EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION
of 16 July 2003
on a Compensation Scheme for Express Bus Operators
(Norway)
(2004/298/EC)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area (1), in particular to Articles 49, 61 to 63 and to Annex XIII (2) thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (3), in particular to Article 24 and Article 1 of Protocol 3 thereof,

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement (4), in particular to Chapters 5, 6 and 15 thereof,

Having regard to the Authority's decision to open the formal investigation procedure (5),

Having called on interested parties to submit their comments, pursuant to the provisions laid down in Chapter 5 of the Authority's State Aid Guidelines (6), and having regard to their comments,

(1) Hereinafter referred to as the 'EEA Agreement'.


(3) Hereinafter referred to as the 'Surveillance and Court Agreement'.

(4) Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 1994, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision No. 264/02/COL of 18 December 2002, not yet published; hereafter referred to as the 'Authority's State Aid Guidelines'.


(6) In particular, point 5.3.2. of the Guidelines.
Whereas:

I. FACTS

A. PROCEDURE AND CORRESPONDENCE

1. OPENING OF THE FORMAL INVESTIGATION PROCEDURE

Following a complaint against the compensation scheme for express bus operators, the Authority carried out a preliminary examination of the scheme in question under the EEA State aid rules. This examination led to the Authority's decision of 18 December 2000 to open the formal investigation procedure against the compensation scheme for express bus operators. The decision was communicated to the Norwegian Government by letter of that same day (Doc. No. 00-9192-D).

In this letter, the Norwegian Government was invited, pursuant to point 5.3.1.(1) of Chapter 5 of the Authority's State Aid Guidelines, to submit its comments on the opening of the formal investigation procedure. The Norwegian authorities were further requested to provide all necessary information to assess the compatibility of the compensation scheme with the EEA State aid provisions.

The Authority reminded the Norwegian Government that, in accordance with point 6.2.3 of Chapter 6 of the Authority's State Aid Guidelines, unlawful aid may be recovered from the recipients should the Authority find the compensation scheme to be incompatible with the EEA Agreement. Against this background, the Norwegian Government was asked to forward a copy of the decision to the recipients of the aid immediately.

Finally and with respect to the proposed continuation of the compensation scheme for 2001, the Authority reminded the Norwegian Government of its obligation not to put the aid into effect.

2. COMMENTS AND FURTHER INFORMATION SUBMITTED BY THE NORWEGIAN GOVERNMENT

The Norwegian Government submitted its comments to the opening of the formal investigation procedure by letter dated 31 January 2001, received and registered by the Authority on 8 February 2001 (Doc. No. 01-1029-A). It claimed that the compensation scheme did not constitute 'new aid', and that, in any case, the compensation scheme was exempted from the obligation of prior notification because it was in accordance with Council Regulation (EEC) No 1191/69 (1). Consequently, the Norwegian Government informed the Authority that payments under the compensation scheme would not be suspended.

By letter of 12 April 2001 (Doc. No. 01-2781-D), the Authority acknowledged receipt of this letter and requested additional information.

By letter of 15 June 2001, received and registered by the Authority on 20 June 2001 (Doc. No. 01-4686-A), the Norwegian Government submitted the information requested.

(1) According to Article 17(2) of Council Regulation (EEC) No 1191/69 reimbursements for public service obligations granted in accordance with this Regulation are exempt from the notification requirement and thus not subject to the standstill obligation.
3. COMMENTS AND ADDITIONAL INFORMATION SUBMITTED BY THIRD PARTIES

After having opened the formal investigation procedure, but before the publication of the decision in the Official Journal, the Norwegian Transport Association ('Transportbedriftenes Landsforening') submitted comments on the opening decision by letter of 21 February 2001, registered by the Authority on 23 February 2001 (Doc. No. 01-1387-A).

The complainant was informed of the opening of the formal investigation procedure by letter of 18 December 2000 (Doc. No. 00-9193-D).

After having received comments on the opening of the formal investigation from the Norwegian Government, the Authority addressed the complainant again, by letter of 12 April 2001 (Doc. No. 01-2780-D). In this letter, the Authority summarised the arguments brought forward by the Norwegian Government with respect to the opening of the formal investigation procedure and invited the complainant to submit his views on these arguments. Furthermore, the complainant was invited to submit additional information, in particular regarding the competitive situation between occasional services and regular services (provided by express bus operators) in Norway. The complainant responded to this invitation by letter of 21 May 2001, received and registered by the Authority on 23 May 2001 (Doc. No. 01-3911-A).

No further comments were submitted by third parties within the time limits set in point 5.3.2.(1) of Chapter 5 of the Authority's State Aid Guidelines (8), i.e. 26 May 2001.

4. ADDITIONAL INFORMATION SUBMITTED BY THE NORWEGIAN GOVERNMENT IN RELATION TO THIRD PARTY COMMENTS

By letter of 30 October 2001 (Doc. No. 01-8453-D), the Authority transmitted third party submissions to the Norwegian Government. In addition, the Authority informed the Norwegian Government that it did not consider the compensation scheme for non-subsidised bus operators to be covered by Council Regulation (EEC) No 1191/69. Finally, and with respect to a possible justification under the Environmental Guidelines, the Authority stressed in particular that the compensation scheme would have to be limited in and, in principle, reduced over time, that the compensation awarded to bus operators must remain below costs due to the actual consumption of autodiesel on regular bus routes; and that the degree of compensation must furthermore be limited in order to provide an incentive for bus operators to reduce consumption of autodiesel. Against this background, the Norwegian Government was requested to supply additional information.

By letter from the Ministry of Transport and Communications dated 31 January 2002, received and registered by the Authority on 5 February 2002 (Doc. No. 02-1006-A), the Norwegian Government submitted its comments to the third party submissions. It also submitted its views on the Authority's assessment as regards the application of Council Regulation (EEC) No 1191/69 and submitted the information requested. Further comments were submitted by the Norwegian Government (cf. letter from the Ministry of Transport and Communications dated 4 April 2002, received and registered by the Authority on 9 April 2002 (Doc. No. 02-2573-A)).

5. THIRD PARTY COMMENTS SUBMITTED AFTER THE DEADLINE FOR COMMENTS HAD EXPIRED

After the deadline for comments from third parties had expired (i.e. 26 May 2001), the Authority also received further comments from the Norwegian Transport Association (cf. fax dated 7 February 2002, received and registered by the Authority on that same day (Doc. No. 02-1058-A) as well as a letter dated 9 April 2002, received and registered by the Authority on 11 April 2002 (Doc. No. 02-2557-A)) and from the complainant (cf. letter dated 8 May 2002, received and registered by the Authority on 15 May 2002 (Doc. No. 02-3635-A)).

(8) According to point 5.3.2. (1) of Chapter 5 of the Authority's State Aid Guidelines, interested parties may submit their comments to the opening decision within one month from the date of publication.
B. DESCRIPTION OF COMPENSATION SCHEME FOR EXPRESS BUSES

1. THE NORWEGIAN AUTODIESEL LEVY: ABOLITION OF THE EXEMPTION FOR BUS OPERATORS

The autodiesel levy ('autodieselavgift') was originally introduced as of 1 October 1993 (when it replaced the kilometre tax introduced in 1978) (9). The tax is levied on the consumption of autodiesel and the rate per litre is fixed annually by Decision of the Norwegian Parliament (10). Bus operators providing passenger transport were exempted from this levy, (as they were previously exempted from the kilometre tax). In the Parliamentary Bill on Green Taxes (St. prp. nr. 54 (1997-1998) 'Gronne Skatter'), the Norwegian Government considered the previous exemption for buses not to be justified on environmental grounds since it relieved buses of external costs arising from the use of roads, accidents and pollution and did not give these operators an economic incentive to reduce these costs. Consequently, the Norwegian Government proposed to abolish the exemption from the autodiesel levy for bus operators in order to give these undertakings an incentive to increase efficiency and to make environmentally oriented investment decisions.

As of 1 January 1999, all bus operators providing passenger transport (i.e. both regular (11) and occasional (12) transport services) were, in principle, subject to the autodiesel levy.

2. INTRODUCTION OF COMPENSATION SCHEMES

However, in order to avoid a weakening of the competitiveness of public transport (i.e. regular passenger transport), it was proposed to compensate certain categories of bus operators (so-called 'tilskuddsberettiget bussdrift' or 'subsidised' bus operators, i.e. bus operators eligible for direct State subsidies for the provision of regular passenger transport services (13)) for the costs resulting from the abolition of the exemption. For other categories of bus operators (so-called 'ikke-tilskuddsberettiget bussdrift' or 'non-subsidised' bus operators, i.e. bus operators providing regular passenger transport services, but not eligible for direct State subsidies in this respect (14)), the Parliamentary Bill on Green Taxes stated that no compensation should be granted since these bus operators were considered to be able to cover the increased costs either through an increase in ticket prices or through a reduction in profits. It was further maintained that the abolition of the tax exemption would give the bus companies an incentive to enhance efficiency and make their operations more environmentally friendly.

Following the Government's proposal, the Parliament decided in the autumn 1998 to introduce a compensation scheme for 'subsidised' bus operators. Although not initially foreseen under the Government's proposal regarding the green tax reform, a separate compensation scheme for so-called 'non-subsidised' bus operators was adopted by the Norwegian Parliament in its Decision on the revised State Budget for 1999 adopted in the spring 1999 (St. prp. nr. 67 (1998-1999)). This scheme is under the Ministry of Transport's responsibility (cf. St.prp.nr. 1 (1999-2000), chapter 1330, post 71 'Tilskudd til ekspressbusser').

(9) Regulation of 8 June 1993 on the autodiesel levy, 'Forskrift om avgift på mineralolje til framdrift av motorvogn og om merking av mineralolje'.
(10) More detailed information on the applicable rates since 1999 are provided in table 2 below.
(11) The term 'regular transport' is used in this decision in line with the definition given in Article 2(1) of Council Regulation (EC) No 12/98 of 11 December 1997, laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State.
(12) The term 'occasional transport' is used in this decision in line with the definition given in Article 2(3) of Council Regulation (EC) No 12/98 of 11 December 1997, laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State.
(13) For a more detailed description of this category of bus operators, see point C. of the present decision.
(14) For a more detailed description of this category of bus operators, see point C. of the present decision.
Therefore, with the introduction of compensation schemes for both ‘subsidised’ and ‘non-subsidised’ bus operators, bus operators providing regular passenger transport were, as of 1 January 1999, (partly) compensated for the costs resulting from the autodiesel levy. On the other hand, other bus operators, inter alia, those providing occasional transport services, had to bear the costs resulting from the autodiesel levy in full.

The rules governing the compensation for express bus operators were laid down in two letters dated 21 February 2000, which were communicated to the eligible bus operators (15).

The amount of compensation per company is calculated according to the distances operated under the ‘route plan’, applying a certain rate per kilometre. This rate is not fixed in advance but will be determined once the total distances of all licensees have been established (16). According to the Norwegian Government, the rates applicable for the years 1999 and 2000 were 1.37 and 1.41, respectively, and for 2001 and 2002 estimated to be 1.07 and 0.62 NOK per km, respectively.

In addition, compensation is granted for so-called ‘position driving’ (17) and ‘assistance driving’ (18). According to the Norwegian authorities, compensation in these cases was only granted where ‘position driving’ and ‘assistance driving’ exceeded 10 % of driving according to schedule. Furthermore, compensation is also granted for ‘approved deviations’ from the route schedule (19).

Domestic transport services provided in the course of international transport (‘cabotage services’) are also included in the compensation scheme. It is assumed that foreign operators providing such cabotage services are doing so in a pool with Norwegian operators. It is further assumed that the Norwegian operators act on behalf of the foreign operators when claiming compensation.

3. SCOPE OF THE PRESENT INVESTIGATION

In its decision of 18 December 2000, the Authority opened the formal investigation procedure against the ‘compensation scheme for express bus operators’ (20). In its comments to the opening decision, the Norwegian Government clarified that the recipients of the aid scheme under investigation were not identical to ‘express bus operators’. The term ‘express bus’ was used by the operators as a marketing term. According to the Norwegian Government, ‘express bus operators’ were in fact providing both ‘subsidised’ and ‘non-subsidised’ services. In light of these explanations, the Authority points out that the compensation scheme under investigation is that introduced for ‘non-subsidised’ bus operators providing regular passenger transport. The compensation scheme for ‘subsidised’ bus operators is not subject to the formal investigation procedure.

(15) A more detailed description of the provisions of the compensation scheme is given in the Authority's opening decision.

(16) This rate is apparently calculated by dividing the total amount earmarked for the purpose of the compensation scheme by the total kilometres for which applications for reimbursement have been submitted.

(17) ‘Position driving’ is necessary before and after driving according to schedule, e.g. driving to and from garage/depot.

(18) ‘Assistance driving’ is necessary so that all passengers attending a specified route should be served at any point in time according to schedules.

