REPORT FOR THE HEARING
in Case E-14/10

APPLICATION to the Court pursuant to the second paragraph of Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Konkurrenten.no AS

and

EFTA Surveillance Authority,

supported by **Kollektivtransportproduksjon AS**

seeking the annulment of the EFTA Surveillance Authority's Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveir and AS Sporveisbussene).

I Introduction

1. The applicant Konkurrenten.no AS (hereinafter "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 (hereinafter "ESA") to close case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveir (hereinafter "Oslo Sporveier") and AS Sporveisbussene (hereinafter "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.

3. The application is based on three pleas in law, namely that ESA infringed its duty to open the formal investigation procedure for aid granted between 2000 and 2008; that ESA infringed its duty to open the formal investigation procedure for aid granted between 1997 and 2000; and that ESA infringed its duty to state reasons.

II Legal background

EEA law

4. Article 61(1) of the Agreement on the European Economic Area (hereinafter "EEA") reads:

> *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.*

5. Article 1 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 (hereinafter "Protocol 3 SCA") reads:

> *1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*
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> *2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*
>
> *[…]*
>
> *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.*

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

> *[…]*
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> *(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;

(ii) authorised aid …

[…]

(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 liberalization;

(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;

[…]

(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;

[…]

7. Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") reads:

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

8. Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

[…]

National law

9. Local bus transport was governed in Norway by the provisions of the 1976 Transport Act and its implementing regulations. Under these 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. Concerning additional compensation for specific, unprofitable transport services paragraph 1, Section 24a of the 1976 Transport Act provided that it was the responsibility of the County (*fylkekommune*: in this context the City of Oslo) to provide for contributions to local bus transport services it wanted to set up 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 of 1 January 2003.[1]

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 dated 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 dated 7 September 2006, 29 November 2006, 19 June 2007 and 2 April 2008. The Norwegian authorities replied to these requests by letters dated 11 October 2006, 11 January 2007, 16 August 2007 and 29 April 2008. The applicant, Konkurrenten, submitted comments by letter on 20 October 2006 and further information by emails dated 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 contact via both telephone and email regarding the case. The information received in this context was, according to the decision, consolidated in a letter submitted electronically on 21 April 2010 by the Norwegian authorities.

15. On 21 June 2010, ESA adopted the contested decision, closing the case on the grounds that the complaint concerned existing aid incompatible with the EEA Agreement, and that there was no need for further measures.

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[1] The parties disagree on whether the national legislation merely establishes a competence of the counties to provide additional compensation, or whether it involves an obligation for counties to cover losses incurred by concession holders in the discharge of their public service obligations.

16. By application registered at the EFTA Court on 2 September 2010, Konkurrenten requested the EFTA Court to annul the contested decision.

IV The contested decision

17. The contested decision describes the recipients of the aid as follows:

> *AS Oslo Sporveier has since its establishment been active 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 if collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/contracts with subsidiaries (such as AS Sporveisbussene) or other third parties.*
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> *AS Oslo Sporveier operated an in-house department which carried out most collective bus transport in Oslo.*[2] *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.*

18. It further appears from the contested decision that in connection with the reorganisation of 1 July 2006, Sporveisbussene became a subsidiary of Kollektivtransportproduksjon AS, the latter undertaking taking over the operative part of Oslo Sporveier.

19. The system of concession and compensation is described in the following way in the contested decision:

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[2] The contested decision makes reference to three other operators which also held concessions for carrying scheduled bus transport "on a few specific routes in Oslo". According to information contained in the letter by the Norwegian authorities of 16. August 2007, approximately 65% of the market were covered by Sporveisbussene prior to tendering the bus routes in Oslo (Annex A.8, p. 164–165).

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.[3] *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.[4] *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.*[5] *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

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3 The contested decision makes reference to Section 3 of the 1976 Transport Act and Section 7(2) of the Royal Decree no. 2170 of 8 December 1986 based thereupon (hereinafter the "1986 Royal Decree").

4 The contested decision makes reference to the 1986 Royal Decree.

5 The contested decision makes reference to Section 7 of the 1986 Royal Decree.

> *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.*
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> *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.*

20. Furthermore, it appears from the contested decision that Sporveier and Sporveisbussene also received capital injections in 2004. ESA considered in this regard:

> *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 Sporveier on behalf of AS Spoveisbussene and featured as capital injection in the accounts of AS Sporveisbussene. […]*
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> *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.*

21. In its assessment whether the aid constituted new or existing aid, 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. ESA took from this that the aid constituted originally existing aid. ESA then considered whether the aid may have become new aid by alteration within the meaning of the SCA.[6] It answered that question in the negative on the grounds that no changes had been made to the concession throughout the time, including at the time of its renewal at the end of 1999. The fact that the transport division was transferred from Oslo Sporveier to Spoeveisbussene in 1997 was considered to be a merely 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.*

22. Assessing the compatibility of the aid on the basis of Regulation 1370/2007[7], ESA considered, on the following grounds, that a public service obligation existed:

> […]
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> *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* […].

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6 The contested decision makes, at this point, reference to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 13.

7 Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ 2007 L 315, p. 1, referred to at point 4a of Annex XIII to the EEA Agreement.

