E-19/13-85

REPORT FOR THE HEARING
in Case E-19/13

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

Konkurrenten.no AS

and

EFTA Surveillance Authority,

supported by **Sporveien Oslo AS**,

seeking the annulment of EFTA Surveillance Authority Decision No 519/12/COL of 19 December 2012, OJ 2013 L 276, p. 8, ("first contested decision"), closing a formal investigation concerning aid granted by Oslo Municipality to AS Oslo Sporveier and of EFTA Surveillance Authority Decision No 181/13/COL of 8 May 2013, notified in OJ 2013 C 263, p. 9, ("second contested decision"), refusing to open a formal investigation into aid measures not covered by the first contested decision.

I Introduction and factual background

1. Konkurrenten.no AS ("applicant" or "Konkurrenten") is a privately owned operator in the express bus market between the central and southern regions of Norway. Konkurrenten is a limited liability company owned by Olto Holding AS, which also owns Risdal Touring AS, a company operating in the tour bus market in Norway and several EU Member States.

2. AS Oslo Sporveier changed its name to Kollektivtransportproduksjon AS ("KTP") in 2006. KTP was renamed in April 2013 to Sporveien Oslo AS ("Sporveien" or "intervener"). Sporveien is a company owned and controlled by Oslo Municipality. Sporveien has three wholly-owned subsidiaries: Oslo Trikken AS, Oslo T-banen AS and Unibuss AS ("Unibuss") previously known as AS Sporveisbussene ("Sporveisbussene"). Unibuss has two wholly-owned subsidiaries

operating in the commercial transport sector: Unibuss Tur AS (a tour bus company) and Unibuss Ekspress AS (an express bus company).

3. On 11 August 2006, Konkurrenten filed its first State aid complaint with the EFTA Surveillance Authority ("ESA" or "defendant"), registered as ESA Case No 60510, concerning alleged State aid to the company now known as Sporveien.

4. On 21 June 2010, ESA closed Case No 60510 by Decision No 254/10/COL, finding that "in view of the termination of the incompatible existing state aid on 30 March, [ESA] considers that no further measures are required in this case".

5. On 2 September 2010, Konkurrenten brought an action seeking the annulment of Decision No 254/10/COL (Case E-14/10 *Konkurrenten.no AS* v *ESA* ("*Konkurrenten I*") [2011] EFTA Ct. Rep. 266).

6. On 22 August 2011, in *Konkurrenten I*, the Court annulled Decision No 254/10/COL of 21 June 2010 to close Case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveier and AS Sporveisbussene for the provision of scheduled bus services in Oslo. The Court held that Decision No 254/10/COL was "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" (see *Konkurrenten I*, cited above, paragraph 92).

7. On 8 September 2011, Konkurrenten filed a second State aid complaint with ESA, registered as ESA Case No 70506, alleging that Sporveien (then KTP) had continued to receive aid from Oslo Municipality since 31 March 2008 on an ongoing basis and that it had benefited from further aid measures until 31 March 2008.

8. On 8 February 2012, Konkurrenten served a pre-litigation notice on ESA pursuant to Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") on the basis that the latter had not opened a formal investigation into State aid to Sporveien (then KTP), notwithstanding the Court's judgment in *Konkurrenten I.*

9. On 21 March 2012, Konkurrenten and Risdal Touring submitted requests to ESA pursuant to Article 2(1) of ESA's Rules on Access to Documents 2008 for access to documents in ESA Case Nos. 60510 and 70506 respectively. Subsequently, applications were brought before the Court concerning these access to documents requests which resulted in the Order in Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrrenten* v *ESA* [2013] EFTA Ct. Rep. 668.

10. On 28 March 2012, ESA opened a formal investigation into potential State aid to Sporveien (then Oslo Sporveier and Sporveisbussene) by Decision No 123/12/COL.

11. On 19 December 2012, ESA issued its subsequent Decision No 519/12/COL (the first contested decision). As regards Konkurrenten's 2006 complaint, ESA concluded that some of the contested measures did not constitute State aid, whilst the remaining contested measures constituted existing aid. ESA therefore closed its formal investigation.

12. On 8 May 2013, ESA issued the second contested decision. As regards Konkurrenten's 2011 complaint, ESA concluded that some of the contested measures did not constitute aid, whilst the remaining contested measures constituted existing aid. ESA therefore decided not to open a formal investigation.

13. On 16 August 2013, Konkurrenten lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of the first and second contested decisions.

II Legal background

EEA law

14. Article 61(1) EEA reads:

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

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

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

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

16. 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.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

17. Article 1(1) of Part I of 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.

18. Article 1 of Part II of Protocol 3 SCA reads:

For the purposes of this Chapter:

…

(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;

(e) 'individual aid' shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

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

…

(h) 'interested party' shall mean any State being a Contracting Party to the EEA Agreement and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

19. Article 4 of Part II of Protocol 3 SCA on the preliminary examination of the notification and decisions of the EFTA Surveillance Authority reads:

…

2. Where the EFTA Surveillance Authority, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

…

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').

...

20. Article 13 of Part II of Protocol 3 SCA on 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.*
>
> *2. In cases of possible unlawful aid and without prejudice to Article 11(2), the EFTA Surveillance Authority shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7) of this Chapter.*
>
> *3. Article 9 of this Chapter shall apply mutatis mutandis.*

21. Article 17 of Part II of Protocol 3 SCA on cooperation pursuant to Article 1(1) in Part I reads:

> *1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.*
>
> *2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.*

National law

The 1976 Public Transport Act ("PTA") in the version of 15 April 1994 (as translated by the applicant)

22. Article 24a PTA on grant responsibility for county municipalities, etc provided as follows:

> *1. The county municipality is responsible for making grants for the operation of local scheduled traffic which the county municipality wishes to establish or maintain within the respective county.*
>
> *2. The Government allocates annual block grants for partial coverage of the county municipalities' costs. The grant is distributed through the income system of the municipalities and county municipalities in accordance with regulations given by the King.*

3. Within the deadlines set by the Ministry, the county municipalities shall submit budgets, accounts, and otherwise provide the information necessary for the Ministry's evaluation of the total future need for grants.

4. The county municipalities' decisions in matters concerning routes, fares and grants cannot be appealed to the Ministry.

5. The county municipalities determine the form of contract and guidelines applicable to the allocation of grants. Grants for scheduled ferries are not allocated on the basis of tenders.

6. It can be agreed that whoever receives grants shall have exclusive rights to routes or route areas for the duration of the grant contract.

7. A grant contract concluded on the basis of tenders shall apply for at least 5 years' with the exception of temporary routes. In special cases, a concluded agreement can be prolonged for a shorter period.

The 2002 Commercial Transport Act ("CTA") in effect from 1 January 2003 (as translated by the applicant)

23. Article 22 CTA on local scheduled traffic, which replaced Article 24a PTA, provides:

1. The county municipality is responsible for allocating grants to scheduled traffic which the county municipality wishes to establish or maintain within a municipality, cf. also Article 24.

2. The county municipalities' decisions in matters concerning routes, fares and payment cannot be appealed to the Ministry.

3. The Government allocates annual block grants for partial coverage of the county municipalities' costs. The grant is distributed through the income system of the municipalities and county municipalities in accordance with regulations given by the King.

4. Within the deadlines set by the Ministry, the county municipalities shall submit budgets, accounts, and otherwise provide the information necessary for the Ministry's evaluation of the total future need for grants.

5. The county municipality determines the form of contract and guidelines applicable to the allocation of grants.

6. A grant contract concluded on the basis of tenders shall apply for at least 5 years, with the exception of temporary routes. In special cases, a concluded agreement can be prolonged for a shorter period.

III The contested decisions

First contested decision – ESA Decision No 519/12/COL of 19 December 2012

24. By Decision No 123/12/COL of 28 March 2012, ESA initiated the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 SCA in respect of potential aid to AS Oslo Sporveier and AS Sporveisbussene.

25. On 19 December 2012, ESA issued its Decision No 519/12/COL closing the formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene.

26. In Articles 1 to 4 of the first contested decision, ESA made the following determinations. In Article 1 it held that the application of the group taxation rules to the Oslo Sporveier Group does not constitute State aid within the meaning of Article 61(1) EEA and, as a consequence, the formal investigation into that measure was therefore closed. In Article 2 it held that the commercial activities capital injection does not constitute State aid within the meaning of Article 61(1) EEA and, as a consequence, the formal investigation into that measure was therefore closed. In Article 3 it held that the formal investigation procedure with regard to the annual compensation was without object since the measure represents existing aid now terminated and, as a consequence, the formal investigation into that measure was therefore closed. Finally, in Article 4 it held that the formal investigation procedure with regard to the public service capital injection was without object since the measure represents existing aid now terminated and, as a consequence, the formal investigation into that measure was therefore closed.

Second contested decision – ESA Decision No 181/13/COL of 8 May 2013 (Kollektivtransportproduksjon AS, Oslo Vognselskap AS and Unibuss AS)

27. On 8 May 2013, ESA issued the second contested decision. ESA concluded, in accordance with Article 13(1) of Part II of Protocol 3 SCA in conjunction with Article 4(2) thereof.

28. In Articles 1 to 5 of the second contested decision, ESA made the following determinations. In Article 1 it held that the 15 short-term liquidity loans which Oslo Municipality granted Kollektivtransportproduksjon AS from 2002 until 2009 did not involve State aid within the meaning of Article 61(1) EEA. In Article 2 it held that the bus for metro and tram contracts concluded with Unibuss AS for ad hoc interruptions until 2011 did not involve State aid within the meaning of Article 61(1) EEA. In Article 3 it held that the metro and tram guarantees provided by Oslo Municipality for the benefit of Kollektivtransportproduksjon AS and Oslo

Vognselskap AS involved State aid within the meaning of Article 61(1) EEA and that these measures were granted on the basis of an existing system of aid. In Article 4 it held that the infrastructure loans granted by Oslo Municipality to Kollektivtransportproduksjon AS involved State aid within the meaning of Article 61(1) EEA and that these measures were granted on the basis of an existing system of aid. Finally, in Article 5 it held that the NBB measures benefitting Kollektivtransportproduksjon AS involved State aid within the meaning of Article 61(1) EEA and that these measures were granted on the basis of an existing system of aid.

IV Procedure and forms of order sought by the parties

29. On 16 August 2013, Konkurrenten lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of ESA Decision No 519/12/COL of 19 December 2012, closing a formal investigation concerning aid granted by Oslo Municipality to AS Oslo Sporveier, and of ESA Decision No 181/13/COL of 8 May 2013, refusing to open a formal investigation into aid measures not covered by the first contested decision.

30. In relation to the annulment of both decisions, Konkurrenten requests the Court to order ESA and any intervener to bear the costs. The applicant, Konkurrenten.no AS, requests the Court to:

> *(i) annul ESA Decision No 519/12/COL of 19 December 2012 (AS Oslo Sporveier and AS Sporveisbussene), and order the defendant and any intervener to pay the costs;*
>
> *(ii) annul ESA Decision No 181/13/COL of 8 May 2013 (Kollektivtransportproduksjon AS, Oslo Vognselskap AS and Unibuss AS), and order the defendant and any intervener to pay the costs.*

31. On 27 August 2013, ESA requested an extension of the deadline to lodge a defence. On 28 August 2013, the President, pursuant to Article 35(2) of the Rules of Procedure ("RoP"), granted ESA's request and set the deadline for the defence to 5 November 2013.

32. On 30 September 2013, Sporveien AS sought leave to intervene, pursuant to Article 36 of the Statute and Article 89 RoP, in support of the form of order sought by ESA.

33. On 14 October 2013, ESA lodged its written observations on the application to intervene at the Court's Registry. On 17 October 2013, Konkurrenten lodged its written observations on the application to intervene at the Court's Registry.

34. On 5 November 2013, ESA submitted "preliminary objections on inadmissibility & defence", pursuant to both Articles 87 and 35 RoP. The defendant, the EFTA Surveillance Authority, requests the Court to:

(i) dismiss the application as inadmissible;

(ii) order the applicant to bear the costs of the proceedings;

In the alternative

(i) dismiss the application as inadmissible insofar as it is directed against Decision No 519/12/COL;

(ii) dismiss the application for the remainder;

(iii) order the applicant to bear the costs of the proceedings.

35. On 15 November 2013, the Court decided to regard ESA's submission of 5 November 2013 as a preliminary objection on inadmissibility pursuant to Article 87(1) RoP. The Court decided that those elements of ESA's submission that purport to constitute a defence in the present case are to be disregarded.

36. On 9 December 2013, Konkurrenten requested an extension of the deadline to submit comments on the application for inadmissibility. The same day, the President, pursuant to Article 78 RoP, granted an extension until 23 December 2013.

37. On 20 December 2013, Konkurrenten submitted its response to ESA's preliminary application concerning inadmissibility. The applicant, Konkurrenten.no AS, requests the Court to:

(i) dismiss the defendant's inadmissibility pleas as inadmissible, or alternatively;

(ii) dismiss the defendant's inadmissibility pleas as unfounded, or alternatively;

(iii) reserve the decision for the final judgment.

38. On 8 January 2014, by an Order of the President, Sporveien Oslo AS was granted leave to intervene in Case E-19/13 in support of the form of order sought by the defendant. On 13 February 2014, Sporveien Oslo AS submitted its statement in intervention.

39. The intervener, Sporveien Oslo AS, requests the Court to:

(i) dismiss the application as inadmissible;

(ii) order the applicant to bear the cost of the proceedings.

40. On 11 March 2014, both Konkurrenten and ESA submitted comments on the statement in intervention.

41. On 2 April 2014, the Court refused to grant Konkurrenten's request for measures of organization of procedure. The same day, the Court decided, pursuant to Article 87(4) RoP, to reserve its decision upon the defendant's preliminary application concerning inadmissibility for the final judgment. A new deadline for the defence was set for 9 May 2014.

42. On 15 April 2014, ESA requested an extension of the deadline to lodge a defence.

43. On 16 April 2014, the President, pursuant to Article 35(2) RoP, granted an extension of the deadline to lodge a defence to 23 May 2014.

44. On 23 May 2014, ESA lodged its defence. The defendant, the EFTA Surveillance Authority, requests the Court to:

(i) dismiss the application as inadmissible;

(ii) order the applicant to bear the costs of the proceedings;

In the alternative

(i) dismiss the application;

(ii) order the applicant to bear the costs of the proceedings.

45. On 18 July 2014, Konkurrenten submitted its reply.

46. On 23 July 2014, the President decided to disregard the reply on the basis that the applicant was not given authorisation to exceed the maximum length of the reply by 63 pages and was requested to present to the Court a shortened version of its reply by 6 August 2014.

47. On 29 July 2014, Norway submitted written observations.

48. On 30 July 2014, the European Commission submitted written observations.

49. On 6 August 2014, Konkurrenten submitted a shortened version of its reply. In the reply, further measures of organization of procedure were requested.

