Aufforderung zur Abgabe von Stellungnahmen nach Teil I Artikel 1 Absatz 2 des Protokolls 3 zum Abkommen zwischen den EFTA-Staaten über die Errichtung einer Überwachungsbehörde und eines Gerichtshofs in Bezug auf etwaige staatliche Beihilfen für Hurtigruten ASA im Rahmen der Küstenstrecken-Vereinbarung für den Hurtigruten-Seeverkehr 2012-2019

(2016/C 236/11)

Mit der Entscheidung Nr. 490/15/COL vom 9. Dezember 2015, die nachstehend in der verbindlichen Sprachfassung wiedergegeben wird, hat die EFTA-Überwachungsbehörde ein Verfahren nach Teil I Artikel 1 Absatz 2 des Protokolls 3 zum Abkommen zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofs eingeleitet. Die norwegischen Behörden wurden durch Übersendung einer Kopie von der Entscheidung unterrichtet.

Die EFTA-Überwachungsbehörde fordert hiermit die EFTA-Staaten, die EU-Mitgliedstaaten und alle Beteiligten auf, ihre Stellungnahmen zu der betreffenden Maßnahme innerhalb eines Monats nach Veröffentlichung dieser Bekanntmachung an folgende Anschrift zu richten:

EFTA-Überwachungsbehörde
Registratur
Rue Belliard 35/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

Die Stellungnahmen werden Norwegen übermittelt. Beteiligte, die eine Stellungnahme abgeben, können unter Angabe von Gründen schriftlich beantragen, dass ihre Identität nicht offengelegt wird.

ZUSAMMENFASSUNG

Hintergrund

Hurtigruten ASA (im Folgenden „Hurtigruten“) erbringt entlang der Küste Norwegens zwischen Bergen und Kirkenes einen kombinierten Fracht- und Personenverkehr.

Infolge einer Ausschreibung wurde mit Hurtigruten am 13. April 2011 eine Dienstleistungsvereinbarung für die Küstenroute Bergen–Kirkenes für den Zeitraum 1. Januar 2012 bis zum 31. Dezember 2019 unterzeichnet. Infolge dieser Vereinbarung führt Hurtigruten ganzjährig tägliche Fahrten mit Anlauf von 32 genau festgelegten Zwischenhäfen zwischen Bergen und Kirkenes durch. Für die Strecken Tromsø–Kirkenes und Kirkenes–Tromsø ist ebenfalls Frachtverkehr vorgesehen. Die Dienstleistungen haben im Einklang mit bestimmten, in der Vereinbarung festgelegten Kapazitäts- und Schiffsanforderungen zu erfolgen. Auf der Küstenstrecke eingesetzte Schiffe müssen über eine Mindestpassagierkapazität von 320 Passagieren, Schlafkabinen für 120 Passagiere und Frachtkapazitäten für 150 Europaletten in einem Frachtraum mit normaler Lasthöhe verfügen. Außerdem müssen sie die rechtlichen und technischen Anforderungen gemäß Abschnitt 4.4 der Leistungsbeschreibung einhalten.

Für die unter die Vereinbarung mit Hurtigruten fallenden Dienstleistungen zahlt Norwegen eine Ausgleichsleistung in Höhe von insgesamt 5 120 Mio. NOK für die achtjährige Laufzeit der Vereinbarung.

Beihilferechtliche Würdigung der Ausgleichsleistung

Das einzige Kriterium für die Einstufung als staatliche Beihilfe, dessen Erfüllung in dieser Sache in Rede steht, ist somit, ob die Vereinbarung Hurtigruten einen ungerechtfertigten selektiven wirtschaftlichen Vorteil verschafft hat.

Selektiver wirtschaftlicher Vorteil für Hurtigruten

Die Behörde bewertete die vier Kriterien des *Altmark*-Urteils ([1]) und stellte fest, dass in diesem Stadium keines von ihnen offenbar erfüllt zu sein scheint und Hurtigruten somit einen selektiven Vorteil im Sinne des Artikels 61 Absatz 1 des EWR-Abkommens erhalten hat.