23. Turning to the question whether the Norwegian authorities 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 busses.*

24. With regard to 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.*

V Forms of order sought by the parties

25. The applicant, Konkurrenten.no AS, requests the Court:

> *(i) to annul EFTA Surveillance Authority Decision No. 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene)*
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> *(ii) to order the Defendant to pay the costs.*

26. The defendant, the EFTA Surveillance Authority, claims that the Court should:

(i) dismiss the Application as unfounded;

(ii) order the Applicant to pay the costs.

27. Kollektivtransportproduksjon AS has intervened in support of the EFTA Surveillance Authority.

VI Written procedure

28. Pleadings have been received from:

- the applicant, represented by Jon Midthjell, advokat;
- the defendant, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as agents.

29. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

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

Admissibility

30. The applicant submits, undisputed by the defendant, that the application is admissible. In particular, Konkurrenten asserts that it has *locus standi* with regard to its pleas that the defendant failed to open the formal investigation procedure in his capacity as "party concerned" under Article 1(2) in Part I of Protocol 3 SCA, as the defendant closed the case without opening the formal investigation procedure.[8] Moreover, the applicant considers that it is also individually concerned by the decision because its position on the market is substantially affected by the aid.[9] It is claimed that the aid provided Sporveisbussene the financial means to acquire Arctic Express AS and to aggressively enter the express bus market, thereby sustaining additional losses.

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[8] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraphs 61–62, 64; Case T-388/03 *Deutsche Post* v *Commission* [2009] ECR II-199, paragraphs41–43; and Case C-321/99 P *ARAP* v *Commission* [2002] ECR I-4287, paragraphs 61–62.

[9] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraph 49.

Identification of the relevant aid measures and admissibility of certain arguments raised by the defendant

31. The defendant submits that the relevant aid measure is the system of public service compensation for Oslo Sporveier which, in its view, consisted of a combination of several elements: The Transport Act, the implementing regulation and the area concession granted to Oslo Sporveier. ESA claims that this system of aid, which remained basically unchanged over time, provided that a concession-holder which operated unprofitable routes, such as Oslo Sporveier, received compensation for the operation of those routes. In that regard, ESA draws attention to the fact that both in 1992 and 2001 the concessions had retroactive effect, yet Oslo Sporveier continued to receive funding during the periods even at the times when the concession had elapsed.

32. The applicant takes the view that the definition of the aid applied by ESA in its defence has no basis in the contested decision which, in its opinion, considered only the concession to be the relevant aid measure.

33. In that regard, Konkurrenten refers to the wording of the contested decision, to the fact that the contested decision unlike the defence did not assess whether there have been any relevant changes to the applicable legislation, that the contested decision was adopted shortly after ESA received a copy of the concessions in April 2010, and that the contested decision found that the aid measures had been terminated when the concession phased out.

34. Based on the above, Konkurrenten submits that the arguments put forward by the defendant which build upon classification of the measures as a national system of aid constitute new reasoning and must be refused as inadmissible by the Court.[10]

35. In its rejoinder, ESA contests Konkurrenten's claim that it has introduced new elements to the case in its defence. ESA submits that the contested decision contains all of the elements that it relied on in reaching its conclusion. It is argued that reasoning, the beginnings of which are set out in the contested measure, may be enlarged upon and clarified during the proceedings.[11]

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10 Reference is made to Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraphs 124–126; and Joined Cases T-371/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 116–117.

11 Reference is made to Case T-16/91 *Rendo NV and Others* v *Commission* [1996] ECR II-1827, paragraph 55; Opinion of Advocate General Leger in Case C-310/93 P *British Gypsum* v *Commission* [1995] ECR I-865, point 24; and Case T-65/89 *British Gypsum* v *Commission* [1993] ECR II-389, paragraph 154.

First plea: Infringement of the duty to open a formal investigation procedure for aid granted between 2000 and 2008

36. Konkurrenten claims that ESA erred in law when it assessed the aid which was granted after the expiration of the concession valid until 31 December 1999 as existing aid rather than as new aid, and that by closing the case it infringed its duty to open the formal investigation procedure in accordance with the procedure for unlawful aid. The plea is based on four separate heads: (1) The renewal of the concession constitutes an alteration of the aid; (2) the terms of the new concession as well as the conditions for granting aid were materially altered; (3) the aid must be considered as new because it was granted on an annual and discretionary basis; (4) the capital injections of 2004 were separate and on-off transactions that constituted new aid.

First part: Renewal of the concession

37. The applicant bases its claim on Article 1(c) of Part II of Protocol 3 SCA, according to which alterations of existing aid are to be considered as new aid. Konkurrenten submits that Member States are not at liberty to prolong existing aid beyond the original expiry date. It argues that the new concession constituted a new aid measure or, at least, that the prolongation of the aid by more than eight years was a material alteration of that aid.[12]

38. To Konkurrenten, the 2001 concession, being a new concession, cannot be considered a measure that is "still applicable" in the sense of Article 1(b)(i) of Part II of Protocol 3 SCA. It also refers to Article 1(b)(v) of Part II of Protocol 3 SCA which provides that existing aid ceases from "the date fixed for liberalization", pointing out that the local bus market was liberalised in Norway since 1994, and has been open to competition in the EEA since 1995. Nor could a new concession be regarded as a "modification of a purely formal or administrative nature" in the meaning of Article 4(1) of Regulation 794/2004.[13]

39. Konkurrenten submits that its reading of Protocol 3 SCA is corroborated by the rationale of the concept of existing aid. In its view, Article 1(b) is intended to create only a transitional period in order to protect legitimate interests and legal certainty. However, recipients as well as the Member State concerned are

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[12] Reference is made to Case T-332/06 *Alcoa* v *Commission* [2009] ECR II-29, paragraphs 128–129; Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 175; Joined Cases T-227/01 to T-229/09, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-3029, paragraphs 232–233; Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 80 [*sic*]; Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 73; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraphs 51–54.

