JUDGMENT OF THE COURT
22 August 2011

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Local bus transport services – Existing aid – Obligation to state reasons – Decision to close the case without opening the formal investigation procedure)

In Case E-14/10,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by **Kollektivtransportproduksjon AS**, established in Oslo, Norway, represented by Gaute Sletten, advokat,

intervener,

APPLICATION for the annulment of decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene),

THE COURT,

composed of Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Per Christiansen, Judges

Registrar: Skúli Magnússon,

having regard to the written pleadings of the applicant and the defendant, and the written observations of

- the European Commission ("the Commission"), represented by Leo Flynn and Tim Maxian Rusche, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Jon Midthjell, the defendant, represented by its agent, Xavier Lewis, the intervener, represented by Gaute Sletten, the Norwegian Government, represented by Ida Thue, Office of the Attorney General (Civil Affairs), acting as Agent, and the Commission, represented by its agent, Tim Maxian Rusche, at the hearing on 10 May 2011,

gives the following

Judgment

I Introduction

1 The applicant Konkurrenten.no AS ("Konkurrenten") is a privately owned operator in the express bus market between the central and southern region of Norway. It is owned by Olto Holding AS, which owns also Risdal Touring AS, a company active in the tour bus market. The group had a combined turnover of NOK 54 million in 2009 and operates a fleet of 17 buses serving approximately 200 000 passengers per year.

2 The case concerns the decision by the EFTA Surveillance Authority ("ESA") to close case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveier ("Oslo Sporveier") and AS Sporveisbussene ("Sporveisbussene") for the provision of scheduled bus services in Oslo. In the decision, ESA concluded that the contested measures, although being aid incompatible with the EEA Agreement, constituted existing aid and, in view of the termination of those aid measures, considered that no further measures were required.

II Legal background

EEA law

3 Article 61(1) EEA reads as follows:

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

4 Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Protocol 3 SCA") reads:

> *3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

5 Under Section I of Part II of Protocol 3 SCA, Implementing provisions, Article 1, *Definitions*, reads:

> …
>
> *(b) 'existing aid' shall mean:*
>
> > *(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;*
> >
> > …
> >
> > *(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;*
>
> *(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;*
>
> *(d) 'aid scheme' shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;*
>
> …
>
> *(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;*
>
> …

6 Under Section II of Part II of Protocol 3 SCA, Procedure regarding notified aid, Article 4(4), *Preliminary examination of the notification and decisions of the EFTA Surveillance Authority*, reads:

> *4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the*

functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').

7 Under Section III of Part II of Protocol 3 SCA, Procedure regarding unlawful aid, Article 13(1), *Decisions of the EFTA Surveillance Authority*, reads:

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

8 Article 16 SCA reads as follows:

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

National law

9 At the time when the Kingdom of Norway became a party to the EEA Agreement, local bus transport in Norway was governed by the provisions of the 1976 Transport Act and its implementing regulations. Under those rules, concessions for local bus transport were granted for fixed ten-year periods, without public tendering. The concession to carry out local bus transport included a right, and also an obligation, to serve the area or route in question, in return for ticket income from passengers.

10 Section 24a, paragraph 1, of the 1976 Transport Act provided that it was the responsibility of the county (*fylkeskommune*, in this context the City of Oslo) to provide for compensation for specific, unprofitable transport services it wished to introduce or continue to operate within the County. This provision is now to be found in Section 22 of the 2002 Commercial Transport Act which replaced the 1976 Transport Act with effect from 1 January 2003.

11 An amendment to the 1976 Transport Act of 11 June 1993, which took effect on 1 January 1994, permitted local bus transport to be submitted to public tendering. The concession would follow the successful bidder for the duration of the contract. The provisions relevant for the rights and duties of the concession holder remained essentially unchanged.

III Pre-litigation procedure

12 By letter of 11 August 2006, Konkurrenten lodged a complaint with ESA, claiming that the Norwegian authorities had granted State aid to Oslo Sporveier and its subsidiary Sporveisbussene.

13 In the subsequent investigation, ESA invited the Norwegian authorities to comment and requested further information from them in letters of 7 September 2006, 29 November 2006, 19 June 2007 and 2 April 2008. The Norwegian

authorities replied to these requests by letters of 11 October 2006, 11 January 2007, 16 August 2007 and 29 April 2008. Konkurrenten submitted comments by letter on 20 October 2006 and further information by emails of 25 February 2008, 25 May 2008, 4 June 2008, 15 August 2008, 1 September 2008 and 20 January 2009.