50. On 14 August 2014, ESA requested an extension of the time limit to submit its rejoinder.

51. On 18 August 2014, the President, pursuant to Article 36 RoP, granted an extension of the time limit for submitting a rejoinder to 6 October 2014.

52. On 6 October 2014, ESA submitted its rejoinder.

53. On 7 November 2014, Sporveien requested to be permitted to submit a statement in intervention upon the merits of the case.

54. On 10 November 2014, the Registrar wrote to Sporveien informing it that it was not possible to accommodate a second statement in intervention.

55. On 8 December 2014, the Registrar wrote to the parties inviting them to submit comments by 15 December 2014 on the further measures of organization of procedure requested in the reply.

56. On 15 December 2014, ESA and Sporveien submitted comments on those further measures of organization of procedure requested.

57. On 6 January 2015, the Court decided to deny those further requested measures of organization of procedure.

V Written observations

58. Pleadings have been received from:

- the applicant, represented by Jon Midthjell, advokat;

- the defendant, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, Maria Moustakali, Officer, and Catherine Howdle, Temporary Officer, and subsequently by Xavier Lewis, Director, Markus Schneider, Deputy Director, Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents;

- the intervener, represented by Håkon Bleken, advokat, and subsequently by Rasmus Asbjørnsen, advokat.

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

- the Government of the Kingdom of Norway, represented by Ida Thue, advocate at the Office of the Attorney General (Civil Affairs), and Dag

Sørlie Lund, adviser at the Ministry of Foreign Affairs, acting as Agents; and,

- the European Commission (the "Commission"), represented by Leo Flynn and Paul-John Loewenthal, Members of its Legal Service, acting as Agents.

Konkurrenten

Admissibility

60. Konkurrenten submits that it has standing to challenge both decisions pursuant to the traditional test of individual concern specified in the second paragraph of Article 36 SCA.[1] It contends further that it has standing to challenge the second contested decision also under the limited test for individual concern that applies in actions challenging a refusal to open a formal investigation into unlawful aid.[2] In addition, Konkurrenten asserts that the Court must first decide, as a matter of public policy, on the extent to which the traditional test can be applied in State aid actions following the entry into force of the Lisbon Treaty, in particular in the light of Article 6(1) TEU and the fourth paragraph of Article 263 TFEU.[3] In its view, the traditional test must be reassessed as a matter of EEA law[4] given the introduction of the fourth paragraph of Article 263 TFEU and the fundamental right to effective judicial protection and the principle of homogeneous interpretation and the application of Article 47 of the Charter of Fundamental Rights of the European Union in conjunction with Article 6 of the European Convention on Human Rights ("ECHR").[5] The "gap" that has been opened must be closed by means of dynamic interpretation.[6]

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1 Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 49.

2 Reference is made to Case E-1/12 *Den norske Forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040, paragraphs 61 to 69; Case C-148/09 P *Belgium* v *Deutsche Post, DHL and Commission* [2011] ECR I-8573, paragraph 55; Case C-287/12 P *Ryanair* v *Commission*, judgment of 13 June 2013, published electronically, paragraph 60; and Case C-47/10 P *Austria* v *Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraph 50.

3 Reference is made to the fourth recital to the preample of the EEA Agreement.

4 Reference is made to Case E-2/02 *Technologien Bau und Wirtschaftsberatung and Bellona Foundation* v *ESA* [2003] EFTA Ct. Rep. 52, paragraph 37; Opinion of Advocate General Jacobs in Case C-50/00 *Unión de Pequeños Agricultores* [2002] ECR I-6677; Opinion of Advocate General Kokott of 21 March 2013 in Case C-274/12 P *Telefonica* v *Commission*, published electronically, point 25; Opinion of Advocate General Wathelet of 29 May 2013 in Case C-132/12 P *Stichting Woonpunt and Others* v *Commission*, published electronically, points 84 and 85; and Case C-583/11 P *Inuit and Others* v *Parliament and Council*, judgment of 3 October 2013, published electronically, paragraph 60.

5 Reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 86; *Bellona* v *ESA*, cited above, paragraph 36; *Unión de Pequeños Agricultores* v *Council*, cited above, paragraph 40; Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178, paragraphs 77 and 78;

61. Konkurrenten submits that the two contested decisions constitute regulatory acts that do not entail implementing measures and that they are of direct concern to Konkurrenten, and therefore the company has standing. In any event, EEA law does not offer a complete system of legal remedies and procedures as provided for in the EU.[7]

62. In its response to the inadmissibility submission, Konkurrenten stresses that ESA has not contested the fact that both contested decisions are of direct concern to it and do not entail implementing measures.[8] The matter before the Court is limited to whether the ESA decisions in State aid cases, should be subject to the same judicial review under Article 36(2) SCA as the Commission is subjected to in exactly the same type of cases under Article 263(4) TFEU. There is nothing to suggest that the Contracting Parties did not intend for the Court's jurisdiction to evolve dynamically with that of the Union courts'. On the contrary, if the Court's jurisdiction should be more limited in relation to ESA's decisions, it would risk the attainment of the overall objective of the uniform application and interpretation of EEA law.

63. In Konkurrenten's view, the traditional test for standing is met in the present case in relation to both contested decisions as Konkurrenten's market position has been substantially affected by the aid to which each decision relates because Konkurrenten's earnings, both actual and potential, were substantially affected by Sporveien's additional capacity expansion into the only market in which Konkurrenten is active. In this context, it submits that ESA's plea of inadmissibility is unfounded. Moreover, it rejects ESA's presentation of the test for individual concern[9] and the rules on the submission of evidence.[10]

64. In its response to the inadmissibility submission, Konkurrenten avers that, as regards the second contested decision, it asserted in its application, specifically and explicitly in relation to each plea, that ESA infringed its duty to open a formal

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Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten* v *ESA* [2013] EFTA Ct. Rep. 668, paragraph 104; and Articles 1 and 108 EEA.

6 Reference is made to Case E-4/04 *Pedicel AS* v *Sosial- og helsedirektoratet* [2005] EFTA Ct. Rep. 1, paragraph 28. Reference is made, in addition, to *Telefonica* v *Commission*, cited above.

7 Reference is made to *Inuit and Others* v *Parliament and Council*, cited above, *Telefonica* v *Commission*, cited above, paragraph 57, and Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 57.

8 Reference is made to *Telefonica* v *Commission*, cited above, paragraphs 30 and 31.

9 Reference is made to Case T-182/10 *Aiscat* v *Commission*, judgment of 15 January 2013, published electronically, paragraphs 70 to 80; Case T-344/10 *UPS* v *Commission*, judgment of 4 May 2012, published electronically, paragraph 50; Case C-525/04 P *Spain* v *Commission* [2007] ECR I-9947, paragraphs 34, 35 and 37 to 39; Case C-487/06 P *British Aggregates Association* v *Commission* [2008] ECR I-515, paragraphs 53 and 56; Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2013, paragraphs 35 and 39; and Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 56.

10 Reference is made to Case T-413/12 *Post Invest Europe* v *Commission*, judgment of 15 May 2013, published electronically, paragraph 21.

investigation and thereby infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.[11]

65. In its response to the inadmissibility submission, Konkurrenten submits that standing depends upon the second paragraph of Article 36 SCA alone. However, for the purposes of determining whether an applicant is individually concerned under that provision, in relation to State aid decisions where ESA has not opened a formal investigation, Article 1(h) of Part II of Protocol 3 SCA delineates who may be considered "individually concerned".[12] Consequently, even if Konkurrenten is found not to be substantially affected by the aid, for the same reasons it can still demonstrate that it "might be affected" by the aid and therefore must be regarded, for the purposes of the second paragraph of Article 36 SCA, as being individually concerned in relation to the second contested decision.

66. In Konkurrenten's view, ESA cannot require that Konkurrenten explain what it would have submitted had a formal investigation been opened.[13]

67. Konkurrenten submits further that the present action is timely as the first contested decision has yet to be published in the EEA Supplement to the Official Journal and a summary notice of the second contested decision has yet to be published in the EEA Supplement to the Official Journal.[14] For the sake of completeness, Konkurrenten states that it received only a copy of the non-confidential version of the first contested decision on 23 January 2013, and a copy of the non-confidential version of the second contested decision on 27 June 2013. As Konkurrenten was not the addressee of the contested decisions, that correspondence does not constitute a notification for the purposes of the third paragraph of Article 36 SCA.

68. In its reply, Konkurrenten notes that ESA has challenged Annexes A.20, A.21, A.22, A.26, A.27 and A.32. According to Konkurrenten, ESA has not

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11 Reference is made to *Ryanair* v *Commission*, cited above, paragraphs 57 to 60; *Austria* v *Scheucher-Fleisch and Others*, cited above, paragraphs 47 to 50, and *Belgium* v *Deutsche Post, DHL and Commission*, cited above, paragraphs 61 to 63.

12 Reference is made to *Den norske Forleggerforening* v *ESA*, cited above, paragraphs 67 and 68.

13 Reference is made to *Sniace* v *Commission*, cited above, paragraph 57.

14 Reference is made to Case T-354/05 *TFI* v *Commission* [2009] ECR II-471, paragraphs 31 to 48; Joined Cases T-273/06 and T-297/06 *ISD Polska and Others* v *Commission* [2009] ECR II-2181, paragraphs 55 to 58; Case T-327/04 *SNIV* v *Commission* [2008] ECR II-72, paragraphs 32 to 35; and Case T-144/04 *TFI* v *Commission* [2008] ECR II-761, paragraphs 18 to 23. Reference is also made to Case T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031, paragraphs 72 to 83; Case T-321/04 *Air Bourbon* v *Commission* [2005] ECR II-3469, paragraphs 32 to 36; Case T-426/04 *Tramarin* v *Commission* [2005] ECR II-4765, paragraphs 47 to 50; and Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraphs 29 to 32.

challenged the fact that the documents were validly annexed to the application and submitted into evidence and are, therefore, admissible.[15]

69. In its written observations on the intervention, Konkurrenten disagrees, in particular, with Sporveien's interpretation of homogeneity and with its contention that the contested decisions cannot be regarded as "regulatory acts" or that, in the alternative, a distinction must be drawn between State aid decisions concerning individual aid and aid schemes. Konkurrenten also notes that Sporveien has contested the assertion that the capital contributed in 2006 and 2007 came directly from its owner, Unibuss AS, indicating, instead, that the capital came from its sister company, Nexus Trafikk AS, which ran local bus services. Moreover, Konkurrenten rejects the view, both as a matter of fact and law, that the potential for other competitors to allege that they have suffered similar harm could constitute an obstacle to the recognition of its individual concern.[16]

Substance

First contested decision

70. In its reply, Konkurrenten submits that the standard of review that applies to the question of what constitutes aid pursuant to Article 61(1) EEA is, as a general rule, comprehensive because State aid is an objective legal concept.[17] Where the dispute does not concern whether a state measure constitutes State aid under Article 61(1) EEA but rather whether ESA has classified such aid correctly as existing aid or new aid, as here, the standard is comprehensive. The Court must review whether the evidence ESA relied on in its decision was factually accurate and reliable; whether the evidence contained all the information which must be taken into account; and whether the evidence was capable of substantiating ESA's conclusions.[18]

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15 Reference is made to *Post Invest Europe* v *Commission*, cited above, paragraph 21, and Case T-73/98 *Société chimique Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 50.

16 Reference is made to *British Aggregates Association* v *Commission*, cited above, paragraph 56.

17 Reference is made to Case E-9/12 *Iceland* v *ESA* ("*Verne*") [2013] EFTA Ct. Rep. 454, paragraph 63; Case T-198/01 R *TGI* v *Commission* [2002] ECR II-2153, paragraph 76, upheld on appeal in C-232/02 P(R) *Commission* v *TGI* [2002] ECR I-8977; and Joined Cases T-195/01 R and T-207/01 R *Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 75.

18 Reference is made to Case C-73/11 P *Frucona Košice* v *Commission*, judgment of 24 January 2013, published electronically, paragraph 76; Joined Cases C-214/12 P, C-215/12 P and C-223/12 P *Land Burgenland and Others* v *Commission*, judgment of 24 October 2013, published electronically, paragraph 79; Cases T-29/10 and T-33/10 *Netherlands and ING* v *Commission*, judgment of 2 March 2012, published electronically, paragraph 102, upheld on appeal in Case C-224/12 P *Commission* v *Netherlands and ING*, judgment of 3 April 2014, published electronically; and Case T-1/08 *Buczek Automotive* v *Commission* [2011] ECR II-2107, paragraph 83, upheld on appeal in Case C-405/11 P *Commission* v *Buczek Automotive*, judgment of 21 March 2013, published electronically.

First plea: unlawful classification of the 2004 capital injection to Sporveien

71. By its first plea, Konkurrenten seeks the annulment of Articles 2 and 4 of the first contested decision. It contends that the factual basis set out in the decision for the assessment of the entire capital injection is manifestly incorrect and incomplete.

72. Konkurrenten submits that certain statements of fact attributed by ESA to the "Norwegian authorities" demonstrate a flawed and superficial assessment of the capital injection. In support of that argument, it sets out why certain facts relied upon in the decision are manifestly incorrect. First, Oslo Municipality already explained to ESA in its letter of 4 January 2007 that it had no legal obligation to cover the underfunding of the pension fund.

73. Second, contrary to ESA's findings, the capital injection was not made because the municipality risked that Sporveien would become insolvent unless NOK 800 million was injected as new equity. According to Konkurrenten, this statement is contradicted by other statements made in the decision[19] and by Oslo Municipality's letter of 4 January 2007. In fact, the underfunding had been identified as early as 1996 by the Norwegian Financial Supervisory Authority which required Sporveien to submit a plan for approval setting out how it would eliminate the shortfall. That plan was approved on 9 July 1997. In Konkurrenten's view, the business context for the capital injection was that the municipality had decided in 2001 that all scheduled bus transport should be put up for public tender, spread over five lots between 2003 and 2008. Having lost a significant number of routes to a privately owned competitor, Norgesbuss, Sporveien needed to improve its cost structure significantly in order to become more competitive. By making a one-off payment to the pension fund in 2004 instead of following the plan approved by the Norwegian Financial Supervisory Authority, Sporveien wanted to achieve significant and immediate cost savings in its operating budget that, in turn, could improve its chances in the remaining tender rounds before its home market was completely opened up to competition. However, Sporveien's weak financial situation made it unable to tap into the credit market, at least on terms that would make a one-off payment worthwhile. Therefore, the municipality chose to inject new capital into the company, using its status to raise the necessary funds on better terms than Sporveien could achieve.