[13] Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as adopted by Authority Decision No 195/04/COL.

well aware that once the expiry date of an aid has passed, Member States have a duty to loyally notify plans to reintroduce or continue aid. The interpretation advanced in the decision would allow Member States to prolong aid in principle in perpetuity, without giving ESA any right to order recovery of the aid, thus failing to guarantee effective protection against lasting distortions of competition.

40. The defendant contends that the aid measure – the system of public service compensation described in paragraph 31 – remained unchanged by the renewal of the concession and, consequently, that the duration of the aid measure was not altered. To ESA, the relevant point of reference to determine whether the aid has been altered is the legal basis of the aid and not the factual extension of the undertaking's activities.[14] ESA submits that the case of the renewal of a concession must be distinguished from the case law relied upon by the applicant, which in its view concerned the extension by legislation or regulation of aid schemes of predetermined duration. ESA argues that it was not the concession in itself that entitled Oslo Sporveier to receive aid, but the provisions of the Transport Act according to which Oslo Sporveier had a right to compensation for fulfilling its public service obligation.

41. Furthermore, the defendant submits that in the assessment of whether a change to an aid measure has the effect of turning hitherto existing aid into new aid, the Commission has examined whether the change is substantive in nature.[15] The Commission has taken account of the nature of the advantage, the aim pursued with the advantage, the basis on which the advantage is made, the persons and bodies affected by it and the relevant sources of finance. In contrast, the Commission has not looked into legislative changes which are not a part of the aid measure in question.

42. In this regard, ESA points out that the renewal of the concession meant that Oslo Municipality continued to impose on Oslo Sporveier the public service obligation and the Municipality continued to pay for the service on the same legal basis as before the renewal.

43. Apart from considering ESA's representation of the relevant aid measure to be inadmissible (see above, paragraphs 31–35), the applicant also disagrees with ESA's description of the national law. Konkurrenten claims that the law was build on the tenet that an operator had to obtain a concession before offering

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[14] Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraphs 23, 28–29 and 23–33; and Opinion of Advocate General Fenelly in Joined Cases C-15/98 and C-105/99 *Italian Republic and Sardegna Lines - Servizi Marittimi della Sardegna SpA* v *Commission* [2000] ECR I-8855, point 64.

[15] Reference is made to Commission Decision of 24 April 2007, case E 10/2005, paragraph 33; Commission Decision of 4 April 2007 in case E 7/2005 – *Finnish guarantee schemes*; Commission Decision of 20 April 2005 in case E 8/2005 – *Spanish Broadcaster RTVE*, point 2.2; and Commission Decision of 22 March 2006 in case E 22/2004 regarding direct tax incentives in favour of export related activities, paragraphs 34–35.

commercial services,[16] and that the authorities could attach a wide set of conditions to the concessions and thereby exercise control, including public price control, over each operator and market.[17] According to Konkurrenten, neither was Oslo Sporveier entitled to the 2001 concession after the old concession had expired, nor was it entitled to aid once the concession was granted. To support the latter point, the applicant refers to a report of the Office of the City Auditor of Oslo (hereinafter "the City Auditor"), according to which the City Government rejected in 1996 the idea of entering an agreement with Oslo Sporveier on granting aid beyond the annual budget period, because such an agreement would unduly tie up the discretion of the City Council in future budgets.[18] According to Konkurrenten the 1976 Transport Act, and specifically Section 24a, was not established as a national measure to grant aid to concession holders by overcompensating them for the transport services provided, but concerns the separation of powers between the government and the counties.[19]

44. In the rejoinder, the defendant maintains that the 1976 Transport Act establishes the basis of a system of aid. It points out that it is irrelevant whether or not this was the intention or the objective of the legislator, as the concept of aid is defined according to the effects of the measure, without it being necessary to take account of its causes or aims or the particular situation of the bodies distributing or managing the aid.[20] The report of the City Auditor is considered to be without value for the examination of this question because it does not analyse the provisions providing for the aid to Oslo Sporveier and Sporveisbussene. Moreover, ESA takes the view that overcompensation is an example of incompatible aid, i.e. where compensation for public services is excessive. Thus, it considers that the reference of the preparatory works to "overcompensation" supports, rather than contradicts, the existence of a national system of aid if it is stated that aid granted within the system should be compatible by ensuring that there is no overcompensation.

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16 Reference is made to Articles 3, 5, 7, 8 and 10 of the 1976 Transport Act.

17 Reference is made to Article 13 of the 1976 Transport Act.

18 Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 12 (Annex A.12).