(19) ‘Approved deviations’ are meant to be those deviations as referred to by the Norwegian Government in its response to the Authority's request for additional information of 12 April 2001: ‘… larger deviations [from the defined route] have not occurred unless as part of public service obligations specified in the licence …’.

(20) This term was used by the Authority in its opening decision, based on the title of the scheme under investigation given in the Norwegian State Budget.
C. DESCRIPTION OF LEGAL FRAMEWORK CONDITIONS GOVERNING REGULAR PASSENGER TRANSPORT IN NORWAY

1. LEGAL FRAMEWORK CONDITIONS GOVERNING THE PROVISION OF REGULAR PASSENGER TRANSPORT SERVICES IN NORWAY

According to the Norwegian Government, all regular passenger transport services in Norway are governed by the Transport Act (Lov om samferdsel 1976 nr. 63) and the regulation on domestic passenger transport (Forskrift om persontransport i rute innenlands med motorvogn eller fartøy). All operators holding a licence in accordance with § 3 of the Transport Act are allowed to provide regular passenger transport services. On the other hand, all operators holding a licence are subject to the same conditions governing the provision of regular passenger transport, as laid down in the Transport Act and the regulation on domestic passenger transport. The provisions in the regulation on domestic passenger transport stipulate, inter alia, that the licensee has a right as well as an obligation to provide the transport service covered by the licence. The route schedule as well as the tariffs is to be approved by the competent authorities. In case an operator applies for a termination of the transport service in question (e.g. to abandon the transport services on a route or to change the conditions of the transport service), the competent authorities may require the operator to continue operations, while granting compensation for possible deficits on the route in question which cannot be financed through profits generated on other routes (cf. § 19 (2) of the regulation on domestic passenger transport).

2. DISTINCTION BETWEEN SO-CALLED ‘SUBSIDISED’ AND ‘NON-SUBSIDISED’ OPERATORS

The Norwegian Government stressed that the distinction between ‘subsidised’ and ‘non-subsidised’ operators was not based on the Transport Act or any other legal act governing the provision of regular passenger transport.

The Authority notes, however, that ‘subsidised’ and ‘non-subsidised’ operators are subject to different rules as regards the procedure proceeding the award of the right to offer regular passenger transport services on individual routes as well as the eligibility (or not) for direct State subsidies for the provision of such transport services.

It results from the information in the Authority's possession that so-called ‘subsidised’ operators are selected through a tender procedure to provide regular transport services. These services are compensated for under 'framework agreements' concluded with the county concerned. The conditions governing the tender procedures, the conclusion of such arrangements and the award of compensation are laid down in a Regulation on tender procedure for local transport services ('Forskrift om anbud i lokal rutetransport'). On the other hand, on routes where expectations about commercial transport possibilities are good, bus operators may apply for licences to run regular passenger transport services on the route in question. These applications are evaluated by the competent authorities, taking into consideration the need for transport and competition. Bus operators providing regular passenger transport services upon application are not entitled to receive direct State subsidies. Accordingly, they are called ‘non-subsidised’ bus operators.

D. THE AUTHORITY’S DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE, COMMENTS FROM NORWAY AND THIRD PARTY COMMENTS SUBMITTED IN THE COURSE OF THE PROCEEDINGS

In December 2000, the Authority decided to open the formal investigation procedure against the compensation scheme for express bus operators (\(^{(23)}\)). In this decision, the Authority expressed doubts as to the compatibility of the compensation scheme with the functioning of the EEA Agreement. In the Authority’s view, the compensation scheme for express bus operators, introduced in 1999, constituted ‘new aid’. Given that the scheme had not been notified to the Authority in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, the compensation scheme had to be regarded as ‘unlawful on procedural grounds’ pursuant to Chapter 6 of the Authority's State Aid Guidelines. Furthermore, the Authority expressed doubts concerning the compatibility of the compensation scheme, in particular, with Article 61(3)(c) of the EEA Agreement, in combination with the Environmental Guidelines.

\(^{(21)}\) The Norwegian Government referred in its submissions to 'supplementary instructions'.

\(^{(22)}\) A more detailed description of the conditions governing regular passenger transport services in Norway is given below.

\(^{(23)}\) See footnote 5.
1. STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

(a) The Authority's views as expressed in the opening decision

Based on the information obtained in the preliminary investigation procedure, the Authority could not exclude that the compensation scheme reinforced the competitive position of companies that operate passenger transport services both inside and outside Norway and was, therefore, liable to distort competition and affect trade between the Contracting Parties.

The Authority's preliminary conclusion was based on the following circumstances:

Undertakings benefiting from the compensation scheme may provide both regular and occasional services. According to the Authority, it could, therefore, not be excluded that payments made under the compensation scheme were used to provide occasional transport services (a service which is fully liberalised).

Even in cases where bus operators exclusively provided regular services, distortive effects on competition could not be excluded since, 'non-subsidised' bus operators were — if only to a certain extent — in competition with occasional bus services.

With respect to international regular transport services, the Authority was not convinced that foreign operators would receive compensation on a non-discriminatory and transparent basis. Finally, the Authority pointed out that even if the scheme were to be applied without discrimination as regards foreign operators providing transport services in Norway, effects on trade could not be excluded since Norwegian bus operators benefiting from the compensation payments may compete outside Norway for both occasional and regular transport services.

(b) Comments from the Norwegian Government to the opening decision

In its comments to the opening decision (cf. letter dated 31 January 2001), the Norwegian Government took the view that the compensation scheme did not constitute aid within the meaning of Article 61(1) of the EEA Agreement. The compensation granted for regular services could not affect the competitive situation of occasional services given that the markets for regular and occasional services were two different markets with a very limited interface. In addition, the Norwegian Government claimed that trade was not affected by the compensation scheme, given that compensation was granted to all (domestic and foreign operators) providing regular cabotage services within Norway. Furthermore, the compensation was calculated only in relation to the kilometres driven within Norway.

(c) Additional information submitted by the Norwegian Government

Information provided by the Norwegian Government showed that out of the total number of 100 operators that provided regular bus services in Norway and that received compensation for the autodiesel levy under the compensation scheme at issue, 49 were also engaged in occasional services, i.e. 49 %. The Norwegian Government also submitted figures which showed that, within the Norwegian bus and coach industry, non-scheduled services (24) constitute normally less than 15 % of total operating costs of the companies concerned.

As regards the competitive situation between regular and occasional services, the Norwegian Government explained (cf. letter dated 15 June 2001) that these services constituted two separate markets given the different legislative obligations which govern both transport activities (licence requirement for regular but not for occasional services; additional obligations regarding timetables, frequency and route schedules for regular but not for occasional services) and the nature of the activity which was claimed to be different from the customer's point of view.

(24) This term is used by the Norwegian Government. The Authority understands the term as referring to transport services other than 'regular transport services' within the meaning of Article 2(1) of Council Regulation (EC) No 12/98; see footnote 2.
According to the Norwegian authorities, a regular service may only be a good alternative to an occasional service for a group of passengers if attractions, hotels, etc. are situated along the specified route. The Norwegian Government also stated that a customer might, under certain circumstances, find that in certain situations there is an economically meaningful choice between travelling by hiring an occasional service or travelling by scheduled service. Normally, this situation would, according to the Norwegian Government, not occur frequently, and the providers of regular bus services have, to a very limited extent, served the customer groups usually served by providers of occasional services.

It was further stated that the Norwegian Transport Act provided for the possibility of regular bus services to pick up groups of passengers within a reasonable distance from their scheduled stops. To the Norwegian authorities' knowledge, larger deviations had not occurred, unless as part of public service obligations specified in the licence. Such obligations may include transport services to special excursion spots.

In addition and as regards the statement in the opening decision that regular bus operators were allowed to reschedule their destinations in wintertime, so as to provide transport service to tourist sites, the Norwegian Government explained that applications for the rescheduling of 'non-subsidised' bus services had to be evaluated by the Ministry of Transport and Communications, considering the need and the impacts on competition of rescheduling. Furthermore, according to the Norwegian Government, operators were, in principle, not allowed to reschedule their transport route if a group of people so requires (however, it would seem that such re-scheduling could be possible, provided that it will not interrupt the transport services according to schedule, i.e. respecting timetables and stopping points).

As regards foreign carriers benefiting from the compensation scheme, the Norwegian Government informed the Authority that, for the time being, there is only one operator, the Swedish company Swebus AB, which provides international regular cabotage transport services in Norway; this company operates in a pool with the Norwegian operator, AS Østfold Bilruter.

As regards Norwegian operators engaged in transport activities abroad, the Norwegian Government informed the Authority that, for the time being, 330 Community licences have issued. Information about licences for regular transport services would need to be obtained from the respective countries.

(d) Comments from the Norwegian Transport Association to the opening decision

The Norwegian Transport Association, while acknowledging that scheduled services were in competition with occasional services, claimed that such competition would be an integral part of the Norwegian and European transport policy. The Norwegian Transport Association claimed that changes in schedules (due to variations in demand over the year) as well as the possibility of picking up groups within a reasonable distance from their scheduled stops would be inherent to such services and covered by Council Regulation (EEC) No 684/92 as amended by Council Regulation (EC) No 11/98. As regards international scheduled services, the Norwegian Transport Association stated that foreign operators would be treated in the same way as domestic operators. As regards the applicability of Article 61(1) of the EEA Agreement to the compensation scheme at issue, the Norwegian Transport Association argues, in its letter dated 9 April 2002, that the regular bus transport services benefiting from the compensation scheme at issue were confined within Norway; competition rules would therefore not be applicable to the compensation scheme at issue.

(25) This term is used by the Norwegian Government. The Authority understands the term as referring to 'regular transport services' within the meaning of Article 2(1) of Council Regulation (EC) No 12/98; see footnote 2.

(26) The Norwegian Government has, however, not indicated which number of such licences was held by bus operators subject to the present investigation.

(27) This term is used by the Norwegian Transport Association. The Authority understands the term as referring to 'regular transport services' within the meaning of Article 2(1) of Council Regulation (EC) No 12/98; see footnote 2.

(28) This term is used by the Norwegian Transport Association. The Authority understands the term as referring to 'international regular transport services' within the meaning of Article 3(3) of Council Regulation (EC) No 12/98; see footnote 2.
(e) **Comments from the complainant**

According to the complainant, 'non-subsidised' bus operators are in competition with tourist coaches. In this respect, the complainant refers to certain routes served by both 'non-subsidised' bus operators and tourist coach operators and where both operators compete for the same group of customers (e.g. express bus routes to Oslo airport, where operators providing regular services are in competition with tourist coaches).

In addition, the complainant claims that scheduled buses are allowed — contrary to what the Norwegian Government has maintained — to reschedule their routes and drive groups of people to tourist areas, typical tourist bus operations (in this respect, the complainant refers to the Valdresbusses serving the route Oslo-Beitostølen, 'a typical tourist area'; other examples mentioned by the complainant concern the routes Oslo-Trysil, Oslo-Hemsedal and Oslo-Geilo). Such deviations from the route schedule would result in an overlapping of services.

Furthermore, 'non-subsidised' bus operators would receive compensation for 'assistance driving' and 'position driving'. Both activities would be used by these bus operators to provide transport services in competition with the complainant (in this respect, the complainant refers in particular to the route Valdres-Oslo; on the return journey/position driving, bus operators would provide tourist services for groups of passengers).

Finally, the complainant emphasised that 'non-subsidised' bus operators receive compensation for the provision of regular passenger transport on routes on which the licensed bus operators, at the same time, offer the transport of goods.

(f) **Comments from the Norwegian Government to third party comments**

The complainants allegations, in particular as regards routes served by both regular bus operators and occasional bus operators and the possibility for regular bus operators to reschedule routes in order to allow those operators to drive groups to tourist areas were not contested by the Norwegian Government (cf. Norwegian Government’s letter dated 31 January 2002). Reference was however made to the control mechanisms established under the compensation scheme which would ensure that compensation payments could not be misused, i.e. benefiting an operator’s tourism activity and that compensation would only be granted for distances according to the specified routes and timetables. As regards the transport of goods, the Norwegian Government informed the Authority that, according to information from the Norwegian Association of Transport Enterprises, the figures regarding the share of turnover generated by the transport of goods compared to the turnover generated by regular transport was ‘probably less than 1 %’.

As regards the effects of the compensation scheme concerning assistance driving, position driving and approved deviations from the route schedules as laid down in the licence, the Norwegian Government stated that, for the year 1999, the assistance and position driving compensated for amounted to less than 4 % of driving according to schedule. Based on these figures, the Norwegian Government took the view that the inclusion of position driving and assistance driving had insignificant effects on competition. The Norwegian Government confirmed that approved deviations (29) were also compensated for.