74. Third, the capital injection was not made to the "Oslo Sporveier Group" but to the parent company, Sporveien. Nor was the capital injection made on 2 April 2004. Instead, that was the date on which Sporveien transferred the payment to its own pension fund. Konkurrenten contends that the Municipality provided ESA with information which appears to show that Sporveien made a separate payment to the tax collector in the amount of NOK 90.5 million in national insurance contributions

[19] Reference is made to paragraphs 84 and 87 of the first contested decision.

on the payment to the pension fund. This means that the amount of underfunded pension costs was NOK 641.9 million.[20]

75. Fourth, Konkurrenten contends that Sporveien did not pay NOK 802.5 million to the pension fund to cover "an accumulated shortage of funds in the existing pension fund accounts". Rather, the transfer to the pension fund made on 2 April 2004 amounted to NOK 711.9 million. This included NOK 70 million which was used to inject new equity into the pension fund.

76. Therefore, ESA's contention that Sporveien was not overcompensated through the capital injection is manifestly incorrect. Rather, according to Konkurrenten, Sporveien was indeed overcompensated in relation to the actual shortfall on the pension fund outside of the scope of the disputed aid scheme.

77. Konkurrenten also submits that the use of capital injections fell outside the disputed aid scheme and, therefore, even if the aid scheme were to be classified as existing, the capital injection should have been classified as new and unlawful aid within the meaning of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[21]

78. In support of this view, Konkurrenten notes that, according to the first contested decision, the aid scheme arises out of Article 24a PTA, which remained in force until 1 January 2003 when it was replaced by the current provision, Article 22 CTA. However, it follows from the wording and the objective of these provisions that their scope was, and is, limited to the remuneration of public services. Neither the law's preparatory works, nor its legislative history supports a different conclusion. Consequently, Konkurrenten asserts that the use of capital injections fell outside the scope of the aid scheme and should have been classified as new and unlawful aid, even if the aid scheme itself were to be classified as existing.

79. Konkurrenten submits that the aid scheme was substantially altered between 1994 and 2001. Thus, the capital injection in 2004 should have been classified, in any event, as new and unlawful aid within the meaning of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[22] Konkurrenten submits that the first contested decision contains no assessment of whether any of the amendments made to the national legal basis for the aid scheme led to an alteration in the scheme. In its view, substantial changes were made, first, to the financing mechanism of the aid scheme on 1

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20 Reference is made to Annex A.14.

21 Reference is made to Case E-14/10 *Konkurrenten* v *ESA* [2011] EFTA Ct. Rep. 266, paragraphs 57, 72, 73 and 87.

22 Reference is made to Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 *Regione autonoma della Sardegna and Others* v *Commission* [2011] ECR II-6255, paragraph 176, upheld on appeal; Joined Cases C-630/11 P to C-633/11 P *HGA and Others* v *Commission*, judgment of 13 June 2013, published electronically, paragraphs 88 to 95; and Joined Cases T-254/00, T-270/00 and T-217/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 358.

January 1994, pursuant to amendments to Article 24a PTA. Consequently, as a result of that substantial alteration to the aid scheme on 1 January 1994, the capital injection must be regarded as new and unlawful aid.

80. Second, pursuant to national law, the local market was liberalised on 15 April 1994. According to Konkurrenten, the liberalisation provided municipalities with several options, with Oslo Municipality opting in 2001 for partial opening of the local market over a five-year transitional period between 2003 and 2008. Those 1994 amendments did not only lead to an alteration of the aid scheme in relation to new contracts awarded through public tenders. Incumbent concession operators, like Sporveien, could continue to receive aid under the old scheme to serve the closed parts of the market while concurrently participating in the public tenders. Therefore, in the event that the capital injection is considered to fall within the scope of the old aid scheme, the substantial alteration of that scheme on 15 April 1994 turns that aid, in any event, into new and unlawful aid, at least from the time the decision was made to open up the local market in 2001.

81. Konkurrenten submits that the finding set out in Article 2 of the first contested decision constitutes an infringement of Article 61 EEA and is based on manifest errors of assessment. First, ESA has conceded that this part of the capital injection, which it describes as the "commercial activities capital injection", "was not granted on the basis of the existing aid scheme. Had it represented State aid, that aid would subsequently have been new aid."[23] According to Konkurrenten, ESA has confused the legal standard for classifying aid with the legal standard for assessing the compatibility of such aid. As long as either the capital injection was granted outside of the relevant aid scheme or the aid scheme was substantially altered before the transaction took place, the capital injection has to be classified, in its entirety, as new and unlawful aid.

82. In addition, Konkurrenten submits that ESA's application of the prudent private investor test was based, in any event, on manifest errors of assessment, as there is no basis to the assertion that the choice that a prudent private investor would have considered in a similar situation would have been either to inject fresh capital into the company or to liquidate it and invest elsewhere.[24] Moreover, ESA has failed to apply the prudent private investor test at the correct level of ownership.

83. Konkurrenten concludes its submissions on its first plea by emphasising that there is no foundation for the decision to classify the capital injection as in part existing aid and in part not to constitute aid. In its view, the capital injection should have been classified as new and unlawful aid within the meaning of Articles 1(c)

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[23] Reference is made to paragraph 140 of the first contested decision.

[24] Reference is made to paragraphs 137 and 139 of the first contested decision.

and 1(f) of Part II of Protocol 3 SCA. Therefore, Articles 2 and 4 of the first contested decision should be annulled.

84. In its reply, Konkurrenten submits that the defence is unfounded because the evidence ESA held at the time of its decision showed that the capital injection overcompensated Sporveien outside of the aid scheme for the shortfall in its pension fund. Konkurrenten submits that Oslo Municipality's letter to ESA of 20 February 2012 (Annex A.10) rejected the view that section 28 A of Regulation No 117 of 19 February 1993 imposed any legal obligation on the municipality to cover the shortfall in Sporveien's pension fund.[25] It contends moreover that, notwithstanding the Court's judgment in Case E-14/10, ESA's decision failed to assess any of the amendments to Article 24a PTA.[26]

85. According to Konkurrenten, section 28 A of Regulation No 117 imposed a minimum fund coverage and provided that any shortfall below the minimum coverage be resolved within a maximum of 25 years in accordance with an approved payment plan. It established an obligation on the Financial Supervisory Authority to wind up funds that failed to provide and follow an approved payment plan in the event of a shortfall below the statutory minimum coverage.[27]

86. In its reply, Konkurrenten submits that the failure in the first contested decision to understand the motivation behind Oslo Municipality's capital injection of NOK 800 million into Sporveien must have had an effect on the outcome. This failure, had a decisive effect because the the capital injection allowed Sporveien to eliminate the shortfall in its pension fund. The result of this was that from 2004, Sporveien was overcompensated by as much as NOK 94 million each year. Konkurrenten also contends that the failure to ascertain accurately the size of the capital injection, and the amount that that was in fact paid towards the shortfall in the pension fund, also affected the outcome.

87. Konkurrenten asserts that ESA cannot tender a new set of reasoning in its defence explaining why it now concludes that the aid scheme had not been altered. Instead, the legality of the first contested decision depends on the reasoning alone that ESA relied on when it adopted the decision.[28] ESA has not claimed that the

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[25] Reference is made to Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, paragraph 307; Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49; Case T-87/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497, paragraph 55; and Case T-106/95 *FFSA* v *Commission* [1997] ECR II-229, paragraph 199.

[26] Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 72, and Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 122.

[27] Reference is made to Annex C.3.

[28] Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28; Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2 Danmark and Others* v *Commission* [2008] ECR II-2935, paragraph 182; Case T-93/02 *Confédération nationale du Crédit mutuel* v

amendments to Article 24a PTA and the preparatory works thereto were not in its possession at the time of the decision.[29] Moreover, whether an applicant has participated in the formal investigation has no bearing on its right to put forward pleas challenging the final decision at the end of that procedure.[30] An applicant is only precluded from relying on information that was not in ESA's possession at the time in support of its pleas against the final decision.[31]

88. In its reply, Konkurrenten seeks to enter a new plea, that is, infringement of the duty to conduct a diligent and impartial investigation of the changes in national law made to the aid scheme after the EEA Agreement entered into force. It justifies the entry of this new plea, pursuant to Article 37(2) RoP, on the basis that the defence contains an admission which together with the disclosure of a letter of 29 May 2012 from Oslo Municipality (Annex B.1) constitute new material facts.[32] Konkurrenten contends that ESA's indication in paragraphs 63 and 65 of the defence that its conclusion on the alteration of the aid scheme was based on a letter from "the Norwegian authorities" of 4 June 2012 constitutes an admission that ESA did not make its own legal assessment.[33] In Konkurrenten's view, this demonstrates that ESA infringed its duty to conduct a diligent and impartial investigation[34] and to assess whether the amendments to the national law governing the aid scheme altered such scheme for the purposes of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[35] Consequently, Articles 3 and 4 of the first contested decision and Articles 3, 4, and 5 of the second contested decision must be annulled for this reason alone.

Commission [2005] ECR II-143, paragraphs 123 to 126; and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 116 to 117.

29 Reference is made to Joined Cases T-81/01,T-82/07 and T-83/07 *Maas and Others* v *Commission* [2009] ECR II-2411, paragraph 194; Case T-533/10 *DTS* v *Commission*, judgment of 11 July 2014, published electronically, paragraph 75; Case T-274/01 *Valmont Nederland* v *Commission* [2004] ECR II-3145, paragraphs 101 to 104; Case T-366/00 *Scott* v *Commission* [2007] ECR II-797, paragraphs 44 to 51; and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139 , paragraphs 54 to 59.

30 Reference is made to *Maas and Others* v *Commission*, cited above, paragraph 195; Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* [2009] ECR II-289, paragraphs 177 to 178; Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraph 84; *Valmont Nederland* v *Commission*, cited above, paragraph 102; and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 64.

31 Reference is made *Risdal Touring and Konkurrenten* v *ESA*, cited above, paragraphs 115 to 117, and Case T-198/01 *TGI* v *Commission* [2004] ECR II-2717, paragraph 198.

32 Reference is made to Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 *Territorio Histórico de Álava and Others* v *Commission* [2009] ECR II-2919, paragraph 331 (upheld on appeal).

33 Reference is made to paragraph 25 of the first contested decision and a comparison is made with Commission Decision in Case SA.21654 (*Aland Industrihus*), paragraphs 98 to 106 (OJ 2012 L 125, p. 33), a decision relied upon in ESA's decision to open the formal investigation on 28 March 2012.

34 Reference is made to *Verne*, cited above, paragraph 117; Cases T-29/10 and T-33/10 *Netherlands and ING* v *Commission*, cited above, paragraph 108, upheld on appeal in Case C-224/12 P *Commission* v *Netherlands*, cited above; and Case C-367/95 P *Commission* v *Sytraval and Brink* [1998] ECR I-1719, paragraph 62.

35 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 72.

89. In its reply, Konkurrenten submits that the defence has conceded that the amendment of Article 24a PTA, which took effect on took effect on 15 April 1994, led to an alteration of the aid scheme for the purposes of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA. However, contrary to the view advanced by ESA, paragraphs 52, 56, and 222 of the first contested decision cannot be relied upon to demonstrate that it considered the alteration severable from the existing aid scheme in accordance with *Gibraltar*. In any event, it continues, on the assumption that the severability argument was properly introduced, which it denies, the only issue that needs to be addressed is whether the defence has interpreted and applied the severability test correctly. According to *Gibraltar*, the alteration must be clearly severable from the initial scheme, otherwise the initial scheme will also be considered altered.[36] However, the amendment at issue shows that the alteration was inextricably tied to the initial aid scheme and produced exclusive advantages for existing concession holders (the aid beneficiaries). Consequently, in Konkurrenten's view, the non-severable and substantial alteration to the aid scheme took place on 15 April 1994, when the amendment entered into force, or, in any event, on 28 November 2001, when Oslo Municipality decided to implement option three and phase in public tenders.

90. Konkurrenten submits, in its reply, that a legal definition of what constitutes an alteration for the purposes of Article 1(c) of Part II of Protocol 3 SCA can be found in Article 4(1) of the Implementing Provisions Decision.[37] In its view, the amendment of the co-financing mechanism and the State's power to place sanctionable stipulations on how the counties should use the State grants cannot be classified as a modification of only a "purely formal or administrative nature".

91. In relation to the capital injection, Konkurrenten submits in its reply that, contrary to the approach taken in the defence, the prudent private investor test cannot be used to establish what another investor could have done in the same case. Instead, its purpose is to determine whether it would have done the same as the municipality in the same situation.[38] Konkurrenten submits that in this case ESA has

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[36] Reference is made to Joined Cases T-195/01 and T-207/02 *Government of Gibraltar* v *Commission*, cited above, paragraph 111; Joined Cases T-231/06 and T-237/06 *Netherlands and NOS* v *Commission* [2010] ECR II-5993, paragraph 177; Case T-189/03 *ASM Brescia* v *Commission* [2009] ECR II-1831, paragraph 101; Case T-489/11 *Rousse Industry* v *Commission*, judgment of 20 March 2013, published electronically, paragraph 55, upheld on appeal in Case C-271/13 P *Rousse Industry AD* v *Commission*, judgment of 20 March 2014, published electronically; and Case T-151/11 *Telefonica de España and Telefonica Móviles España* v *Commission*, judgment of 11 July 2014, published electronically, paragraphs 63 to 65.

[37] Reference is made to Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 SCA and, by comparison Case C-271/13 P *Rousse Industry* v *Commission*, cited above, paragraphs 31 and 32.

[38] Reference is made to Case C-124/10 P *Commission* v *EDF*, judgment of 5 June 2012, published electronically, paragraph 84.

used the test to create an *ex post* justification for Norway and relied upon that justification to classify the capital injection as not constituting aid.[39]

Second plea: unlawful classification of the annual lump-sum compensation

92. Konkurrenten seeks the annulment of Article 3 of the first contested decision, which classifies the annual compensation as existing aid. In its view, the factual basis for the assessment of the annual compensation is manifestly incorrect and incomplete. ESA has not addressed three of the four *Altmark* criteria which would have required a detailed analysis of the facts underpinning the contention that no overcompensation was granted.[40] The remainder of ESA's reasoning on this point is only brief.[41]

93. According to Konkurrenten, facts available to ESA before taking the first contested decision show that Sporveien's public service obligations concerning local scheduled bus transport were never defined in writing by the municipality under the aid scheme; that the municipality made grants on an estimated cost basis to cover all modes of public transport combined; and that the municipality failed to control how Sporveien subsequently spent the funds. In these circumstances, ESA's analysis must be considered manifestly flawed because it failed to ascertain whether Sporveien was overcompensated by the municipality outside of the scope of the aid scheme.

