2001 decision are irrelevant.

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[16] Reference is made to a draft communication, now adopted as Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8, p. 4. In addition, ESA refers to the Commission Communication on services of general interest in Europe, OJ 2001 C 17, p. 4.

[17] Reference is made to Annex C.12 in the reply.

Application of the Altmark criteria by ESA in the contested decision (the third plea of Hurtigruten and the first plea of Norway)

90. Hurtigruten and Norway submit that the three measures provided for in the 2008 agreement satisfied all of the *Altmark* criteria.

91. In contrast, ESA, supported by the Commission, submits that the contested decision shows that the three measures do not satisfy the second, third and fourth *Altmark* criteria.

92. Hurtigruten submits that the renegotiation of the 2004 agreement satisfies the *Altmark* criteria given that the renegotiation clause was part of the initial tender and was published in the course of the tender procedure.

93. Hurtigruten and Norway assert that the approach used in the contested decision is manifestly wrong. If ESA's position were to be applied, it is argued that hardship provisions in public/private contracts can no longer be interpreted in accordance with general commercial law, including UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law, with the view of adapting a contract to restore its equilibrium when the conditions of hardship are met. On this point the position of ESA would fundamentally affect almost all public/private contracts within the EEA as most contracts would have one or more hardship provisions. On procedure, if ESA's position were to be applied, when a hardship provision is invoked in a public/private contractual relationship that would automatically render it necessary with a notification to the Commission or ESA. Furthermore, the position of a commercial operator in such a scenario would be entirely at the discretionary mercy of the public authorities and the Commission or ESA with no possibility for the commercial operator to affect its own position in the market place or rights under a contractual regime.

94. Moreover, Hurtigruten and Norway assert that, under Norwegian law, the 2004 agreement can be renegotiated either on the basis of the renegotiation clause in the agreement itself or on the basis of section 36 of the Norwegian Contract Act. The question is whether it is possible to include a renegotiation clause intended to restore a balance to the contract without infringing the second *Altmark* criterion.

95. Hurtigruten refer to the practice of the Commission which has accepted price adjustments for "unforeseeable costs" in public service contracts. It submits that the unforeseen introduction of the NOx tax in 2007 should be treated as such an unforeseen event and that, consequently, recovery should not be ordered.

96. Hurtigruten submits that ESA has made a manifest error of assessment in the application of Article 61(1) EEA in concluding that the renegotiation clause does not meet the *Altmark* criteria.

97. Finally, Hurtigruten refers to the PWC reports of 27 September 2007 and 14 October 2008. These reports formed the basis for the conclusion that the Norwegian authorities could pay additional compensation, following renegotiations under Article 8 of the 2004 agreement, without overcompensating Hurtigruten in breach of the *Altmark* criteria. Hurtigruten submits that this model is within the scope of the *Altmark* criteria, and, consequently, that ESA has made a manifest error of law or assessment in relation to Article 61(1) EEA.

98. Norway submits that ESA committed a manifest error of law and/or assessment in finding that the three measures in question constitute State aid within the meaning of Article 61(1) EEA. It maintains, as it has throughout the administrative procedure, that Hurtigruten has not received an advantage which other undertakings would not also have received under the same circumstances. Moreover, the 2008 agreement fulfils the *Altmark* criteria.

99. Norway refers to section 1.3.3.1 of the contested decision and contests the findings of ESA that the 2008 agreement was not covered by the original tender. In fact, the renegotiation clause was included in the tender documents. The tendering companies submitted a common offer and later merged into one single company. Therefore, it is difficult to see how the three measures provided for in the 2008 agreement could alter the result of the tender process.

100. According to Norway, the 2008 agreement did not change the economic balance of the contract in favour of Hurtigruten but restored the economic balance of the contract.

101. Norway refers to Articles 6.1 and 6.2 of the 2004 agreement and submits that ESA erred in assessing the second *Altmark* criterion against Article 8 of the 2004 agreement (the renegotiation clause) alone and not against the compensation mechanism as a whole, in which the renegotiation clause only represents one of several elements. Norway submits also that ESA erred in failing to recognise that Article 8 of the 2004 agreement, even when taken on its own merit, is consistent with other standard hardship clauses, and that the contested measures are within the scope of that clause. Moreover, ESA erred in adopting a stricter approach towards hardship clauses than that taken by the Commission in public procurement cases.

102. The assertion of ESA that Norway has not shown that the “efficiency” criterion has been satisfied is unsubstantiated and unsupported by the relevant facts. In assessing the renegotiations, it is important to remember that the undertakings entrusted with a public service obligation are not allowed to make more than a reasonable profit. The absence of a possibility to make more than a reasonable profit means that the risks involved with the contract must be reduced. Otherwise, undertakings contemplating the provision of public services would lack adequate incentives in comparison with those inherent in the provision of commercial services under market conditions. A renegotiation clause in public service contracts is common practice.

103. Norway refers to ESA's demand for "objective and transparent parameters" mentioned in section 1.3.3.1 on page 15 of the contested decision. It interprets ESA's analysis to imply that the *Altmark* criteria cannot be fulfilled unless a renegotiation clause includes objective and transparent parameters on the basis of which extraordinary compensation is calculated. Norway rejects that approach as it would prohibit all renegotiation clauses in public service contracts, which are included, as a rule, to regulate unpredictable events impossible to establish in advance. The very nature of such events means they are impossible to establish in advance in an objective and transparent manner to the extent that ESA appears to require.

104. Instead, the relevant test must be whether payments granted on the basis of the renegotiation clause do not go beyond the actual costs incurred in providing the public service, including a reasonable profit. If this is the case and the events do not relate to the efficiency of the operator, the *Altmark* criteria are satisfied. Norway refers to the Commission's decision *Southern Moravia* and the definition of unforeseen costs in that decision in order to substantiate its contention that the renegotiation clause establishes specific conditions which must be satisfied in order to trigger the right to renegotiations.[18] In the present case, those specified situations are independent of Hurtigruten's management or efficiency. They concern external factors over which the management of Hurtigruten has no influence.

105. Norway submits that the renegotiation clause allows for compensation only in relation to the demonstrable changes in cost which triggered the renegotiation rights, with the aim of restoring the contractual balance in relation to these factors. The clause cannot be interpreted as according the contractor the right to be compensated for factors completely unconnected with the conditions which triggered the right. In its view, the payments made under the three measures at issue in the present case are limited to the actual increase in costs. This is corroborated by *ex post* assessment.

106. In its reply, Norway underlines that Article 8 of the 2004 agreement must be interpreted in the light of applicable Norwegian law, since it falls under Norwegian jurisdiction. In that regard, Norway also refers to the UNIDROIT Principles of International Commercial Contracts 2010, the Principles of European Contract Law (PECL), and section 36 of the Norwegian Contract Act, which allows for renegotiations of contracts. Norway also refers to the draft directive on procurement by entities operating in water, energy, transport and postal sectors, in particular Article 82.[19]

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[18] Reference is made to Commission Decision 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* (notified under document number C(2008) 7032), OJ 2009 L 97, p. 14.

[19] Reference is made to the Proposal for a Directive of the European Parliament and the of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011) 895 final.

107. Norway claims that the *Altmark* criteria are fulfilled. The renegotiation clause takes due account of the interests of the contracting parties to maintain economic equilibrium even in the case of unforeseen events. It also ensures that any additional compensation is granted in a transparent and objective manner.

108. Norway submits that the conclusion that the *Altmark* criteria are fulfilled applies in particular to the NOx tax/NOx fund reimbursements, since the increased costs due to these NOx charges is an objectively identifiable fact. Should the compensation under the "general compensation" and capacity reduction measures be found to exceed the corresponding actual costs, Norway submits that a different conclusion must be drawn as regards the NOx tax/NOx fund reimbursements.

109. ESA shares the view that Article 8 of the 2004 agreement is a renegotiation clause which can be invoked under two specific circumstances: official acts entailing changes of costs and radical and unforeseeable changes in costs. However, the clause does not contain any parameters governing increases in compensation. Therefore, according to ESA, the clause does not satisfy the requirements of objectivity and transparency. In this regard, ESA contends that Norway appears to have misunderstood the *Altmark* test. What is crucial is not whether the right to renegotiate was triggered but whether the clause adequately specified the necessary parameters. A vaguely worded clause of that kind cannot be used to justify an increase in compensation for a public service and shelter it from state aid control in accordance with the *Altmark* criteria.

110. ESA submits that the contested decision demonstrates that the three measures do not satisfy the second, third and fourth *Altmark* criteria.