19 Reference is made to the preparatory works on Section 22 of the 2002 Commercial Transport Act, which corresponds to Section 24a of the 1976 Transport Act, Ot. prp. nr. 74 (2001–2002), p. 8. The relevant part reads: "*Through the EEA Agreement, Norway is bound by the general rules on state aid which also takes effect on the area regulated by this law. […] The rules require that arrangements of grants within the transport sector is* [sic] *designed and enforced so that no overcompensation is given for the services agreed/stipulated. Any overcompensation can be recovered pursuant to the law.*" (translation by the applicant).

20 Reference is made to Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 27 and 28 [*recte*: paragraph 13]; and Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21.

Second part: Terms and conditions materially altered

45. The applicant submits that whether aid may be classified as new aid or as an alternation of existing aid must be determined by reference to the provisions providing for it.[21] Where the alteration affects the actual substance of the original scheme that latter is transformed into a new aid scheme; there can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.[22]

46. The applicant considers the decision to be manifestly incorrect in stating that no changes were made to the concessions during the entire period from 1990 to 2008.[23] Konkurrenten first of all refers to the aspects treated by the other parts of the first plea: to the extension of the aid by the new concession, to what it considers to be annual and discretionary budget grants, and to the separate decision to make a NOK 800 million investment in Oslo Sporveier in 2004.

47. Apart from that, the applicant claims that under the 1990 concession, Oslo Sporveier held an area concession that was restricted by five and six separate route concessions granted to two competitors, Norgesbuss Oslo AS and Ing. M. O. Schøyens Bilcentraler AS respectively. In contrast, the 2001 concession was granted as an exclusive area concession, thereby removing the restraints posed by the route concessions.[24] It is claimed that these changes were part of a significant reform of public transport in the City of Oslo in 2001, which included a reorganisation of Oslo Sporveier: Oslo Sporveier was intended to continue as a purchasing organisation of transport services, whereas the performance of those services would be transferred to a separate holding company. Sporveisbussene should compete on the same terms as privately owned companies in the market and eventually be put up for sale, while local bus transport market should become subject to competitive tendering.[25]

48. The defendant maintains that no changes were made to Oslo Sporveier's concession between 1992 and its expiry in 2008.[26] It is asserted that contrary to what the applicant claims, the route concessions held by Ing. M. O. Schøyens

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21 Reference is made to Case C-44/93 *Namur-Les Assurances du Credit* [1994] ECR I-3829, paragraph 28.

22 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

23 Reference is made to the contested decision, at p. 16.

24 Reference is made to the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4).

25 Reference is made to case 265/01, proposal for an overall strategy on ownership and organization of public transport in Oslo from the City Government, of 20 September 2001 (Annex A.11.1).

26 Reference is made to the 1990 area concession granted to Oslo Sporveier dated 16 November 1992 (Annex A.11.2, p. 387) and the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4, p. 432).

Bilcentraler AS and Norgesbuss AS were simultaneously prolonged with Oslo Sporveier's area concession.[27] It is further submitted that even if some changes were made to the two other route concessions which had an effect on Oslo Sporveier's operations, such changes cannot alter the classification of the aid.[28]

Third part: Aid granted on an annual and discretionary basis

49. The applicant contends that the concession did not carry any 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, the implication being that the aid granted by the City was discretionary and independent of the duration of any concession granted. In that regard, Konkurrenten points out that the City Auditor categorised the contested measures as annual subsidies to Oslo Sporveier, and claims that the City Government rejected in 1996 the idea of entering an agreement with Oslo Sporveier on granting aid beyond the annual budget period, because such an agreement would unduly tie up the discretion of the City Council in future budgets.[29] On that basis, the applicant submits that each annual budget should be considered as a separate aid measure, and be consequently assessed as new aid.[30]

50. The defendant reiterates that the aid must be seen in the legal framework governing it. In the alternative, ESA contends that even if the applicant would be correct in asserting that the legal basis of the aid granted was the City's discretionary budget, each individual grant of aid would nevertheless be existing aid. It is considered inconceivable that each individual aid would have to be notified merely because it was granted as part of annual budgetary decisions. ESA contends that in this case the long standing practice of the City of Oslo, which existed prior to the formation of the EEA Agreement, to provide funding for the public services performed by Oslo Sporveier must be considered as an existing system of aid within the meaning of Article 62 EEA.[31] The imprecise way of determining the level of the public service compensation is considered a problem for the assessment of the compatibility of the aid, but deemed [*recte*: not] to be significant for the classification of the aid as existing or new.

51. In its reply, the applicant submits that the alternative reasoning has no basis in the contested decision and must therefore be dismissed. Moreover, Konkurrenten rejects the alternative reasoning on the merits as implying that the

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27 Reference is made to the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4, p. 432).

28 Reference is made to Case C-44/93 *Namur-Les Assurances du Credit* [1994] I-3829, paragraph 28.

29 Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 8, 12 and 20 (Annex A.12).

30 Reference is made to Joined Cases T-227/01 to T-229/09, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] II-3029, paragraphs 232–233.

31 Reference is made to ESA decision no. 491/09/COL (Norsk Film).

mere habitude of a Member State to grant aid on an annual and discretionary basis could be sufficient to qualify as an existing aid scheme.