(29) ‘Approved deviations’ are meant to be those deviations as referred to by the Norwegian Government in its response to the Authority’s request for additional information of 12 April 2001: ‘… larger deviations [from the defined route] have not occurred unless as part of public service obligations specified in the licence. Such obligations may be to serve … special excursion spots …’. 
2. NOTIFICATION REQUIREMENT AND STANDSTILL OBLIGATION

(a) Authority's views as expressed in the opening decision

In the opening decision, the Authority took the view that the compensation scheme in question constituted 'new aid'. In the Authority's view, the compensation scheme could not be regarded as 'existing aid' within the meaning of point 7.2 (1) first bullet point of Chapter 7 of the Authority's State Aid Guidelines, since the compensation payment was not based on a legal act which was in operation at the time of the entry into force of the EEA Agreement (after the exemption from the autodiesel levy for bus operators was abolished as of 1 January 1999, the compensation scheme for so-called 'non-subsidised' bus operators was introduced). Furthermore, the compensation was determined according to specific rules, part of which were communicated to the bus operators concerned in two letters dated 21 February 2000. These rules constituted a new legal framework for the provision of aid to certain regular bus operators. Therefore, the compensation could not be considered to be a continuation of a tax concession which was laid down in a different legal act.

(b) Comments from the Norwegian Government to the opening decision

In its comments to the opening of the formal investigation procedure, the Norwegian Government argued that it was irrelevant that the compensation scheme constituted a new legal framework. Decisive in determining whether a measure constitutes 'new aid' or 'existing aid' was whether additional money was granted and new beneficiaries included. In this respect, the Norwegian Government claimed that the compensation scheme was less extensive (both in money terms and in terms of eligible companies) than the previous tax exemption: according to the Norwegian Government, when determining the compensation amount for 1999 a 6% reduction in fuel consumption was assumed; furthermore, the scope of the compensation scheme was limited to regular transport undertakings whereas the previous tax exemption covered all bus operators, including those offering occasional services.

3. COMPATIBILITY ASSESSMENT UNDER COUNCIL REGULATION (EEC) No 1191/69

(a) Authority's views as expressed in the opening decision

Even though not invoked by the Norwegian Government in the course of the preliminary investigation, the Authority assessed whether Regulation No 1191/69 could be applicable. Based on the information at its disposal, the Authority came to the preliminary conclusion that ‘… the compensation for “non-subsidised” bus operators would not seem to fall within the scope of Regulation No. 1191/69, since the eligible operators do not seem to be subject to public service obligations within the meaning of Article 2 of that Regulation.’ Furthermore, the Authority expressed the view that ‘... on the basis of the rules regarding compensation payments, as laid down in the two letters of 21 February 2000, it was apparent that the compensation awarded to the bus operators in question had not been determined in accordance with the procedure laid down in Regulation No. 1191/69 (in particular Art. 9 et seq.). …’

(b) Comments from the Norwegian Government to the opening decision

In its comments to the opening of the formal investigation procedure, the Norwegian Government claimed that the compensation scheme would fall under Council Regulation (EEC) No 1191/69.

According to the Norwegian Government, all regular passenger transport services in Norway fell within the scope of Council Regulation (EEC) No 1191/69. The Norwegian Government maintained that both 'subsidised' and 'non-subsidised' bus operators are subject to the same legal framework conditions. There was no distinction between these two groups under the Norwegian Transport Act. Consequently, the Norwegian Government did not see a justification to assess both types of operations differently. Assuming that the Authority found the compensation for so-called 'subsidised' bus operators in compliance with the EEA Agreement, the Norwegian Government claimed that the compensation granted to so-called 'non-subsidised' operators should also be regarded as compatible with the EEA Agreement.
The Norwegian Government stressed that the distinction between both categories of operators depending on estimates as to which routes were commercially viable, was drawn prior to the removal of the tax exemption. After the abolition of the tax exemption, the commercial situation of so-called 'non-subsidised' bus operators had changed. According to the Norwegian authorities, it was clear that the 'non-subsidised' bus operators would not necessarily assume the public service obligations they undertook prior to 1 January 1999 to the same extent or under the same conditions as they did if it had not been for the exemption from the autodiesel levy.

According to the Norwegian Government, the Transport Act (Lov om samferdsel 1976 nr. 63) and the regulation on domestic passenger transport (Forskrift om persontransport i rute innenlands med motorvogn eller fartøy) stipulate a number of conditions governing the provision of regular passenger transport services which entailed public service obligations (30):

— The operator has an unconditional obligation to carry, except in cases of force majeure (§ 7);

— The operator shall engage a sufficient number of buses to cover ordinary demand and if possible also extraordinary demand that is foreseen (§ 8);

— The route schedules must be approved by the competent authority; all information regarding schedules, starting points, intermediate stops and destination must be properly advertised (§ 10);

— Fares and discounts must be approved by the competent authority (§ 11);

— The operator must use tickets, ticketing machines and other equipment which is approved by the competent authority (§ 12);

— The competent authority has the right to decide the use of terminals, stopping points and the exact roads to be used for the routes (§ 13);

— The competent authority may decide that passengers have the right to reserve seats in advance (§ 15);

— The operator must equip bus stops with information boards.

In addition, it is claimed that many routes running parallel to railroad services are denied rights to take up passengers near the railway services, which would constitute a public service obligation on the operators concerned.

According to the Norwegian authorities it is obvious that the obligations contained in the Transport Act and regulation on domestic passenger transport increase costs above what would be incurred if the services had been run on a strictly commercial basis and that, in particular the restrictions in order to protect the railway services, reduced revenues.

As regards the Authority's concern that the compensation scheme for express bus was not in line with the requirements laid down in Article 10 to 13 of Council Regulation (EEC) No 1191/69, since the compensation was not calculated in accordance with the criteria set out therein, the Norwegian authorities claimed that these discrepancies would not affect the compatibility of the compensation scheme with the Regulation, since the amount of compensation awarded would still be within the range permissible under the Regulation.

The Norwegian Government also refers to compensation schemes employed in other EU Member States, which had not been the cause of objections from the European Commission (in this context, reference is made in particular to an exemption from the diesel fuel tax in Denmark for scheduled bus services). It claimed that Council Regulation (EEC) No 1191/69 has not been interpreted by the Commission in a very strict manner and concluded that according to this lenient Commission approach all costs related to public service obligations were reimbursable.

(30) References are made to the relevant provisions in the regulation on domestic passenger transport.
(c) **Additional comments from the Norwegian Government**

In response to the Authority's letter of 30 October 2001, in which the Authority explained its doubts as regards the application of Council Regulation (EEC) No 1191/69, the Norwegian Government reiterated its view that the conditions contained in the Transport Act and the regulation on domestic passenger transport constitute public service obligations imposed on the bus operators in question. In response to the Authority's argument that these conditions could not be regarded as necessarily being imposed upon the bus operator concerned, given that the operator had applied for a licence to run a particular service on a certain route, the Norwegian Government stated that operators could not unilaterally change standards of continuity, regularity and capacity as laid down in the licences in order to adapt to changed financial circumstances (here the abolition of the exemption from the autodiesel levy). Applications for changes in fares, schedules and routes were not always approved. Insofar as the applications to change certain conditions was not granted, this would have to be considered as a public service obligation imposed on the operator concerned. The Norwegian Government also stated that it was likely that after the abolition of the previous exemption from the autodiesel levy some of the regular passenger services would no longer be profitable. The result would probably be that some operators would withdraw their services. Other operators would be forced to increase fares and/or reduce frequency to stay profitable. According to the Norwegian Government, neither a withdrawal of lines nor major increases in fares as a consequence of the abolition of the exemption from the autodiesel levy could be accepted by the Norwegian authorities.

The Norwegian Government stated that, according to the Transport Association, about 25 lines would possibly be shut down in the absence of the compensation scheme and for the remaining lines price increases of around 15% could be expected. Asked by the Authority to provide verifiable information in this respect, the Norwegian Government stated that considering the marginal profits of some of the operators, the Norwegian Government found no reason to doubt that withdrawal of some lines and/or increases in fares would be a likely outcome of the abolishment of the compensation scheme. Exactly which services would be withdrawn or on which routes tariffs would be increased if the compensation scheme were to be abolished would only become evident once the scheme was actually abolished.

Furthermore, and as regards the costs resulting from these obligations, reference is made to the comments submitted by the Transport Association (and in particular Annex II to the submission). This Annex contained estimates of the financial consequences of the public service obligations. According to the Norwegian Government the compensation scheme does not leave room for overcompensation. Generally, the compensation was kept at a level well below the actual costs of the autodiesel levy. As regards the exact costs of the public service obligation, the Norwegian Government acknowledged, however, that there was no concrete verifiable information.

(d) **Comments from the Norwegian Transport Association**

According to the Norwegian Transport Association, all domestic scheduled bus services, whether called ‘non-subsidised’ or ‘subsidised’ operators were equally subject to public service obligations as laid down in the Transport Act and regulation on domestic passenger transport, and should therefore be equally eligible for compensation.

There would be nothing in Council Regulation (EEC) No 1191/69 that would indicate that remunerative and non-remunerative services should be treated differently as regards public service obligations and compensation.

According to the Norwegian Transport Association, the question of legality of tax relief as a practical form of compensation for public service obligations has never been raised by an EC Member State or the European Commission itself. On the contrary, tax relief in various forms is a common way of compensating public transport throughout the EU. According to the Norwegian Transport Association, Council Regulation (EEC) No 1191/69 does not only apply to direct compensation payments but also to indirect forms of aid, such as VAT exemptions, mineral oil exemption, etc. It stresses that practical and administrative considerations have led to the choice of the aid in question in addition to a more complicated system of direct compensation through operational subsidies. The indirect form of aid through compensation for the mineral oil levy was regarded as being in line with Article 3(1) of Council Regulation (EEC) No 1191/69 which states that the competent authority shall select the way least costly to the community.
The Norwegian Transport Association concedes that, formally, the Norwegian fuel tax restitution regime
was not tied directly to the actual costs resulting from the public service obligations imposed. However, as
long as no over-compensation exists and the necessary steps are taken to avoid this, compliance with Arti-
cles 10 to 13 of Council Regulation (EEC) No 1191/69 would be of a purely theoretical nature.

The Norwegian Transport Association provided a list of obligations contained in the relevant legal docu-
ments as well as several licences that contain restrictions on the operation on certain parts of the route for
which a licence was granted. According to the Norwegian Transport Association, the various obligations
increase costs above what would be incurred had the services been run on a strictly commercial basis and
reduce revenues due to restrictions on the serving of the market along parts of the routes in order to
protect the railways. According to the Norwegian Transport Association, the Authority’s doubts that the
Norwegian authorities have not shown to what extent the operators in question assume additional obliga-
tions and costs compared to the level of services provided for purely commercial reasons, would be purely
theoretical. The operators in question were never able to provide regular transport services without public
service obligations. As regards the Authority’s doubts concerning the qualification of the restriction to
serve routes along railway lines as being a public service obligation, the Norwegian Transport Association
claims that it would follow from Council Regulation (EEC) No 1191/69 that the imposition of reduced
revenues constituted a public service obligation. In this respect, it is maintained that compensation for
such obligations was commonly used in Europe in the calculations of public service obligations.

The Norwegian Transport Association presented estimates regarding the financial consequences of public
service obligations for scheduled bus services in Norway (subject to the compensation scheme administered
by the Ministry of Transport). In its view, the negative value of the various obligations would be higher
than the amount of fuel restitution. Even if there was an element of overcompensation, such advantages
for public service transport were inherent to the EEA wide public transport policy.

Based on the calculations and considerations set out in the Annex II to the submission of the Norwegian
Transport Association, financial consequences due to public service obligations can be summarised as
follows (31):

Table 1

<table>
<thead>
<tr>
<th>Conditions/Obligations</th>
<th>Estimated extra costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>— Unconditional obligation to carry</td>
<td>n.a.</td>
</tr>
<tr>
<td>— Engagement in sufficient number of buses</td>
<td>n.a.</td>
</tr>
<tr>
<td>— Equipment of bus stops with information boards and other items</td>
<td>n.a.</td>
</tr>
<tr>
<td>— Obligation to give financial and statistical information</td>
<td>n.a.</td>
</tr>
<tr>
<td>— Advertising in the ‘Rutebok for Norge’</td>
<td>NOK 0.1 million (1)</td>
</tr>
<tr>
<td>— Special fares and discounts</td>
<td>NOK 30 million p.a.</td>
</tr>
<tr>
<td>— Obligation to use specific terminals</td>
<td>NOK 13 million p.a. (2)</td>
</tr>
</tbody>
</table>

(31) It should be noted that the Norwegian Transport Association provided estimates for extra costs only for certain obli-
gations and only for certain companies; where information was lacking, the Authority noted ‘n.a.’.
### Conditions/Obligations Estimated extra costs

<table>
<thead>
<tr>
<th>Conditions/Obligations</th>
<th>Estimated extra costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>— Excess costs due to the use of compulsory routes in certain areas</td>
<td>NOK 0,5 million p.a. (1)</td>
</tr>
<tr>
<td>— Reduced operating efficiency due to imposed time schedules, limitations in number of departures and periods of operation, mainly to protect railways</td>
<td>No general estimates were given; the Norwegian Transport Association referred to one example where an operator was not allowed to offer daytime bus services (for this specific case a cost estimate was given of NOK 0,5 million p.a.)</td>
</tr>
<tr>
<td>— Loss of revenues due to restrictions on the serving of the market, most often to protect railway lines from competition on similar routes</td>
<td>The Norwegian Transport Association stated that it was not possible to make realistic calculations of the financial consequences; it was however stated that the loss in revenues would be higher than the calculation of excess costs mentioned above.</td>
</tr>
</tbody>
</table>

(1) Referring to advertising the route schedule of the NOR-WAY express bus scheme.