14 At the beginning of 2010, ESA and the Norwegian authorities had informal telephone and email contact regarding the case. The information received in this context was, according to the decision, consolidated in a letter submitted electronically to ESA by the Norwegian authorities on 21 April 2010.

IV The contested decision

15 On 21 June 2010, ESA adopted the decision to close the case.

16 The decision describes the recipients of the aid as follows:

> *AS Oslo Sporveier has since its establishment been active in bus transport, metro ("T-banen"), tram ("Trikk") and ferry transport* [in Oslo]. … *As of 1934, Oslo Municipality became practically the sole owner (with 98.8% ownership) until a reorganization in July 2006. Following this reorganization, a new company, Kollektivtransportproduksjon, which is wholly owned by Oslo Municipality, became the 100% owner of AS Oslo Sporveier. According to the Norwegian authorities Oslo Municipality was involved in all issues of commercial importance relating to the carrying out of collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/contracts with subsidiaries (such as AS Sporveisbussene) or other third parties.*
>
> *AS Oslo Sporveier operated an in-house department which carried out most collective bus transport in Oslo. On 23 April 1997 the bus transport was separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveisbussene.*
>
> *Since 1994 AS Oslo Sporveier operated a tour bus division. The division was transferred to AS Sporveisbussene when the company was established in 1997.* …
>
> *In 2003 AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005 AS Sporveisbussene acquired the company, Arctic Express, engaged in flight bus transport and regional bus transport.*

17 The system of concession and compensation is described in the following way:

> *Since the 1950's AS Oslo Sporveier has held concessions awarded by Oslo Municipality for carrying out scheduled bus transport in Oslo. The latest concession was awarded by Oslo Municipality on 16 November 1992 and permitted AS Oslo Sporveier to operate scheduled bus transport in the entire Oslo grid (the "Concession"). The Concession was awarded on the basis of the rules in the 1976 Transport Act and was therefore valid for ten years: It was granted with retroactive effect from 1 January 1990 until 31 December 1999.*

The Concession was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out. Since all scheduled bus transport was tendered out by 30 March 2008 the renewal period of the Concession expired on that date.

The Concession – and the previous concessions granted since 1976 – were all based on a Royal Decree issued on the basis of the Transport Act. The Royal Decree provides that the grant of a concession is linked to an obligation to carry out the transport services stipulated in the concession. Since the Concession was granted for carrying out scheduled bus services in Oslo, AS Oslo Sporveier was therefore under an obligation to carry out the relevant services in Oslo.

In order to compensate for the operation of bus transport services based on the Concession Oslo Municipality granted … funding to AS Oslo Sporveier. From the 1980's the compensation was granted as a lump sum to cover the difference between the costs and ticket revenues based on all activities carried out by AS Oslo Sporveier. Hence the lump sum also financed the operation of scheduled bus transport in Oslo to the extent that this was not covered by ticket revenue.

… After the separation of the bus transport division …, AS Oslo Sporveier and AS Sporveisbussene entered into a "Transport Agreement" on the provision of scheduled bus transport services in Oslo. The Transport Agreement provided that AS Sporveisbussene carries out scheduled bus transport in Oslo based on the Concession on behalf of Oslo Sporveier. …

By linking the Transport Agreement to the Concession, AS Oslo Sporveier channelled the compensation received from Oslo Municipality for carrying out scheduled bus transport to its subsidiary AS Sporveisbussene. Based on the Transport Agreement (and explanations by the Norwegian authorities) AS Sporveisbussene was entitled to receive on an annual basis … [revenue from various ticket sales] *and (iv) a subsidy. The subsidy was fixed annually for the following year on the basis of the following formula: Using as a basis the amount of costs for the previous year the parties negotiated and agreed on a "cost amount" and then deducted (i) 3% of the total to ensure efficiency improvements; and (ii) the estimated revenues for the following year. The difference represented the subsidy.*

The Norwegian authorities have provided the Authority with the following figures on the annual amounts of the subsidy: NOK 97 million in 1997; NOK 60.6 million in 1998; NOK 42 million in 1999; NOK 42 million in 2000; NOK 37.3 million in 2001; NOK 19.2 million in 2002; NOK 10.5 million in 2003; and NOK 11.5 million in 2004.