The second *Altmark* criterion (compensation calculated on the basis of objective and transparent parameters)

111. The fundamental position of ESA regarding the second *Altmark* criterion is that, in the absence of necessary parameters, guidance or limitations to be applied to determine future increases in compensation, Article 8 of the 2004 agreement did not satisfy the requirements of objectivity and transparency since the parameter on the basis of which compensation is calculated must be established in advance in an objective and transparent manner. In contrast, Article 8 of the 2004 agreement has been applied in a discretionary manner.

112. ESA expands on that position with the following arguments. First, the necessary parameters do not exist. Second, ESA refutes any argument that its assessment of Article 8 of the 2004 agreement must be viewed as a prohibition on renegotiation provisions in public service agreements. Third, any considerations relating to the level of risk that bidders have to calculate into their bids or to the efficient utilisation of community resources do not challenge this assessment. They are simply irrelevant. Fourth, ESA's view on the matter is supported by the evidence submitted by the Norwegian authorities. Namely, the

payments appear to have been determined in light of the negotiating strengths of the parties.

113. ESA submits that the *Southern Moravia* decision has no bearing on this assessment, since it concerned the third *Altmark* criterion. As for the second *Altmark* criterion, the Commission concluded in that case that the price had been established in advance on the basis of statistical data before the selection of operators took place. In contrast, the situation in the present case indicates that the second *Altmark* criterion has not been satisfied.

The third *Altmark* criterion (compensation must not exceed cost)

114. ESA disagrees with the approach taken by Hurtigruten. Whereas Hurtigruten appears to rely on a parallel between the *Southern Moravia* decision and the consultants' reports prepared between 2007 and 2011 to prove that the 2008 agreement related to cost increases falling within Article 8 of the 2004 agreement, ESA takes a different view.

115. ESA distinguishes the present case from the facts of the *Southern Moravia* decision and notes in particular that the compensation in question was not paid on the basis of prior established parameters or on the basis of proven costs. In the contested decision, ESA found that the lack of separate accounts made it impossible to calculate the losses Hurtigruten alleged were attributable to the public service. The financial reports show that the 2008 agreement went beyond compensation for the services of general economic interest. ESA avers that it has received only hypothetical numbers for the costs and revenue and contends that it has not been shown that Hurtigruten was not over-compensated. In any event, ESA was not in a position to conclude that the payments under the three measures provided for in the 2008 agreement did not exceed actual costs incurred and, consequently, could not find that the third *Altmark* criterion had been satisfied.

The fourth *Altmark* criterion (the need for a public procurement procedure)

116. ESA contends that the compensation awarded under the 2008 agreement covered more than the cost and prices of input factors which according to the applicants were covered by the original tender on the basis of Article 8 of the 2004 agreement. It follows from the contested decision that the Norwegian authorities could not prove that the compensation covered only such costs. Furthermore, the increase in compensation was not insignificant. ESA contests the purpose of the 2008 agreement. In its view, the retroactive re-establishment of an economic equilibrium or restoration of the balance of a tendered contract defeats the very purpose of the tender itself as it is no longer the market that places a value on the services tendered.

117. Even if it were to be found that the 2008 agreement re-established an economic equilibrium, ESA maintains that the payments also covered costs

linked to the commercial activities of Hurtigruten. Finally, ESA observes that the Norwegian authorities have not submitted any information to substantiate that the "efficiency" requirement inherent in the fourth *Altmark* criterion has been satisfied.

118. Contrary to the view taken by Norway, the fact that only one bidder submitted an offer to the tender has no bearing on whether the increased price paid for the service resulting from exercising an open-ended renegotiation clause is covered by the original tender. Moreover, according to ESA, the argument that no other operators would have been interested in bidding as the economic balance of the contract was restored, and not modified, does not hold. No operator that was interested in 2004 could have known that, in 2008, such a restoration would occur.

119. In the view of ESA, Norway's alternative argument in relation to the fourth *Altmark* criterion must also be dismissed. It appears to allege that as regards the "efficiency" criterion, the contested decision is unsubstantiated and unsupported by the facts. ESA counters that is for Norway to demonstrate that this criterion has been satisfied. However, in its view, the Norwegian authorities were unable to provide information demonstrating that Hurtigruten was an efficient operator of the public service.

The NOx tax

120. ESA considers the NOx tax to be the clearest indication that the measures involved State aid. Hurtigruten was, in effect, largely exempted from having to pay this tax by virtue of compensation allocated to it under the State budget. In support of that view, it refers to a letter of 8 May 2007 in which Hurtigruten claimed that it was impossible to determine how much of the NOx tax fell on its commercial operations and which demanded full reimbursement for its NOx tax payments. Further evidence can be found in a letter from the Norwegian authorities of 16 August 2011 concerning recovery of the State aid which shows that between 58% and 62% of capacity costs were attributable to the public service activities of Hurtigruten. This is considerably lower than the 90% reimbursement of the NOx tax. ESA asserts that it was therefore correct in its finding of over-compensation. Finally, ESA refers to tables set out in reports submitted by Norway to show that the NOx compensation granted exceeded the public service obligation share of Hurtigruten's NOx costs.

121. The Commission considers that the contested decision is correct in its finding that the second, third and fourth *Altmark* criteria were not fulfilled in the present case.

Second criterion

122. The Commission takes the view that Article 8 of the 2004 agreement cannot be regarded as specifying in advance, in an objective and transparent

manner, the parameters on the basis of which compensation granted to Hurtigruten was calculated. In view of the broad wording of Article 8 of the 2004 agreement, it is reasonable to conclude that the specific application of this provision appears largely to depend on the discretion of the national authorities.

123. According to the Commission, it is clear that the renegotiation clause falls short of the *Altmark* criteria. Open-ended renegotiation clauses in public service contracts are inadequate to satisfy the second *Altmark* criterion. This assessment is confirmed by the *Southern Moravia* and *NorthLink & CalMac* decisions. In the present case, Article 8 of the 2004 agreement does not even oblige the parties to resort to an arbitration procedure. It only requires disclosure of all the necessary documentation.

Third criterion

124. The Commission points out that its practice emphasises the need to rely on "actual costs" rather than simple estimations of costs. In this connection, it notes that, whatever the accuracy of the models discussed in the present case, it is common ground that they are estimates of the costs incurred by Hurtigruten. For this reason alone, the additional compensation granted to Hurtigruten cannot be regarded as respecting the third *Altmark* criterion. Moreover, it should be noted that Hurtigruten did not keep separate accounts.

125. The Commission emphasises that, under EU law, the Member States must cooperate with the Commission. This is even more important in the context of services of general economic interest, as only the Member State which alleges that the criteria are fulfilled in respect of a given measure that would otherwise constitute State aid is in possession of the information necessary to show that the relevant criteria have indeed been respected. In any event, according to the Commission, ESA was clearly in a position to conclude that the third *Altmark* criterion was not met in respect of the NOx tax measure, since it provided for reimbursement of 90% of the tax burden.

Fourth criterion

126. The Commission considers Article 8 of the 2004 agreement to be an open-ended renegotiation clause which leaves the parties with unchecked discretion to modify the level of the compensation granted under the public service contract. The provision does not establish an adjustment mechanism for verifiable increases in costs which is transparent and known in advance. Since the renegotiations resulted in a substantial increase in the level of compensation provided for in the original agreement, these may have infringed the principles of transparency and equal treatment between tenders.

127. In the alternative, the Commission contends that the burden of proof must lie with the State which alleges that the level of compensation has been

determined on the basis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

The compensation level and Article 59(2) EEA (the second plea of Hurtigruten and the second plea of Norway)

128. By its present plea, Hurtigruten submits that the wording of the contested decision is ambiguous, that it is impossible to determine the "yardstick" used to measure any potential over-compensation and that the legal basis is also unclear.

129. Hurtigruten's principal argument is that ESA's substantive assessment under Article 59(2) EEA is incorrect on a conceptual level. The decisive test as set out in Article 59(2) EEA should be whether the additional contributions were necessary in ensuring the performance of the public service. That should be determined by assessing whether Hurtigruten was over-compensated for the public service during the relevant years when all costs and revenues have been appropriately allocated between public and commercial operations, in particular when there was an immediate and realistic risk of non-performance of the service. The annual results related to the service of general economic interest should be decisive.

130. Hurtigruten's alternative argument is that ESA's assessment under Article 59(2) EEA is incorrect on a specific level. Even if overcompensation should be assessed in relation to cost increases rather than on the overall yearly result related to the public service (as ESA does), the reasoning in the contested decision is fundamentally flawed for three reasons: (i) Article 59(2) EEA does not require an assessment of each and every cost element separately. (ii) ESA accepts only those parts of payments under the 2008 agreement that are compensation for costs beyond radical and unforeseen costs. The question of over-compensation under Article 59(2) EEA cannot be equaled with the right to launch renegotiations.