(2) Reference was made to the obligatory use of specific terminals in Oslo, Trondheim, Kristiansand, Arendal, Stavanger, Haugesund, Bergen, Elverum, Fagernes and Otta; estimates were, however, provided only for user fees at terminals in Oslo and partly in Trondheim.

(3) Estimates were given only for the south and westbound long distance buses from Oslo. The estimates for extra costs were only provided with respect to these routes. It was, however, indicated that similar costs would occur also in other areas, especially in major urban areas. In this respect, reference was also made to loss in revenues arising from prohibitions for serving town centres, without however giving estimates in this respect.

In addition to these estimates, the Norwegian Transport Association provided examples of certain express bus operators and the conditions under which certain routes were operated.

The Norwegian Transport Association stressed the importance of Norwegian express bus lines for the remote and sparsely populated districts of Norway where no alternative public transport is available.

Finally, the Norwegian Transport Association maintained that a decision from the Authority declaring the compensation scheme for one group of licensed bus operators as incompatible with the EEA Agreement would seem to be in breach of Article 61 and possibly Article 59 of the EEA Agreement as well as Article 9 of Council Regulation (EEC) No 1017/68 on rules of competition in transport (32). Furthermore, the Norwegian Transport Association draws the Authority’s attention to the fact that according to the amended proposal for a new Regulation on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (33), the rules of calculation of public service obligations under Article 1 in Annex I shall not apply to exceptions from some or all of the financial effect of an excise duty on fuels. In this way, the European Commission would intend to lift the fuel tax question completely out of the rules governing compensation for public service obligations. The Norwegian Transport Association considers this an important element which should be taken into account in the current investigation.

(e) **Comments from the complainant**

According to the complainant, the ‘non-subsidised’ bus operators are not subject to public service obligations. In particular, on routes which are also served by the railway, it would be the railway services which would provide transport services in the public interest. There was no additional need for express busses along these routes.


4. COMPATIBILITY OF THE COMPENSATION SCHEME UNDER THE ENVIRONMENTAL GUIDELINES

(a) Authority's views as expressed in the opening decision

In the opening decision, the Authority took the view that the Norwegian authorities had not demonstrated that the compensation scheme complied with the conditions of the Environmental Guidelines as regards level of compensation, the temporary and degressive nature of the aid, as well as the necessity of the aid to offset losses in competitiveness.

(1) Possible over-compensation

In the opening decision, the Authority acknowledged that ‘a decrease in compensation as compared to the relief previously granted under the exemption from the autodiesel levy might indicate that compensation remains below costs resulting from the autodiesel levy.’ However, the Authority took the view that it could not be ruled out that operators who received payments under the scheme could benefit from compensation exceeding their actual costs resulting from the autodiesel levy.

(2) Incentive effect: temporary and degressive nature of the compensation scheme

As regards the temporary nature of the compensation scheme, the Authority observed in the opening decision that the compensation scheme did not contain any limitation in time. As regards the incentive effects of the compensation scheme, the Authority had expressed the concern that, ‘… there is no clear signal as to the future reduction of State support which would oblige bus operators to reduce their fuel consumption.’

The Authority also observed that the Norwegian authorities did not submit ‘… information which would have enabled the Authority to ascertain that compensation awarded under the scheme decreased continuously since its introduction and compared to the situation before the abolition of the tax exemption in 1999.’

Finally, the Authority expressed the concern that, ‘… without information on the level of compensation granted under the scheme, it is difficult to ascertain whether and to what extent the scheme has a sufficient incentive effect.’

(3) Necessity to offset losses of competitiveness

As regards the compensation scheme for the so-called ‘non-subsidised’ bus operators as opposed to so-called ‘subsidised’ bus operators, both providing regular transport services, the Authority observed in the opening decision that the initial Government’s proposal on Green Taxes stated that no compensation would be necessary since these ‘non-subsidised’ bus operators were considered to be able to cover the increased costs either through an increase in ticket prices or through a reduction in profits. Therefore, the Authority had strong doubts as to whether the compensation scheme was necessary.

(b) Comments from the Norwegian Government

(1) Possible overcompensation

The Norwegian Government argued that the compensation scheme was limited to the extra costs due to the introduction of the autodiesel levy. Furthermore, the Norwegian authorities informed the Authority that the amount of compensation was calculated based on the consumption of the most energy efficient vehicles. Overcompensation could only occur if an express bus operator would use less than 0.31 litres per km. Any amounts allocated under the scheme which would exceed the amount necessary to compensate for the consumption based on the most efficient vehicles would not be paid out. In addition, the Norwegian Government pointed out that bus operators had expenses which were not completely compensated for, such as assistance and position driving.
As regards the level of compensation granted under the compensation scheme at issue, the Norwegian authorities submitted the following figures:

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Amounts allocated under Chapter 1330, post 71 (NOK)</td>
<td>n.a.</td>
<td>71 million</td>
<td>75.4 million</td>
<td>50 million</td>
</tr>
<tr>
<td>B</td>
<td>Amounts actually spent (NOK)</td>
<td>n.a.</td>
<td>64 million</td>
<td>66 million (estimate)</td>
<td>50 million (estimate)</td>
</tr>
<tr>
<td>C</td>
<td>Revenues from auto diesel levy only related to regular passenger transport services provided by non-subsidised bus operators (NOK) (VAT inclusive)</td>
<td>n.a.</td>
<td>More than 64 million</td>
<td>More than 66 million</td>
<td>More than 53 million</td>
</tr>
<tr>
<td>D=B/C</td>
<td>Compensation spent expressed as percentage of revenue from auto-diesel levy</td>
<td>n.a.</td>
<td>Less than 100 %</td>
<td>Less than 100 %</td>
<td>Less than 100 %</td>
</tr>
<tr>
<td>E</td>
<td>Autodiesel consumption (litres per km) (1)</td>
<td>0.315 (estimate)</td>
<td>0.315 (estimate)</td>
<td>0.315 (estimate)</td>
<td>0.315 (estimate)</td>
</tr>
<tr>
<td>F</td>
<td>Autodiesel levy (NOK per litre) exclusive VAT</td>
<td>3.43</td>
<td>3.54</td>
<td>3.74 (as from 1 July: 3.54)</td>
<td>3.04 (as from 1 July: 2.72)</td>
</tr>
<tr>
<td></td>
<td>Autodiesel levy (NOK per litre) VAT incl.</td>
<td>4.22</td>
<td>4.35</td>
<td>4.6 (as from 1 July: 4.35)</td>
<td>3.77 (as from 1 July: 3.37)</td>
</tr>
<tr>
<td>G</td>
<td>Compensation (NOK per km)</td>
<td>n.a.</td>
<td>1.37</td>
<td>1.41</td>
<td>1.07 (estimate)</td>
</tr>
</tbody>
</table>

(1) According to the Norwegian Government, these figures represent consumption of the most efficient vehicles.

(2) Necessity to offset losses of competitiveness

The Norwegian Government claimed that the compensation scheme was necessary to maintain the competitiveness of the bus operators providing regular passenger transport services. According to the Norwegian authorities, experience from recent years made it evident that public transport on a scale sufficient to compete effectively with the private car could not be upheld without substantial contributions from public funds. It was considered important not to weaken the competitiveness of public transport in relation to private cars.
The Norwegian Government claimed that, contrary to what had been stated in the initial proposal (34), profitability of these operators was not sufficient to absorb increased costs. Referring to the Norwegian Parliament’s decision, it was expected that the abolition of the previous exemption from the autodiesel levy would change the commercial viability of many regular routes, with the consequence that so-called ‘non-subsidised’ routes formerly operating with small profit margins would have to be closed down. As for the other routes, ticket prices would have to be raised, with the danger of customers switching to private transport. It was also stressed that an increase in ticket prices was not regarded as acceptable from the point of view of providing public transport at affordable prices.

In this respect, the Norwegian Government referred to a report on an evaluation of the competitive situation of express busses (35). With respect to four selected routes (i.e. Haukeliekspresen, More-ekspressen, Nordfjordekspressen and TIMEekspressen), the Norwegian Government stated from that report that the percentage of travellers who alternatively would use a private car as driver or passenger would be on average around 47%.

The Norwegian Government claimed that the costs related to the use of the private car did not, at present, reflect the external costs caused by this means of transport.

As regards the cost increases due to the abolition of the tax exemption, the Norwegian Government submitted information allowing a comparison between costs under the old legal framework, i.e. with the exemption from the autodiesel levy in 1998 and the costs under the new legal framework, i.e. after the exemption had been abolished as from 1 January 1999. According to the Norwegian authorities, the average price of autodiesel from retail dealers was NOK 4.38 (VAT incl.) per litre in 1998, while the average price was NOK 8.27 (VAT incl. and including the autodiesel levy) in 1999. The cost per km was NOK 1.38 in 1998 and NOK 2.61 in 1999 respectively (the cost per km was calculated based on the assumed consumption of 0.315 litre per km).

(c) **Comments from the complainant**

The complainant claimed that the compensation scheme would result in operators being compensated for 0.45 litres per km, which was allegedly exceeding the real consumption.

(d) **Comments from the Norwegian Transport Association**

According to information from the Norwegian Association of Transport Enterprises, to which the Norwegian Government referred, overall costs per km could be estimated as amounting to NOK 12 (VAT incl. and including autodiesel levy). This would imply that fuel costs in 1998 (VAT incl. but without autodiesel levy) could be estimated to be about 12% of overall costs, while fuel costs in 1999 (VAT incl. and including the autodiesel levy) could be estimated to be about 20% of overall costs.

(e) **Comments regarding the level playing field within the EEA**

The Norwegian Government and the Norwegian Transport Association claimed that the compensation scheme in Norway would be similar to derogations from the mineral oil duty in favour of local public passenger transport within the European Union. These derogations were covered by the EC Mineral Oil Directive (36) and the recent European Council decision of 12 March 2001 (37). In addition, the Norwegian Government claimed that the special topography of Norway, as well as the fact that the country’s population lives very scattered around the country compared to other European countries, would require special arrangements within the public transport sector. In remote areas of the country, it would be difficult to maintain public transport on a commercial basis.

(34) Cf. Norwegian Government’s proposal for the State Budget 1999 (St.prp. nr.1 (1998-1999), which follows up on the proposals made in the Parliamentary Bill on Green Taxes (St.prp. nr. 54 (1997-98)).


(37) EC Council Decision of 12 March 2001 concerning reduced rates of excise duty and exemptions from such duty on certain mineral oils when used for specific purposes (OJ L 84, 23.3.2001, p. 23).
The complainant claimed, in his letter dated 8 May 2002, that the compensation scheme in Norway could not be regarded as an acceptable exemption covered by Council Directive 92/81/EEC (38). In this respect, he claims that the compensation is not dependent upon the amount of fuel actually used, but instead on the route kilometres; this would not take into account that the amount of fuel used varied considerably based on speed, time of the year, road quality, etc. The complainant also points out that, according to the Directive, exemptions may only be authorised if they do not give rise to distortions of competition.

II. APPRECIATION

A. STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

Article 61(1) of the EEA Agreement stipulates: ‘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, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of the Agreement.’

Support measures under the compensation scheme are financed through the State budget (cf. State Budget, Chapter 1330, post 71: Subsidies for express busses, 'Tilskudd til ekspressbusser'). It follows from established case law that measures which mitigate the charges that are normally included in the budget of an undertaking, constitute State aid (39). Bus operators eligible under the compensation scheme receive a financial contribution which reduces their normal business expenses (i.e. costs due to the autodiesel levy), thus giving them an advantage over their competitors.

In the Authority's view, this assessment is not altered by the findings of the European Court of Justice in the 'Ferring' judgment (40). In that judgment, the Court held that tax measures which have the effect of exempting certain operators from the tax in question, and which compensate for the additional costs actually incurred by these operators in discharging their public service obligations, might be regarded as a service these operators provide and hence not State aid within the meaning of Article 92 of the EC Treaty (now Article 87 EC). The Court also stated that, provided there is the necessary equivalence between the exemption and the additional costs incurred, the operators in question would not be enjoying any real advantage for the purposes of Article 92(1) of the EC Treaty (now Article 87 EC) because the only effect of the tax measure in question was to put operators active in the same market on an equal competitive footing.

Given the sector specific rules in the transport sector (in particular, Article 49 of the EEA Agreement and Council Regulation (EEC) No 1191/69), it is not obvious that the conclusions of this judgment may be applied to the transport sector. The question of qualification of public support for regular passenger transport as State aid is currently pending before the European Court of Justice (41).