94. Konkurrenten submits that ESA's analysis in paragraphs 212 to 214 of the first contested decision is both superficial and limited in concluding, on the basis of selected financial streams between the parent company and one subsidiary, that those streams do not include overcompensation. It notes that ESA advanced two examples in support of its conclusion: an agreement between Sporveien and its bus subsidiary from 1997 signed on behalf of both companies by the chief executive officer of Sporveien[42] and a memo from the public transport commissioner to the finance committee of Oslo Municipality of 8 September 2004.[43] On that basis – Konkurrenten alleges – ESA's contention that the annual combined grants did not contain any form of overcompensation is manifestly incorrect. In any event, ESA has failed to state adequate reasons for its conclusion that no overcompensation was involved, in breach of Article 16 SCA.

95. Konkurrenten submits that the annual lump-sum compensation was granted in contravention of the disputed aid scheme and, consequently, even if the aid

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39 Ibid., paragraph 85 and to Annexes B.5 and B.1.

40 Reference is made to paragraphs 154 to 158 of the first contested decision.

41 Ibid., paragraphs 211 to 215.

42 Reference is made to Annex A.19.

43 Reference is made to Annex A.20.

scheme as such is classified as existing, should have been classified as new and unlawful aid within the meaning of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[44] Konkurrenten submits that paragraphs 206 to 215 of the first contested decision are erroneous and contradicted by other parts of the decision.[45] It notes, moreover, that, according to the first contested decision, the aid scheme results from Article 24a PTA, which remained in force until 1 January 2003 when it was replaced by the current provision, Article 22 CTA. In Konkurrenten's view, and contrary to ESA's submissions, these provisions require grants to be made in the form of a contract, whereas it is common ground that the municipality operated without a contract between 1994 and 2008. Thus, the annual compensation should have been classified as new and unlawful aid.

96. Konkurrenten submits that the aid scheme was substantially altered between 1994 and 2001. Consequently, the annual compensation should, in any event, have been classified as new and unlawful aid.[46] Konkurrenten thus requests the Court to annul Article 3 of the first contested decision.

97. In its reply, Konkurrenten adds that the implication in the defence that the combined lump-sum grants to Sporveien were granted on an estimated cost basis but subsequently corrected to take account of the actual costs of the preceding year ignores the findings of the City Auditor's 2006 special report. The defence is therefore unfounded. In addition, Konkurrenten submits that, contrary to suggestions made in the defence, Oslo Municipality could not delegate to Sporveien the task of planning and administering public transport in Oslo before the amendment of the law on 15 April 1994. From that date the task could only be delegated to an administration company established for that purpose under the new Article 24(b) PTA.

98. According to Konkurrenten, the preparatory works to the amendments confirm that no such delegation could be made previously under the PTA. In fact, Oslo Municipality availed itself of the possibility provided for in Article 24(b) PTA when it established Ruter AS as its administration company, on 1 January 2008, which it explained to ESA in a letter of 16 December 2011. In this regard, Konkurrenten emphasises that it was clear at the time that an administration company could not own or control public transport assets, or companies owning

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44 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 87.

45 Reference is made to paragraph 65 of the first contested decision.

46 Reference is made to *Regione autonoma della Sardegna and Others* v *Commission*, cited above, paragraph 176, upheld on appeal; *HGA and Others* v *Commission*, cited above, paragraphs 88 to 95; and *Hotel Cipriani and Others* v *Commission*, cited above, paragraph 358.

such assets, and provide public transport services. Therefore Sporveien was disqualified from becoming an administration company.[47]

99. In its reply, Konkurrenten highlights the serious discrepancy between the statement in the first contested decision that the average annual profit relied on in the assessment concerns Sporveien's bus service exclusively and the statement in the defence that it covers the "beneficiary" which was the parent company and thus included all of its activities. Moreover, in its view, the annual average profit is generally unreliable and inconclusive as evidence with a view to determining overcompensation.

100. According to Konkurrenten, the City Auditor's report of 2006 confirmed that Oslo Municipality failed to control how the annual lump-sum grants were used by Sporveien. Moreover, contrary to defence submissions, ESA was informed by Oslo Municipality in 2007 that Sporveien had been overcompensated by at least NOK 94 million annually from 2004 onwards.

101. In its reply, Konkurrenten notes that in paragraph 151 of the defence ESA now contends that it is of no consequence whether the aid scheme required Oslo Municipality to enter into a contract with Sporveien to define the public service obligations for which the company would be entitled to aid under the scheme. However, in Konkurrenten's view, ESA cannot alter a central premise for the decision in its defence. Furthermore, in paragraph 150 of the defence, ESA has contended, in interpretation of Article 24a PTA and Article 22 CTA, that "[i]n other words, an oral agreement was sufficient under Norwegian law at the time". Konkurrenten disagrees with ESA's interpretation of those provisions whose wording refers to "contract" (in Norwegian: "*kontrakt*"), and not "agreement" (in Norwegian: "*avtale*"), which would have also covered oral agreements. The notion that a co-financing mechanism would permit the use of oral agreements is not credible.

Third plea: infringement of Article 61 EEA and breach of the duty to state reasons

102. Konkurrenten seeks the annulment of Article 1 of the first contested decision, whereby ESA concluded that Sporveien's use of group taxation rules to reduce the tax burden on its bus subsidiary (which also competes in the express and tour bus markets) through negative tax positions accumulated by the parent company does not constitute aid within the meaning of Article 61 EEA.

103. Konkurrenten submits that ESA's interpretation of the notion of State aid[48] is too narrow and would allow a parent company to accumulate negative tax positions

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47 Reference is made to Annexes A.3, A.9, C.6 and B.1.

48 Reference is made to paragraphs 131 and 142 of the first contested decision.

in relation to the discharge of public service obligations in one part of the group that could subsequently be used to reduce the tax burden on other parts of the group competing on private markets.[49] Under the *Altmark* test, compensation for public service obligations must allow for only reasonable profit, in order not to be classified as aid pursuant to Article 61 EEA.

104. Konkurrenten submits that ESA's failure to reconcile the statements given at paragraphs 131 and 142 of the first contested decision constitutes a breach of the obligation to state reasons pursuant to Article 16 SCA. Therefore, it requests the Court to annul Article 1 of the first contested decision.

105. In its reply, Konkurrenten submits that, contrary to the position taken in the defence, ESA's incorrect interpretation of Article 61(1) EEA may well have affected the outcome given that ESA has not contested the fact that Sporveien made use of its accumulated negative tax positions towards its bus subsidiary during the relevant period. Furthermore, Konkurrenten stresses its entitlement to challenge the interpretation of Article 61(1) EEA relied on in ESA's final decision.

Second contested decision

106. In its reply, Konkurrenten submits that the standard of review can only be limited when dealing with "complex economic assessments" and not in the case of "complex economic facts".[50]

First plea: the NBB transaction

107. Konkurrenten seeks the annulment of Article 5 of the second contested decision, whereby ESA classified the asset purchase in connection with the NBB scheme as existing aid. This classification rests on a single contention, that is that

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49 Reference is made to Case C-280/00 *Altmark* [2003] ECR I-7747, paragraph 84.

50 Reference is made to paragraph 245 of the defence and *Frucona Košice* v *Commission*, cited above, paragraph 76; *Land Burgenland and Others* v *Commission*, cited above, paragraph 79; Cases T-29/10 and T-33/10 *Netherlands and ING* v *Commission*, cited above, paragraph 102, upheld on appeal in Case C-224/12 P *Commission* v *Netherlands and ING*, cited above; and Case T-1/08 *Buczek Automotive* v *Commission*, cited above, paragraph 83, upheld on appeal in Case C-405/11 P *Commission* v *Buczek Automotive*, cited above. Further reference is made to Case E-1/13 *Míla* v *ESA*, judgment of 27 January 2014, not yet reported, paragraphs 89 to 92; *Den norske Forleggerforening* v *ESA*, cited above, paragraphs 106 and 107; Case C-646/11 P *3F* v *Commission*, judgment of 24 January 2013, published electronically, paragraphs 30 and 31; Case T-123/09 *Ryanair* v *Commission*, judgment of 28 March 2012, published electronically, paragraphs 77, 79 and 80 (upheld on appeal in Case C-287/12 P *Ryanair* v *Commission*, cited above); Case T-388/03 *Deutsche Post and DHL* v *Commission* [2009] ECR II-199, paragraphs 92 and 95 (upheld on appeal in Case C-148/09 P *Belgium* v *Commission*, cited above); Case T-488/11 *Scheepsbouwkundig Advies- en Rekencentrum (Sarc) BV* v *Commission*, judgment of 12 June 2014, published electronically, paragraph 64; Case T-137/10 *CBI* v *Commission*, judgment of 7 November 2012, published electronically, paragraph 75; and Case T-359/04 *BAA* v *Commission* [2010] ECR II-4227, paragraph 57.

the asset purchase was made on the basis of, and in accordance with, the disputed aid scheme on which ESA relied in its first contested decision.[51] Therefore, according to Konkurrenten, if the Court annuls the first contested decision, Article 5 of the second contested decision will also have to be annulled.

108. Konkurrenten submits that the asset purchase, which took place in 2009, should have been classified as new and unlawful aid within the meaning of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[52] ESA should have opened a formal investigation in accordance with Article 4(4) in conjunction with Article 13 of Part II of Protocol 3 SCA and, in not doing so, it has infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.[53]

109. Should the Court uphold the first contested decision, Konkurrenten submits that the classification of the asset purchase as existing aid is nonetheless unlawful because the transaction fell outside the scope of the disputed aid scheme and involved overcompensation. Konkurrenten submits that the NBB assets were sold by Sporveien to Ruter AS ("Ruter"), which is also under the control of the municipality, in a closed transaction. Although, at the time of the sale, the ticketing and payment system had not been completed, six years after it had been commissioned, Sporveien was paid NOK 424 million.

110. Konkurrenten contends that the second contested decision has failed to consider whether the asset purchase, as such, fell outside the scope of the disputed aid scheme and has confused that investment decision with the municipality's separate decision to grant compensation towards the costs involved in the provision of public transport services (which would include compensation for operating a ticketing system).

111. Konkurrenten alleges that ESA has not adduced any evidence to show that the buyer was legally obliged to buy the assets from Sporveien under the aid scheme. Therefore, there is no intrinsic link between the asset purchase and the aid scheme that concerns the annual compensation granted in return for the provision of public transport services. Thus, ESA has thereby unlawfully classified the asset purchase as existing aid. ESA's reasoning, therefore, is based on manifest errors of assessment.[54] In this regard, Konkurrenten submits that ESA did not assess the

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51 Reference is made to paragraph 154 of the second contested decision.

52 Reference is made to *Regione autonoma della Sardegna and others* v *Commission*, cited above, paragraph 176, upheld on appeal; *HGA and Others* v *Commission*, cited above, paragraphs 88 to 95; and *Hotel Cipriani and Others* v *Commission*, cited above, paragraph 358.

53 Reference is made to *Den norske Forleggerforening* v *ESA*, cited above, paragraphs 65 and 66.

54 Reference is made to paragraph 170 of the second contested decision.

conflicting financial evidence it received but relied primarily on a report commissioned by Sporveien.[55]

112. Konkurrenten asserts that ESA's conclusion that the asset purchase did not involve any overcompensation of Sporveien, and that there was no doubt on this point to warrant a formal investigation, is implausible. In any event, ESA has failed to state adequate reasons as required by Article 16 SCA.

113. In its reply, Konkurrenten submits that the defence is inconsistent in its definition of what would constitute overcompensation.[56] In these circumstances, Konkurrenten continues, ESA cannot simultaneously assert that there was no need to open a formal investigation of that issue and, consequently, the defence is unfounded.

114. In its reply, Konkurrenten submits that Annex B.5 should be considered inadmissible, as ESA has submitted what appears to be a translation of six pages from the 2008 Deloitte report. This document is headed "UNOFFICIAL TRANSLATION". According to Konkurrenten, Article 25(3) RoP requires that the original document is submitted with the translation, which ESA has failed to do. The translation must therefore be held inadmissible as evidence. Konkurrenten also notes that assertions made on the basis of the accompanying cover letter from Deloitte dated 7 November 2012 cannot be afforded probative value in relation to the actual content of the report itself, which has not been submitted into evidence.[57]

115. In its reply, Konkurrenten asserts that ESA's argument in paragraph 218 of the defence, concerning the reasons why the aid should be considered incompatible, is ineffective, as the second contested decision did not conclude that any of the aid measures were compatible aid under Article 61(2) and (3) EEA.[58] Furthermore, it follows from Article 1(c) of Part II of Protocol 3 SCA that all aid that does not constitute existing aid must be classified as new aid. In Konkurrenten's view, when the aid scheme that the decision has relied on has unlawfully or, at any rate, prematurely, been classified as existing, it follows that ESA can no longer classify the aid granted under that scheme as existing aid without first opening a formal investigation.

Second plea: the 15 short-term liquidity loans

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55 Reference is made to footnote 39 of the second contested decision.

56 Reference is made to paragraphs 222 and 226 of the defence.

57 Reference is made to *Valmont Nederland* v *Commission*, cited above, paragraph 71.

58 Reference is made to Article 5 of the second contested decision.

116. Konkurrenten seeks the annulment of Article 1 of the second contested decision, in which ESA classified the short-term liquidity loans as not constituting aid.

117. Konkurrenten submits that ESA has infringed Article 61 EEA by manifestly failing to apply correctly the prudent private creditor test.[59] On the basis of the facts set out in the second contested decision, the contention that Sporveien would have been able to raise a similar amount and sequence of 15 short-term liquidity loans, in the same period, on the same terms as those granted by the municipality, is simply implausible. Instead, the loans should have been classified as new and unlawful aid and ESA should therefore have opened a formal investigation in accordance with Article 4(4) in conjunction with Article 13 of Part II of Protocol 3 SCA. In not doing so, ESA infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.

118. Konkurrenten contends that for the purposes of assessing how a prudent private creditor would have acted it is legally irrelevant to assume that the creditor was also the owner of Sporveien.[60] Moreover, ESA was wrong to premise the prudent private creditor test on a creditor having full ownership of the company.[61] In Konkurrenten's view, the fact that Sporveien is publicly owned and thus enjoyed a special advantage in the credit market cannot be used in the context of the prudent private creditor test to argue that the short-term liquidity loans at issue cannot be classified as aid.[62] Konkurrenten thus requests the Court to annul Article 1 of the second contested decision.

119. In its reply, Konkurrenten submits that the prudent private creditor test must be applied using the same information as was available to the municipality at the time and must take account of all information liable to have significant influence on the decisions of a normally prudent and diligent private creditor.[63] In Konkurrenten's view, by assuming that the creditor would have to be the sole owner of Sporveien, the second contested decision failed to apply correctly the prudent private creditor test.[64] Instead, the defence has shown that what ESA really seeks to

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59 Reference is made to paragraphs 112 and 113 of the second contested decision.

60 Reference is made to paragraph 106 of the second contested decision.

61 Reference is made to Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom* v *Commission*, judgment of 19 March 2013, published electronically.