131. In its challenge to ESA's notion of over-compensation, Hurtigruten draws attention to Article 1 of the contested decision ("in so far as [the measures] constitute a form of over-compensation") and page 24 of the contested decision ("the Authority cannot conclude that the three measures do not involve any over-compensation").

132. Hurtigruten submits that for the purposes of assessment of any possible over-compensation the correct yardstick must be the total costs (and a reasonable profit) involved the provision of the service of general economic interest balanced against the total revenues and compensation for that service. In its view, any form or amount of state compensation is justifiable as compatible aid under Article 59(2) EEA if such compensation is necessary in order not to obstruct an undertaking's performance of the service of general economic interest.

133. According to Hurtigruten, the relevant test in the present case is whether the total revenues it obtains related to the provision of the service of general economic interest, including the revenues from the state under the 2004 agreement, the payments under the 2008 agreement and the revenues from the transport of passengers or goods in performing the service of general economic interest, are higher than necessary to cover the costs and a reasonable profit in performing the service specified under the 2004 agreement.

134. In that regard, Hurtigruten refers to ESA's State Aid Guidelines Part IV, Chapter 1, which state in paragraph 13 that compensation may not exceed "the costs incurred in discharging the public service obligations". Hurtigruten also refers the judgment of the General Court in *FFSA*.[20] Hurtigruten notes that in the decisions following the Commission's 2001 Communication, the Commission essentially limited its assessment of the necessity/proportionality of the aid to the verification that there was no over-compensation in relation to the costs of performing the service of general economic interest.[21]

135. Hurtigruten refers to two decisions in particular, the restructuring aid given to *SNCM* and the decision concerning *NorthLink & CalMac*. In the first decision, the Commission assessed the proportionality of the aid by examining "whether the amount of the subsidies awarded to *SNCM* in the context of its public service obligations for maritime services to Corsica matches the excess costs borne by *SNCM* to satisfy the fundamental requirements of the public service contract".[22]

136. Hurtigruten claims that *NorthLink & CalMac* decision confirms that Hurtigruten may receive additional compensation where the original compensation is insufficient to cover the costs. In that decision, the Commission noted that the compensation awarded altered the nature and extent of the initial tender, but stressed later in the decision that "the compatibility assessment is limited to checking for over-compensation and possible anti-competitive behaviour". In contrast, the contested decision does not even refer to the *NorthLink & CalMac* decision and provides far less any analysis thereof in order to distinguish the cases and justify another conclusion.

Cost allocation

137. Hurtigruten observes that for the comparison of total costs and revenues relating to the provision of the service of general economic interest, a proper allocation of costs and revenues is needed. In that regard, Hurtigruten agrees in

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[20] Reference is made to Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229.

[21] Reference is made to the 2001 Commission Communication on Services of General Interest, cited above.

[22] Reference is made to the Commission Decision in Case C 58/2002, *Aide à la restructuration de la SNCM*, OJ 2009 L 225, p. 180. A challenge to this decision is pending before the General Court in Case T-565/08 *Corsica Ferries France* v *Commission*.

principle with the three points concerning the calculation of public service compensation specified by ESA on page 29 of the contested decision and avers that the cost allocation submitted to ESA in the course of the proceedings complied with these requirements. More specifically, it asserts that:

> i) relying on the costs of the smallest of the eleven ships covered by the 2004 agreement, which have exactly the minimum capacity requested in the 2004 agreement results in a proper allocation of costs for the public service and the activities outside the public service remit;
>
> ii) the allocation model results in compensation for the service of general economic interest for merely a proportionate share of the fixed costs relating to these sailings and vessels; and
>
> iii) the costs relied upon are actual and representative for the costs of the provision of the service of general economic interest.

138. Hurtigruten also refers to page 8 and page 23, first paragraph, of the contested decision and asserts that ESA committed a manifest error of assessment in relation to the reports submitted by the Norwegian authorities, that a proper method for the allocation of fixed costs has been relied upon in all the studies to which reference has been made and that the documentation demonstrates that there is no over-compensation incompatible with Article 59(2) EEA or even Article 61(1) EEA.

139. Hurtigruten makes the following observations on the reports from the consulting firms.

140. The contested decision fails to note that the PWC report was updated to 30 June 2008 in a second report of 14 October 2008 submitted when requesting additional compensation.[23] ESA's assessment also fails to reflect the fact that the purpose of the first PWC report was limited to analysing the cost increases which were considered relevant under Article 8 of the 2004 agreement, and which could justify renegotiation within the combined terms of that provision and the *Altmark* criteria. ESA also fails to note that the three methods used in the PWC report are merely three approaches to analysing how costs may be duly allocated. It is wrong simply to compare the first and second methods resulting in an incorrect presentation of the facts on page 8 of the contested decision. It is simply not correct that "fixed costs common to the public service and the commercial activities tend to be allocated to the public service side".

141. In relation to the first BDO report,[24] the contested decision fails to explain that its limited scope reflects the fact that the report is drafted as answer to questions in this connection from ESA. Both the PWC report and the first BDO

[23] Reference is made to the PWC Report of 14 October 2008.

[24] Reference is made to the BDO Noraudit Report of 23 March 2009.

report make allocations of common costs based on capacity, on the definition of the service of general economic interest in terms of the capacity required under the 2004 agreement as a minimum capacity, on the actual costs of the vessel applied using such minimum capacity and with additional restrictions on the cost allocated to the service of general economic interest based on assessment of individual cost groups.

142. In relation the main BDO report,[25] Hurtigruten observes that the contested decision fails to discuss this report. It was submitted to ESA by the Norwegian authorities in a letter of 30 September 2010. The report explains that no over-compensation had taken place. The report includes both a thorough justification for the method applied and a calculation under this method based on the actual accounts of Hurtigruten for 2008. The conclusion of the report is that Hurtigruten, even after having received additional compensation under the supplementary agreement, recorded a deficit in the operation of the service of general economic interest.

143. The underlying methodology of this report, presenting a representative measure of the costs related to the provision of the service of general economic interest based on the minimum capacity required, implies a cost allocation of all costs which are common to the service of general economic interest and commercial services. Consequently, according to Hurtigruten, the contested decision is incorrect on pages 8 and 23. The core of this error lies in ESA's dismissal of the possibility to use the cost of providing the minimum capacity required under the 2004 agreement when determining the cost to be covered by the State.

144. The statement on page 23 of the contested decision categorising this cost allocation as "hypothetical" is also incorrect. The method takes as its point of departure the actual definition of the service of general economic interest specified in the 2004 agreement, that is, the provision of a certain minimum capacity on a certain route. Hurtigruten stresses that the method applied in the report for assessing possible over-compensation allocates costs on the basis of the actual costs of the actual minimum vessel on an annual basis. Moreover, the assessment also reflects actual revenues.

145. Hurtigruten contends that States enjoy a certain margin of discretion in their choice of models for cost allocation and refers to the General Court judgments in *BUPA* and *FFSA*. Therefore, in its view, the contested decision is wrong to dismiss the cost allocation model of the Norwegian authorities and fails to identify how there could have been a manifest error of assessment on the part of the Norwegian authorities in this regard.

146. Hurtigruten submits further that in the contested decision ESA actually proposes an allocation model which is inconsistent with the service of general

[25] Reference is made to the BDO Noraudit Report of 27 September 2010.

economic interest assessment in question. The Norwegian authorities used their discretion when basing the cost allocation model on exploitation of the minimum capacity requested. According to Hurtigruten, it would be inconsistent to use a model based on revenue as is suggested by ESA. In that regard, Hurtigruten refers to *Chronopost II*[26] and the Commission's decision *NorthLink & CalMac*. It notes that, in the latter, the Commission accepted an allocation model based on the use of capacity.

Subsequent events confirm the cost allocations

147. Finally, Hurtigruten asserts that, when a refined model for cost allocation is applied, the results support its findings. In that regard, Hurtigruten refers to a refined model for cost allocation included in the 2010 tender, which is applicable from 2012.[27] This model is based on a separation of accounts between the service of general economic interest and the commercial activities. An application of this model – which is also based on capacity – to the facts of the case demonstrates that Hurtigruten has not received any over-compensation.