52. Additionally, the applicant contends in its reply that the aid must be regarded as new aid because the City of Oslo operated outside of any approved aid scheme. It is argued that no overcompensation could be paid for local bus transport under either the 1976 Transport Act or the 2002 Commercial Transport Act after 1992. Nevertheless, the decision found that the subsidy could not be considered to be a 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 busses. It is added that the City Auditor's 2006 report concluded that the aid was not subject to a proper written procedure, with the City of Oslo neither stipulating the objectives, the criteria for the use nor any routines for the monitoring of the aid.[32]

Fourth part: 2004 capital injections constituted new aid

53. 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 as separate, one-off transactions constituting new aid. It is claimed that Oslo Sporveier was not entitled to this aid, neither on the basis of the concession nor the system of aid as put forward in the defence, and that the decision to make the capital injection was taken separately from the annual grants, as shown by the fact that in the same year, Sporveisbussene additionally received an annual subsidy of NOK 11.5 million and a "quality bonus" of NOK 3.9 million.

54. Konkurrenten argues that the transactions were investments by the City of Oslo in its capacity as the owner of the company and not payments for transport services performed. Reference is made to statements of the City of Oslo that it had no obligation based on law to solve the problem with underfunding of the pension fund.[33] It is pointed out that the contested decision established that the underfunding had never been reflected in the accounts of Oslo Sporveier or Sporveisbussene. It is further claimed that following the capital injection, Oslo Sporveier outsourced its pension fund and stated that by doing so it "liberated" NOK 485 million from its present pension fund, that it would use NOK 168 million to eliminate the current underfunding, set aside NOK 131 million for

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32 Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 8 and 20 (Annex A.12).

33 Reference is made to the letter by the City of Oslo of 4 January 2007, annexed to the letter from the Ministry of the Government Administration and Reform to ESA of the same day (Annex A.6, p. 86).

future pension costs and on top of that had received NOK 186 million in "fresh" money.[34]

55. The defendant submits that the investments form part of the aid system identified, and are accordingly to be considered as existing aid as well. In that regard, ESA contends that the pension obligations, which these capital injections 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 the rejoinder, it is claimed that the annual compensation included, since 1995, amounts to cover higher premiums intended to make-up for the underfunding over a 25 year period. However, when Sporveisbussene's pension fund was outsourced in 2004, Norwegian law required it to abandon the "corridor solution" and to pay up the outstanding premiums.[35]

56. In ESA's view, the change in accounting principle – 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 system of aid (the Transport Act, the implementing regulation and the area concession) as new aid.[36] It is argued that the change in accounting principle had impact 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. On the last aspect, it is pointed out that the funds were never at the disposition of Sporveisbussene but were directly paid to "Oslo Sporveiers Pensjonskasse".

57. Concerning Konkurrenten's assertion on the outsourcing of Oslo Sporveier's pension fund, ESA claims that this operation concerned pension funds for companies other than Sporveisbussene,[37] whose pension fund had already been outsourced from "Oslo Sporveiers Pensjonskasse" to Vital Forsikring ASA at that time.[38] ESA also rejects Konkurrenten's claim that the City of Oslo was under no legal obligation to rectify the underfunding of the pension fund. ESA asserts that local authorities in Norway and companies owned by them were under an obligation to provide their employees upon retirement with an indexed pension equal to 66% or 70% of their final salary, and that the

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34 Reference is made to the press release of Oslo Sporveier of 25 November 2005 "*485 millioner kroner frigjøres ved overgang til forsikret tjenestepensjon*" (Annex A.19, p. 609).

35 Reference is made to Section 8c-11 in conjunction with paragraphs 1 and 3 of Section 8c-10 of the 1988 Insurance Activity Act (Lov 1988-06-10 nr 39: *Lov om forsikringsvirksomhet*).

36 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28; and Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*).

37 The outsourcing of the pension fund of Oslo Sporveier, Oslo T-banedrift AS and Oslo Sporvognsdrift AS from "Oslo Sporveiers Pensjonskasse" to "Storebrand".

38 Reference is made to a letter from Sporveisbussene to Oslo Sporveiers Pensjonskasse of 4 June 2004 (Annex D.1, p. 1).

national authorities required the rectification of the underfunding.[39] ESA argues that the statement by the City of Oslo referred to by the applicant was made at an early stage in the administrative procedure, is contradicted by the subsequent statements of the Norwegian authorities and that accordingly, that statement cannot be given any weight.

58. In the alternative, if the capital injection should be regarded as a separate aid measure by the Court, ESA argues that the transaction is severable from the original aid measure within the meaning of the *Gibraltar* judgment and that therefore, it cannot have an effect on the classification of the original system of aid if the capital injection is regarded as new aid.[40]

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

59. Konkurrenten claims that the defendant erred in law when it assessed the aid which was granted from 1997 until the expiry of the concession on 31 December 1999 as existing aid rather than as new aid, and that by closing the case it infringed its duty to open the formal investigation procedure in accordance with the procedure for unlawful aid.