In Bezug auf das erste Kriterium, d. h. eine klare Definition einer gemeinwirtschaftlichen Verpflichtung, hat die Überwachungsbehörde Zweifel daran, ob die Reservekapazitätsanforderung in Abschnitt 4.2 der Hurtigruten-Vereinbarung von Norwegen als Dienstleistung von allgemeinem wirtschaftlichem Interesse (DAWI) geltend gemacht werden kann. Folglich

([1]) Urteil des Gerichtshofs vom 24. Juli 2003, Altmark Trans GmbH und Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH („Altmark“), C-280/00, EU:C:2003:415, Randnrn. 87-93.

bittet sie Norwegen um objektive Rechtfertigung der Notwendigkeit einer gemeinwirtschaftlichen Verpflichtung unter Berücksichtigung der jahreszeitlich bedingten Schwankungen bei der gewerblichen Passagierbeförderung.

Hinsichtlich des zweiten Kriteriums und der Tatsache, dass die Parameter zur Berechnung der Ausgleichsleistung im Voraus objektiv und transparent festzulegen sind, zweifelt die Überwachungsbehörde in diesem Stadium daran, dass die Reservekapazitätsanforderung an die tatsächlichen Passagierzahlen im Rahmen einer gemeinwirtschaftlichen Verpflichtung geknüpft ist. So wurde beispielsweise keine objektive und transparente Methode zur Vorab-Berechnung der Kosten pro Passagierkilometer vorgelegt. Hurtigruten hat ein gesondertes Budget für alle Kosten und Einnahmen in Bezug auf Strecken, die unter die gemeinwirtschaftliche Verpflichtung fallen, erstellt. Diese getrennte Rechnungslegung zielt jedoch nicht auf eine vorherige Festlegung der Parameter für die Ausgleichsleistung ab, die in direktem Zusammenhang mit den tatsächlichen Verlusten und Kosten (Kapazitäts- und Passagierkosten) von Hurtigruten stehen.

Was das dritte Kriterium angeht, so ist zu klären, ob Norwegen sichergestellt hat, dass die gewährte Ausgleichsleistung nicht über das hinausgeht, was zur teilweisen oder völligen Deckung der Kosten für die Wahrnehmung der gemeinwirtschaftlichen Verpflichtung unter Berücksichtigung der dabei erzielten Einnahmen und einer angemessenen Gewinnmarge für die Erfüllung dieser Verpflichtungen erforderlich ist.

Die Überwachungsbehörde kann in diesem Stadium eine Überkompensation an Hurtigruten für die Bereitstellung der öffentlichen Dienstleistung nicht ausschließen. Bei dieser vorläufigen Schlussfolgerung hat die Überwachungsbehörde Folgendes gewürdigt:

i) Hurtigruten reserviert keine Kapazitäten für Passagiere, die aufgrund der gemeinwirtschaftlichen Verpflichtung befördert werden, sondern verkauft die Kapazität vielmehr an Kreuzfahrtpassagiere, während die Ausgleichsleistung für gemeinwirtschaftliche Verpflichtungen auf demselben Niveau verbleibt;

ii) im Vergleich zum vorangegangenen Vereinbarungszeitraum stieg die Ausgleichsleistung für die Erbringung der öffentlichen Dienstleistung erheblich;

iii) Hurtigruten erhält weiterhin Ausgleichsleistungen für nicht erbrachte Dienste; und

iv) Hurtigruten versucht weiterhin, bei gleichzeitigem Bezug unverändert hoher Ausgleichsleistungen für gemeinwirtschaftliche Verpflichtungen niedrigere Hafengebühren entrichten zu müssen.

Was schließlich das vierte Kriterium angeht, das die Einleitung einer Ausschreibung oder die Durchführung eines Vergleichs mit einem effizienten Betreiber vorschreibt, zweifelt die Überwachungsbehörde in Bezug auf das Ausschreibungsverfahren, das zu einem einzigen Angebot, nämlich dem von Hurtigruten geführt hat, zum gegenwärtigen Zeitpunkt daran, dass eine Ausschreibung wie die hier in Rede stehende als ausreichend angesehen werden kann, um die „geringsten Kosten für die Allgemeinheit“ zu gewährleisten. Diese Zweifel sind umso angebrachter, als Hurtigruten einen erheblichen Wettbewerbsvorteil hatte, der die Position des Unternehmens bei der Ausschreibung stärkte, da es bereits Schiffe besaß, die den Anforderungen der Leistungsbeschreibung genügten.