148. These findings support Hurtigruten's contention that ESA erred in the contested decision in not accepting that the cost allocation presented by the Norwegian authorities in the PWC reports and the BDO reports relating to the compensation for a service of general economic interest under the 2004 and 2008 agreements clearly and sufficiently demonstrates that Hurtigruten has not received any over-compensation for such services which is incompatible with Article 59(2) EEA.

149. Finally, Hurtigruten observes that under the new contract for the period 2012 to 2019 concluded following a tender procedure, it will be paid substantially more than under the agreement addressed by the contested decision. In its view, this confirms that there was no over-compensation under the 2008 agreement.

150. Hurtigruten contests ESA's reliance on the Commission decision in *SNCM* and the judgment of the General Court in *Combus*. According to Hurtigruten, those cases involved very different facts.

151. In its reply, Hurtigruten submits that during the recovery procedure, ESA has finally defined its substantive position on the allocation of costs which Hurtigruten characterises as three pillars of "ESA logic". First, there must be a separation of accounts. Second, only the service of general economic interest related portion of costs that can be considered unforeseen and radically increased may be covered. Third, the different cost elements must be assessed separately.

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[26] Reference is made to Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste* v *Union française de l'express (UFEX) and Others* [2008] ECR I-4777.

[27] Reference is made to Annex C to the invitation to tender of 2010 (Annex A.32 and A.39 of the Application).

Hurtigruten rejects this "logic". The correct test is whether the additional contributions were necessary in ensuring the performance of the service of general economic interest. In any event, ESA erred in using the criteria for initiating renegotiations under the 2004 agreement to assess the outcome of the renegotiations.

152. Norway refers to Article 1 of the operative part of the contested decision and, in particular, to the fact that the three measures are considered incompatible "in so far as they constitute a form of over-compensation for public service". Norway concurs, at a very general level, with the test of cost allocation set out in the contested decision, and refers to the case-law of the ECJ according to which the relevant test for over-compensation is whether the compensation is necessary in order to enable the undertaking to perform its obligations under economically acceptable conditions. This requires an allocation of the costs common to commercial activities and activities to ensure a service of general economic interest.

153. Norway points to the State aid guidelines on public service obligations,[28] which, even if they are not applicable in the present case, appear, in its view, to formulate accurately the relevant principle, namely, that compensation may cover all variable costs, a contribution to fixed costs, and an adequate return on own capital.

154. In light of this, Norway divides its second plea into three branches. By the first branch Norway alleges a manifest error of assessment in that ESA misunderstood or misinterpreted essential aspects of the allocation model used by Norway, in particular as set out in its letter of 30 September 2010. By the second branch, Norway contends a manifest error of law or assessment in that ESA rejected the allocation model as such as an appropriate model for cost allocation, a matter which is well within the margin of discretion of the State. By the third branch Norway alleges an error of law or assessment in that ESA applied an incorrect test of necessity for the purposes of Article 59(2) EEA in relation to possible over-compensation.

The first branch of the second plea – the allocation model

155. The first branch concerns ESA's misinterpretation of the allocation model and not the legality of the model as such. Norway submits that ESA committed a manifest error of assessment in relation to the allocation model relied upon by the Norwegian authorities, in particular, as set out in the letter of 30 September 2010.[29]

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[28] Reference is made to point 15 of the Guidelines of ESA on State aid in the form of public service compensation, cited above.

[29] Reference is made to the BDO Report of 2010.

156. In the contested decision, ESA fails to take account of the answer submitted by Norway to the opening of the formal investigation procedure on 14 July 2010. In Norway's letter of 30 September 2010, a new analysis of legal and factual matters was presented together with a report from BDO dated 27 September 2010. These documents are reflected only to a limited extent in the contested decision. The letter of 30 September 2010 clearly stated that the Norwegian authorities intended to allocate the costs between commercial and non-commercial activities and explained why this was a challenging task. The purpose of the 2010 BDO report was to allocate the costs and revenues between state purchases and other activities on the coastal route. It is clear that the model applied in the report reflects the fact that the actual fleet performs a larger part of its activities outside the public service remit.

157. Norway refutes the conclusion reached by ESA in the contested decision that this model implies "the lack of common costs" and that "several categories of [common costs] are fully allocated to the public service side …". Instead, under this model, nearly half of the common costs of performing the coastal route Bergen-Kirkenes are allocated to the commercial side.

158. Norway asserts that the allocation model is based on the minimum requirements in the 2004 agreement. The essence of this model is to quantify the services that are required under the agreement. These costs are allocated to the service of general economic interest, whereas all other costs are allocated to the commercial part of the coastal route.

159. As a result of ESA's misinterpretation, the reasoning in the contested decision is incorrect and, hence, Norway contends that the decision must be annulled.

The second branch of the second plea – error of law and/or assessment in rejecting the allocation model

160. Norway submits that rejection of the minimum capacity allocation model constitutes a manifest error of law and/or assessment. In particular, it criticises the failure of ESA in the contested decision to acknowledge the model as compatible with EEA law.

161. Norway refers to the judgments of the General Court in *BUPA* and *FFSA*, according to which the State enjoys discretion in defining a service of general economic interest and the conditions of its implementation. This discretion is all the wider in evaluating additional public service costs. Thus, according to Norway, having regard to the State's broad discretion in these complex matters, ESA may only turn down the allocation relied upon by the State if it comprises a manifest error.

162. According to Norway, this discretion must be seen against the background that the test of cost allocation is itself vague. The decisive criterion is that there

must be an “appropriate” allocation of common costs. The contested decision does not appear to set out more precise parameters. Any estimation of what is an “appropriate” distribution of costs will necessarily be uncertain and difficult. As the relevant costs are common to different activities, one is forced to establish a model that by nature implies estimations and more or less theoretical assessments of how these costs may be distributed in an appropriate manner. By failing to recognise this margin of discretion of the State, ESA committed a manifest error of law and/or assessment in relation to the model.

163. Norway contends that the starting point for the assessment concerning cost allocation must be the contractual obligations that the model is intended to reflect. The public service obligation is to perform daily sailings between 34 predetermined ports from Bergen to Kirkenes with ships that must have capacity for no less than 400 passengers. The State pays for this capacity and Hurtigruten is obliged to have this capacity available for passengers. However, Hurtigruten is free to use larger ships, which they do. Hence, Norway submits that the capacity allocation model is appropriate.

164. Norway maintains that the essence of this model is to quantify the costs in performing only those tasks required under the 2004 agreement, that is, the costs in performing the sailings with the minimum capacity required by the State. It notes that the model, as set out in the 2010 BDO report, is based on actual costs and revenues as presented by Hurtigruten to the Norwegian authorities in relation to one of the smallest ships on the Bergen-Kirkenes route. The costs and revenues are multiplied by 11 to reflect the number of ships in service, a number which is then modified in several respects in order to reach a more appropriate distribution of fixed costs.

165. Norway refers in particular to two sets of fixed costs. First, certain costs relate only to the commercial activities and are allocated accordingly. This concerns transfer costs and excursion costs. Second, the sales on board are allocated on the basis of passenger revenues from the service of general economic interest and commercial passengers. Remaining costs, such as fuel costs, harbour costs etc, are calculated on the basis of the actual costs related to the ship chosen (MS Vesterålen) multiplied by 11. Norway further submits that no cost element is allocated in full to the public service part of the operations, and ESA errs also on this point.

166. Norway observes that on the basis of that data BDO drew the conclusion in their 2010 report that the minimum cost to operate the fleet was NOK 989 million in 2007 and NOK 1 088 million in 2008. This represents 53% of the total costs in performing the coastal route Bergen-Kirkenes in both of those years. For the same years and having taken account of the additional payments under the 2008 agreement, BDO estimate the deficit related to the service of general economic interest was NOK 211 million in 2007 and NOK 274 million in 2008.

167. Norway submits that in the contested decision ESA should have acknowledged that a minimum capacity model as presented to it was, in principle, compatible with EEA law, appropriate and well within the margin of appreciation of the State.

168. Norway refers to the Commission's decision *NorthLink & CalMac* and submits that neither the Court nor the Commission have questioned the legality of very generally formulated allocation principles based on volumes of, or the capacity of, a service of general economic interest. It submits that the Commission's analysis in that decision demonstrates the acceptance of allocation principles such as those applied by the Norwegian authorities and the restraint exercised by the Commission in that regard.

169. Alternative allocation models, such as the model proposed by ESA based on revenues, have definite weaknesses. In Norway's view, the capacity obligation under the 2004 agreement renders the revenue-based approach of little interest, since the costs related to performing the 2004 agreement are determined more precisely by a capacity-based allocation than a revenue-based allocation.