Furthermore, and as will be explained in more detail below, the Norwegian Government has not, in the Authority's view, shown whether and to what extent the bus operators benefiting from the compensation scheme are subject to public service obligations which would result in a possible competitive disadvantage compared to other (commercial) bus operators. In addition, the Authority was not satisfied that the compensation granted to express bus operators would be limited to the additional costs incurred due to the alleged public service obligations. In fact, the compensation scheme as such provides for no explicit link between possible public service obligations and the compensation. Consequently, the Authority cannot rule out that financial support granted under the compensation scheme might confer on the eligible operators a real economic advantage subject to the EEA State aid rules.

The aid scheme is also specific inasmuch as it favours only undertakings in the transport sector.

For a measure to be caught by Article 61(1) of the EEA Agreement, it must also distort competition and affect trade between the EEA States. When State financial aid strengthens the position of an undertaking compared to other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid (42). According to recent case law by the European Court of Justice, ‘… in matters relating to State aid, it is sufficient that the market concerned be open, even partly, to competition for aid to be capable of affecting trade between Member States’ (43).

As regards the possible distortive effects of the State support granted under the compensation scheme, the Authority recalls the legal provisions applicable to passenger transport. Access to the international market for the carriage of persons has been opened up through Council Regulation (EEC) No 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (44). Cabotage rights were introduced by Council Regulation (EEC) No 2454/92 of 23 July 1992 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (45), subsequently replaced by Council Regulation (EEC) No 12/98 of 11 December 1997 on the same subject (46).

Pursuant to Council Regulation (EEC) No 12/98, road passenger transport cabotage, with the exception of domestic regular services, was liberalised as from 1 January 1996. These provisions have opened up the market to competition for occasional services, special regular services as well as regular services provided in the course of an international regular service.

According to an analysis of the passenger transport market carried out by the European Commission, the public transport market within the EC is gradually being opened to competition. With reference to 11 out of the 15 Member States, the European Commission observes that legislation or administrative arrangements have been introduced providing for competition in at least part of the urban, regional and inter-regional bus and coach markets (47).

Furthermore, the European Commission’s analysis refers to public procurement rules and, in particular, national legislation in EC Member States, which would enhance EC/EEA wide market access. Finally, the European Commission noted that transport undertakings showed an increasing interest in entering other countries’ domestic markets and have, to a certain extent, already acquired shares in national bus companies or operate public service transport outside their home markets (48).

As the Authority already pointed out in the opening decision, express bus operators provide both regular passenger transport services and occasional transport services. Therefore, there is a risk that State support under the compensation scheme might be used by express bus operators for occasional transport services. Furthermore, even as regards the market for regular passenger transport services, State support granted under the compensation scheme may be used by the eligible operators to provide similar services abroad in countries which have opened up that market segment to competition.

(48) The Authority notes that Norwegian companies engaged in bus operations have acquired foreign undertakings providing bus transport services, see e.g. European Commission decision of 10 December 1999 (Case No COMP/M.1768-SCHOYEN/GOLDMAN SACHS/SWEBUS) declaring a concentration between inter alia the Norwegian company Schoyen, engaged, in particular, in bus operations and the Swedish company Swebus, engaged in the provision of bus and coach transport, compatible with the common market, published in OJ C 11 of 14.1.2000, p. 6.
These circumstances alone lead to the conclusion that the compensation scheme which grants aid to undertakings providing regular passenger transport on a local, regional and inter-regional level must be regarded as being liable to distort competition and to affect trade within the meaning of Article 61(1) of the EEA Agreement.

This conclusion is also in line with European Commission practice in this area (49).

In addition, the Authority observes that the information submitted by the Norwegian Government as well as information and comments submitted by third parties in the course of the formal investigation procedure indicate that the compensation granted to ‘non-subsidised’ bus operators actually distorts competition and affects trade.

Firstly, information submitted in the course of the formal investigation procedure showed that almost 50% of operators eligible under the compensation scheme provided both regular and occasional services. Consequently, any financial benefits granted to express bus operators for the operation of regular passenger transport services could be channelled into other business areas, such as the provision of occasional transport services.

Secondly, the Authority cannot exclude that, at least on certain routes, regular and occasional services are in competition with each other. As regards the competitive situation between regular and occasional bus services, the Norwegian Government claimed that due to differences in the legal conditions under which scheduled and occasional services operate, occasional and regular passenger transport constituted two separate markets. However, the Authority observes that the actual scope of competition between regular transport services and occasional transport services cannot be determined in an abstract manner. Whether or not both kinds of services are in competition with each other can only be determined based on individual routes and the individual circumstances, such as distances, location, etc.

Based on the information submitted by the Norwegian Government and its comments to the complainant’s allegations in this respect, the Authority notes that there would seem to be a number of routes which are served both by regular and occasional services. This would seem to be the case, in particular, where the final destination is a tourist site/ski resort or where tourist attractions are located along a specific route. In addition, the information submitted shows that operators providing regular transport services were allowed to serve groups of passengers to special excursion spots.

The market for occasional services (as well as for the transport of goods/packages) is a fully liberalised market. Therefore, State support which may distort competition on this market is also liable to affect trade. Furthermore, the State support may also affect trade as regards the provision of regular transport services. The fact that foreign operators providing international regular transport in Norway might equally benefit from the compensation scheme at issue does not exclude effects on trade, because operators benefiting under the compensation scheme may take advantage of the market opening in other EEA States and provide regular transport outside Norway.

Therefore, the Authority concludes that the compensation scheme at issue is liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

Based on the foregoing considerations, the Authority concludes that the compensation scheme at issue constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

(49) See European Commission decision regarding the continuation of the ecological tax reform, State aid N 575/A/99 — Germany, as well as the more recent Commission decision regarding the continuation of these measures beyond March 2001, State aid N 449/2001 — Germany and the more recent Commission decision in State aid N 588/2002 — United Kingdom concerning a grant scheme for long-distance coach services.
B. NOTIFICATION REQUIREMENT AND STANDSTILL OBLIGATION

Pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, ‘[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid...The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision’.

This notification requirement and standstill obligation concern ‘new aid’. On the other hand, ‘existing aid’ can be granted until the Authority finds the aid in question to be incompatible with the functioning of the EEA Agreement. According to point 7.2 of Chapter 7 of the Authority’s State Aid Guidelines, ‘existing aid’ is defined as ‘pre-EEA’ aid (i.e. ‘aid schemes in operation at the time of the entry into force of the EEA Agreement’) and authorised aid.

In deciding whether or not an aid scheme is to be regarded as ‘new aid’ or ‘existing aid’, the Authority examines the relevant legal provisions providing for the aid in question, and in particular the entry into force of these provisions. The Authority is not obliged to carry out an economic analysis of the measure in question as compared to aid schemes which had been in place prior to the introduction of new legal provisions.

This view is confirmed by the case law of the European Court of Justice.

According to the European Court of Justice in the 'Namur-Les Assurances'-case ‘...the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.’ (50) (underlined here).

The fact that the previous tax exemption, which was based on decisions adopted under the Norwegian Act on excise duties, was abolished and a new compensation scheme put into place, is sufficient to turn this compensation scheme into ‘new aid’ within the meaning of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

In addition, the Authority takes the view that the compensation scheme introduced in 1999 contains provisions regarding the scope of activities eligible for support and, in particular, the calculation of the compensation, which are as such substantially different from the previous rules governing the tax exemption. In this respect, the Authority notes, in particular, that whereas the previous exemption from the autodiesel levy ensured that the benefits resulting from this tax exemption were, by definition, equal to the costs resulting from the autodiesel levy, the newly introduced compensation scheme does not ensure that operators may not receive more than their actual costs due to the autodiesel levy. The compensation scheme bears the risk of overcompensation, given that the amount of compensation is not linked to the actual autodiesel costs incurred by the operators concerned but is determined based on the route kilometres driven by operators applying for State support under the scheme (51).

In the Authority’s view, the compensation scheme was not exempted from the notification requirement pursuant to Article 17(2) of Council Regulation (EEC) No 1191/69, since the conditions laid down in the Regulation were not fulfilled (52).

(51) This issue will be discussed in more detail below.
(52) For a detailed assessment of compensation scheme under Council Regulation (EEC) No 1191/69, see below.
The Authority, therefore, concludes that the compensation scheme introduced in 1999 constitutes ‘new aid’ which, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, should have been notified to the Authority in advance (53).

Since the compensation scheme at issue was not notified to the Authority in advance, it is considered as being ‘aid unlawful on procedural grounds’, in accordance with Chapter 6 of the Authority’s State Aid Guidelines.

C. COMPATIBILITY OF COMPENSATION SCHEME FOR EXPRESS BUSES

In light of the objectives invoked by the Norwegian Government, the Authority assessed the compensation scheme for ‘non-subsidised’ bus operators under Council Regulation (EEC) No 1191/69 (and Article 49 of the EEA Agreement) and Article 61(3)(c) of the EEA Agreement in combination with the Environmental Guidelines.

1. COUNCIL REGULATION (EEC) No 1191/69

(a) Legal framework conditions

Pursuant to Article 49 of the EEA Agreement, ‘[a]id shall be compatible with this Agreement if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.’

Regulation (EEC) No 1191/69 of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (54), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (55) and incorporated into the EEA Agreement, lays down the rules under which compensation payments for public service obligations can be regarded as compatible with the functioning of the EEA Agreement.

Council Regulation (EEC) No 1191/69 declares compatible and exempts from the requirement of prior notification compensation for public service obligations, where such obligations have been imposed and where the amount of compensation has been determined in accordance with the provisions of the Regulation.

Public service obligations within the meaning of the Regulation are defined and enumerated in Article 2 of Council Regulation (EEC) No 1191/69. In follows from Article 2 of the Regulation that any such obligations may only give rise to compensation if it can be established that these obligations have been imposed on the operators concerned contrary to their commercial interests.

Furthermore, Article 3 of Council Regulation (EEC) No 1191/69 allows EFTA States to maintain public service obligations in order to ensure adequate transport services, having regard to the public interest and the possible recourse to other forms of transport. Transport undertakings may apply to the competent authorities for the termination of such obligations where the obligation entails economic disadvantages. Article 6(2) of the Regulation requires that the decision to maintain public service obligations shall also provide for compensation determined in accordance with the provisions of the Regulation (cf. Articles 10 to 13 of the Regulation).

(53) The Authority’s conclusions are in line with European Commission practice, e.g. State aid N 1999/99 — Netherlands regarding tax relief for municipal transport undertakings.
(b) **Definition of public service obligations**

At the outset, the Authority observes that it does not exclude that the conditions laid down in the Norwegian regulation on domestic passenger transport could, in principle, be regarded as public service obligations referred to in Article 2(2) to (5) of Council Regulation (EEC) No 1191/69.

(c) **Imposition of specific public service obligations on ‘non-subsidised’ bus operators**

The Authority takes the view that, based on the information submitted, the conditions laid down in the Norwegian regulation on domestic passenger transport cannot be regarded as having been imposed on the bus operators benefiting under the compensation scheme for express busses.

In the Authority’s view, there is a significant difference between ‘subsidised’ and ‘non-subsidised’ bus operators which require a different assessment under Council Regulation (EEC) No 1191/69. This difference follows the legal framework conditions established under Norwegian law. ‘Subsidised’ operators were selected to provide regular passenger transport services following a tender procedure in which the competent authorities lay down the specific conditions under which operators are invited to provide transport services. The selected operators receive direct State support in the form of compensation for the costs resulting from the provision of transport services at a level determined through the tender procedure. The conclusion of a contract with operators having been selected by a tender and giving them the right to operate a certain route, subject to the predetermined obligations, could be regarded as a decision by which specific public service obligations were imposed on the selected operator. On the other hand, ‘non-subsidised’ operators have taken up regular transport services out of commercial considerations. Consequently, such operators are, according to Norwegian law, not entitled to receive direct State support for the provision of regular passenger transport services on these routes.

The Authority is of the opinion that the licence granted by the competent authorities to ‘non-subsidised’ bus operators to provide regular passenger transport services on certain routes, cannot be regarded as a decision required by Article 3 and 6 of Council Regulation (EEC) No 1191/69. In the Authority’s view, the licence is rather the pre-requisite for the provision of regular passenger transport services, than a decision by which the provision of such services was imposed on these operators. Even though the licence granted to these bus operators entails the obligation to satisfy the conditions laid down in the Transport Act as well as the regulation on domestic passenger transport, these conditions do not necessarily constitute public service obligations imposed on the operators concerned, given that these operators have applied for a licence to run regular transport services out of commercial considerations. In addition, the Authority observes that the level of service appears to have been determined to a large extent by the bus operators applying for a licence for regular passenger transport services on a given route, rather than by the public authorities (56).

The Authority is aware that applications for licences on particular routes and the level of services offered by the bus undertakings and contained in these licences were submitted under legal framework conditions which relieved the operators in question (partly (57)) of the costs resulting from the autodiesel levy. It might not be excluded that the commercial assumptions underlying the application for a licence to operate regular passenger transport services have changed, where bus operators have to bear (part of) the autodiesel costs themselves.