Gemäß der Leistungsbeschreibung wurde der Auftrag zur Wahrnehmung der gemeinwirtschaftlichen Verpflichtung so ausgeschrieben, dass er auf drei alternative Weisen erfüllt werden konnte. Dies würde darauf hinweisen, dass im Rahmen dieser Alternativen weitere Informationen und/oder Gewichtungskriterien gefordert wurden. In Anbetracht der Tatsache, dass diese Informationen in den Ausschreibungsunterlagen nicht enthalten waren, zweifelt die Überwachungsbehörde daran, dass das Ausschreibungsverfahren Anreize für potenzielle Bieter — außer für Hurtigruten — enthielt, die zur Angebotsabgabe im Einklang mit den Anforderungen der drei verschiedenen Alternativen und für eine andere als die tatsächlich gewählte Alternative bereit gewesen wären.

Norwegen hat keine Informationen zur Durchführung eines Vergleichs mit einem effizienten Betreiber beigebracht.

Würdigung der Vereinbarkeit

Die Vereinbarkeit der Ausgleichsleistungen für gemeinwirtschaftliche Verpflichtungen im Seeverkehr wird nach Artikel 59 Absatz 2 des EWR-Abkommens in Verbindung mit dem Rahmen der Europäischen Union für staatliche Beihilfen in Form von Ausgleichsleistungen für die Erbringung öffentlicher Dienstleistungen (nachstehend „Rahmen“) ([2]) gewürdigt.

([2]) Abrufbar unter http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Framework-for-state-aid-in-the-form-of-public-service-compensation.pdf.

Die Grundsätze dieses Rahmens gelten für Ausgleichsleistungen für die Erbringung öffentlicher Dienstleistungen nur insofern, als es sich um staatliche Beihilfen handelt, die nicht unter den Beschluss 2012/21/EU der Kommission über die Anwendung des Artikels 106 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union auf staatliche Beihilfen in Form von Ausgleichsleistungen zugunsten bestimmter Unternehmen, die mit der Erbringung von Dienstleistungen von allgemeinem wirtschaftlichem Interesse betraut sind („DAWI-Beschluss") ([3]), fallen.

Der Überwachungsbehörde liegen keine Informationen Norwegens hinsichtlich der Vereinbarkeitserwägungen vor. Auch hegt sie zum gegenwärtigen Zeitpunkt Zweifel daran, ob die Vereinbarung mit Hurtigruten mit dem EWR-Abkommen vereinbar ist.

Schlussfolgerung

Aufgrund der vorstehenden Erwägungen hat die Überwachungsbehörde beschlossen, das förmliche Prüfverfahren nach Teil I Artikel 1 Absatz 2 des Protokolls 3 zum Abkommen zwischen den EFTA-Staaten über die Errichtung einer Überwachungsbehörde und eines Gerichtshofs einzuleiten. Beteiligte werden aufgefordert, ihre Stellungnahmen zu den Maßnahmen binnen eines Monats nach Veröffentlichung dieser Bekanntmachung im *Amtsblatt der Europäischen Union* zu übermitteln.

EFTA SURVEILLANCE AUTHORITY DECISION

No 490/15/COL

of 9 December 2015

opening the formal investigation procedure on the Coastal Agreement for Hurtigruten Maritime Services 2012-2019

(Norway)

[NON-CONFIDENTIAL VERSION]

The EFTA Surveillance Authority ('the Authority'),

HAVING REGARD to:

the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 59(2) and 61,

Protocol 26 to the EEA Agreement,

the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1 of Part I and Articles 4(4), 6 and 13 of Part II,

Whereas:

I. **FACTS**

1. **Procedure**

(1) On 28 April 2014 the Authority received by e-mail a complaint about alleged incompatible aid to Hurtigruten ASA ('Hurtigruten') under the Coastal Agreement for the Bergen – Kirkenes route ('Hurtigruten Agreement' or 'HA') for the period 1 January 2012 to 31 December 2019.

(2) A second complaint referring to the same Coastal Agreement was received on 9 July 2014. The two complaints are independent, but there are certain overlapping issues. Given that both complaints refer to the same HA, the present decision will treat them jointly and refer to them as 'the complaints' (reference will also be made to 'the complainants') throughout the text.

(3) By letter dated 13 June 2014 (supplemented by a subsequent letter of 10 July 2014), the Authority requested information from the Norwegian authorities. By letter dated 22 September 2014, the Norwegian authorities replied to the information request. An additional request for information was sent to the Norwegian authorities on 21 November 2014, to which the Norwegian authorities replied by letter dated 16 January 2015.

([3]) ABl. L 7 vom 11.1.2012, S. 3, als Punkt 1h in Anhang XV des EWR-Abkommens aufgenommen.