62 Reference is made to *Commission* v *EDF*, cited above, paragraph 79, Case T-36/99 *Lenzing* v *Commission* [2004] ECR II-3597, paragraphs 85 and 156, and *Land Burgenland and Others* v *Commission*, cited above, paragraph 52.

63 Reference is made to *Frucona Košice* v *Commission*, cited above, paragraph 78.

64 Reference is made to the Opinion of Advocate General Poiares Maduro in Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, point 25; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 46; Case T-152/99 *Hijos de Andrés Molina* v *Commission* [2002] ECR II-3049, paragraph 167; and *Frucona Košice* v *Commission*, cited above, paragraph 78.

argue is that a prudent private investor would have extended the same credit on the same terms in the same situation,[65] which, in the same way as a shareholder loan, must be assessed under the prudent private investor test.[66]

120. Konkurrenten denies the suggestion that in its application it added new elements to the decision that ESA did not take into account when applying the prudent private creditor test.[67] Furthermore, Konkurrenten continues, ESA's failure to review whether any contemporaneous evidence supported the contention that Oslo Municipality had intended to act only as a prudent private creditor would have done may well have affected the outcome of the decision.[68]

Third plea: the bus for metro and tram contracts

121. Konkurrenten seeks the annulment of Article 2 of the second contested decision, in which ESA classified the bus for metro and tram contracts as not constituting aid on the basis that they were awarded at market prices.

122. Konkurrenten submits that all the contracts should have been classified as new and unlawful aid and that, therefore, the defendant should have opened a formal investigation in accordance with Article 4(4) in conjunction with Article 13 of Part II of Protocol 3 SCA. By not doing so, ESA infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.

123. According to Konkurrenten, ESA manifestly failed to assess why the contracts for planned interruptions, which it asserts were the most valuable contracts, were classified as not constituting aid and to provide reasons why these contracts were considered to have been awarded at market prices.[69] Furthermore, Konkurrenten submits that the second contested decision also contains manifest errors of assessment of the contracts for ad hoc interruptions. These contracts were awarded without competition directly to Sporveien's bus subsidiary until 2011. However, ESA only reviewed comparison prices in two specific years, 2008 and 2011 on the basis of three specific customers, selected by Sporveien. Moreover, ESA has asserted that the contract values were "appreciably limited in scope" an assessment based upon the contracts awarded between 2004 to 2007. Konkurreten submits that these appear to have been selected for ESA by Sporveien. In these

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65 Reference is made to paragraphs 247 to 262 of the defence.

66 Reference is made to *Bouygues and Bouygues Télécom* v *Commission*, cited above; and Case T-20/03 *Kahla/Thüringen Porzellan* v *Commission* [2008] ECR II-2305, paragraphs 237 and 243, upheld on appeal in Case C-537/08 P *Kahla Thüringen Porzellan* v *Commission* [2010] ECR I-12917.

67 Reference is made to paragraph 106 of the second contested decision.

68 Reference is made to *Commission* v *EDF*, cited above, paragraph 85, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraphs 71 and 72, and *Land Burgenland and Others* v *Commission*, cited above, paragraph 58.

69 Reference is made to paragraphs 60 to 62 and 117 of the contested decision.

circumstances, therefore, Konkurrenten requests the Court to annul Article 2 of the second contested decision.

124. In its reply, Konkurrenten submits that, contrary to what ESA implies at paragraph 269 of the defence, the second contested decision concluded that no contracts for planned interruptions awarded to Sporveien's bus subsidiary from 2003 included State aid on the basis that they had all been awarded following public tenders.[70] Moreover, according to Konkurrenten, while the defence has asserted, in paragraph 272, that from 2008 onwards the prices for ad hoc replacement services were based on the prices in the contracts for planned replacement services, the second contested decision makes no such statement in paragraph 62 to the effect that the prices for ad hoc replacement services were based on the contracts for planned replacement services.

Fourth plea: the long-term infrastructure loans and guarantees

125. Konkurrenten seeks the annulment of Articles 3 and 4 of the second contested decision, in which ESA classified the guarantees and long-term infrastructure loans as existing aid.[71] In Konkurrenten's view, as these two Articles are based on the contention that the aid was granted in accordance with the disputed aid scheme relied upon in the first contested decision, should the Court annul the first contested decision, both Articles 3 and 4 of the second contested decision would also have to be annulled.

126. According to Konkurrenten, as the aid scheme was substantially altered, these aid measures should have been classified as new and unlawful aid within the meaning of Articles 1(c) and 1(f) of Part II of Protocol 3 SCA.[72] Moreover, ESA should have opened a formal investigation in accordance with Article 4(4) in conjunction with Article 13 of Part II of Protocol 3 SCA, and by not doing so, ESA infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.[73]

127. In conclusion, therefore, Articles 1, 2, 3, 4 and 5 of the second decision cannot be upheld. For that reason, Konkurrenten requests the Court to annul the decision in its entirety, as set out in the form of order.

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70 Reference is made to paragraph 62 of the second contested decision.

71 Reference is made to Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, judgment of 19 December 2012, published electronically.

72 Reference is made to *Regione autonoma della Sardegna and Others* v *Commission*, cited above, paragraph 176, upheld on appeal; *HGA and Others* v *Commission*, cited above, paragraphs 88 to 95; and *Hotel Cipriani and Others* v *Commission*, cited above, paragraph 358.

73 Reference is made to *Den norske Forleggerforening* v *ESA*, cited above, paragraphs 65 and 66.

128. In its reply, Konkurrenten submits that the defence is contradictory as ESA has claimed[74] that the existing aid scheme remained unaltered, whereas it has conceded[75] that the amendment of national law that entered into effect on 15 April 1994 constituted an alteration of the aid scheme, arguing instead that the alteration was severable from the initial aid scheme. Consequently, Konkurrenten contends that ESA prematurely and unlawfully closed the present case without opening a formal investigation. Konkurrenten further submits that the contention in the defence,[76] that the application failed to explain why the new aid should be considered "incompatible aid", is extraneous to the present proceedings.

129. Moreover, in response to ESA's allegation[77] that the application failed to set out how the alterations to the aid scheme resulted in the long-term loans and guarantees becoming new aid and "does not set out how these measures have become detachable from the aid scheme", Konkurrenten submits that, according to Article 1(c) of Part II of Protocol 3 SCA, all aid that does not constitute existing aid must be classified as new aid.

ESA

Admissibility

130. ESA submits that, pursuant to Article 33(1)(d) RoP, the scope of Konkurrenten's application is limited to the pleas in law made in the application. Abstract statements of the grounds on which the action is based are inadmissible.[78]

First contested decision

131. Konkurrenten has not established that it has sufficient standing to challenge the first contested decision. According to ESA, the second paragraph of Article 36 SCA contains the same provisions on standing as those set out in the fourth paragraph of Article 263 TFEU. In its view, to the extent that the provisions governing *locus standi* are substantively the same, the principle of homogeneity apples.[79] The Court has adopted the *Plaumann* test,[80] which has recently been nuanced as regards applicants who are competitors of alleged aid beneficiaries.[81]

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74 Reference is made to paragraph 218 of the defence.

75 Reference is made to paragraphs 92 to 97 of the defence.

76 Reference is made to paragraph 279 of the defence.

77 Reference is made to paragraph 279 of the defence.

78 Reference is made to *Posten Norge AS* v *ESA*, cited above, paragraphs 207, 287 and, in particular, paragraph 268 and the case law cited, and Case T-33/11 *Besselink* v *Council*, judgment of 12 September 2013, published electronically, paragraphs 38 to 40.

79 Reference is made to Case E-2/13 *Bentzen Transport* [2013] EFTA Ct. Rep. 802, paragraph 37, and *Private Barnehagers Landsforbund*, cited above, paragraph 47.

132. According to ESA, a competitor which has participated in the pre-decision procedure can be "individually concerned" if its market position is substantially affected by the aid.[82] An applicant must show that its market position has been substantially affected by the aid[83] and supply the necessary evidence to that effect.[84]

133. ESA contends that Konkurrenten's statements[85] are insufficient to meet the test for *locus standi*. An applicant's position as a complainant is insufficient to distinguish it individually.[86] ESA submits that Konkurrenten has failed to demonstrate that its market position was substantially affected by the alleged aid.

134. In relation to Annexes 26 and 27, ESA highlights their high degree of hesitancy and equivocation. It notes that the documents are short and lack detail. Both documents refer to additional documents but provide no links or references to such further evidence. In this regard, ESA stresses that it is not for the Court to seek and identify in the annexes the pleas and arguments on which the action is based, since the annexes have a purely evidential and instrumental purpose.[87]

135. ESA submits that, in examining the provenance of the evidence provided by Konkurrenten, the Court should follow the critical approach adopted in *UOP* v *Commission* and invites the Court to find that that evidence is insufficient to show standing. Konkurrenten provides long distance coach services between Kristiansand and Oslo, a route which Arctic Express entered only in 2006. Konkurrenten has failed to demonstrate that its market position has been substantially affected by the alleged aid measures pertaining to bus services in Oslo, a market upon which it has not been active.

136. For the sake of completeness, ESA asserts that the part of Article 263 TFEU which relates to regulatory acts has no equivalent in the EEA Agreement or SCA. It remains open to the EEA/EFTA States to amend the SCA. However until such time, an applicant must fulfil the criteria of direct and individual concern under the

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80 Reference is made to Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and *Private Barnehagers Landsforbund*, cited above.

81 Reference is made to Case C-525/04 P *Spain* v *Commission*, cited above, paragraph 30, and Case T-198/09 *UOP* v *Commission*, order of 7 March 2013, published electronically, paragraph 24.

82 Reference is made to Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25, Case C-519/07 *Friesland Campina* [2009] ECR I-8495, paragraph 54, and *UOP* v *Commission*, cited above, paragraphs 25, 35 and 36.

83 Reference is made to *UOP* v *Commission*, cited above, paragraphs 43 and 55.

84 Reference is made to Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 41, and *UOP* v *Commission*, cited above, paragraphs 26 and 41 and case law cited.

85 Reference is made to paragraphs 32 and 42 to 45 of the application.

86 Reference is made to *Cofaz and Others* v *Commission*, cited above, paragraphs 24 and 25.

87 Reference is made to *Posten Norge* v *ESA*, cited above, paragraph 112.

Plaumann test.[88] Konkurrenten's argument that procedural homogeneity requires the Court to apply the test set out in the fourth paragraph of Article 263 TFEU is ill-founded. Nevertheless, were the Court to examine this contention, ESA submits that the first contested decision is not a "regulatory act". The measure at hand pertains to a specific aid scheme rather than being a measure of general application.[89] Furthermore, in its view, fundamental rights do not justify the creation of new rights of action.

137. ESA submits that the application directed towards the first contested decision should be dismissed as inadmissible.

138. In its rejoinder, ESA adds that it is not for the Court to make a definitive finding whether Konkurrenten's market position was substantially affected by the alleged aid but for Konkurrenten alone to so demonstrate.[90] In relation to its submissions on the meaning of the fourth paragraph of Article 263 TFEU, ESA contends that its position is supported by two recent General Court judgments.[91]

Second contested decision

139. ESA submits that Konkurrenten has not demonstrated that it meets the test for standing. The test for *locus standi* in actions brought alleging a breach of procedural rights is that adopted by the Court in Case E-1/12 *Den Norske Forleggerforening*.[92] An applicant seeking to safeguard its procedural rights must establish that it is an "interested party" by demonstrating, in particular, that its economic interests might be affected.[93] In that regard, where an applicant seeks to enforce its procedural rights, if it can show that it is an "interested party", it is permitted to raise substantive pleas contending that the competition authority should have had serious doubts, which required it to open a formal investigation.[94] ESA submits that where an applicant seeks a declaration from the Court to the effect that the aid concerned in

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88 Reference is made to Case E-15/12 *Jan Anfinn Wahl* v *Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 73.

89 Reference is made to *Unión de Pequeños Agricultores* v *Council*, cited above, paragraph 45.

90 Reference is made by analogy to Case E-8/13 *Abelia* v *ESA*, judgment of 29 August 2014, not yet reported, paragraph 84.

91 Reference is made to Case T-601/11 *Dansk Automat Brancheforening* v *Commission*, judgment of 26 September 2014, published electronically, and Case T-615/11 *Royal Scandinavian Casino Arhus* v *Commission*, judgment of 26 September 2014, published electronically.

92 Reference is made to *Den norske Forleggerforening* v *ESA*, cited above, paragraph 61 et seq., and Case C-89/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4411.

93 Reference is made to Article 1(h) of Part II of Protocol 3 SCA and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

94 Reference is made to the Opinion of Advocate General Sharpston in Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, points 26 to 49, and Case C-89/09 P *Commission* v *Kronoply and Kronotex*, cited above, paragraphs 55 and 56.

the decision at issue was unlawful in itself or that the aid should be given a classification other than that applied by ESA, the applicant is not making a procedural plea but a substantive plea. For Konkurrenten to take advantage of the less onerous test for standing set out in *Kronoply*, it must be seeking a declaration based on a procedural infringement alone. In contrast, ESA contends that Konkurrenten is bringing a merits-based action and seeks the annulment of the second contested decision on a substantive basis.

140. In relation to the first, second, third and fourth pleas, ESA submits that the Court should apply the test set out in the second paragraph of Article 36 SCA in order to establish *locus standi*.

141. ESA contends that Konkurrenten does not have standing pursuant to the second paragraph of Article 36 SCA as it has not evidenced that its market position has been affected by the alleged aid. Nor does Konkurrenten have standing pursuant to Article 1(h) of Part II of Protocol 3 SCA as it has not shown that its market position might have been affected by the alleged aid. Konkurrenten has not demonstrated that it is in a "relationship of rivalry" with the recipient of the alleged aid.

142. However, should the Court find that Konkurrenten seeks to enforce its procedural rights by means of its challenge to the second contested decision, in ESA's view, those alleged procedural rights are devoid of substance as Konkurrenten was able to make its views known to ESA during the preliminary examination procedure.[95]

143. ESA submits that Konkurrenten has no standing to contest either the first or second contested decisions. Therefore, ESA submits that, pursuant to Article 87 RoP, the Court should dismiss the application as inadmissible.

144. In its written observations on the statement in intervention, ESA observes that the intervener supports its core submissions regarding the inadmissibility of the challenges brought against both contested decisions.

145. In its rejoinder, ESA submits that Konkurrenten has failed to demonstrate that it is in a relationship of rivalry with the beneficiary of the alleged aid measures and, therefore, lacks standing.[96] Moreover, in its pleas with regard to the second contested decision, Konkurrenten confuses the aid measures.[97] In any event,

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95 Reference is made to Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* and *Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 125, and *Commission* v *Sytraval and Brink's France SARL*, cited above, paragraph 59.