In addition hereto the Norwegian authorities have explained that in the year 2004 AS Sporveisbussene received "a quality bonus" over and beyond the subsidy. The bonus represented NOK 3.9 million.

18 Furthermore, it follows from the decision that Oslo Sporveier and Sporveisbussene also received a capital injection in 2004. In this regard, ESA observed in its decision:

> *It is also clear that in 2004 Oslo Municipality contributed capital of NOK 800 million to Oslo Sporveier which then paid the outstanding amount of underfunding to the pension fund. The amount of NOK 111 760 000 was paid to the pension fund by AS Oslo Sporveier on behalf of AS Sporveisbussene and featured as capital injection in the accounts of AS Sporveisbussene. …*
>
> *However, in this context the Authority points out that the pension obligations of AS Sporveisbussene did not constitute new costs but were costs accrued in the past which had just technically been kept outside the general accounts of the company. The only reason the specific costs of the pension obligations in question were paid later than when they accrued was a change in the accounting principles. Since all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality. Hence the payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene. On this basis the Authority concludes that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene.*

19 ESA found that the aid was existing aid. It considered that the compensation for carrying out bus transport in Oslo was inherently linked to the concession awarded by Oslo Municipality in 1990, on the basis of the 1976 Transport Act, and which was renewed in 1999. ESA observed that the sector had never been liberalised on the basis of EEA law and that the measure became State aid only in 1995 due to the opening up for competition of the sector at that time. As a result, in ESA's view, the aid constituted existing aid. ESA then considered whether the aid could have become new aid by alteration within the meaning of the SCA. It answered that question in the negative on the grounds that no changes had been made to the concession throughout the period, including at the time of its renewal at the end of 1999. The fact that the transport division was transferred from Oslo Sporveier to Sporveisbussene in 1997 was considered merely an administrative act which did not involve any changes in the nature of the bus transport activities. ESA concluded:

> *On the basis of the above the Authority considers that the Concession has not been altered within the meaning of the state aid rules since 1990 until its full expiry on 30 March 2008. Hence, in line with Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement the Authority considers that the compensation granted on the basis of the Concession to AS Oslo Sporveier and AS Sporveisbussene qualifies as existing aid.*

20 In assessing the compatibility of the aid with the State aid rules, ESA reasoned that a public service obligation existed on the following grounds:

> *The obligation to carry out scheduled bus transport has been imposed on AS Oslo Sporveier and on AS Sporveisbussene respectively based on three measures: (i) The 1976 Transport Act and the implementing Royal Decree state that the grant of concessions involves an obligation to carry out the*

transport services stipulated in the concessions; (ii) the Concession, granted initially to AS Oslo Sporveier, refers to the carrying out of collective bus transport in Oslo; and (iii) the Transport Agreement delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the Concession to AS Sporveisbussene. The Authority considers that the duties are clearly identified and described in the Concession ….

21 Turning to the question whether the Norwegian authorities had demonstrated that the amount of compensation received by Oslo Sporveier and Sporveisbussene did not exceed what was necessary to cover the costs associated with discharging the public service obligation, ESA found that this was, for the following reasons, not the case:

First, the Authority notes that as regards AS Oslo Sporveier, the company received a lump sum without any reference to costs incurred in the past or the future. As regards Sporveisbussene, the Authority notes that besides keeping ticket revenues, in all years between 1997 and 2004, the company received a subsidy to cover the gap between revenues and costs. Although the subsidy amount was based on an initial cost estimate, the subsidy was not based on a determination of real costs and the amount was subsequently the subject of negotiations between the parties to the Transport Agreement. Moreover, in 2004 a bonus was granted. Secondly, the Authority notes that the Norwegian authorities have not submitted information showing that AS Oslo Sporveier and AS Sporveisbussene had arrangements for allocating costs nor that the accounts for carrying out collective bus transport services in Oslo were kept separate from any other commercial activities carried out by AS Oslo Sporveier and AS Sporveisbussene, such as operating tour buses.

...

[T]he Authority considers that the Norwegian authorities have not demonstrated that the amount of compensation received by AS Oslo Sporveier and AS Sporveisbussene prior to 31 March 2008 did not exceed what was necessary to cover the costs associated with discharging the public service obligation, nor that a cost separation was made between public services and other commercial activities. The Authority concludes therefore that the Norwegian authorities failed to demonstrate that the compensation granted by the State to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not excessive. As a consequence the compensation granted from the State to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not proportional.