(56) See e.g. the decision of the Møre and Romsdal County dated 6 February 2002 as well as the decision of the Buskerud County dated 22 August 2001. Both decisions are available on the Internet.

(57) Where operators have applied for a licence prior to 1 January 1999, they have been fully exempted from the payment of the autodiesel levy; on the other hand, where licences were awarded after that date, operators were, in principle, subject to the autodiesel levy, while being entitled to receive compensation under the compensation scheme in question, thus being only partly relieved from the costs resulting from the autodiesel levy.
The Authority also notes that the relevant legal provisions (cf. § 19 of the regulation on domestic passenger transport) would seem to allow transport undertakings to request the termination of transport services on a particular route or changes to conditions under which transport services are provided. Based on such a request, the competent authorities could impose public service obligations on the operator concerned, if the maintenance of transport services on that route is regarded as being in the public interest. The application of this provision would have allowed the Norwegian authorities to determine which routes were considered to be in the public interest and which conditions and obligations needed to be imposed on the operator concerned, in order to ensure a service level the operator would not offer out of its own commercial interests.

The Authority notes, however, that this provision was not applied in the present case. Therefore, the Authority takes the view that there was no decision taken by the competent public authorities in which public service obligations were imposed on specific operators.

(d) **Determination of extra costs compared to costs incurred by ‘non-subsidised’ bus operators out of their own commercial interest**

The Authority is aware that § 19 of the regulation on domestic passenger transport may not have been invoked due to the existence of the compensation scheme. The Authority therefore examined whether, based on the operators’ financial situation, non-subsidised bus operators could be regarded as assuming obligations as laid down in the Transport Act and the regulation on domestic passenger transport contrary to their commercial interest (in particular, where the operation of certain routes, without revenues from the compensation scheme, would be loss making).

The Authority does not exclude that commercial (i.e. profitable) operators may be eligible for State support in the form of compensation for public service obligations, as claimed by the Norwegian Transport Association. However, in order for such State support to be regarded as compatible with the functioning of the EEA Agreement, the requirements laid down in Council Regulation (EEC) No 1191/69 must be fulfilled (in particular, the additional net cost generated by specific public service obligations must be determined and the compensation amount calculated accordingly).

According to the ‘common compensation procedures’ laid down in Articles 10 to 13 of Council Regulation (EEC) No 1191/69, the amount of compensation has to be determined based on the extra costs of specific conditions and obligations, net of benefits. The application of this method would require the competent authorities to compare the situation in which the public service obligation is fulfilled, with the (real or hypothetical) situation in which the operator in question would have been free to determine the operation of the service in question on a purely commercial basis. The determination of the amount of compensation requires a case-by-case assessment by the competent authorities of the cost and revenue effects due to the public service obligations in question.

In this respect, the Authority notes that the compensation scheme at issue does not provide for such an assessment. It is therefore difficult to see how the compensation scheme for express bus operators can be regarded as satisfying the requirements laid down in Council Regulation (EEC) No 1191/69.

In addition, the Authority notes that the information submitted by the Norwegian Government and the Norwegian Transport Association does not clearly establish the extra costs due to all alleged public service obligations, nor does it establish such extra costs for individual carriers. In this respect, the Authority notes that for some obligations (such as the unconditional obligation to carry) no estimates as regards extra costs, were submitted. In addition, some of the obligations referred to by the Norwegian Government as well as the Norwegian Transport Association would, in the Authority's view, not necessarily imply extra costs compared to what the operators concerned would do in their own commercial interest (e.g. requirement that information regarding route schedules should be adequately publicised). Further conditions would also seem to generate additional revenues that would have to be deducted from the extra costs. However, no information on possible additional revenues due to the obligations referred to by the Norwegian Transport Association was submitted.
Consequently, the Authority takes the view that the Norwegian Government did not demonstrate the existence of extra costs with respect to all alleged public service obligations and all operators allegedly being subject to such obligations.

(e) Compensation limited to the net extra costs due to public service obligations

The Norwegian Government argued that the compensation scheme could not result in overcompensation for express bus operators since the amount of compensation would always remain below the costs due to the autodiesel levy.

Whether or not the compensation only partly covers the costs due to the autodiesel levy, is irrelevant for the assessment of the compatibility of the compensation scheme under Council Regulation (EEC) No 1191/69, because the costs due to the autodiesel levy incurred by express bus operators, may not be equal to the costs due to the alleged public service obligations.

As stated above, the information submitted only consisted of estimates for certain obligations and certain operators. Certain obligations referred to by the Norwegian Transport Association would seem to be applicable for all regular passenger services (e.g. unconditional obligation to carry, engagement of sufficient number of buses, publication in the 'Rutebok'), whereas other obligations would only seem to apply for a certain number of operators (e.g. use of specific terminals, use of specific stopping points, requirement to equip bus stops with information boards, priority for certain groups of passengers, use of tickets, tickets machines approved by competent authorities) (58).

Therefore, the conditions under which regular transport services are provided and possible (net) additional costs incurred by the bus operators concerned, may differ substantially from one bus operator to another and from one route to another. On the other hand, the amount of compensation is determined based on the route production. The amount does not vary depending on the existence or non-existence of specific obligations or on the costs related to these obligations.

Consequently, the Norwegian Government has not demonstrated that the State support granted under the compensation scheme does not entail any overcompensation of the alleged public service costs incurred by the operators concerned.

(f) Conclusions regarding the assessment under Council Regulation (EEC) No 1191/69 and final remarks

In light of the foregoing circumstances, the Authority concludes that the conditions under which express bus operators provide regular passenger transport services cannot in an abstract manner be regarded as public service obligations imposed on the operators in question. Furthermore, the Norwegian Government has not demonstrated that the alleged public service obligations generated extra costs (and failed to quantify any such costs) and that the compensation granted to the express busses under the compensation scheme in question was limited to these extra costs. Consequently, the Authority did not regard the requirements laid down in Council Regulation (EEC) No 1191/69 to be fulfilled.

Assuming that the compensation scheme could be assessed directly under Article 49 of the EEA Agreement (59), the Authority considers that the compensation scheme could not be regarded as compatible with that provision, given that the Norwegian Government has not demonstrated that the compensation was necessary and proportionate to the provision of a public service.

(58) The difference in conditions under which transport services are provided, is apparent from information provided by the Norwegian Transport Association with respect to the cost of public service obligations and conditions laid down in individual licences.

(59) In this respect, the Authority also notes that, according to the recent Opinion delivered by Advocate General Léger in the ‘Almark Trans’-case, recourse to the basic provisions of the EC Treaty regarding reimbursement for public service obligations is not permissible (cf. First Opinion delivered on 19 March 2002, para. 114 — 117, not yet reported.
The Authority would like to point out that the above conclusion does not mean that regular passenger transport provided by express buses may not be compensated for the costs due to public service obligations that have actually been imposed on them. It would depend on an individual assessment carried out by the competent authorities of the circumstances regarding the routes in question whether and to what extent public service obligations are or can be imposed on the operator in question, to determine the extra costs related to these obligations and to award compensation covering these extra costs. Without such an individual assessment by the competent national authorities, the Authority cannot see how the compensation scheme for express bus operators could be regarded as compatible with the EEA State aid rules.

Finally, the Authority is not aware of any European Commission decision which would have approved aid comparable to the aid granted under the compensation scheme at issue based on Council Regulation (EEC) No 1191/69. On the contrary, a recent Commission decision concerning grants for long-distance coach services in the United Kingdom shows that the European Commission, when assessing the compatibility of compensation payments for public service obligations under Council Regulation (EEC) No 1191/69, attached great importance to the risk of possible over-compensation. The European Commission considered that the grant scheme as such, according to which grants were calculated based on the mileage operated without there being a link to the actual costs incurred due to public service obligations, did not avoid the risk of over-compensation. Only after the British authorities had introduced mechanisms ensuring that neither on an overall level nor on the level of each operator benefiting from the scheme payments made under the grant scheme could lead to overcompensation, the European Commission considered the grant scheme to be in accordance with the requirements laid down in Council Regulation (EEC) No 1191/69 (60).

2. ARTICLE 61(3)(C) OF THE EEA AGREEMENT, IN COMBINATION WITH THE ENVIRONMENTAL GUIDELINES

The Authority has, on the basis of the additional information furnished by the Norwegian Government, examined whether the compensation scheme may benefit from an exemption under Article 61(3)(c) of the EEA Agreement in connection with Chapter 15 of the Authority’s State Aid Guidelines regarding aid for environmental protection.

At the outset, it should be recalled that, after the Authority’s decision to open the formal investigation procedure, new Environmental Guidelines were adopted (61).

Pursuant to point 73 of the new Chapter 15 of the Authority’s State Aid Guidelines, the new guidelines will apply from the date of their adoption (i.e. as from 23 May 2001). Pursuant to point 74 of the new Chapter 15 of the Authority’s State Aid Guidelines on environmental protection, the Authority will apply the 1994 guidelines (62) in cases of non-notified aid, when aid has been granted before the adoption of the new guidelines. To the extent, aid is granted after the adoption of the new guidelines, the Authority applies the new guidelines.

As has been stated above, the compensation scheme constitutes new aid which has not been notified by the Norwegian Government to the Authority. It is therefore non-notified aid within the meaning of point 74 of the new Environmental Guidelines.

Consequently, the Authority assessed the compensation scheme for the period 1 January 1999 until 22 May 2001 under the 1994 Environmental Guidelines, and for the period starting 23 May 2001 under the new Environmental Guidelines.

(60) State aid No N 588/2002 — United Kingdom.
(a) Assessment of the compensation scheme under the 1994 Environmental Guidelines

Pursuant to point 15.4.3 of the Authority's 1994 Environmental Guidelines, operating aid may be acceptable in the fields of waste management and relief from environmental taxes. Application of the conditions laid down in the Authority's State Aid Guidelines implies that, in principle, compensation should be limited to extra production costs and the aid should be temporary and in principle degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly. Such temporary relief from new environmental taxes may be authorised where it is necessary to offset losses in competitiveness, particularly at international level. A further factor to be taken into account is what the firms concerned have to do in return to reduce their pollution.

(1) Compensation limited to extra production costs

In the course of the formal investigation procedure, the Norwegian Government provided figures related to the overall amounts spent under the compensation scheme as compared to the revenues due to the autodiesel levy. These figures, which were up-dated based on the Norwegian Government's recent budgetary proposals, are reproduced in the table below.

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation payments (revised)</td>
<td>n.a.</td>
<td>64.0 million</td>
<td>71.7 million</td>
<td>40.8 million</td>
<td>29.0 million</td>
</tr>
<tr>
<td>Revenues from the autodiesel levy (incl. VAT) (1)</td>
<td>n.a.</td>
<td>64.0 million</td>
<td>66.0 million</td>
<td>53.0 million</td>
<td>51.0 million</td>
</tr>
</tbody>
</table>

(1) These figures do not represent the actual amount of revenues due to the collection of the autodiesel levy from 'non-subsidised' bus operators, but are calculated based on the consumption of the most efficient vehicles.

The Norwegian Government claimed that the revenues from the autodiesel levy exceeded the amounts spent under the compensation scheme. Consequently, the general level of compensation was, according to the Norwegian Government, always below 100 %.

In this respect, the Norwegian authorities claimed that the revenues from the autodiesel levy would in reality be higher than the amount stated in the above table. According to the Norwegian authorities, the amount of revenues as communicated to the Authority was not based on the autodiesel levy actually collected from the non-subsidised bus operators, but was calculated based on the assumption that the bus operators concerned would use the most energy efficient vehicles (with a consumption of 0.315 litres per km). According to the Norwegian authorities, bus operators were not all equipped with these vehicles. Should operators in reality have higher autodiesel consumption than assumed for the purpose of the calculation of the revenues, the figure regarding revenues due to the autodiesel levy might be higher. In that case, the level of compensation and thus the aid intensity would in reality be lower than the one calculated on the basis of the figures presented by the Norwegian authorities.

However, given the absence of verifiable information concerning the exact amount of revenues from the autodiesel levy collected from express bus operators benefiting from the compensation scheme, the Authority can only base itself on the figures provided by the Norwegian Government as stated in the above table. Based on these figures, the level of compensation would amount to 100 % in 1999, approximately 109 % in 2000 and 77 % in 2001. Consequently, the level of compensation, as determined based on the above figures, would amount on average to 95.3 %, during the period 1999-2001.
The Authority regrets that the figures provided by the Norwegian Government do not allow the Authority to establish the exact level of compensation. Despite the remaining uncertainties, the Authority can, however, conclude that the amount of compensation awarded under the compensation scheme was on average limited to the extra costs (i.e. those costs resulting from the autodiesel levy, including VAT (63)). In addition, the Authority takes note of the assurance from the Norwegian Government that any amounts allocated under the scheme which would exceed the amount necessary to compensate for the consumption based on the most efficient vehicles, would not be paid out. The Authority takes also note of the statement from the Norwegian Government that expenses related to assistance and position driving would not be completely compensated for.