96 Reference is made to *Abelia* v *ESA*, cited above, paragraph 88.

97 Reference is made to paragraph 72 of Konkurrenten's reply to the observation on inadmissibility.

according to ESA, the test resulting from Article 1(h) of Part II of Protocol 3 SCA only applies when an applicant is, as a matter of fact, trying to safeguard its procedural rights.[98]

Substance

146. As a preliminary point, ESA sets out its understanding of the concepts of "existing aid"[99] and "aid scheme"[100]. ESA submits that in both contested decisions it analysed the reasons why the operation and financing of the public scheduled bus services in Oslo consitituted an existing aid scheme pursuant to Article 1(d) of Part II of Protocol 3 SCA. Because the operation of scheduled bus services in Oslo were found to fulfil the conditions to be characterised as an aid scheme in place prior to the entry into force of the EEA Agreement, it was concluded that that market constituted an existing aid scheme which remained applicable thereafter.[101] In light of that finding, ESA states that it then analysed all aid measures that potentially fell under that 'umbrella' in both contested decisions. ESA submits that its findings were based confirmation and information received from the Norwegian authorities.[102]

147. ESA submits that while Konkurrenten sent it comments following the adoption of ESA Decision 123/12, which opened the formal investigation, those comments failed to address the specific points made in that Decision about the nature of the existing aid scheme and the possible modifications made to it. ESA submits that if an interested third party had the right to make a comment or supply information but failed to do so, that third party cannot reproach it during litigation for deciding the case otherwise.[103] Finally ESA notes that it is only where the alternation affects the actual subsntace of the original scheme that it is transformed

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98 Reference is made to *Abelia* v *ESA*, cited above, paragraph 79, and *Mila* v *ESA*, cited above, paragraphs 53 and 55.

99 Reference is made to Article 1(b) of Part II of Protocol 3 SCA, Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others v ESA*, cited above, paragraphs, 111 to 119. Case C-6/12 *P Oy,* judgment of 18 July 2013, published electronically, paragraphs 36, 37, 40 and 47; *Namur-Les Assurances du Crédit*, cited above, paragraphs 28 to 33; *HGA and Others* v *Commission*, cited above,paragraphs 92 to 94.

100 Article 1(d) and (e) of Part II of Protocol 3 SCA; Case C-47/91 *Italy* v *Commission* [1994] ECR I-04635; and *Konkurrenten* v *ESA*, cited above, paragraph 76;

101 Reference is made to paragraphs 189 and 190 of the first contested decision.

102 Reference is made to Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraphs 189 and 190; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 7; *Verne*, cited above, paragraph 100 and 119 *in fine*; Case T-139/00 *France* v *Commission* [2002] ECR FP-I-A-33 paragraph 52; Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph, 89.

103 Reference is made to *Scott* v *Commission*, cited above, paragraph 145; *Freistaat Thüringen* v *Commission*, cited above, paragraph 88; Case T-109/01 *Fleuren Compost BV* v *Commission* [2004] ECR II-127, paragraphs 40 to 52; Case T-17/03 *Schmitz-Gotha Fahrzeugwerke v Commission*, cited above, paragraph 54; *Verne*, cited above, paragraphs 100 and 101; *Namur-Les Assurances du Crédit*, cited above, paragraphs 30 to 33.

into a new aid scheme. There can be no question of a subsntative alteration where the new element is clearly serverable from the initial scheme.[104]

First contested decision

First plea: the classification of the 2004 capital injection

148. ESA contends that Konkurrenten's argument that the aid scheme was substantially altered before the capital injection was made contradicts its previous contention.[105]

149. Moreover, ESA stresses that the legality of a decision concerning State aid falls to be assessed in the light of the information available to ESA at the time when the decision was adopted. The concept of State aid must be applied to an objective situation appraised on the date on which ESA takes its decision. It is the appraisals carried out on that date that must be taken into account when the Court undertakes its review. ESA submits that the Court should not accept Konkurrenten's request that it should be able to rely on facts which it did not disclose to ESA.[106]

150. ESA submits that the scheme was not altered and the capital injection did not fall outside the scheme's scope. Only insofar as the capital injection catered for the underfunding of pensions allocated to Sporveien's tour bus division did ESA find that the measure fell outside the scope of the existing aid scheme. However, that was found not to constitute aid in accordance with the private investor principle.[107] ESA stresses that, according to case law, it had to carry out the private investor test of its

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104 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gilbraltar* v *Commission*, cited above, paragraphs 109 and 111.

105 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 84; *Ter Lembeek* v *Commission*, cited above, paragraph 84; Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103 paragraph 31; Case T-565/08 *Corsica Ferries France SAS* v *Commission*, judgment of 11 September 2012, published electronically, paragraph 64; *Associazione italiana del risparmio gestito and Others* v *Commission*, cited above, paragraph 177; and Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle GmbH and Others* v *Commission* [2005] ECR II-1579, paragraph 68.

106 Reference is made to paragraphs 23, 188 and 122 of the first contested decision and to *Scott* v *Commission*, cited above, paragraph 145; *Freistaat Thüringen* v *Commission*, cited above, paragraph 88; *Fleuren Compost BV* v *Commission* , cited above, paragraphs 40 to 52; Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 76; and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, cited above, paragraph 31.

107 Reference is made to Case E-12/11 *Asker Brygge AS* v *ESA* [2012] EFTA Ct. Rep. 536, paragraph 58, and *Míla* v *ESA*, cited above, paragraph 95 and the case law cited.

own motion.[108] Therefore, Konkurrenten's argument that ESA was wrong to investigate the purpose of that capital injection should be rejected.[109]

151. In relation to the alleged manifest error of assessment regarding the options a hypothetical private investor faced,[110] ESA submits that the private investor test involves a complex economic assessment and that Konkurrenten has failed to demonstrate that its assessment is manifestly wrong. In ESA's view, Konkurrenten's assertion that the private investor test should have been applied to the City of Oslo, and not Sporveien, lacks clarity and precision and does not enable ESA to prepare a defence or enable the Court to give a ruling on the point.[111] Moreover, Konkurrenten has not demonstrated that it would have been more efficient to liquidate Sporveisbussene rather than make the capital injection of NOK 430 300.

152. ESA asserts that Konkurrenten's arguments fail to show that it erred in its conclusion that the capital injection did not involve overcompensation.[112] Konkurrenten has not contested the fact that section 28 A of Regulation No 117 of 19 February 1993 is the legal basis for the measures to cover the underfunded pension fund.[113] ESA observes further that Konkurrenten, in its written observations of 2 August 2008, did not allege an overcompensation of at least NOK 317 million.

153. In its rejoinder, ESA submits that it is irrelevant 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.[114] In that regard, what remains to be assessed is the extent to which the public service 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.[115] ESA maintains that the City of Oslo, after choosing to maintain the public service of urban bus transport in the capital, was not free to decide whether or not to cover the loss of AS Oslo Sporveier and AS Sporveisbussene.[116] Moreover, a divergence from the usual procedure (of annual compensation payments) cannot, in itself, lead to the finding that the aid was not granted on the basis of the aid scheme.[117]

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108 Reference is made to *Commission* v *EDF*, cited above, paragraph 80 et seq.

109 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraphs 87, 89 and 90.

110 Reference is made to paragraphs 137 and 139 of the first contested decision.

111 Reference is made to *Posten Norge* v *ESA*, cited above, paragraph 111.

112 Reference is made to paragraphs 216 to 219 of the first contested decision.

113 Ibid., paragraphs 216 to 220.

114 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 73.

115 Ibid., paragraphs 85, 89 and 90.

116 Ibid., paragraph 86.

117 Ibid., paragraph 87.

154. ESA submits that the argument concerning alleged tax discrimination[118] was not included the application. As Konkurrenten has not, and cannot, explain its late timing, the argument should be rejected as inadmissible pursuant to Article 37(2) RoP.

155. ESA submits that it does not consider that either party has made any admissions on the question whether in 1994 the aid scheme underwent substantial changes within the meaning of the relevant case law.

156. In relation to the new plea raised in the reply, ESA submits that Konkurrenten's references to its new plea at paragraphs 119, 141 and 162 of the reply do not comply with Article 37 RoP read in conjunction with Article 33(1)(c) RoP.[119] ESA submits that the references to the "new plea" are neither coherent nor comprehensible. Moreover, as a matter of law, the new plea is inadmissible. ESA contends that, in making its new plea, Konkurrenten has distorted the first contested decision and in this regard refers to paragraph 194 et seq. of the first contested decision which is not put into question by the new plea. Finally, ESA submits that the new plea is time-barred.[120]

157. In its rejoinder, in relation to its finding that the commercial activities capital injection did not constitute aid, ESA submits that an alleged error in paragraph 137 of the defence cannot constitute a manifest error of assessment in the contested decision itself. In addition, ESA submits that the statement made in Annex B.5 supports the conclusion reached.[121] In any event, ESA stresses that it is neither for the Court nor for the defendant to seek and identify in the annexes the pleas and arguments on which the action is based.[122]

Second plea: the classification of the annual lump-sum compensation

158. ESA submits that the existing aid scheme remained unaltered between 1994 and 2001. The replacement of Article 24a PTA with Article 22 CTA did not affect the substance of the legal basis on which aid was granted. Therefore no measure falling within the scope of the scheme constituted new aid in the relevant period, i.e. from 1994 to 2008.

159. ESA submits that the assertion that the aid was paid to the beneficiary in a manner which did not comply with the terms of the aid scheme is unfounded.[123] The

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118 Reference is made to paragraph 42 of the reply.

119 Reference is made to *Posten Norge* v *ESA*, cited above, paragraphs 86, 110 and 111, and *DB Schenker* v *ESA*, cited above, paragraph 78.

120 Reference is made to *Posten Norge* v *ESA*, cited above, paragraph 114.

121 Reference is made to paragraph 140 of the first contested decision.

122 Reference is made to *Posten Norge* v *ESA*, cited above, paragraph 112.

123 Reference is made to paragraphs 65 to 70 of the first contested decision.

starting point for determining the amount of compensation in any year was a quantification of the compensation paid in the preceding year, reviewed each May. Separate accounts were kept and a clear and consistent practice was established of common cost allocations and arms-length intra-group transactions.[124] The beneficiary made only a marginal profit. Consequently, no aid was granted that was not permitted.

160. ESA submits that, pursuant to Article 6(1) CTA, undertakings providing scheduled passenger transport services for remuneration must hold a concession. Pursuant to Article 25 of the Commercial Transport Regulation ("CTR"), this concession obliges the concessionaire to carry out the transport service set out in the concession.[125] Oslo Municipality delegated to Sporveier the task of planning and administering public transport in Oslo. In that capacity, Sporveier concluded the 1997 Transport Agreement with Sporveisbussene as a concession. There was no overcompensation. In ESA's view, this agreement constituted a "contract" for the purposes of Article 24a(5) PTA and Article 22(5) CTA, as an oral agreement was sufficient under Norwegian law at the time.

161. ESA contends that the annual compensation did not entail overcompensation. Article 22 CTA permits compensation to be paid covering the cost of the public service less the ticket revenue. Sporveien had separate accounts for its public service and commercial activities. ESA avers that it did not address three of the four cumulative *Altmark* criteria as it was clear that the fourth criterion was not met. Nor, in its view, was the second alternative of the fourth *Altmark* criterion satisfied. Therefore, ESA concluded that the annual compensation conferred an economic advantage upon Sporveien.

162. The assessment of the amount of the amount of the actual compensation was based on the costs incurred in the preceding year, corrected for efficiency gains, the development of the Norwegian consumer price index, salaries, taxes and laws and regulations that would affect the costs.[126] This method of calculation was standard administrative practice from the 1980s until 2008 when all public service contracts were tendered out.

163. ESA contends that Annex A.20, the memorandum from the public transport commissioner, is presented for the first time in the application. Therefore, in its view, it cannot be criticised for not having taken it into account even though the memorandum is dated September 2004.[127] In any event, the reference to this

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124 Reference is made to paragraph 67 of the first contested decision.

125 Reference is made to paragraphs 29 to 36 of the first contested decision.

126 Reference is made to paragraph 67 of the first contested decision.

127 Reference is made to *Scott* v *Commission*, cited above, paragraph 145; *Freistaat Thüringen* v *Commission*, cited above, paragraph 88; *Fleuren Compost BV* v *Commission*, cited above, paragraphs 40

memorandum does not demonstrate that ESA's conclusions regarding the administrative practice in Oslo Municipality and the calculation of the annual compensation were flawed. Second, ESA stresses that, in its assessment, the cost of Sporveien's commercial activities was not taken into account in the calculation of the annual compensation for public services.

164. Third, the average annual profit of Sporveien relating exclusively to the public service was 1.98% for the period between 1994 and 2005. This profit does not exceed what can be considered "reasonable" for the purposes of Article 22 CTA.[128] In ESA's view, it did not err in finding that there was no overcompensation.

165. In its rejoinder, ESA contends that the fact that Sporveien received annual compensation from the Municipality for carrying out other public transport activities in Oslo is irrelevant. The first contested decision does not make any findings with regard to any possible overcompensation of Sporveien's non-city bus activities.

166. ESA avers that it did not conduct a compatibility assessment in the first contested decision due to the fact that the aid was granted under the existing aid scheme. In any event, ESA submits that the public service obligation was sufficiently defined by its geographic area, budget and activities.[129]

167. ESA contends that Oslo Municipality delegated the task of planning and administering public transport to Sporveien prior to the entry into force of the EEA Agreement.[130] Moreover, in ESA's submission, the counties were entitled to establish management companies pursuant to the PTA Amendment Act of 4 July 1991 No 52, which entered into force on 4 September 1991. Furthermore, until the establishment of a separate, "pure" management company in 2007, Sporveien was responsible for managing and planning the public transport service. Moreover, the final version of Article 24b PTA adopted by Parliament did not prohibit a management company from owning transport means or having ownership interests in companies providing scheduled passenger transport services. Only for pure management companies was ownership precluded.

168. ESA submits that it is an oversimplification to claim that the average annual profit of the bus subsidiary was the sole element of its assessment in its formal investigation and analysis in the first contested decision. ESA contends that Konkurrenten has misrepresented the content of Annex A.4. From the extract of

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to 52; Case C-382/99 *Netherlands* v *Commission*, cited above, paragraph 76; and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, cited above, paragraph 31.

128 Reference is made to Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 24 and 25.

129 Reference is made to paragraphs 32 and 65 of the first contested decision and paragraph 148 of the defence.

130 Reference is made to paragraph 36 of the first contested decision and paragraphs 149 to 151 of the defence.

Annex A.4 referred to by Konkurrenten it is not possible to draw the conclusion that the 25 percent cost reduction was achieved immediately. The reduction took place over "several rounds", i.e. over several years, possibly extending from 1994, when the tender possibility was introduced in the legislation, until 2001 when the document was drafted. ESA contends that the budget allocated by the Municipality was adjusted annually for efficiency gains. These efficiency gains negotiated by the municipality included all the scheduled bus service providers.