On this basis the Authority concludes that the compensation linked to the Concession to AS Oslo Sporveier and AS Sporveisbussene was not compatible with the EEA Agreement on the basis of Regulation 1370/2007 and Article 49 of the EEA Agreement.

22 On the question whether there was a need to propose any appropriate measures, the contested decision reads:

> *… However, in the present case, the Norwegian authorities, between 2003 and 2008, gradually phased out the Concession for the provision of scheduled bus transport services in Oslo and subjected all such services to public tenders by 30 March 2008. The conclusion of this process automatically terminated both the Concession, the Transport Agreement and the compensation in favour of AS Oslo Sporveier and AS Sporveisbussene. …*
>
> *Given the termination of the existing state aid measures by the Norwegian authorities the Authority considers that no further measures are required in this case.*

23 The operative part of the contested decision, Article 1, reads:

> *The case on the grant of state aid by the Norwegian authorities to AS Oslo Sporveier and AS Sporveisbussene for the provision of scheduled bus transport services in Oslo is hereby closed.*

V Procedure and forms of order sought

24 By application lodged at the Court on 2 September 2010, Konkurrenten brought the present action.

25 The applicant requests the Court:

- to annul EFTA Surveillance Authority decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene); and
- to order the defendant to pay the costs.

26 The defendant lodged a defence on 8 November 2010, in which it claims that the Court should:

- dismiss the application as unfounded; and
- order the applicant to pay the costs.

27 A reply by the applicant was lodged at the Court on 10 December 2010. A rejoinder by the defendant was registered at the Court on 26 January 2011.

28 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission submitted written observations registered at the Court on 10 January 2011.

29 By document lodged at the Registry of the Court on 8 March 2011, Kollektivtransportproduksjon AS sought leave to intervene in support of the defendant. Written observations on the application to intervene were received from both the applicant and defendant on 21 March 2011. By order of the President of the Court of 25 March 2011, Kollektivtransportproduksjon AS was granted leave to intervene at the hearing on the basis of the Report for the Hearing.

30 By document lodged at the Registry of the Court on 14 March 2011, the applicant requested the Court to summon Mr Steinar Undrum, Director of the Competition Policy Department of the Norwegian Ministry of Government Administration, as a witness. In its observations, lodged at the Court Registry on 29 March 2011, the defendant contended that the Court should reject the applicant's request. On 4 April 2011, the Court ordered Mr Undrum to be heard as a witness.

31 Mr Undrum testified and answered questions of the Court and of the parties at the hearing on 10 May 2011 in Luxembourg. At the same hearing, the applicant, the defendant, the intervener, the Norwegian Government and the Commission presented oral argument and replied to questions put to them by the Court.

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

VI Law

33 The application is based on three pleas in law. First, it is alleged that ESA infringed its obligation to open the formal investigation procedure for aid granted between 2000 and 2008. Second, the applicant alleges that ESA infringed its obligation to open the formal investigation procedure for aid granted between 1997 and 2000. Finally, it is alleged that ESA infringed its obligation to state reasons.

34 With regard to the first and second plea, the applicant argues that ESA had a duty to open the formal investigation procedure in accordance with the procedure for unlawful aid, as a preliminary examination raised doubts in relation to the compatibility of the aid with the EEA Agreement. According to the decision, Oslo Sporveier received significant State aid between 1997 and 2008 within the meaning of Article 61(1) EEA not compatible with the functioning of the EEA Agreement. However, the defendant categorised this aid as existing aid.

35 By its first plea, the applicant submits that aid granted after the renewal of the concession in 1999 must be considered as new aid. The applicant argues, first, that ESA should have regarded the renewal of the concession and the prolongation of the aid which it entailed to constitute a material alteration of the aid which ought to have been notified to ESA.

36 By the second part of its first plea, the applicant contends that the aid granted after the renewal of the concession in 1999 must be considered as new aid, because the terms of the new concession were materially altered, as well as the conditions for granting aid.

37 Having regard to the applicant's arguments to the effect that the new concession should have prompted ESA to classify the aid granted after the renewal of the concession as new aid, it is appropriate to consider, first, the applicant's third

plea, namely, that ESA failed to provide sufficient reasoning for its decision in this regard, since only if the decision is adequately reasoned will it be possible to consider whether the first and second part of the first plea are well founded.