60. On the basis of Article 1(b)(v) of Part II of Protocol 3 SCA, the applicant submits that ESA should have considered the aid as being new from 1995 onwards, having established in the contested decision that the market for bus transport has been open for competition in the EEA since 1995. Referring to the *Alzetta* case, the applicant argues that that case does not apply to circumstances such as in the present case, where the national market has already been liberalised (in 1991) before the EEA market was liberalised (in 1995).[41]

61. Konkurrenten reiterates its view that the aid was granted on an annual and discretionary basis by the City of Oslo through the city budget. The applicant further asserts that in the wake of the liberalisation of the national bus market, neither the City of Oslo nor Oslo Sporveier could have had legitimate expectations that the aid would be treated as existing aid.[42] Consequently, it was foreseeable to the City of Oslo that the aid could be contrary to Article 61 EEA

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39 Reference is made to the letter by the City of Oslo of 4 January 2007, annexed to the letter from the Ministry of the Government Administration and Reform to ESA of the same day (Annex A.6, p. 87 and 88); and Section 8c-11 in conjunction with paragraphs 1 and 3 of Section 8c-10 of the 1988 Insurance Activity Act (Lov 1988-06-10 nr 39: *Lov om forsikringsvirksomhet*).

40 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

41 Reference is made to Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraphs 141–147.

42 Reference is made to Case T-288/97 *Regione Friuli Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraphs 89–90.

and should therefore have been notified before the next annual and discretionary grant was made.

62. In the alternative the applicant maintains that the contested aid must be regarded at the latest as new aid from 1997, when the bus division of Oslo Sporveier was transferred to Sporveisbussene to allow the new subsidiary better opportunities to compete in the liberalised market. Konkurrenten does not consider the reorganisation as such to be relevant. However, it is claimed that the City of Oslo was positioning the bus division from 1997 to trump the emerging competition and later also started preparations to sell the company. Under these circumstances, neither the City of Oslo nor Oslo Sporveier could have entertained legitimate expectations in seeing the aid treated as existing aid. Konkurrenten argues that the effectiveness of Article 61 EEA would be significantly reduced if aid granted to a publicly owned and formerly almost *de facto* monopolist following the liberalisation of a market would be beyond the reach of any recovery order.

63. The defendant submits that it is apparent from the wording of Article 1(b)(v) of Part II of Protocol 3 SCA that it is applicable only when the market was liberalised by virtue of EEA law. It is pointed out that the contested decision concluded, on that basis, that the system of aid became existing aid in 1995. Moreover, ESA contends that internal reorganisation within Oslo Sporveier, such as entrusting the bus services to its subsidiary Sporveisbussene, is irrelevant with regard to the classification of the aid.[43] Concerning the arguments identical with the first plea, ESA refers to its respective reasoning and asks the Court to reject the plea on the same basis.

Third plea: Infringement of the duty to state reasons

64. The applicant claims that ESA infringed its duty to state reasons, and that the contested decision should accordingly be annulled. It is submitted that Article 16 SCA requires that a decision stets out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Authority to its decision may be understood.[44]

65. Konkurrenten considers the contested decision to be opaque on the assessment of whether the measure is new or existing aid. In particular, the

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[43] Reference is made to Commission Decision of 29 November 2007 in case C 56/2007 – France, *Garantie illimitée de l'Etat en faveur de La Poste*, paragraphs 93–97; Commission Decision in case E 14/2005 – Portugal, *Compensation payments to public service broadcaster RTP*, paragraphs 78–80, Commission Decision of 20 April 2005 in case E 10/2005 (ex C 60/1999) – France, *Redevance radiodiffusion TF1*, paragraph 33; and Letter from the Commission to Germany of 8 May 2000 proposing appropriate measures in case E 10/2000, Landesbank, point 7, first paragraph.

[44] Reference is made to Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Ct. Rep. 59, paragraph 26.

applicant submits that the decision offers no reasons why only a change in the terms of the concession should be relevant as a matter of law, when the concession itself did not entitle the holder to receive any aid. Furthermore, it is criticised that the decision contains no explanation why the fact that a new concession was granted does not qualify as a relevant change. Konkurrenten maintains that by not explaining these issues, it was not possible to understand how the decision arrived at the conclusion that the aid must be considered as existing.

66. The defendant submits that the statement of reasons required under Article 16 SCA must disclose in a clear and unequivocal fashion the reasoning followed by the Authority, in such a way as to enable the parties to ascertain the reasons for the decision adopted and enable the EFTA Court to exercise its power of review. To ESA it is, however, not necessary for the reasoning to go into all the various relevant facts and points of law. The question whether the statement of reasons for a decision meets those requirements 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.[45]

67. Against this standard, ESA 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. ESA asserts that the applicant *de facto* restates his previous arguments, and adds in that respect that the duty to state adequate reasons must be distinguished from the question whether the reasoning is well founded.[46] It submits that whether or not the case-law regarding the extension of aid schemes is applicable is an issue of substance, which would alter the classification of the aid, but that there was no obligation for ESA to explain why it did not consider this case-law to be relevant.

Written observations of the European Commission

68. The Commission notes that it is undisputed between the parties that the payments to Oslo Sporveier constituted existing aid when the EEA Agreement entered into force. The decisive question for the present case therefore is how the expression “alterations to existing aid” in Article 1(c) of Part II of Protocol 3 SCA is to be interpreted.

69. To begin with, the Commission considers two different scenarios where aid may be altered: first, alterations which affect the actual substance of the

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45 Reference is made to Joined Cases E-5/04 to E-7/04 *Fesil and Finfjord* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraphs 96–97; and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission*, judgment of 10 December 2010, not yet reported, paragraph 96.