169. ESA submits that the allegation that the annual compensation was increased by NOK 94 million[131] is a new claim submitted too late in the proceedings for introduction in accordance with Article 37 RoP and should be rejected. In any event, while it is correct to assert that the Municipality "strengthened the economic situation for Sporveien with NOK 94 million per year", in ESA's view, this did not lead to overcompensation because only Sporveien's costs were covered.

170. ESA maintains that the first contested decision, read in its relevant context and taking into account the relevant legal rules, is appropriately reasoned.[132] As regards the assertion that the annual lump-sum payments were granted in contravention of the existing aid scheme, ESA submits that Konkurrenten misconstrues its submissions.[133]

Third plea: the alleged breach of Article 61 EEA and the duty to state reasons

171. ESA contends that it has interpreted the notion of State aid correctly. Konkurrenten has not provided any evidence to contest ESA's findings regarding AS Sporveisbussene's tax position.[134] There is nothing to suggest that AS Sporveisbussene derived any individual benefit through making group contributions, and Konkurrenten has adduced no evidence to suggest otherwise. Konkurrenten's arguments on these points are hypothetical and not well-founded. Furthermore, ESA submits that it examined the Norwegian group taxation rules to determine whether they themselves could amount to State aid, but concluded that this was not the case, as the measures were not selective.[135]

172. ESA submits that its findings are line with *Altmark*. Addressing Konkurrenten's submission that there must be a corresponding safety valve on the accumulation of negative tax positions, ESA contends that this point was not raised during the preliminary or formal investigation. However, ESA has no obligation to

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131 Reference is made to paragraphs 107 and 108 of the reply.

132 Reference is made to Case E-21/13 *FIFA* v *ESA*, judgment of 3 October 2014, not yet reported, paragraph 91, and *Verne*, cited above, paragraphs 129 to 136.

133 Reference is made to paragraphs 149 to 151 of the defence.

134 Reference is made to paragraph 131 of the first contested decision.

135 Reference is made to paragraphs 127 to 130 of the first contested decision.

consider a point not raised at an appropriate time. Moreover, this argument is not well-founded.

173. ESA submits that there is nothing in the condition of "reasonable" profit, as set out in the *Altmark* test, to suggest that a body within a group which receives public funding cannot have its losses partially set-off by a transfer of funds from another member in the group. No evidence has been brought to the contrary. Without any evidence that Sporveisbussene's group contributions could give it an advantage, or could eventually be ploughed back into that company, this argument is manifestly irrelevant.[136] In light of the above, ESA contends that the application for the annulment of the first contested decision should be dismissed in its entirety.

174. In its rejoinder, ESA submits that Konkurrenten has changed the focus of its submissions to the individual situation of the companies in the Sporveien group.[137] As Konkurrenten has not, and cannot, explain its late timing, the argument should be rejected as inadmissible pursuant to Article 37(2) RoP. Konkurrenten has not demonstrated that ESA erred in finding that the Norwegian rules on corporate taxation are not selective.[138]

Second contested decision

175. In its rejoinder, ESA submits that the assessment of complex economic facts by the Court must be limited to a plausibility review. The standard of review to be applied to a decision that concludes after a preliminary examination that the measures do not constitute aid is whether ESA has overcome all doubts and has no difficulties in reaching its conclusion. In ESA's view, judicial review of the existence of serious difficulties will, by its nature, go beyond consideration of whether or not there has been a manifest error of assessment.[139]

First plea: the NBB measures

176. ESA contends that the existing aid scheme remained unaltered and thus measures falling under its scope cannot be classified as new aid. Moreover, even if the aid scheme were to be regarded as having changed, Konkurrenten fails to demonstrate how the NBB measures necessarily became new aid. Second, ESA avers that it did not entertain any doubts with regard to the fact that the NBB transaction entailed no overcompensation to Sporveien. As the asset in question is a

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136 Reference is made to paragraphs 131 and 142 of the first contested decision.

137 Reference is made to paragraphs 120 and 122 of the reply.

138 Reference is made to paragraph 130 of the defence.

139 Reference is made to *Mila* v *ESA*, cited above, paragraphs 88 to 90, and Case T-73/98 *Société chimique Prayon-Rupel* v *Commission*, cited above, paragraphs 47 to 50.

ticketing system, i.e. an indispensable element for the functioning of city public transport, all relevant aid was covered by the existing aid scheme.

177. By ESA Decision No 123/12, ESA opened a formal investigation procedure to examine whether an existing aid scheme was in place and whether this scheme had been altered. In the first contested decision, ESA's conclusion was that the scheme remained unaltered. Even if the aid scheme were to be regarded as having changed, in ESA's view, the application does not set out how the NBB measures have become detachable from the aid scheme. Moreover, nor has Konkurrenten explained why the alleged new aid should be considered incompatible aid.

178. According to ESA, the second contested decision "illustrated the exact figures" concerning the development and transfer of the NBB.[140] Moreover, it contends that the figures presented in the application relating to an alleged increase in costs are not relevant for assessing the compatibility of the measures with State aid rules and, in addition, they have not been substantiated by evidence. It avers that the figures presented in the second contested decision were provided by the Norwegian authorities during the preliminary phase. Moreover, the methodology ESA used to determine the transfer price of the NBB system from Sporveien to Ruter was calculated by Deloitte.[141]

179. ESA concluded that no advantage was conferred on Sporveien from the transfer of the NBB system to Ruter as the purchase price was not higher than the actual costs incurred in developing the system. The reason behind the transaction was the fact that the single ticketing system for all transport modes had to be administered on the basis of the scheme. In ESA's view, its development and transfer complied with the cost coverage principle which governed the entire existing aid scheme.

180. ESA submits that the relevant costs incurred in the development of the NBB ticketing system had to be compensated and points out that Sporveien actually made a loss on selling the system.[142] It contends that the distinction Konkurrenten seeks to draw between compensation for the provision of the public transport service and the acquisition of an asset is unsubstantiated as they are strictly linked.

181. In its rejoinder, ESA submits that, contrary to Konkurrenten's contention,[143] the NBB system was 60% owned by Oslo Municipality and 40% by Akershus

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140 Reference is made to paragraphs 165 to 170 of the second contested decision.

141 Reference is made to paragraphs 69 to 72 and 166 of the second contested decision.

142 Reference is made to paragraph 170 of the second contested decision.

143 Reference is made to paragraph 127 of the reply.

county and both had the right to veto a decision. It contends that Konkurrenten's interpretation of the aid scheme is arbitrary.[144]

182. In its rejoinder, as regards Konkurrenten's submission that Annex B.5 should be ruled inadmissible, ESA submits that Article 25(3) RoP stipulates no specific form regarding translations of annexes into English.[145] It is simply for the Court to determine whether there is any need to supplement the information available to it.[146]

183. ESA fails to see the inconsistency invoked by Konkurrenten in paragraph 133 of the reply and rejects the suggestion that the evidence summarised by Konkurrenten in paragraphs 135 and 136 of the reply is contradictory. On the contrary, ESA contends that these figures are quite consistent. It points out that the 2009 Report by the Institute of Transport Economics used a valuation method which was rejected by Deloitte for the transfer of the NBB system. Moreover, the second contested decision stated how the price of the NBB system was calculated.[147] Therefore, the assertion that ESA failed to state reasons is unfounded.

Second plea: the 15 short-term liquidity loans

184. ESA avers that it addressed exhaustively the 15 loans, analysed their character as commercial short-term loans, applied three sets of ESA guidelines, as well as the private creditor test, and made a comparison with actual market indicators.[148] In its view, these loans functioned as a form of revolving credit facility bearing an interest rate "agreed at the level of the closest relevant NIBOR plus [60-90] bps". It contends that it assessed whether these terms were comparable to what a private market creditor being also the sole owner of the undertaking would have required. ESA concluded that the loans satisfied the criteria in its guidelines.[149]

185. ESA notes that it conducted its assessment on the basis of complex economic facts. Consequently, it submits that the Court's review of this assessment must be limited.[150]

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144 Reference is made to paragraph 128 of the reply.

145 Reference is made in addition to the final sentence of section 15(d) of the Court's *Guidance for Counsel in written and oral proceedings before the EFTA Court.*

146 Reference is made to Case C-127/13 P *Strack* v *Commission*, judgment of 2 October 2014, published electronically, paragraph 77.

147 Reference is made to paragraphs 65 to 71 and 165 to 167 of the second contested decision.

148 Reference is made to paragraphs 83 to 113 of the second contested decision.

149 Reference is made to ESA's Guidelines on reference and discount rates (OJ 2000 L 274, p. 26, OJ 2006 L 324, p. 34, and OJ 2011 L 105, p. 32).

150 Reference is made to Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA* [2012] EFTA Ct. Rep. 758, paragraph 156, and *Verne*, cited above, paragraph 64.

186. ESA submits that the essence of the private creditor test is how a prudent private creditor in a market economy applying ordinary commercial criteria would have acted in a similar situation to that of the public creditor.[151] ESA was obliged to analyse all factors that are relevant to the transaction at issue and its context.[152] It asserts that, in commercial terms and under normal market conditions, the conduct of a creditor, in particular a creditor extending short-term commercial loans in the form of a revolving credit facility to another undertaking, is somehow different to the conduct of a private investor pursuing long-term profitability of the capital invested.[153] In its view, in the present case, considerable emphasis must be placed on the fact that the public creditor was also the sole owner of the undertaking.[154] It adds, however, that a 100% owner may not act in an unreasonable manner.

187. According to ESA, the fact that the short-term, uncollateralised loan granted by Nordea Bank bore an interest rate in the same range shows that a private creditor would have granted a loan on the same terms to Sporveien. In its view, the case at hand is very different to that in Case C-457/00 *Belgium* v *Commission*.[155] Finally, ESA notes that the EEA rules on State aid affect the exercise of ownership rights held by the EEA State, in that as soon as public funds and assets are used for commercial competitive activities, they must be subject to normal market economy rules.[156]

188. ESA submits that Konkurrenten has misconstrued its reasoning in paragraph 106 of the second contested decision. A credit rating was not required as the City of Oslo, as the sole owner, had a full overview of Sporveien's financial position.[157] ESA avers that it requested and received all necessary information for its assessment

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151 Reference is made to *Commission* v *EDF*, cited above, paragraph 78, and Case T-198/01 *TGI* v *Commission*, cited above, paragraphs 98 and 99.

152 Reference is made to *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited above, paragraph 257.

153 Reference is made to Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913, paragraph 24, Case C-342/96 *Spain* v *Commission*, cited above, paragraph 46, and Case T-152/99 *Hijos de Andrés Molina SA (HAMSA)* v *Commission*, cited above, paragraph 167.

154 Reference is made to *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited above, paragraph 335; Opinion of Advocate General Lenz in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, at p. 2271, and Case T-323/99 *INMA* v *Commission* [2002] ECR II-545, paragraphs 96 to 106.

155 Reference is made to Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraphs 73 and 74.

156 Reference is made to *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited above, paragraph 267.

157 Reference is made to paragraphs 260 to 262 of the defence, Joined Cases C-533/12 P and C-536/12 P *Société nationale maritime Corse-Méditerranée (SNCM) SA and French Republic* v *Corsica Ferries France SAS*, judgment of 4 September 2014, published electronically, paragraph 31, and *Commission* v *EDF*, cited above, paragraphs 80 and 81.

from the national authorities.[158] It assumes that the national authorities complied with their duty of loyal cooperation. Therefore, ESA continues, it did not entertain any doubts as to the possible existence of State aid.

189. In its rejoinder, ESA submits that, during the period that the 15 loans were granted, there were "no wide reaching pledges on the operational assets of Sporveien".[159] Therefore, in its view, the notion that Sporveien could not obtain an uncollateralised loan is unfounded.

190. ESA submits, as Konkurrenten has also noted, that the perspective of a creditor is inherently different to that of an investor.[160] Moreover, contrary to Konkurrenten's allegations, the defence does not in fact show that the assessment of the 15 short-term loans should have been based on the prudent private investor test as, evidently, the Municipality acted as a creditor.[161] Finally, ESA invites the Court to reject the argument that it failed to review any contemporaneous evidence and based its assessment only on an *ex post* justification.[162]

Third plea: bus for metro and tram contracts

191. ESA observes that the State aid complaint was limited to the contracts directly awarded by Sporveien to Unibuss AS, as set out in paragraph 7(iii) of the second contested decision. As regards the bus for metro and tram contracts for planned interruptions, ESA avers that it had no reason to doubt that the statement made by the Norwegian authorities in their letter of 16 December 2011 was complete and correct.[163]

192. In relation to the contracts for ad hoc interruptions, ESA observes that the second contested decision refers to all such contracts until 2011, as they were directly awarded. It stresses its finding in this regard, namely, that the contracts with Unibuss were concluded on a commercial basis and the undertaking received no economic advantage.[164]

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158 Reference is made to *Hotel Cipriani and Others* v *Commission*, cited above, paragraph 234; *Fleuren Compost BV* v *Commission*, cited above, paragraph 491; *Commission* v *Sytraval and Brink's France SAR*, cited above, paragraph 60; and *Verne*, cited above, paragraph 122.

159 Reference is made to paragraph 98 of the second contested decision.

160 Reference is made to the Opinion of Advocate General Poiares Maduro in Case C-276/02 *Spain* v *Commission*, cited above, point 24, and *Société nationale maritime Corse-Méditerranée (SNCM) SA and French Republic* v *Corsica Ferries France SAS*, cited above, paragraph 38.

161 Reference is made to paragraphs 247 to 259 of the defence.

162 Reference is made to paragraphs 263 to 265 of the defence.

163 Reference is made to *Verne*, cited above, paragraph 122.

164 Reference is made to paragraphs 114 to 117 of the second contested decision.

193. According to ESA, the relevant test for finding that no aid was granted is whether this ancillary service was purchased on market terms.[165] Consequently, there is no element of aid if the transaction takes place under normal market price conditions.[166] In its view, the market price can be found by means other than a tender procedure. In any event, in the present case, from 2008, the price of the service was based on a price derived from a tender procedure for an identical activity. Furthermore, ESA contends, no advantage is conferred when a service is offered on cost coverage principles as it remains within the remit of "market price conditions".[167] In this regard, ESA avers that it examined whether these contracts were offered on market terms and concluded that they were.[168]

194. ESA contends that the price setting mechanism and its application were illustrated by reference to examples of two different years: 2008 and 2011. It avers that it had no reason to suspect that the pricing would be any different in the intervening years. Therefore, Konkurrenten is wrong to claim that only comparison prices in two specific years were reviewed. In conclusion, ESA avers that it did not entertain any doubts with regard to the fact that the directly awarded contracts for bus for metro and tram did not entail any State aid.