170. Norway notes that, under the 2004 agreement, Hurtigruten may not increase ticket prices for the service of general economic interest but may do so for commercial activities. Consequently, a revenue-based allocation key could be subject to quite substantial changes from one year to the next. As a result, Norway contends that a cost allocation model based on turnover does not reasonably reflect the actual costs necessary in performing the public service obligations.

171. Norway concedes that in a complex case such as the present any cost allocation model includes inaccuracies and uncertainties. For example, the model was not adjusted to reflect certain sailings in the Geirangerfjorden simply because the deficit in the service of general economic interest activities was so substantial that an adjustment would not have influenced the outcome of the analysis. Moreover, one may question why all the marketing costs are allocated to the commercial activities of Hurtigruten. According to Norway, what is decisive is that the total allocation of common costs in sum is appropriate, not whether single cost elements could possibly have been assessed differently. None of the possible objections to the model would have altered the conclusion that Hurtigruten is not over-compensated for its public service tasks. In Norway's view, this is further supported by the refined analysis undertaken following the adoption of the contested decision and submitted ESA with a view to avoiding the present action.

172. Norway submits that the consequences of the contested decision are difficult to assess.

173. In seeking to determine whether there has been any over-compensation, Norway has developed an alternative and more refined allocation model

submitted to ESA on 17 August 2011. According to Norway, this model confirms the legality of the allocation presented. The two models lead to the same conclusion, namely, that, even taking account of the additional payments under the 2008 agreement, Hurtigruten has been undercompensated throughout all the relevant years. Under the refined model, unlike the minimum capacity allocation model relied upon by the Norwegian authorities in the present procedure, the allocation keys are adjusted, inter alia, for the Geiranger operations, leading to a higher allocation of capacity costs to the commercial activities. Notwithstanding that shift in capacity costs to the commercial activities, the 2011 BDO report shows a deficit in the operations of the service of general economic interest for each of the years 2005 to 2010. In none of the years 2007 to 2010 is Hurtigruten over-compensated, even after additional payments and other effects of the 2008 agreement are added. For 2007, the refined models allocate 48% of the costs on the coastal route to the service of general economic interest and for 2008 this figure is 47%.

174. According to Norway, the fact that the refined 2011 model arrives at the same conclusions as the minimum capacity allocation model demonstrates that ESA erred in the contested decision in deciding that the minimum capacity allocation model was not applicable.

The third branch of the second plea – manifest error in law in rejecting an overall analysis for the purposes of possible over-compensation under Article 59(2) EEA

175. According to Norway, it is unclear whether in the contested decision ESA takes the view that over-compensation should be assessed by reference to the total costs of providing the service of general economic interest (plus a reasonable profit) or by reference to a different yardstick such as the costs relating to items that triggered the renegotiations. It appears to Norway that ESA adopted the latter approach in its assessment both for the purposes of Article 61(1) EEA and in relation to Article 59(2) EEA.

176. If that is the case, Norway contends that ESA erred in law, in particular, in failing to acknowledge that the test for the purposes of Article 59(2) EEA is an overall test based on the service of general economic interest as such and that the additional payments were necessary to ensure the maritime transport service at issue in the present case. According to Norway, the necessity test requires a specific assessment of the need for additional contributions based on the total costs and revenues involved. In contrast, there is no efficiency requirement under Article 59(2) EEA. The general test is whether the compensation is necessary in order to enable the undertaking to perform its tasks under economically acceptable conditions. The purpose of the compensation is to ensure cost coverage. There is not even an obligation for the State to choose the least expensive undertaking. Norway also refers to the possibility for cross-compensation in relation to several tasks which all constitute services of general economic interest.

177. Norway submits that if a public service operator is undercompensated, the State is permitted – but not obliged – under Article 59(2) EEA to amend the act of entrustment in order to increase the level of compensation, provided that the level of compensation does not exceed the total cost plus a reasonable profit. Additional compensation is allowed irrespective of whether the original act of entrustment includes mechanisms for additional compensation or not. The relevant test is the actual, overall result.

178. Norway submits that these principles (i.e. the "necessity test") imply that the additional compensation awarded to Hurtigruten under the 2008 agreement was compatible with the rules and principles governing public service compensation. In the present case, ESA has failed to separate the assessment for the purposes of Article 59(2) EEA from the assessment for the purposes of Article 61(1) EEA. In Norway's view, the 2008 agreement was necessary and did not involve over-compensation for the purposes of Article 59(2) EEA, having regard to the total costs of providing the service of general economic interest.

179. Norway contends that there is no legal basis on which to hold – as ESA did in the contested decision – that in cases where the act of entrustment has been awarded on the basis of a public tender a radically different assessment applies for determining whether there is over-compensation for the purposes of Article 59(2) EEA. First, none of the legal sources concerning Article 59(2) EEA to which it has referred establish a distinction based on the type of act of entrustment used. Second, the basic objectives underpinning the principles of necessary compensation under Article 59(2) EEA will be the same, irrespective of the type of act of entrustment. Third, it should also be noted that the procedure under which a contract is entered into does not as such affect the parties' legal rights and obligations under the contract. Fourth, to adopt an alternative understanding would be paradoxical, since it would imply that the option of using a tender procedure radically limits the possibility to compensate the operator providing the service of general economic interest in the event of unforeseen costs or revenue decline. Finally, for the purposes of the assessment under Article 59(2) EEA, it is irrelevant whether the public procurement rules have been respected.

180. According to Norway, the service in the present case was undercompensated and having regard to the imminent risk of the termination of the service of general economic interest in 2008, for the purposes of Article 59(2) EEA, the additional contributions were clearly necessary to ensure the performance of the service. Norway emphasises the importance of the emergency situation in relation to its submissions on Article 59(2) EEA, such as its letter to ESA of 4 March 2010. While ESA appears to acknowledge that an emergency situation may substantiate the cancelling of a public service contract, Norway fails to see why the efforts invested by the Norwegian authorities to ensure continued performance should lead ESA to conclude that the 2008 agreement was not necessary for the performance of a service of general economic interest.

181. Norway submits that the 2008 agreement was absolutely necessary. First, there was an imminent risk of termination of the 2004 agreement. Second, there was no alternative service provider. Third, there were challenging negotiations between the Norwegian authorities and Hurtigruten to ensure that contributions were limited to only what was strictly necessary. During the autumn of 2008 it became clear that the cost increases were radical. It became equally clear that the service was undercompensated. It was impossible to secure the services without awarding the additional compensation. A new tender was initiated in 2010. This period of preparation was necessary in order to evaluate all necessary aspects of the service.

182. Norway contends that when assessing a reasonable time frame for a new tender, it is necessary to make an overall assessment of, in particular, the market situation and the likely consequences of the new tender. As it is normally assumed that the price determined on the basis of a competitive procedure will be lower than the "emergency price", a quick retender may often be reasonable in order to re-establish a presumably lower market price. Several factors called for a different solution in the present case. These are, *inter alia*, the particularities and the complexity of the service, making it very unlikely that a quick retender would provide any alternatives to Hurtigruten, and that it became increasingly clear that Hurtigruten was in fact undercompensated for the service of general economic interest. A new tender would, according to the Norway, very likely lead to higher contributions than under the 2008 agreement. Under these circumstances, Norway considers that it was necessary to make a new and comprehensive assessment of the several elements of the operation of the service of general economic interest on the route Bergen – Kirkenes.

183. Finally, Norway submits that these arguments are supported by the Commission decision in *NorthLink & CalMac*. In that case, the Commission limited its assessment to whether – as an overall conclusion – the undertaking was over-compensated during the relevant period, in other words, whether the overall outcome was over-compensation (over and above a reasonable profit). Norway submits that a State is permitted to amend the act of entrustment and award additional compensation. In its view, the test remains the same irrespective of whether the original contract was subject to a public tender.

184. In its reply, Norway expands its arguments on Article 59(2) EEA and tendered contracts. It asserts that the *raison d'être* of Article 59(2) EEA is that public service considerations should to a certain extent prevail over pure market economic considerations. The prohibition on State aid established in Article 61(1) EEA only comes into play "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". This means that, if, following a tender, the market price is inadequate to ensure the public service provision, State aid may be granted. Were this not to be permitted, citizens would be deprived of the public service in question.

185. Norway notes that public procurement rules indicate that some amendments to tendered contracts will always be compatible with the State aid principles. However, it observes that, in the *NorthLink & CalMac* decision, the Commission did not appear to consider the previous tendered agreement relevant for the purposes of its assessment. Moreover, in that decision, an amount of compensation alleged to be outside the scope of the public service obligation was considered compatible with State aid law, as the undertaking had a deficit on its public service activities.