46 Reference is made to Case C-413/06 P *Bertelsmann AG and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 181; Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35; and Case C-159/01 *the Netherlands* v *Commission* [2004] ECR I-4461, paragraph 65.

original scheme and second, alterations which are severable from the scheme. To establish the first kind of alteration which affects the entire scheme, it is decisive to examine whether the provisions providing for the aid have been altered.[47] In the other case, if the alterations are severable from the original scheme, the existing aid scheme remains existing and the severable part is to be assessed on its own as new aid.[48]

70. The Commission submits that only substantial alterations affect the substance of a scheme,[49] such as changes in the objective pursued,[50] a change of the content of the advantage or the volume of the aid,[51] or the introduction of new conditions for eligibility for the aid as well as new mechanisms of granting the aid.[52] Other examples are the prolongation in time of an aid measure that initially had been limited in time,[53] as well as an increase in the budget of 50%.[54] Generally speaking, Member States must notify the Commission of alterations which, because of the effect that they have on undertakings or their competitive relationship, may influence the Commission's decision. On the other hand, it is not necessary to communicate alterations of a merely formal or administrative nature.[55]

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47 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraphs 28 and 35.

48 Reference is made to Joined Cases 91/83 and 127/83 *Heineken* [1984] ECR 3435, paragraphs 21–22; Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 109–114; Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P und C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*); Case T-297/02 *ACEA* v *Commission* [2009] ECR II-1683, paragraphs 113, 117 and 127 [*sic*]; Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraphs 117 and 121; Case T-189/03 *ASM Brescia* v *Commission* [2009] ECR II-1831, paragraphs 97 and 101; and Case T-222/04 *Italy* v *Commission* [2009] ECR II-1877, paragraphs 90 and 94.

49 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 23; and Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P und C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*).

50 Reference is made to Opinion of Advocate General Trabucchi in Case 51/74 *Hulst* [1975] ECR 99, point 7.

51 Reference is made to Opinion of Advocate General Lenz in Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3831, points 77–113.

52 Reference is made to Opinion of Advocate General Fennelly in Joined Cases C-15/98 and C-105/99 *Sardegna Lines* v *Commission* [2000] ECR I-8855, points 66–75.

53 Reference is made to Case C-138/09 *Todaro Nunziatina & C. Snc*, judgment of 20 May 2010, not yet reported, paragraph 47; and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 175.

54 Reference is made to Case C-138/09 *Todaro Nunziatina & C. Snc*, judgment of 20 May 2010, not yet reported, paragraph 47.

55 Reference is made to Opinion of Advocate General Mancini in Joined Cases 91 and 127/83 *Heineken* [1984] ECR 3456, point 5; and Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed

71. Turning to its decision practice, the Commission explains that in general, in line the Opinion of Advocate General Trabucchi in *Hulst*,[56] it takes into account the nature of the benefit, the objective pursued by the measure and the beneficiary institutions or undertakings, the legal basis and the source of financing.[57]

72. In the transport sector, the Commission has dealt with the issue of possible substantial alterations to existing aid in three decisions.[58] The Commission notes that the common feature in these cases is that the State aid was based on certain principles for calculating compensation payments, which were laid down in generally applicable rules. These rules were applicable for an undetermined duration; the actual aid amount was calculated and approved annually on the principles laid down in those rules. These competent authorities enjoyed no discretion but were simply applying predetermined rules. The Commission found that only substantial changes to the rules for calculating the compensation constituted substantial alterations of the aid schemes, but not the application of those rules.

73. Turning to the first part of the first plea, that the renewal of the concession is a substantive alteration of the aid, the Commission submits that in order to determine whether it is well founded, it is necessary to establish whether the aid was initially limited in time. To the Commission, it is ultimately a question of Norwegian law to identify the legal basis for the granting of aid. However, on the basis of the elements submitted by the parties, the Commission considers paragraph 1 of Section 24a of the 1976 Transport Act to constitute the legal basis of the aid. In its view, the concession is rather a criterion for eligibility for compensation payments, rather than the legal basis for the payment itself. Based on that understanding of Norwegian law, it is submitted that the aid scheme was unlimited in time and consequently, that the renewal of the concession constituted a decision to award aid based on an existing aid scheme. Accordingly, the first part of the first plea is considered unfounded.

74. Based on the assumption that the concession is not a part of the aid scheme itself, the Commission submits that also the second part of the first plea

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rules for the application of Article 93 of the EC Treaty (referred to at point 2 of Protocol 26 to the EEA Agreement).

56 Reference is made to Opinion of Advocate General Trabucchi in Case 51/74 *Hulst* [1975] ECR 99, point 7.

57 Reference is made to Commission Decision of 28 October 2009 in Case E 2/2008 – *Financing of ORF*, point 124; Commission Decision of 24 April 2007 in Case E 3/2005 – *Financing of public service broadcasters in Germany*, point 197; Commission Decision of 20 April 2005 in Case E 10/2005 – *Redevance radiodiffusion*, points 31-33; Commission Decision of 20 April 2005 in Case E 8/2005 – *State aid in favour of the public Spanish broadcaster RTVE*, after point 47.