195. In its rejoinder, ESA rejects as unsubstantiated Konkurrenten's assertion that Norgebuss submitted a tender offer with a price 20% lower than Sporveien's offer but was not awarded the contract and that no explanation was provided for this rejection. ESA contends, on the contrary, that Unibuss was awarded the contract due to its fulfilment of other award criteria and not on the basis of price alone, which accounted for only 50% of the award criteria.[169]

Fourth plea: long-term infrastructure loans and guarantees

196. ESA repeats that it already explained in detail in both the first contested decision and the defence that the existing aid scheme remained unaltered. Therefore, in its view, the fourth plea should be rejected. Moreover, even if the aid scheme were to be regarded as having been changed, as alleged, ESA stresses that the application fails to set out how those measures became new aid. In particular, it does not set out how these measures have become severable from the aid scheme.

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165 Reference is made to Case T-289/03 *British United Provident Association Ltd (BUPA) and Others* v *Commission* [2008] ECR II-81, paragraph 249.

166 Reference is made to Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 33, and Case C-39/94 *Syndicat français de l'Express international (SFEI) and Others* v *La Poste and Others* [1996] ECR I-3547, paragraph 62.

167 Reference is made to *France* v *Commission*, cited above, paragraph 69, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20.

168 Reference is made to paragraphs 63 and 116 of the second contested decision.

169 Reference is made to paragraphs 267 to 270 of the defence.

Equally, ESA continues, Konkurrenten does not explain why the alleged new aid should be considered incompatible aid. In conclusion, as there were no grounds for doubts or serious difficulties, ESA reiterates that it was correct not to open the formal investigation procedure.

197. In its rejoinder, ESA submits that Konkurrenten has misrepresented ESA's arguments[170] in its reference to an alleged contradiction.[171] In any event, ESA maintains that the "first decision" satisfies the requirements of Article 16 SCA.[172]

Sporveien Oslo

198. Sporveien contends that Konkurrenten has not established sufficient standing to challenge the first contested decision. In its view, there are no grounds for the revision of the test for standing following the amendment to the fourth paragraph of Article 263 TFEU and, in addition, the contested decisions do not constitute regulatory acts within the meaning of that provision.[173] Furthermore, Sporveien continues, Konkurrenten has not established that it is directly and individually concerned within the meaning of the second paragraph of Article 36 SCA.

199. Sporveien submits that Konkurrenten has not shown how its situation can be distinguished from that of all other competitors to Sporveisbussene, or at least from all other competitors to Arctic Express (acquired by Sporveisbussene) on all the bus routes operated by it. Konkurrenten has therefore has not shown that it is individually concerned in terms of being substantially affected by the aid measures themselves. According to Sporveien, the fact that Arctic Express entered the market for the Oslo-Kristiansand route could not have had a substantial effect on Konkurrenten given that Nettbuss had a "clearly dominant position" on that route.

200. Sporveien submits that undertakings entrusted with services of general economic interest may establish and run commercial activities, as long as those activities are separated to ensure that there is no cross-subsidisation. It avers that this is what Sporveisbussene did. In its view, it is not possible to establish links between the measures at issue and Konkurrenten's market position.

201. Sporveien contends that Sporveisbussene's decision to acquire Arctic Express followed a thorough process. Once purchased, the decisions taken by Arctic Express

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170 Reference is made to paragraphs 92 to 97 and 278 of the defence.

171 Reference is made to paragraph 14 of the second contested decision.

172 Reference is made to *Verne*, cited above, paragraphs 129 to 136, and *FIFA* v *ESA*, cited above, paragraph 91.

173 Reference is made to *Inuit and Others* v *Parliament and Council*, cited above, paragraph 60, Case C-274/12 P *Telefonica* v *Commission*, cited above, paragraph 38, and the Opinion of Advocate General Kokott in the same case, points 26 and 28.

to enter, exit or operate routes were taken solely on the basis of profitability, allowing for some time to establish new routes and to attract new customers.

202. Sporveien stresses that, since March 2008, all scheduled bus transport in Oslo has been tendered out. From that date, the Sporveisbussene group has only operated commercial activities and, as a result, Konkurrenten cannot have been affected by any aid thereafter.

203. In relation to the second contested decision, Sporveien submits that Konkurrenten does not meet the test for standing. In particular, Konkurrenten has not shown that it is an "interested party".[174] In addition, the measures at issue in the second contested decision relate to activities of the Sporveien group which do not compete with those of Konkurrenten. Further, the measures do not relate to any assets that may serve as input to Sporveien's express bus activity and, consequently, a competitive relationship with Konkurrenten cannot be said to exist.

204. According to Sporveien, Konkurrenten has brought a merits-based action against the second contested decision. However, not only does Konkurrenten not qualify as an interested party under the *Kronoply* test, it also fails to satisfy the stricter *Plaumann* test for standing.[175]

Norway

205. Norway submits that Konkurrenten does not meet the criteria necessary to establish standing to challenge the two contested decisions and supports ESA's preliminary objections on inadmissibility.

206. First, Norway submits that Annexes A.26 and A.27 do not demonstrate any more than a decline in Konkurrenten's commercial or financial performance, without establishing any causality between the aid to Sporveien and the impact on its market position.[176] Second, neither of the contested decisions would constitute a "regulatory act" for the purposes of the fourth paragraph of Article 263 TFEU, an amended provision not to be found in the EEA Agreement or SCA. Therefore, according to Norway, the Court should reject Konkurrenten's argument by which it seeks to establish standing by analogy with the TFEU provisions[177] as well as its argument that the traditional test should be reassessed in light of the general principle of EEA law concerning the right to effective judicial protection.[178]

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174 Reference is made to *Míla* v *ESA*, cited above, paragraph 54.

175 Ibid., paragraph 55.

176 Reference is made to *Scheepsbouwkundig Advies- en Rekencentrum (Sarc) BV* v *Commission*, cited above, paragraph 36.

177 Reference is made to Case E-1/02 *ESA* v *Norway* [2003] EFTA Ct. Rep. 1, paragraph 55.

178 Reference is made to Case C-274/12 P *Telefonica* v *Commission*, cited above, paragraph 59.

207. In the event that the system of compensation for public transport under the CTA and CTR is found to constitute State aid, Norway agrees with ESA that it must be regarded as an aid scheme within the meaning of Article 1(d) of Part II of Protocol 3 SCA. In Norway's view, whether aid may be classified as new aid, existing aid, alteration of existing aid or an aid scheme must be determined by reference to the provisions providing for it.[179] Only substantial amendments to an existing aid scheme may change its status from existing aid to new aid.[180]

208. Norway contends that the principle according to which operators receive compensation amounting to the cost of the public service (including a reasonable profit) less the ticket revenue has not been modified since the entry into force of the EEA Agreement. Consequently, if payments under this system constitute State aid, they must be regarded as existing aid.

209. Norway notes the earlier finding of the Court to the effect 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.[181] However, it stresses that the question of aid granted in excess of an aid scheme must not be confused with the question of the existence of possible overcompensation for public service obligations under Article 61 EEA. Overcompensation for public service obligations, within the meaning of *Altmark*,[182] is not relevant for the distinction between existing and new aid.

210. Norway contends that the question whether compensation has been granted outside an aid scheme can only be determined on the basis of the aid scheme's provisions. If that scheme's conditions are fulfilled, and the aid therefore falls within the national scheme, it will remain an existing aid scheme even if it contains elements of overcompensation. Such aid may be incompatible with EEA law, but this must be assessed under the procedure for existing aid.[183] Conversely, if the conditions for granting compensation are not fulfilled, compensation granted outside the scheme must be regarded as new aid.

211. In the present case, the aid scheme provided for compensation for the cost of the public service (including a reasonable profit) less the ticket revenue. In Norway's view, there is nothing to suggest that compensation has been granted outside the scope of this scheme.

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179 Reference is made to *Namur-Les Assurances du Crédit*, cited above, paragraph 28, and *Konkurrenten* v *ESA*, cited above, paragraph 57.

180 Reference is made to the Opinion of Advocate General Trabucchi in Case 51/74 *Van der Hulst* [1975] ECR 79.

181 Reference is made to *Konkurrenten* v *ESA*, cited above, paragraph 76.

182 Reference is made to *Altmark*, cited above.

183 Reference is made to Section V of Part II of Protocol 3 SCA.

European Commission

Admissibility

212. The Commission contends that Konkurrenten has not demonstrated its standing to challenge the first contested decision. Not being the addressee of that decision, it can only establish standing under the second paragraph of Article 36 SCA. There is currently no equivalent to the third limb of the fourth paragraph of Article 263 TFEU under the SCA.

213. According to the Commission, to demonstrate individual concern for the purposes of challenging a decision taken at the end of a formal investigation procedure, it is not enough for an applicant to be an actual or potential competitor of the beneficiary. Rather, there must be a real competitive relationship between the applicant and the beneficiary and the market position of the applicant must be substantially affected by the measure. Accordingly, an applicant must demonstrate the magnitude of the prejudice to its market position.[184] That test must be conducted by reference to the beneficiary of the aid measure (or alleged aid measure) at issue.[185] That obligation has not been discharged in relation to the first contested decision and, consequently, the application should be dismissed as inadmissible.

Substance

First contested decision

214. As a preliminary point, the Commission sets out its understanding of the distinction between new and existing aid.[186]

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184 Reference is made to Case T-193/06 *TFJ* v *Commission* [2010] ECR II-4967, paragraph 77, and Case T-117/04 *Werkgroep Commerciele Jachtshaven Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, paragraph 53.

185 Reference is made to *TFJ* v *Commission*, cited above, paragraphs 78 and 91, Case T-54/07 *Vtesse Networks* v *Commission* [2011] ECR II-6*, and Case T-58/10 *Phoenix-Reisen and DRV* v *Commission*, judgment of 11 January 2012, published electronically, paragraphs 35, 44, 47 and 50.

186 Reference is made to *Namur-Les Assurances du Crédit*, cited above, paragraphs 23, 28 and 35; Joined Cases 91/83 and 127/83 *Heineken* [1984] ECR 3435, paragraphs 21 and 22; Joined Cases T-195/01 and T-207/01 *Gibraltar* v *Commission*, cited above, paragraphs 109 to 114; *Hotel Cipriani* v *Commission*, cited above, paragraph 362; Case T-297/02 *ACEA* v *Commission* [2009] ECR II-1683, paragraphs 113, 117 and 127; Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraphs 117 and 121; *ASM Brescia* v *Commission*, cited above, paragraphs 97 and 101; Case T-222/04 *Italy* v *Commission* [2009] ECR II-1877, paragraphs 90 and 94; Opinion of Advocate General Trabucchi in *Van der Hulst*, cited above, point 7; Case C-138/09 *Todaro Nunziatina & C. Snc* [2010] ECR I-4561, paragraph 47; Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Alava - Diputación Foral de Alava and Others* v *Commission* [2002] ECR II-1275, paragraph 175; *Konkurrenten* v *ESA*, cited above, paragraphs 74 to 76, 87 and 89; and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657.

215. In relation to the first plea and the commercial activities capital injection, the Commission does not share the applicant's view that a single payment must always be examined as one measure. It submits that Konkurrenten's first argument misreads paragraph 137 of the first contested decision. Further, it contends that Konkurrenten's second argument, that ESA should have applied the market economy operator principle at the level of the holding by Oslo Municipality in AS Oslo Sporveier without having regard to the ultimate destination of that investment, seeks to subvert the principle of equality of treatment on which that principle is ultimately based. In relation to the public service capital injection, the Commission contends that the applicant's arguments on this matter are not made out.[187]

216. In relation to the second plea, the Commission submits that Konkurrenten's first argument is simply a reference back to its first argument brought against the public service capital injection and should be rejected. Further, Konkurrenten's second argument, that the payment of the annual compensation fell outside the scope of the existing aid scheme, has been convincingly rebutted by ESA. As for Konkurrenten's third argument, the Commission submits that it should be rejected. In addition, the Commission submits that there has been no breach of Article 16 SCA.

217. In relation to the third plea on the group taxation rules, the Commission contends that the first two claims presented by Konkurrenten under the rubric of this plea are redundant. Those claims contest the presence of an advantage in relation to a measure for which Konkurrenten does not dispute ESA's finding that the measure in question is not selective. As for Konkurrenten's final claim, the Commission contends that this is baseless. Paragraphs 128 and 130 of the first contested decision show clearly why ESA considered that Norway's group taxation rules are not selective. In summary, the Commission contends that the application to annul the first contested decision should be rejected.

Second contested decision

218. In relation to the first plea, the Commission considers that Konkurrenten's simple reference back to its first argument against the public service capital injection should be rejected. As regards Konkurrenten's alternative argument on this point, namely, that if the aid scheme constituted existing aid, the NBB measures involved overcompensation, the Commission contends that Konkurrenten has not demonstrated the errors of assessment which would allegedly justify opening a formal investigation procedure. This is because the valuation method used is set out in paragraph 69 of the second contested decision and that method was not

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[187] Reference is made to Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 25, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 43 to 45, and Case T-489/11 *Rousse Industry* v *Commission*, cited above, paragraph 33.

inconclusive. Moreover, the payment by Ruter to KTP was at a level which did not cover the costs incurred by the latter and, finally, the figures from Ruter's 2009 annual report do not conflict with the level of costs incurred by KTP established by ESA in the second contested decision.

219. Turning to Konkurrenten's arguments in the further alternative, the Commission agrees with ESA's view that it was evident that the provision of an inter-operational payment and ticketing system for all operators at the transport level was covered by the existing aid scheme.

220. According to the Commission, the second plea must be rejected. In its view, Konkurrenten's first contention, criticising ESA's comparison of the terms granted by Oslo Municipality and terms obtained by Sporveien in the market, is at odds with the analysis in paragraphs 98 and 101 to 112 of the second contested decision. As for the second contention, criticising ESA for taking account of Oslo Municipality's ownership of Sporveien, the Commission submits that the ultimate foundation of the market economy operator principle is the principle of equality of treatment. Accordingly, the Commission shares ESA's view that it would be improper to disregard Oslo Municipality's position as sole owner of the borrower. Finally, the Commission agrees with paragraphs 260 to 262 of the defence in relation to Konkurrenten's submission that ESA was incorrect to consider that a private creditor would take a positive view of the fact that Oslo Municipality compensated KTP for much of the latter's business activities on a cost coverage basis.

221. Turning to the third plea, in relation to the treatment of the contracts for planned interruptions of metro and tram services, the Commission adopts the submissions made by ESA in paragraph 270 of the defence. In relation to the treatment of the contracts for ad hoc interruptions, the Commission supports ESA's argument set out at paragraphs 272 and 273 of the defence, in line with the demonstration in paragraphs 62 to 64 of second contested decision. Consequently, the Commission would dismiss Konkurrenten's objection on this point and with it the third plea in its entirety.

222. Turning to the fourth plea, the Commission contends that the argument is a rerun of the first argument against the public service capital injection and, consequently, the plea should be rejected.

Carl Baudenbacher
Judge-Rapporteur