Third plea: Infringement of the obligation to state reasons

Arguments of the parties

38 The applicant claims that the defendant infringed its duty to state reasons under Article 16 SCA in concluding that the aid granted after the renewal of the concession in 1999 constituted existing aid. In particular, the applicant submits that the decision offers no reasons on why, as a matter of law, only a change in the terms of the concession should be relevant or why the fact that a new concession was granted does not qualify as a relevant change.

39 Furthermore, the applicant challenges the admissibility before the Court of the arguments advanced by the defendant which build upon the classification of the relevant aid measure as a system of public service compensation consisting of the Transport Act, the implementing regulation and the area concession granted to Oslo Sporveier. The applicant argues that this constitutes new reasoning without a basis in the contested decision. In its view, the decision refers only to the concession as the relevant aid measure.

40 The defendant, supported by the Commission, considers that the decision adequately sets out the facts and elements in law upon which it is based, and therefore complies with Article 16 SCA. As regards the allegation that its defence is based on new reasoning, it contends that the contested decision contains all the elements that it relied on in reaching its conclusion. In its view, its reasoning, the beginnings of which are set out in the contested measure, may be enlarged upon and clarified during the proceedings.

Findings of the Court

41 The Court recalls that one of the purposes of Article 16 SCA, according to which decisions of ESA must state the reasons on which they are based, is that the addressee of the decision, or anyone else directly concerned by it, must be able to assess why the decision has been taken, how ESA has applied the EEA Agreement and the SCA and whether or not there are grounds to seek judicial review (see Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Ct. Rep. 59, paragraph 25).

42 It follows that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see most recently Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *EFTA Surveillance Authority*, judgment of 10 May 2011, not yet reported, paragraph 171, and case-law cited).

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

44 Although ESA is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure in its reasons for a decision, it must none the less take account of all the circumstances and all the relevant factors of the case (see, for comparison, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 32) so as to enable the Court to review its lawfulness and make clear to the EEA States and the persons concerned the circumstances in which ESA has applied the relevant rules of the EEA Agreement (see, for comparison, Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39).

45 Thus, it is necessary to ascertain whether the statement of reasons in the contested decision indicates clearly and unequivocally ESA's reasoning, particularly in view of the complaint concerning the assessment of the contested aid and ESA's findings that it constituted existing aid.

46 As regards the Court's examination of the reasoning provided by ESA, it must be noted that an absence of or inadequate statement of reasons constitutes an infringement of an essential procedural requirement for the purposes of Article 16 SCA which may be raised by the Court of its own motion (see, for comparison, Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 34, and case-law cited). Therefore, the Court is not bound by the arguments of the parties as to how the decision might be considered lacking in terms of its reasoning.

47 According to the conclusion of ESA's decision, the latter considered that the concession and the compensation linked to it in favour of Oslo Sporveier and Sporveisbussene involved existing State aid within the meaning of Article 61(1) EEA and Article l(b)(i) and (v) of Part II of Protocol 3 SCA.

48 It is evident from the assessment of the compatibility of the aid in the contested decision that ESA considered the aid to be based on three measures: (i) the 1976 Transport Act and the implementing Royal Decree, which stated that the grant of concessions involves an obligation to carry out the transport services stipulated in the concession; (ii) the concession, granted initially to Oslo Sporveier, which refers to the carrying out of collective bus transport services in Oslo; and (iii) the Transport Agreement which delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the concession to

Sporveisbussene. In its decision, ESA stated that it considered these duties to be clearly identified and described in the concession with respect to the public service task and the geographical area concerned, namely, Oslo. Moreover, the obligation to carry out bus transport services was clearly entrusted to (i) Oslo Sporveier as of 1990; and (ii) Sporveisbussene as of April 1997 on the basis of the Transport Agreement.

49 As regards the term "concession", it clearly follows from the decision that it refers to the concession awarded by Oslo Municipality on 16 November 1992, which permitted Oslo Sporveier to operate scheduled bus transport in the entire Oslo grid. In the decision, it is moreover explicitly stated that this concession was granted with retroactive effect from 1 January 1990 until 31 December 1999, when it was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out.

50 Whether the aid granted after the renewal of the concession constitutes "existing aid" not subject to recovery depends upon the interpretation of the provisions of Protocol 3 SCA, which govern the procedure and the powers of ESA in the field of State aid. Protocol 3 SCA corresponds to Article 108 of the Treaty on the Functioning of the European Union and Council Regulation No 659/1999. Part II of Protocol 3 SCA essentially reproduces the Regulation.