58 Commission Decision of 20 December 2006 in Case C 58/2006 – *Verkehrsverbund Rhein-Ruhr*; Commission Decision of 10 October 2007 in Case C 42/2007 – *Reform of the pension system of RATP*; and Commission Decision of 28 January 2009 in Case E 4/2007 – *French airport charges*, points 57-60.

must be rejected. The Commission argues that the alleged changes to the concession do not change the provisions providing for the aid and that an expansion of the beneficiary's activities does as such not constitute a material alteration of the aid.[59] Equally, the Commission considers that the reform of the corporate structure of Oslo Sporveier is without any impact on the provisions providing for the aid.[60]

75. Addressing the third part of the first plea, the Commission outlines its understanding of the applicable Norwegian law that the City of Oslo enjoyed discretion in granting concessions and could, on that occasion, decide to reduce or increase the number of unprofitable bus routes which an undertaking was obliged to operate under the concession. However, once the concession was granted, the City was under an obligation to cover losses and could not, in a discretionary manner, increase, reduce or abolish the yearly payments.

76. Based on that understanding, the Commission considers the present case to be comparable with its decisions in *Verkehrsverbund Rhein-Ruhr* and *Reform of the pension system of RATP* and *French airport charges*.[61] It is argued that as in *Verkehrsverbund Rhein-Ruhr* and *Reform of the pension system of RATP*, the precise amount of the payments was established on an annual basis by the public authority, but in establishing the amount, the authority had no discretion; rather, it was applying mechanically the mechanism established by the statutory provisions. Accordingly, the Commission submits that the third part of the first plea must be rejected.

77. With regard to the fourth part of the first plea, concerning the 2004 capital injections, the Commission submits that any public support to an undertaking in order to finance pension obligations in principle constitutes State aid.[62] The Commission considers that there is no intrinsic link between aid granted to fund

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59 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 35; Commission Decision of 28 October 2009 in Case E 2/2008 – *Financing of ORF*, points 132–133; Commission Decision of 24 April 2007 in Case E 3/2005 – *Financing of public service broadcasters in Germany*, points 207–211.

60 Reference is made to Commission Decision of 20 April 2005 in Case E 10/2005 – *Redevance radiodiffusion*, point 33; Commission Decision of 20 April 2005 in Case E 8/2005 – *State aid in favour of the public Spanish broadcaster RTVE*, point 52.

61 Commission Decision of 20 December 2006 in Case C 58/2006 – *Verkehrsverbund Rhein-Ruhr*; Commission Decision of 10 October 2007 in Case C 42/2007 – *Reform of the pension system of RATP*; Commission Decision of 28 January 2009 in Case E 4/2007 – *French airport charges.*

62 Reference is made to Joined Cases E-5/04 to E-7/04 *Fesil and Finnfjord* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraph 76; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 12; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 34; Case C-256/97 *Déménagements-Manutention Transport* [1999] ECR I-3913, paragraph 19; Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41; Commission Decision 2008/722/EC of 10 May 2007 on State aid for OTE, points 90-102; Commission Decision 2008/204/EC of 10 October 2007 on the State aid for La Poste, points 118-148; and Commission Decision 2009/945/EC of 13 July 2009 on State aid for RATP, points 84-105.

the pension deficit and the compensation payments for public service obligations awarded by the City of Oslo by granting licences. Moreover, the Commission notes that Oslo Sporveier and Sporveisbussene provide commercially viable bus services beyond their public service obligations, whereas the capital injection concerned unfunded pension liabilities for all staff of the companies rather than for only those members of staff engaged in the public service activities. Consequently, the Commission contends that the capital injection cannot form part of the existing scheme for annual compensation payments.

78. The Commission draws the conclusion that the capital injection is severable from the annual compensation payments made under the existing aid scheme. In the absence of information that the capital injection is existing aid for other reasons, it is submitted that the 2004 capital injection is new aid and that accordingly, the fourth part of the first plea is well founded. The Commission agrees however with the defendant that due to the severability of that measure, this outcome is without impact on the qualification of the annual compensation payments as existing aid.

79. Concerning the second plea, the Commission supports the findings in the decision that the opening of the market for public passenger transport by bus was not ordered by an act of EEA law, but occurred through voluntary decisions of Member States to open their domestic markets. It argues that accordingly, the second sentence of Article 1(b)(v) of Part II of Protocol 3 SCA does not apply, as that provision requires liberalization by virtue of EEA law.[63]

80. The Commission shares the view of the defendant also with respect to the third plea. It is observed that the contested decision mentions the legislation on the basis of which the aid is granted, namely the 1976 Transport Act and the 2002 Commercial Transport Act, as well as the concessions which made Oslo Sporveier eligible for the aid, and the obligation for the City of Oslo to compensate Oslo Sporveier for the public service obligations imposed upon it by those concessions. Further the contested decision describes why the compensation payments constitute existing aid in application of the first sentence of Article 1(b)(i) and (v) of Part II of Protocol 3 SCA. The Commission concludes from this that the contested decision respects the duty to state reasons.

81. In conclusion, the Commission submits that the Court should annul the contested decision insofar as it qualifies the 2004 capital injection as existing aid, and uphold the remainder of the contested decision.

Carl Baudenbacher

Judge-Rapporteur

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63 Reference is made to Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 79.