(2) Temporary and degressive relief from new environmental taxes, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly

The Authority observes that the compensation scheme, as such, is not limited in time. The continuation of the compensation scheme depends upon the annual budget proposals from the Norwegian Government and the annual budgetary decisions taken by the Norwegian Parliament. However, that part of the compensation scheme which is to be assessed under the 1994 Environmental Guidelines is limited in time, i.e. from 1 January 1999 until 22 May 2001, or approximately 2½ years (64).

Based on the figures presented by the Norwegian Government, the Authority observes that the amounts allocated to the compensation scheme decreased, from 1999 to 2001 (from NOK 64 million in 1999 to NOK 40.8 million in 2001). Based on the figures presented by the Norwegian Government (65), the level of compensation was, during the period 1999-2001 reduced from 100% in 1999 to 77% in 2001. If the level of compensation resulting from the application of the compensation scheme in 2002 was to be taken into account (i.e. 56.9%), a certain overall downwards trend can be observed. In this respect, it should, however, be noted that strict compliance with the principle of degressivity has not been required by the European Commission in its practice (66).

On the other hand, the level of compensation throughout that same period was very high. Based on the figures presented by the Norwegian Government, the average level of compensation amounted to 95.3% (67). As pointed out above, this percentage does not necessarily reflect the actual level of compensation, given that these figures are estimates based on the assumed consumption of autodiesel of only the most energy efficient vehicles.

It should be recalled that only where operators would have a fleet consisting entirely of what are regarded as being the most energy efficient vehicles, the compensation granted would cover a large proportion of their costs, due to the autodiesel levy. Compared to the situation prior to 1999, where bus operators were fully exempted from the autodiesel levy, it is reasonable to assume that operators would seem to have an incentive to minimise additional costs and thus replace existing fleet with new energy efficient vehicles. The Authority regrets that the Norwegian Government did not furnish information concerning the eligible operators’ behaviour following the abolishment of the tax exemption and the introduction of the compensation scheme, and in particular as to whether these operators invested in less polluting vehicles. However, the Authority is aware that, under the 1994 Environmental Guidelines, permissible aid was not subject to a fixed ceiling. Commission practice under the 1994 Environmental Guidelines shows that the conditions concerning the incentive effect of the tax measure in question were regarded as being fulfilled provided that the tax relief did not fully compensate for the tax. Under such circumstances, the European Commission considered that the tax itself gave the beneficiaries an incentive to reduce their polluting behaviour (68).

(63) The extra costs resulting from the abolishment of the exemption from the autodiesel levy are both the autodiesel levy as such and the VAT charged on that levy. It should be stressed that the extra costs do not, however, include costs due to the VAT charged on the price of the autodiesel as such.

(64) See State aid No NN 75/2002 — Finland, where the Commission considered the requirement regarding the temporary nature of the aid to be fulfilled given that the duration of the scheme to be assessed under the 1994 Environmental Guidelines was limited to approximately 4 years; see also State aid No NN 3/A/2001 and NN 4/A/2001 — Sweden, where the European Commission considered that the ‘issue of whether the aid was temporary becomes irrelevant.’

(65) As regards the calculation of the level of compensation, see explanation on page 33.

(66) See Commission decision referred to in footnote 69.

(67) As regards the calculation of the level of compensation, see explanation on page 33.

(68) See e.g. State aids No NN 3/A/2001 and NN 4/2001 — Sweden ‘Prolongation of CO 2 tax scheme’, the scheme was assessed partly under the 1994 and partly under the new environmental guidelines; State aid No N 575/A/1999 — Germany ‘Continuation of the ecological tax reform’.
(3) Necessity to offset losses of competitiveness

According to the guidelines, temporary relief from environmental taxes may be authorised where it is necessary to offset losses of competitiveness.

The abolishment of the exemption from the autodiesel levy for bus operators resulted in an additional burden for companies providing regular passenger transport services. This cost increase was estimated by the Norwegian authorities to be in the range of 8% of the undertakings’ overall costs per km. The services provided by express bus operators are competing for passengers that would otherwise use the private car. Public transport causes less environmental damage than the use of the private car. Based on studies about the external costs of transport in Europe (studies including Norway), average external costs resulting from the use of the car (including externalities such as air pollution, climate change and accidents) are more than twice the external costs caused by the use of busses (\(^\text{(*)}\)). There is currently no comprehensive system which would ensure that these external costs are fully internalised in the various modes of transport and thus reflected in market prices. According to the Norwegian Government, costs related to the use of the private car do not at present reflect the external costs caused by this means of transport. The compensation granted to operators providing regular passenger transport might therefore be interpreted as a compensation for unpaid external costs caused by the use of private cars. Such a measure constitutes a second best solution in the absence of a comprehensive system internalising external costs caused by the transport system. Given the particularities of the market for providing regular passenger transport services, the Authority considers that it is justified to adopt measures to safeguard the competitive position of regular passenger transport in relation to the use of the private car as an alternative means of transport.

(4) Compensation scheme not contrary to the common interest

Finally, the Authority points to the fact that the support of local and regional passenger transport lies in the common interest of the Contracting Parties. In its Communication of 10 July 1998 on ‘Developing the citizen’s network’, the European Commission considered that a ‘well functioning European transport system needs good, sustainable passenger transport. This contributes to the economic development and employment and reduces congestion. It helps to clean up the environment by using less energy, making less noise and producing fewer pollutants. It reduces social exclusion by allowing people without the use of the car to gain access to jobs, schools, shops, medical facilities and leisure activities, recognizing that women, the young, the elderly, the unemployed and the disabled people are particularly dependent on public transport.’

Based on these considerations, the European Commission approved, inter alia, a tax relief for undertakings providing local passenger transport in Germany (\(^\text{(**)}\)). As in the present case, the relief from the mineral oil levy in Germany was granted only to those operators providing scheduled/regular passenger transport services, while excluding occasional transport services.

The complainant claimed that the compensation scheme would distort competition between companies providing regular passenger transport and those providing occasional transport services. In this respect, he referred in particular to certain routes on which both, operators providing regular passenger transport and those providing occasional transport services would be in direct competition.

As explained above, the Authority shares this view. However, the distortive effects of the compensation scheme do not, in the Authority’s view, exceed what is necessary to achieve the objectives pursued with the scheme.

\(^{(*)}\) These figures are based on a study carried out by INFRAS and IWW in 2000; they are referred to in the recent White Paper on the European Transport Policy — 2010, Time to decide.

In this respect, the Authority notes that operators eligible for support under the compensation scheme provide regular passenger transport services based on a licence issued by the local authorities. In issuing the licence, public interests, as regards an adequate offer of transport services, are taken into account. Express busses can therefore be regarded as forming an integral part of the collective transport system in Norway. Express busses are often the only collective transport means as well as the only alternative to the use of the private car. These circumstances justify public support for express busses in relation to the provision of regular passenger transport services.

The fact that, on some routes, occasional transport services are provided in competition with regular transport services does not affect the overall assessment. The liberalisation of the market for occasional transport services may lead to overlaps in transport offer from regular and occasional transport service operators. This does, however, not put into question the necessity for compensation for express bus operators with regard to the use of the private car as predominant means of transport.

As regards the distortion of competition between regular and occasional transport services, the Authority also refers to the assurance given by the Norwegian authorities that compensation is only granted with respect to regular passenger transport. Consequently, express bus operators providing occasional transport services are not entitled to receive payments under the compensation scheme. As regards the alleged distortive effects due to express bus operators rescheduling their routes in order to drive people to tourist sites, the Authority considers that rescheduling of routes in order to take into account changes on demand, do not put into question the qualification of the service in question as a ‘regular service’ within the meaning of Article 2(1) of Council Regulation (EC) No 12/98 (71). In addition, according to the Norwegian authorities, deviations from the original schedule have been approved only as part of public services obligations specified in the licence of the operator concerned. Consequently, these transport services would still be part of the regular passenger transport services provided by the operator in question. The fact that the destination of some of the regular routes may be a tourist site does not change the nature of the transport service from regular service into occasional service. Furthermore, the alleged distortive effects due to ‘assistance driving’ and ‘position driving’ being used by express bus operators to offer tourist services to groups of passengers, would not seem to result from the application of the compensation scheme as such. Should such services, as referred to by the complainant, have to be qualified as ‘occasional services’ within the meaning of Article 2(3) of Council Regulation (EC) No 12/98, such services would not be eligible for compensation.

In light of all the above considerations, the Authority considers that the distortive effects resulting from the compensation scheme are limited to what is necessary to ensure the objective pursued, namely to maintain the competitive situation of the regular passenger transport vis-à-vis the private car.

(b) Assessment under new Environmental Guidelines

The new Environmental Guidelines lay down specific rules applicable to all operating aid in the form of tax reductions or exemptions. Pursuant to point 42, ‘When adopting taxes that are to be levied on certain activities for reasons of environmental protection, EFTA States may deem it necessary to make provision for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. …When assessing whether such measures qualify for exemptions from the general State aid prohibition as laid down in Article 61(1), it has to be ascertained among other things whether the tax in question corresponds to a tax which is to be levied within the European Community as the result of a Community decision. This aspect will be essential with regard to whether or not there could be a loss of international competitiveness for the taxpayer.’

(71) Article 2(1) stipulates, ‘The fact that the operating conditions of the service may be adjusted shall not affect its classification as a regular service.’
According to point 46.1.(b) of the Environmental Guidelines, exemptions from new environmental taxes may be justified covering a 10-year period with no degressivity, if the tax corresponding to a harmonised Community tax exceeds that provided for in Community legislation, provided that the amount effectively paid by the firms after the reduction remains higher than the European Community minimum, in order to provide the firms with an incentive to improve environmental protection.

Against that background, the Authority assessed whether the autodiesel tax rates set under Norwegian law exceed the applicable rates in the European Community.

Pursuant to Article 5(1) of Directive 92/82/EEC, the minimum rate for diesel (gas oil used as propellant) is set at EUR 245 per 1,000 litres (or EUR 0.245 per litre). Expressed in NOK, the minimum rate for mineral oil was as 2,037 NOK per litre in 2001 (\(^{72}\)) and 1,96 NOK per litre in 2002 (\(^{73}\)).

The applicable rates for the autodiesel levy in Norway amounted to NOK 3.44 per litre in 2001 (weighted average tax rate applicable during the period covered by the new Environmental Guidelines) and NOK 3.43 per litre in 2002. These rates are above the applicable rates within the European Community.

Furthermore, the Authority assessed whether bus operators, subject to the autodiesel levy but benefiting under the compensation scheme at issue, would still pay more than the minimum rate for diesel laid down in the EC Mineral Oil Directive.

Based on the applicable rates for autodiesel levy (VAT incl.) for the years 2001 and 2002 and the level of compensation (aid intensity) as referred to in the above table (\(^{74}\)), the Authority calculated the rate of autodiesel levy actually paid by operators benefiting under the compensation scheme. This calculation gives the following picture: In 2001, the tax rate actually paid by bus operators was calculated as being 0.79 NOK per litre (\(^{75}\)). This is below the applicable Community minimum rate for mineral oil, which amounted to 2,037 NOK per litre. In 2002, the tax rate actually paid by bus operators was calculated as being 1.47 NOK per litre (\(^{76}\)). This is below the applicable Community minimum rate for mineral oil, which amounted to 1,96 NOK per litre.

Even though the actual level of compensation may be lower than what the figures provided by the Norwegian Government indicate, the Authority is not, due to the lack of precise information in this respect, in a position to ascertain that the amounts actually paid by express bus operators remains above the Community minimum.

Consequently, the Authority does not consider a 10-year derogation to be justified in the present case.

\(^{(72)}\) This calculation is based on the conversion rate of 8,3145 NOK = EUR 1, as fixed by the Authority for 2001.

\(^{(73)}\) This calculation is based on the conversion rate of 8,0105 NOK = EUR 1, as fixed by the Authority for 2002; cf. the Authority's homepage: http://www.eftasurv.int/fieldsofwork/fieldstateaid/dbaFile791.html.

\(^{(74)}\) As regards the calculation of the level of compensation, see explanation on page 33.

\(^{(75)}\) This results from a level of compensation amounting to 77 % (i.e. tax actually paid being 23 % of the applicable tax rate). The applicable tax rate was from 1 January 2001 until 30 June 2001 set at NOK 3.77 per litre and as from 1 July 2001 at NOK 3.37 per litre. The weighted average tax rate for the period governed by the new Environmental Guidelines therefore amounted to approximately NOK 3.44 per litre.

\(^{(76)}\) This results from a level of compensation amounting to 57 % (i.e. tax actually paid being 43 % of the applicable tax rate). The rate was set for 2002 at NOK 3.43 per litre.
(2) 5-year derogation for new environmental taxes which correspond to Community taxes

Pursuant to point 48 second paragraph of the Environmental Guidelines, ‘… the EFTA State may grant operating aid in accordance with points 40 and 41 if the reduction granted satisfies the conditions laid down in these points. If the tax corresponds to a tax subject to harmonisation at European Community level, an express authorisation to derogate from the Community minimum must then in any event be provided for in the corresponding Community tax harmonisation provision.’