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

52 As the concession in question was limited in time and had to be renewed for the financial support to continue beyond 1999, it is clear that the renewed concession cannot qualify as an existing individual aid measure which was put into effect before the entry into force of the EEA Agreement and still applicable after that date.

53 Accordingly, in order for the renewed concession to qualify as an "existing aid measure" under the EEA State aid rules, it must be part of an aid scheme that was put into effect before the entry into force of the EEA Agreement.

54 The concept of an aid scheme is defined in Article 1(d) of Part II of Protocol 3 SCA. According to this definition, an "aid scheme" means "any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount".

55 The question whether the renewal of the concession could be classified as part of an existing aid scheme that predated Norway's accession to the EEA was

relevant to ESA's conclusion in the case at hand, given the different legal consequences attached depending on whether the renewal was classified as existing aid or new aid. In this regard, the Court recalls that measures taken after the entry into force of the EEA Agreement to grant or alter aid, whether the alterations relate to existing aid or to initial plans notified to ESA, must be regarded as new aid (see, for comparison, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 48, and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 51).

56 It follows, therefore, that ESA was obliged under Article 16 SCA to elaborate the reasons for its assessment concerning the renewal of the concession and its classification of the aid as existing aid in light of the applicable EEA rules, that is, in particular, Article 1(b)(i) and Article 1(d) of Part II of Protocol 3 SCA.

57 In this regard, the Court notes that questions concerning the classification of State aid, such as whether aid may be classified as new aid, existing aid, alteration of existing aid or part of a general aid scheme, must be determined by reference to the provisions providing for it (see, for comparison and *mutatis mutandis*, Case C-44/93 *Namur-Les Assurances du Credit* [1994] ECR I-3829, paragraph 28).

58 Therefore, in order to provide sufficient reasoning for the purposes of Article 16 SCA, it was incumbent on ESA to disclose, in a clear and unequivocal manner, by reference to the provisions of national law providing for the renewal of the concession, how the renewal of the concession could be classified as a part of an existing aid scheme.

59 As ESA neither explained its findings to an adequate extent in this regard nor indicated what criteria were laid down in the national provisions for the allocation of individual aid awards, its decision fails to identify how the renewal of the concession could fit within an existing "aid scheme", as defined in Article 1(d) of Section I of Part II of Protocol 3 SCA.

60 Further, even on the assumption that the concession was part of an existing aid scheme, the Court notes that it would have been incumbent on ESA to explain why it considered the renewal of the concession in 1999 not to be a relevant alteration of that aid scheme.

61 Instead, ESA's decision merely sets out its observation that no changes were made to the concession in the context of the renewal. This finding is not supported by any further explanation. The mere setting-out of that conclusion does not meet the requirements for sufficient reasoning mentioned in paragraphs 41 to 44 above. It neither gives the applicant a real opportunity to express its views as regards ESA's conclusion nor does it permit the Court to exercise its power of review in accordance with settled case-law (see paragraph 42 above).

62 As the grounds of the contested decision did not make it clear how and for what reasons ESA came to the conclusion that the renewed concession constituted a

part of an aid scheme that was introduced prior to the entry into force of the EEA Agreement, the third plea must be regarded as well founded. As a result, it follows also that the Court is not in a position to address the first and second part of the first plea.

63 Accordingly, the contested decision must be annulled on the ground that the statement of reasons is inadequate regarding the renewal of the concession.

Second plea: Infringement of the obligation to open a formal investigation procedure for aid granted between 1997 and 2000

Arguments of the parties

64 The applicant submits that the defendant should have categorised the aid as new aid from 1995 onwards, when the market for bus transport opened up for competition in the EEA, or, at the latest, from 1997, when Sporveisbussene started to position itself in order to compete in the newly liberalised market.

65 The applicant argues that the concession did not entail a right for Oslo Sporveier to receive aid. Rather, it claims that the aid was granted by the City of Oslo on the basis of its annual budget, and, hence, by implication, was discretionary and independent of the duration of any concession granted. On that basis, the applicant submits that each annual decision to grant aid from the city budget should be considered a separate aid measure and, consequently, assessed as new aid.