186. Norway acknowledges that when a party to a tendered contract claims to be in need of additional compensation, the tender procedure may influence the assessment under Article 59(2) EEA. It may be difficult to prove that additional compensation is absolutely necessary. There may be additional limits as to the extent of subsequent compensation. Additional compensation under a tendered contract may, in some situations, imply an obligation to retender the service.

187. However, in Norway's view, in the present case, ESA failed to respect those principles in the contested decision. The only substantial argument of ESA is too formalistic, fails to take account of the *raison d'être* of Article 59 EEA and wrongly concludes that application of Article 59(2) EEA to situations such as that of the present case would result in a *carte blanche* for State aid. According to Norway, if the Court were to accept ESA's approach, this would lead to arbitrary results.

188. Finally, Norway contests the relevance of *Corsica Ferries* and *Combus*. In its view, those cases concerned very different circumstances.

189. ESA rejects the assertion that it erred in its assessment of the 2008 agreement. It carried out the correct calculations that led it to conclude that Hurtigruten had been over-compensated and received incompatible State aid. ESA refers to page 21 of the contested decision and the principles set out there such as transparency, proportionality and the notion of a reasonable profit. In the light of those principles, ESA submits that it did not err in its application of Article 59(2) EEA, since that provision does not permit any assessment of the "total costs and revenues" of the public service at issue in the case.

190. ESA notes that the 2004 agreement was subject to a tendering process. As a general rule, such a contract does not involve State aid. However, in the present case, the increased compensation went far beyond the payments that had been agreed under the tender. First, the increase in costs was not all radical and unforeseeable. Second, the 2008 agreement did not limit the additional compensation to costs linked to the provision of the public service obligation and effectively included Hurtigruten's commercial operations as well. Therefore, the increased compensation was no longer "protected" from the State aid rules that the tendering process was presumed to have offered.

191. ESA asserts that its assessment of the 2008 agreement in the light of Article 59(2) EEA was carried out methodically. It assessed the objectivity and transparency of the cost allocation model and analysed whether the increased compensation led to over-compensation. ESA was unable to conclude that this was not the case. Since over-compensation is not necessary for the operation of a public service it constitutes incompatible State aid that must be recovered.

192. ESA stresses that it does not claim that a public service agreement cannot be modified. Rather, it refused to accept the allocation of State resources to Hurtigruten's commercial activities. ESA notes that Article 3 of the 2008 agreement states that the three measures should not overcompensate Hurtigruten. However, in ESA's assessment, the 2008 agreement went beyond the scope of both its own Article 3 and Article 8 of the 2004 agreement. In other words, the position of Hurtigruten runs counter to the very act entrusting the public service in the first place.

193. Finally, ESA seeks to respond to the arguments of Hurtigruten in which it refers to Commission decisions *SNCM* and *NorthLink & CalMac*. According to ESA, those decisions demonstrate, in fact, that ESA's assessment was correct. Consequently, the claim that it erred in its interpretation or application of Article 59(2) EEA must be dismissed.

194. As for the alleged errors of law and/or assessment in relation to cost allocation, ESA notes that both ESA and Hurtigruten are agreed, as a starting point, that an assessment under Article 59(2) EEA can only be carried out where there is (i) a proper allocation of Hurtigruten's costs and revenues for the public service and commercial operations, (ii) the compensation does not cover more than a proportionate share of fixed costs common to the public service and commercial operations, and (iii) the compensation is not calculated on the basis of unrepresentative hypothetical costs where real costs are known.

195. In ESA's view, however, the fundamental problem is that ESA was not presented with an appropriate transparent and objective cost allocation model during the administrative procedure. In that regard, ESA contests the arguments of Hurtigruten concerning the BDO report of 27 September 2010. ESA refers to the contested decision and submits that the hypothetical minimum fleet model set out in that report was assessed in the light of the basic principles that need to be applied in assessing compensation for a public service. Only if the calculation principles were respected could ESA have accepted the model set out in that report. As the contested decision shows, they were not.

196. As regards the arguments raised concerning respect for the Norwegian authorities' choice of allocation model, ESA acknowledges that the EEA States have a margin of discretion in that regard. However, this freedom must be exercised having regard to the fundamental principles referred to above. The hypothetical minimum fleet model did not respect those principles. If Hurtigruten's position regarding a State's discretion were to be upheld, this

would effectively allow EEA States to devise cost allocation models that permit cross-subsidisation, lead to over-compensation and circumvent State aid control (including judicial review).

197. As regards the argument that a separation of common costs on the basis of revenue resulting from the turnover of the public service and commercial activities could have been carried out, ESA asserts that its problem was the fundamentally general and hypothetical nature of the proposed allocation model. In that regard, it notes that the Norwegian authorities did in fact have access to the actual cost data of the fleet (which was provided swiftly after the contested decision was adopted on 29 June 2011). From ESA's perspective, the hypothetical nature of the model proposed meant that it could not determine the extent to which the model and the public service/commercial cost allocations were unbiased and objective.

198. ESA agrees that the passenger kilometre model is more precise as a cost allocation model but contests the alleged result of this model. In its view, the model does not show that Hurtigruten had not been over-compensated. The argument that over-compensation cannot exist as long as there is a deficit on the public service obligation side is flawed. Moreover, the fact that this transparent and objective model was presented on 16 August 2011 shows that ESA was correct in rejecting the less advanced models presented during the administrative procedure.

199. In relation to the argument of the Norwegian authorities that ESA misinterpreted the allocation model submitted in 2010, ESA maintains that the letter of the Norwegian authorities of 30 September 2010 itself states that the BDO report 2010 "makes an assessment of the compensation based on a theoretical allocation of costs between the public service and the commercial part of the route Bergen – Kirkenes" and "the theoretical assumption that the public service part of the costs might be calculated on the basis of the service being operated with a fleet with the minimum capacity described in the call for tender". The hypothetical nature of the model is illustrated by the fact that it fails to explain why 47% of the total costs of the coastal route are allocated to Hurtigruten's commercial activities.

200. ESA refers to criticism of its findings in the contested decision on the cost allocation made in the reports submitted by the Norwegian authorities. In response, it reiterates its assessment that certain categories of costs (harbour charges, maintenance and fuel) were fully allocated to the public service side, while others were incorrectly allocated.

201. As regards the costs of the vessel MS Vesterålen, ESA submits that some of the costs for the operations of this ship should have been allocated to its commercial operations. The allocation of costs regarding this ship was not carried out with reference to a specific key in a consistent manner. Furthermore,

ESA underlines that the vessel MS Vesterålen exceeded the minimum capacity requirement imposed by the 2004 agreement by 30%.

202. In its rejoinder, ESA rejects the notion of "ESA logic" advanced by Hurtigruten. ESA stresses that the present case concerns the legality of the contested decision, which must be examined in the light of its wording and the relevant facts and circumstances when it was adopted. Consequently, the documents concerning the recovery procedure to which Hurtigruten refer in its reply are irrelevant.

203. Moreover, ESA stresses that the need for a timely re-tender was not an unfounded and novel idea which it proposed in this case.

Minimum capacity allocation model

204. As regards the notion that it committed a manifest error in rejecting the allocation models, ESA maintains that a State only has discretion in its choice of a cost allocation model to the extent that the model reflects the fundamental principles needed.

205. ESA reiterates that the minimum capacity allocation model in the 2010 BDO report is not an acceptable means of establishing the costs of the public service incurred by Hurtigruten, and refers to the contested decision. It contends that, even if the model is more sophisticated than previous models, it is based on the costs and revenues from only one ship and lacks the necessary objectivity and transparency allowing ESA to verify that there was no over-compensation for Hurtigruten's performance of the public service as a whole. Therefore, ESA rejects the argument that it should have accepted the 2010 BDO minimum capacity allocation model as compatible with EEA law.

206. ESA avers that it did not reject the minimum capacity allocation model on the basis that it was capacity based. It emphasises that its approach is pragmatic and accepts a margin of discretion on the part of the State to choose an appropriate model. However, in the present case, the general and hypothetical nature of the proposed allocation model was neither appropriate nor unavoidable.

Refined model based on separation of accounts

207. ESA agrees with Norway that the passenger kilometres model is more refined. However, it rejects the notion that as the outcome under the refined model is alleged to be the same as under the earlier model this confirms the correctness of the earlier model. ESA emphasises that the model as such was flawed and not simply its results.