(a) Temporary nature and aid intensity

According to point 40 of the Guidelines ‘[a]ll…operating aid is subject to a limited duration of five years where the aid is “degressive”. Its intensity may amount to 100 % of the extra costs in the first year but must have fallen in a linear fashion to zero by the end of the fifth year.’ Point 41 of the guidelines further states that ‘[i]n the case of “non-degressive” aid, its duration is limited to five years and its intensity must not exceed 50 % of the extra costs.’

As regards the requirement that the aid must be temporary, the Authority observes that, as pointed out above, the compensation scheme, as such, is not limited in time. The Authority also notes that the Norwegian Parliament decided to continue the operation of the compensation scheme for 2003, allocating, for that purpose, the amount of NOK 30 million.

As regards the permissible aid intensity, the Authority observes that the compensation scheme as such is not set up such that the aid intensity would fall in a linear fashion from 100 % in the first year to zero by the end of the fifth year. Hence, the aid is not ‘degressive’ within the meaning of point 40 of the guidelines. ‘Non-degressive’ aid is permissible provided that its duration is limited to five years and that the aid intensity does not exceed 50 % of the extra costs. Based on the figures above, the level of compensation (aid intensity) in the years 2001 and 2002 was 77 % and 57 %, respectively (on average during the two year period, the aid intensity amounted to 67 %) (77).

Furthermore, the compensation scheme does not contain any provision which would ensure that the average level of compensation of the five-year period would be limited to 50 % of the extra costs due to the autodiesel levy.

(b) Derogation from Community minimum

Point 44(b) of the guidelines stipulates that an exemption which results in the benefiting companies paying less than the Community minimum would be regarded as incompatible with Article 61 of the EEA Agreement ‘[i]f such an exemption would not have been authorised within the European Community by the directive in question …’ Where such an exemption would have been authorised, ‘the Authority may take the view that… [the exemption] is compatible with Article 61 in so far as it is necessary and is not disproportionate in the light of the EEA objectives pursued. The Authority will be especially concerned to ensure that any such exemption is strictly limited in time.’

Based on the figures presented by the Norwegian Government, operators benefiting from the compensation scheme would seem to pay less than the Community minimum.

Even if the compensation would be limited to 50 % of the costs resulting from the autodiesel levy, as required under point 41 of the Environmental Guidelines, the autodiesel levy actually paid by the eligible bus operators would remain below the harmonised minimum rate: in 2001, the amount to be paid by operators would have amounted to NOK 1,71 per litre, with the harmonised rate being NOK 2,037 per litre; in 2002, the amount to be paid by operators would have amounted to NOK 1,72 per litre, with the harmonised rate being NOK 1,96 per litre.

Given that the Norwegian Government failed to submit information allowing the Authority to determine the exact level of compensation, the Authority assumes that, based on the aforementioned considerations, the amount of autodiesel levy actually paid by operators eligible under the compensation scheme, was below the harmonised rate for mineral oil as laid down in the Mineral Oil Directive.

(77) As regards the calculation of the level of compensation, see explanation on page 33.
Consequently, and in accordance with point 44 of the Environmental Guidelines, the Authority has to assess whether the relief from the autodiesel levy could have been authorised within the EC.

Article 8(2) lit. c) of Directive 92/81/EEC allows EC Member States to apply total or partial exemptions or reductions in the rate of duty to mineral oil used in the field of passenger transport. On 12 March 2001, the EC Council adopted a decision to authorise for several EC Member States exemptions from the mineral oil duty, mainly for local public passenger transport vehicles (78).

The compensation scheme at issue is not limited to local transport services but extends to regional and inter-regional transport services.

As regards the question as to whether a relief from the autodiesel levy could have been authorised within the European Community, the Authority notes at the outset that Article 8(2) of the Mineral Oil Directive does not limit the possibility for exemptions to local passenger transport. Therefore, an exemption for regional and inter-regional passenger transport would not seem to be excluded.

Furthermore, the Authority considers that the justification for a compensation scheme for regular passenger transport is not only valid as regards local transport. The information in the Authority’s possession does not show that the competitive situation of express bus operators as part of the collective transport system vis-à-vis the private car is, significantly better on regional or inter-regional routes as compared to local routes. The Authority also took into account the special geographical circumstances in Norway and the fact that, due to a limited railway network, regular bus services are often the only collective means of transport and only alternative to the use of the private car.

In accordance with point 44(b) of the Environmental Guidelines, the Authority still needs to examine whether the tax relief in question is necessary, not disproportionate in light of the EEA objectives pursued, and strictly limited in time. In addition, point 45 of the guidelines states that ‘... the tax measures in question should make a significant contribution to protecting the environment. Care should be taken to ensure that the exemptions do not, by their very nature, undermine the general objectives pursued.’

Given that the operators benefiting from the compensation scheme were previously fully exempted from the autodiesel levy, the abolishment of this tax exemption together with the partial relief from these extra costs increases the transport operators' costs and thereby gives them an incentive to reduce pollution, inter alia, by investing in more energy efficient vehicles. Furthermore, the compensation scheme is intended to maintain the competitive situation of regular passenger transport vis-à-vis the private car which causes more external costs than collective means of transport. In light of these considerations, the abolishment of the exemption from the autodiesel levy, together with the compensation scheme, contribute to the achievement of environmental objectives. As has been pointed out above, the distortive effects of the compensation scheme, in particular as concerns the provision of occasional transport services, are regarded as being limited to what is necessary to achieve the objectives pursued.

However, as already addressed above, the compensation scheme is neither limited in time, nor does the compensation scheme contain the necessary guarantee that the State support granted under the scheme is limited to 50 % of the extra production costs. As stated above, the information submitted by the Norwegian authorities does not show that, as regards the application of the compensation scheme in 2001 and 2002, the 50 % ceiling has been respected.

(78) See footnote 37.
Therefore, in order to ensure compliance with the Environmental Guidelines, the Authority considers it necessary to request the Norwegian Government to limit the duration of the compensation scheme to five years starting from the application of the new Environmental Guidelines. This means that the duration of the compensation scheme must be limited until 22 May 2006 at the latest.

Furthermore, the Authority requests the Norwegian Government to ensure that any compensation granted under the compensation scheme for express bus operators is limited to 50% of the extra costs due to the autodiesel levy. Any amounts granted to express bus operators which exceeded this ceiling must be regarded as being incompatible with the functioning of the EEA Agreement and would have to be recovered from the recipient.

(c) Conclusions under Article 61(3)(c) of the EEA Agreement, in combination with the Environmental Guidelines

The compensation scheme for express bus operators applicable in the period from 1 January 1999 until 22 May 2001 fulfils the conditions laid down in the 1994 Environmental Guidelines. Any aid granted under the compensation scheme during that period can be regarded as being compatible with the functioning of the EEA Agreement.

The compensation scheme for express bus operators applicable as from 23 May 2001 can be regarded as being compatible with the functioning of the EEA Agreement, provided that it will be limited in time, i.e. to five years starting from the entry into force of the new Environmental Guidelines, and that the compensation granted to express busses is limited to 50% of extra costs due to the autodiesel levy in relation to the provision of regular passenger transport services. No compensation may be granted for costs resulting from the autodiesel levy in connection with other transport services (i.e. provision of occasional transport services within the meaning of Article 2(3) of Regulation (EC) No 12/98 or transport of goods).

Any amounts granted under the compensation scheme as from 23 May 2001 which exceed this ceiling are regarded as incompatible with the functioning of the EEA Agreement and have to be recovered from the recipient. As regards the future application of the compensation scheme, the Norwegian Government needs to adopt measures which guarantee that compensation granted under the scheme will not exceed 50% of the extra costs due to the autodiesel levy.

3. CONCLUSIONS

The compensation scheme for express bus operators (based on the State Budget, Chapter 1330, post 71) qualifies as ‘new aid’ within the meaning of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. It was put into effect without the Authority’s approval and is therefore to be regarded as ‘unlawful on procedural grounds’ pursuant to Chapter 6 of the Authority’s State Aid Guidelines.

The Authority does not question the public financing of regular passenger transport in general. However, any such financing needs to be in accordance with the applicable EEA State aid rules.

In the Authority’s view, the Norwegian Government has not demonstrated that the compensation scheme for express bus operators fulfils the requirements laid down in Council Regulation (EEC) No 1191/69. As the Authority has pointed out above, this conclusion does not rule out that express bus operators providing regular passenger transport could be compensated for costs inherent to the public service obligations imposed on them. Any such compensation would have to be done in accordance with the rules laid down in Council Regulation (EEC) No 1191/69.
On the other hand, the Authority considers that the abolishment of the exemption from the autodiesel levy for buses together with the compensation scheme for regular passenger transport may be regarded as pursuing environmental objectives. Express bus operators providing regular passenger transport are part of the collective transport system in Norway. Collective transport causes less external costs than the use of the private car. In the absence of a comprehensive system of internalising external costs in all modes of transport, compensation for collective transport can be regarded as justified to maintain the competitive position vis-à-vis the private car.

Given that the compensation scheme covers the period starting 1 January 1999, the Authority had to assess the compensation scheme both under the 1994 and the new Environmental Guidelines. Whereas the compensation scheme can be regarded as compatible with the 1994 Environmental Guidelines, the continuation of the compensation scheme as from 23 May 2002, can be regarded as compatible only if the scheme will be limited in time and the amount of compensation granted to express bus operators limited to 50 % of the extra costs due to the autodiesel levy.

The limitation in time means that the application of the compensation scheme needs to be limited until 23 May 2006 at the latest. Operators should be informed about the limited duration of the compensation scheme.

The limitation of the compensation to 50 % of extra costs requires from the Norwegian Government to limit any future compensation to 50 % of the extra costs due to the autodiesel levy, and to examine whether payments made to individual express bus operators under the compensation scheme in the past since 23 May 2001 respected the 50 % ceiling. Any compensation which exceeds that ceiling cannot be regarded as compatible with Article 61(3)(c) of the EEA Agreement in combination with the Environmental Guidelines. For payments which have already taken place and where the amount of compensation granted exceeds the permissible 50 % ceiling, the exceeding amount need to be recovered from the aid recipient, including interest.

Any exceeding amounts would have to be recovered from express bus operators in accordance with the rules and procedures laid down by national law, provided that those rules and procedures do not have the effect of making the recovery required by EEA law practically impossible and do not undermine the principle of equivalence with procedures for deciding similar, but purely national, disputes (79),

HAS ADOPTED THIS DECISION:

1. The compensation scheme for express bus operators (Chapter 1330, post 71 of the State Budget) constitutes new State aid within the meaning of Article 61(1) of the EEA Agreement. The compensation scheme has been implemented contrary to the Norwegian Government's obligations under Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, and therefore constitutes 'aid unlawful on procedural grounds' within the meaning of Chapter 6 of the Authority's State Aid Guidelines.

2. The compensation scheme for express bus operators as applied from 1 January 1999 until 22 May 2001 is compatible with the functioning of the EEA Agreement, and in particular Article 61(3)(c) thereof, in combination with Chapter 15 of the Authority's State Aid Guidelines as adopted in 1994.

3. The compensation scheme for express bus operators as applied from 23 May 2001 is compatible with the functioning of the EEA Agreement, and in particular Article 61(3)(c) thereof, in combination with Chapter 15 of the Authority's State Aid Guidelines as amended in 2001, provided that:

(a) The compensation scheme is limited to five years starting from 23 May 2001;

(b) The compensation granted under the scheme does not exceed 50 % of costs resulting from the auto-
diesel levy in relation to the provision of regular passenger transport services.

4. Any payments made under the compensation scheme as from 23 May 2001 which exceed the permis-
sible aid amount as referred to in point 3 are incompatible with the functioning of the EEA Agreement.

5. Incompatible aid as referred to in point 4 needs to be recovered from the aid recipients. Recovery shall
be effected without delay and in accordance with the procedures of national law, provided that they
allow the immediate and effective execution of the decision. The aid to be recovered shall include
interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.
Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of
regional aid.

6. The Norwegian Government is requested to take the necessary measures ensuring compliance with
point 3 and 5 with immediate effect. As regards the limitation in time, as referred to under point 3.a.,
the Norwegian Government is requested to inform aid beneficiaries without delay of the limitation of
the current compensation scheme until, at the latest, 23 May 2006. As regards compliance with the
requirements contained in points 3.b. and 5, the Norwegian Government is asked to examine whether
the payments made to individual express bus operators under the compensation scheme since 23 May
2001 respect the 50 % ceiling.

7. The Norwegian Government is requested to inform the Authority within two months from receipt of
this decision of the measures taken to comply with the present decision.

8. This Decision is addressed to the Kingdom of Norway.

Done at Brussels, 16 July 2003.

For the EFTA Surveillance Authority

Einar M. BULL
The President