66 Moreover, the applicant contends that the aid must be regarded as new aid because the City of Oslo operated, in any event, outside of any approved aid scheme. It submits that, whether under the 1976 Transport Act or the 2002 Commercial Transport Act, no overcompensation could be paid for local bus transport after 1992. However, according to the contested decision, the subsidy at issue could not be considered cost-based compensation. Nor was it established that Oslo Sporveier and Sporveisbussene had arrangements for allocating costs or that the accounts for carrying out collective bus transport services in Oslo were kept separate from other commercial activities such as operating tour buses.

67 The defendant, supported by the Commission, considers that neither the liberalisation of the market by virtue of national law nor an internal reorganisation within Oslo Sporveier could have the effect of turning the aid provided under the scheme into new aid. As regards the argument that the aid was granted on a discretionary basis under the city budget, the defendant maintains that the aid must be seen in the context of the legal framework governing it. It contends that the imprecise way of determining the level of the public service compensation is a problem for the assessment of the compatibility of the aid, but that it is not significant for the classification of the aid as existing or new.

Findings of the Court

68 As regards the first argument of the applicant, that is, that the liberalisation of the market for bus transport and the change of business strategy of Oslo Sporveier turned the contested measures into new aid, it appears from the decision that the defendant considered the contested measures to have evolved into existing aid initially when the sector was opened up for competition.

69 Pursuant to Article 1(b)(v) of Part II of Protocol 3 SCA, aid is deemed to be existing aid if it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State concerned. It is only where measures become aid following the liberalisation of an activity by EEA law that such measures may not be considered as existing aid after the date fixed for liberalisation.

70 In the present case, the market for local scheduled bus transport was not liberalised on the basis of EEA law, but was opened up by virtue of national law. It follows that the defendant correctly applied Article 1(b)(v) of Part II of Protocol 3 SCA, considering that the contested measures became existing aid when the sector was opened up for competition. The alleged changes in the business strategy of the recipient of the aid are irrelevant in this regard.

71 Accordingly, the first argument of the applicant must be rejected.

72 As to the argument that the aid was granted annually and on a discretionary basis under the city budget, the Court recalls that the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. As noted in paragraph 57, whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.

73 It follows, therefore, that contrary to the applicant’s assertion, it does not matter whether the beneficiary had a right to receive the aid. Rather, what is relevant is whether the aid was granted in accordance with the provisions providing for it.

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

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

76 However, it also follows from those findings that any aid granted to Oslo Sporveier in excess of the losses actually incurred in connection with the services in question cannot be regarded to constitute, on the basis of that aid scheme, existing aid (see, for comparison, Case C-400/99 *Italian Republic* v *Commission* [2005] ECR I-3657, paragraphs 65 to 66).

77 The defendant noted in the decision that the Norwegian authorities had not submitted information showing that Oslo Sporveier and Sporveisbussene had arrangements for allocating costs nor that the accounts for carrying out collective bus transport services in Oslo were kept separate from any other commercial activities carried out by Oslo Sporveier and Sporveisbussene, such as operating tour buses. It also found that the Norwegian authorities had failed to demonstrate that the compensation granted was not excessive. It is clear that ESA could not exclude the possibility that Oslo Sporveier had received aid over and above the losses associated with discharging the public service obligation and, indeed, according to information submitted at the hearing, it considered that such overcompensation was likely.

78 It follows from established case-law that if doubts are raised as to the compatibility of aid with the EEA Agreement, ESA is obliged to open the formal investigation procedure in order to become fully informed of all the facts of the case and in order to protect the rights of parties concerned by allowing them to make their views known. This principle applies not only to notified aid, but also to complaints alleging the existence of unlawful aid (see Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraphs 74 to 76, and, for comparison, Cases C-521/06 P *Athinaïki Techniki AE* v *Commission* [2008] ECR I-5829, paragraph 34, and *Italian Republic* v *Commission*, cited above, paragraphs 47 to 48).

79 In the present case, not only had the defendant doubts concerning the legality of some of the aid; it even considered it likely that unlawful aid was present. The fact that it found itself unable, after almost four years of investigation, to establish which parts of the aid granted by the City of Oslo were existing aid and which parts were unlawful aid should have prompted it not to close the case but, on the contrary, to open the formal investigation procedure in order to become, as far as possible, fully informed of the facts.

80 Accordingly, the plea that the defendant failed to open the formal investigation procedure for the period from 1997 to 2000 must be declared well founded. Moreover, the third part of the first plea, which addresses the same issues with regard to the period from 2000 to 2008, must also be declared well founded.