Increased compensation involved compatible public service compensation

208. ESA stresses that the fact of tendering meant that the compensation for the public service was the market price. This is relevant as, under Article 59(2) EEA, the compensation may not exceed what is necessary to cover the costs of the public service obligation. ESA avers that it does not hold the test under Article 59(2) EEA to be radically different where the contract has been tendered. Moreover, it views considerations relating to the objectives of Article 59(2) EEA and the binding nature of the act of entrustment as irrelevant. The present case does not concern an infringement of the public procurement rules, but the incompatibility of State aid.

209. The Commission supports the arguments of ESA.

210. In the Commission's view, the interpretation of Article 59(2) EEA suggested by Norway cannot be correct. It would encourage undertakings to obtain the entrustment of public services through the presentation of unrealistically low bids during the tender procedure, knowing they would be sheltered from the consequences of their poor business decisions by the possibility of later obtaining additional compensation from the State.

211. In that regard, the Commission contends, first, that the arguments of Norway on Article 8 of the 2004 agreement are contradictory. On the one hand, Norway argues that Article 8 complies with the *Altmark* criteria as its effects are established in advance and, on the other, it maintains that any measure pursuant to Article 8 of the 2004 agreement is compatible aid as long as it does not lead to over-compensation, regardless of the factors that led to the increase in costs. Second, Article 59(2) EEA should not be applied in a manner which encourages and rewards unsound economic decisions.

212. The Commission considers that the Community framework for State aid in the form of public service compensation can be of relevance, even if the transport sector is excluded from that framework. It emphasises that, although in the past, when applying Article 59(2) EEA, it has accepted an overall approach to the compensation of costs, its acceptance of this approach has been subject to strict conditions. The Commission notes further that the framework requires the official decision entrusting the public service to specify the parameters for reviewing the compensation. Moreover, if losses are incurred due to bad management, it may be necessary to adopt a more restrictive approach.

Compatibility of the aid under Article 61(3) EEA (the fourth plea of Hurtigruten)

213. Hurtigruten admits that no restructuring plan was formally notified to ESA. It explains that as the Norwegian authorities rightly 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. The letter set out the critical financial situation of Hurtigruten. By letter of 30 July 2010, the measures were formally notified to ESA under the State aid Guidelines for aid for rescuing and restructuring firms in difficulty.

214. Hurtigruten notes that the earlier non-notification of the measures appears to be the main reason why ESA declined to apply those Guidelines in the contested decision. In that regard, Hurtigruten refers to the decision to open the formal investigation procedure in which ESA stated 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 2009.

215. 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 (specific) question to the Norwegian authorities on the applicability of these Guidelines.

216. Hurtigruten invites the Court to consider the *prima facie* applicability of the Guidelines. ESA has never contested Hurtigruten's contention that at the time of the 2008 agreement it constituted a firm in difficulty within the meaning of those Guidelines. Moreover, according to Hurtigruten, the substantive criteria set out in the Guidelines are fulfilled and it appears that it was simply the lack of notification that led ESA to disregard the Guidelines. The disagreement between Hurtigruten and ESA appears, thus, to be related to the procedural *lacunae* that no notification to ESA was made in 2008 and that the Norwegian authorities did not "commit" to a restructuring plan in accordance with the Guidelines. However, 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. Hurtigruten refers to the case-law on which ESA relies in support of its view[30] and contends that these cases can be distinguished. First, in the present case, there was a restructuring plan. Second, the objective of the 2008 agreement was to downsize and not expand market

[30] Reference is made 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; see footnote 89 of the contested decision.

presence. On its view, that case-law implies that, when a real restructuring plan exists, the substantial applicability of the Guidelines must be assessed by ESA.

217. Hurtigruten contends that, in the present case, there is no reason why ESA should escape its obligation to substantively assess the applicability of the Guidelines. In the light of ECJ case-law, there is nothing to support any departure from the principle that ESA cannot declare aid as incompatible simply because it has not been notified but must examine in substance whether aid unlawfully granted is nevertheless compatible with the common market.[31]

218. Hurtigruten notes that 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 participations depended on each other; one would not have taken place without the other.

219. With regard to the position taken by ESA that, at the time the 2008 agreement was concluded, the Norwegian authorities could not or did not assess whether Hurtigruten's restructuring plan was based on realistic assumptions, Hurtigruten asserts that the funding from the Norwegian authorities was not in itself sufficient to save Hurtigruten from bankruptcy and, as a consequence, the authorities must have assessed the restructuring plan including the funding by way of the NOK 314 million private placement and the instalment from the bank as a realistic scenario. Moreover, as a listed company in Norway, Hurtigruten complied with corporate governance rules and continuously reported its status to the market.

220. Therefore, according to Hurtigruten, the contested decision is wrong to state that there was no restructuring plan in accordance with the applicable 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. Consequently, the contested decision is vitiated by a manifest error of assessment in relation to Article 61(3) EEA and the Guidelines.

221. In its reply, Hurtigruten refers to documents already submitted and claims that ESA's defence is incorrect on three fundamental points.[32] First, ESA was wrong to claim that there had not been any notification. Second, ESA was wrong to find that there was no restructuring plan. Third, ESA was wrong to assume that the aid was not conditioned on the implementation of a restructuring plan as foreseen in the Guidelines.

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[31] Reference is made to Case C-301/87 *France v Commission ("Boussac")* [1990] ECR I-307.

[32] Reference is made to the Norwegian Government's letter to the EFTA Surveillance Authority of 4 March 2010 and relevant annexes, included in the Application as Annex A.24.

222. ESA refers to page 25 of the contested decision and notes that Hurtigruten does not appear to dispute the assessment that the requirements for granting rescue aid were not complied with.

223. ESA stresses 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, following the decision to open the formal investigation procedure, which invite ESA to consider the previous letter of 4 March 2010 as a notification *ex post*.

224. On the 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. It stresses that the existence of a restructuring plan is a precondition for restructuring aid.

225. According to the Commission, Hurtigruten's fourth plea should be dismissed.

226. The Commission stresses that as Article 61(3) EEA constitutes derogation from the prohibition on State aid the burden of proof lies on the State which invokes this provision. On the substance, it agrees with ESA that the 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.

Procedural pleas (the fifth plea of Hurtigruten and the third plea of Norway)

Obligation to state reasons

227. Hurtigruten submits that, in adopting the contested decision, ESA has breached its obligation to state reasons as required by Article 16 SCA. In light of the case-law of the Court, the decision breaches that obligation in that it neither discloses in a clear and unequivocal fashion the reasoning followed by ESA nor enables Hurtigruten to ascertain the reasons for the measure. In fact, the contested decision does not even answer the essential question, whether the 2008 agreement includes incompatible State aid, in a clear and unequivocal manner.

228. 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 over-compensation. 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.

229. Hurtigruten 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 over-compensated for operating the service 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. The contested decision provides less guidance than the overall framework for services of general economic interest. According to Hurtigruten, the decision should at least have given a sketch as to how a "proper allocation" of costs and revenues is to be understood and what ESA regards as "fixed common costs". For the guidance to have any meaning, it should have addressed the issue of justifiable compensation, i.e. whether this involves simply the compensation of additional costs covered by the 2008 agreement or allows for the possibility of compensating the total costs incurred in the provision of a service of general economic interest, as was raised in its pleas concerning Article 59(2) EEA.

230. In effect, the contested decision relieves ESA of its responsibilities under the EEA Agreement and transfers these back to the national authorities in their entirety. According to Hurtigruten, this cannot withstand scrutiny from the perspective of the obligation to state reasons.

231. Hurtigruten submits further that ESA's assessment of anti-competitive behaviour is clearly inadequate when compared with the Commission decision in *NorthLink & CalMac*.

232. Finally, in its reply, Hurtigruten observes that the contested decision does not mention the second and third parts of what it describes as "ESA logic". Consequently, in its view, the decision must be annulled.

Good administration, due diligence and the requirements of Article 13 in conjunction with Article 10 of Part II of Protocol 3 SCA

233. 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.

234. Hurtigruten 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. As, in the present case, ESA adopted the contested decision without requesting sufficient information, the contested decision should be annulled, as it was adopted in breach of the principle of good administration and of ESA's duty to exercise due diligence.

235. 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.

236. Hurtigruten submits that ESA admit that they have not received all information necessary from the Norwegian authorities to undertake the substantive assessment. No information injunction has been 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

237. Finally, Hurtigruten refers to the ECJ's judgment in *MTU* and submits in light of that case-law that the contested decision should be considered a hypothetical decision.[33] In its view, ESA adopted the contested decision on an unlawful negative presumption and, consequently, the decision must be annulled.