Fourth part of the first plea: 2004 capital injection

Arguments of the parties

81 The applicant asserts that the NOK 800 million investment in Oslo Sporveier in 2004, of which Sporveisbussene received NOK 111.7 million, must be considered a separate, one-off transaction constituting new aid. It contends that the transaction was an investment made by the City of Oslo in its capacity as the owner of the company and not a payment for transport services provided.

82 The defendant, supported by the intervener and the Norwegian Government, submits that the capital injection forms part of the aid scheme and must accordingly be considered as existing aid. In that regard, those parties contend that the pension obligations, which this capital injection covered, did not constitute new costs, but were costs that had been accrued in the past and had only been kept outside of the company's general accounts due to the use of the "corridor solution" accounting principle. In ESA's view, the change in accounting principle, that is, the abandoning of the "corridor solution", is a mere technical adjustment that cannot be qualified as a substantial alteration entailing a re-qualification of the aid system and which impacted neither on the amount necessary to cover the underfunding, nor on the duration of the aid, nor on the use of the aid by the recipient.

83 The Commission takes the view that any public support to an undertaking in order to finance pension obligations constitutes, in principle, State aid. It considers that there is no intrinsic link between the aid granted to fund the pension deficit and the compensation payments for public service obligations awarded by the City of Oslo through the grant of concessions. The Commission concludes that the capital injection is severable from the annual compensation payments made under the existing aid scheme. In the absence of information indicating that the capital injection is existing aid for other reasons, in the Commission's view, the 2004 capital injection constitutes new aid.

Findings of the Court

84 As a preliminary point, it should be noted that the applicant contends that the 2004 capital injection is a separate transaction constituting new aid. It does not claim that the injection constitutes a relevant alteration of the aid scheme. Rather, it argues that the capital injection is not covered by any aid scheme and therefore constitutes new aid.

85 It is common ground between the parties that the material scope of the aid scheme was to compensate the aid recipients for the operation of the bus transport services, that is, to cover gaps between costs and revenues related to the operation of the services.

86 It is also undisputed that pension costs are, as such, costs related to the operation of services, like wages or social security contributions. The question, however, remains to what extent the capital injection, and the pension costs it was intended

to meet, qualify as "costs related to the operation of the services" which were covered by the aid scheme at issue.

87 In order to constitute existing aid on the basis of the aid scheme in question, the capital injection must have been granted on the basis and in accordance with the provisions of the aid scheme providing for it (see paragraphs 72 to 76 above). Accordingly, if the relevant aid scheme does not have any particular provisions on how the aid is to be provided, a divergence from the usual procedure cannot, in itself, lead to the finding that the aid was not granted on the basis of the aid scheme. In the same way, it cannot matter whether a single aid payment relates to the upcoming year, to the past year or to another period of time, as long as the aid is covered by the legal basis providing for it.

88 In the decision, after explaining the reasons for the change in accounting principles, the defendant merely stated that "[s]ince all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality. Hence the payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene." On this basis, ESA concluded "that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene".

89 While the decision states that the pension costs related to the public bus transport activities formed a part of the costs to be compensated in the past, it fails to provide any explanation whether and to what extent the capital injection was actually linked to losses relating to the discharge of these public services. In this regard, the Court notes that it follows from the case-file that both Oslo Sporveier and Sporveisbussene also provided other commercial services, in addition to their public service activities, during the period when the shortfall in the pension fund accumulated. Therefore, it was incumbent on ESA, in light of Article 16 SCA and the criteria laid down in paragraphs 41 to 44 above, to identify whether the capital injection only concerned unfunded pension liabilities that arose in connection with the discharge of public service obligations, or if it also covered other activities.

90 In the absence of such an assessment, the Court is not in a position to review the decision in relation to the applicant's claim that the capital injection did not correspond to a payment for transport services provided. As has been held at paragraph 46 above, an inadequate statement of reasons constitutes an infringement of an essential procedural requirement for the purposes of Article 16 SCA.

91 In light of the decision's lack of reasoning, the Court is not in a position to properly exercise its power of review with regard to the fourth part of the applicant's first plea. For this reason, the part of the decision relating to the capital injection must also be annulled.

92 It follows from all of the foregoing that the contested decision is vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008. Accordingly, the decision to close the case must be annulled in its entirety.

VII Costs

93 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has requested that the defendant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Kollektivtransportproduksjon AS bears its own costs. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. Annuls decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene).

2. Orders the defendant to pay the costs incurred by the applicant.

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 22 August 2011.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President