Legal certainty

238. Hurtigruten submits that, in the present case, it is impossible to assess the framework and the conclusion of the decision itself. In those respects, the decision is unclear and practically impossible to assess. Hurtigruten considers that, with regard to the substantive conclusion of the contested decision, even after careful scrutiny, it is not in a position to assess the framework of its obligations. Hurtigruten recalls that a recovery decision must include information enabling the EEA State to determine the amount to be recovered without too much difficulty.[34] This legal standard has not been met by ESA.

239. Hurtigruten refers to Article 1 of the operative part of the contested decision and submits that it appears as if the three measures "may or may not" involve State aid. It also notes that in section 5 of the contested decision ("Recovery") ESA states that the measures "may" entail over-compensation. As Article 1 of the operative part refers only to Article 61(1) EEA, whereas the guidance on the compatible payments set out on page 29 of the contested decision refers to Article 59(2) EEA, it is difficult to make an assessment of the obligations on the beneficiary. In Hurtigruten's view, this becomes even more apparent when the contested decision is compared with the Commission decision

[33] Reference is made to Case C-520/07 P *Commission* v *MTU Friedrichshafen* [2009] ECR I-8555.

[34] Reference is made, *inter alia*, to Case C-480/98 Spain v Commission [2000] ECR I-8717, paragraph 25, and point 36 of ESA's Guidelines on the recovery of unlawful and incompatible State aid.

in *NorthLink & CalMac*. This is particularly the case as regards the separation of accounts.

240. Moreover, according to Hurtigruten, ESA must be under an obligation, in a negative decision at least, to set out its findings in an unambiguous fashion and provide a clear framework for the national authorities on which they may make their implementing assessments. In the present case, the framework of the contested decision is unclear, ambiguous and confusing. The contested decision should have provided additional guidance also on the model and the parameters on which the Norwegian authorities could base their assessments. In the present case, it is impossible to assess the legal framework of the contested decision, which makes it impossible to ascertain whether, in order not to lose the right to judicial review, an application for annulment is necessary. This constitutes a breach of the principle of legal certainty as applicable to negative decisions in State aid cases.

241. Norway advances several procedural pleas.

Legal certainty

242. Norway refers to the case-law of the Court and submits that the lack of clarity and precision in the contested decision raises issues of legal certainty. Norway refers to Article 1 of the operative part of the contested decision and emphasises the findings of ESA that the aid is considered illegal "in so far as" it constitutes over-compensation. In that respect, it is unclear whether ESA considers that there has been any State aid at all. Norway further refers to section 4.2.4 of the contested decision and submits that it is unable to predict its legal position since it is unclear whether the aid is illegal or not.

243. 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. In that regard, Norway refers to Part I and Part II of Protocol 3 SCA, which require ESA to make a positive finding of State aid. In contrast, the contested decision is a hypothetical or empty decision which cannot be considered sufficient to satisfy the principle of legal clarity nor the requirement to state adequate reasons.

244. 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.

245. In its reply, Norway observes that ESA appears to have added during the recovery procedure 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. This confirms the lack of clarity of the contested decision.

Failure to state reasons

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

247. 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.[35] 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.

248. 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 over-compensation. At the same time, the contested decision does not provide any yardstick for the assessment of any possible over-compensation. 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 over-compensated for its task. However, ESA did not undertake this test and does not explain why the submissions of the Norwegian authorities in this respect should be rejected. Instead, ESA appears to focus on purely formal requirements. Norway submits that ESA cannot base its decision to order the recovery of over-compensation on an alleged failure to separate accounts and to provide information that was not hypothetical, 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 as to whether the measures were necessary.[36]

249. Norway observes that ESA could have issued an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. Since it did not use all its

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[35] Norway refers to sections 1.3.3.2, 3.2.3, 4.2 and 4.3 of the contested decision.

[36] Reference is made to Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Denmark* [2008] ECR II-2935.

powers, in Norway's view, it cannot base its decision on the fragmentary nature of the information provided. In particular, no specific information request has been submitted to Norwegian authorities.

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 over-compensated at all as a result of incompatible aid.

251. ESA disagrees.

Lack of reasoning and recovery

252. ESA shares the view taken by Norway that it is not required to set out all the details when ordering recovery. Recovery is an obligation on the State concerned, and it is for the latter to calculate the exact amount. According to ESA, this is particularly the case where a State has not provided sufficient information. It notes in that regard that there is a general duty of EEA States to cooperate with ESA in good faith.

253. According to ESA, given that the Norwegian authorities were able to present a proper allocation model within six weeks of the contested decision, it is clear that the reasoning in the contested decision is not inadequate.

254. ESA submits that, in accordance with case-law, it is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure.[37]

255. ESA claims that there is no ambiguity to the contested decision. Articles 1 to 4 of the operative part of the contested decision demonstrate that the 2008 agreement entails incompatible State aid in providing for over-compensation for the public service. In support of that argument, ESA refers to pages 17 and 22 to 24 of the contested decision.

256. Moreover, according to ESA, the contested decision answers the arguments of Hurtigruten concerning the conclusion of new contracts in particular on page 20 *et seq.* of the contested decision.

257. As far as recovery is concerned, ESA notes that it is sufficient for the contested decision to include information enabling the national authorities to work out for themselves, without overmuch difficulty, the exact amount of aid to be recovered. In its view, these requirements have been complied with.

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[37] Reference is made to Case E-14/10 *Konkurrenten.no AS* v *ESA*, judgment of 22 August 2011, not yet reported.

258. ESA further claims that the argument concerning the criterion of anti-competitive behaviour is irrelevant and, in any event, is not really contested by Hurtigruten.

259. ESA submits that the present case can be distinguished from *Konkurrenten.no*, which covered a different situation concerning new aid.

260. ESA stresses that the contested decision concerns the 2008 agreement and not the compensation under the tendered 2004 agreement. The assessments in the contested decision concern the unforeseeable cost increases addressed by the 2008 agreement and related to the provision of the public service.

261. ESA asserts that Article 1 of the contested decision must be read in context and criticises Norway for reading it in isolation. In that regard, it refers to the reasoning set out in the contested decision and stresses the need to see the contested decision as a whole.

262. ESA does not consider *TV2/Denmark* relevant as that case did not concern the cancellation of a tendered contract for replacement with public service compensation. In any event, ESA claims that it was perfectly possible, given the information available to it, to examine seriously the relevant legal and economic conditions in order to conclude whether over-compensation was involved. The "topping up" argument was not dismissed because of any fragmentary nature of the available information but because the argument is not legally sound. ESA stresses that the contested decision did not seek to justify the dismissal of the "topping up" argument by stating that it was entitled only to rely on the information it had at the time.

263. ESA denies that there was ever need to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. ESA avers that it received the information necessary in relation to the relevant test. In that regard, it refers to the requests for information contained in the decision of 14 July 2010 to open the formal investigation procedure.

264. ESA refers to Part II, sections 3.1 to 3.2.4, of the contested decision where it clearly set out that when an 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. The contested decision explains how the models presented by the Norwegian authorities, including the refined minimum ship model, entail an inadequate allocation of fixed common costs between the public service and the commercial activities of Hurtigruten.

265. In connection with the provision of information and the obligations incumbent on ESA, the Commission underlines that it is for the EEA State which invokes derogation to the prohibition on State aid laid down in the EEA Agreement to provide evidence that the conditions for the application of such

derogation are satisfied. Moreover, it emphasises that, according to the case-law, where the institution responsible for the review of State aid is in a position to make a definitive assessment based on the information made available to it during the administrative procedure, that institution is not obliged to require the State concerned, by way of interim decision, to provide further information.

Legal certainty

266. ESA contends that there has been no violation of the principle of legal certainty. The arguments advanced by the applicants do not substantiate a breach of this principle. This applies in particular to the question whether there was over-compensation. ESA submits that it set out detailed arguments in this regard in response to the pleas on reasoning and recovery.

267. ESA emphasises that the contested decision must be read as a whole. It is not lacking in clarity and precision such as to infringe the principle of legal certainty.

Good administration, due diligence and the requirements of Article 13 in conjunction with Article 10 of Part II of Protocol 3 SCA

268. In general, ESA submits that the information asked for and received during the whole procedure demonstrates that the payments made constitute State aid and that the operator is over-compensated for the provision of the public service such that recovery must be effected. ESA observes that the contested decision was not taken on the basis of Article 13(1) of Part II of Protocol 3 SCA, which allows a decision to be taken on the basis of the information available. ESA also rejects the argument that the decision is hypothetical and, in that regard, refers to the contested decision.

Páll Hreinsson
Judge-Rapporteur

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