2. **Background – the Hurtigruten Agreement**

(4) Hurtigruten operates transport services consisting of the combined transport of persons and goods along the Norwegian coast from Bergen to Kirkenes, as illustrated in the diagram below:

Diagram 1 – The Bergen – Kirkenes coastal route

(5) The operation of the service for parts of the period 1 January 2005 to 31 December 2012 was the subject of the Authority's Decision No 205/11/COL. ([4]) In that Decision the Authority concluded that the measures involved entailed state aid that was incompatible with the functioning of the EEA Agreement in so far as they constituted a form of overcompensation for a public service obligation, and ordered the recovery of the aid.

(6) The operation of the service for the period 1 January 2012 to 31 December 2019 was the subject of a tender procedure initiated on 30 June 2010, when the tender specifications were published on Doffin (online database for public procurement). ([5])

(7) Following this tender procedure, and on the basis of a bid submitted on 8 November 2010, a contract for the procurement of services for the Bergen – Kirkenes coastal route for the period 1 January 2012 to 31 December 2019 was signed with Hurtigruten on 13 April 2011. Under this contract, Hurtigruten shall perform daily sailings throughout the year with calls at 32 intermediate defined ports between Bergen and Kirkenes. For the Tromsø – Kirkenes and Kirkenes – Tromsø routes, freight transport shall also be provided. The services shall be operated in line with certain capacity and vessel requirements, as stipulated in the contract. Vessels used on the coastal route shall as a minimum have a passenger capacity for 320 passengers, berth capacity in cabins for 120 passengers and freight capacity for 150 euro pallets in a cargo hold with a normal load height. They shall also meet legal and technical requirements as indicated in section 4.4 of the tender specifications.

(8) The maritime services for the Bergen – Kirkenes route are based on maximum fares as regards port-to-port passengers (i.e. public service passengers), which must be approved by the Norwegian authorities. According to the HA, '"[p]ort-to-port passengers" are passengers who purchase tickets for travelling on a chosen route in accordance with the normal tariff, with any supplement for cabins and/or meals at their option. Prices for supplementary services must correspond to published prices for the selected standard of cabin and meal. The overall price must in such cases equal the sum of the ticket price and individual prices of the selected supplementary services.' An approved fare is taken to mean the normal fares tariff that applied on this route on 1 October 2004, adjusted in line with the Consumer Price Index. Any subsequent changes to the normal tariff must be approved by the Norwegian authorities.

([4]) OJ L 175, 5.7.2012, p. 19 and EEA Supplement No 37, 5.7.2012, p. 1. See also Joined Cases E-10/11 and E-11/11 *Hurtigruten* [2012] EFTA Ct. Rep. 758, upholding the Authority's Decision.

([5]) See www.doffin.no.

(9) For other passengers, Hurtigruten is free to set its prices. According to the HA, '"[o]ther passenger" are those who are not "port-to-port passengers". In other words, they are passengers who purchase travel products for specific routes, defined by the supplier, and which include at least one overnight cabin stay and at least one meal on board, where the supplier has published a combined price for the items included and which cannot be broken down into the individual published prices for the same items, including that the passengers will not be entitled to defined discounts on the travel component of the product. Other passengers also include those purchasing a travel product, defined by the supplier, with at least the above-mentioned supplementary services at a combined price, specified per day, but where the passengers themselves select the route where these conditions apply.' The same applies to cabin and meal prices, as well as to freight transport.

(10) For the services covered by the HA, the Norwegian authorities pay a total compensation of NOK 5120 million for the eight years' duration of the agreement, expressed in 2011 prices, in accordance with Statistics Norway's cost index for domestic sea transport. ([6]) The compensation allocation for each individual year is as follows:

Table 1 – Annual Compensation under the HA

2012	NOK 700 million
2013	NOK 683 million
2014	NOK 666 million
2015	NOK 649 million
2016	NOK 631 million
2017	NOK 614 million
2018	NOK 597 million
2019	NOK 580 million

(11) According to the HA, Hurtigruten is obliged to keep separate accounts for the activities on the Bergen – Kirkenes route and other activities and routes outside the scope of the HA. ([7]) In addition, Hurtigruten is obliged to keep separate accounts for the public service obligation routes ('PSO routes') of the Bergen – Kirkenes main coastal route and the commercial part of the same route.

3. **The complaints** ([8])

(12) Both complainants have requested confidential treatment.

(13) The complainants' argument that Hurtigruten receives state aid in the form of overcompensation, violating thus Articles 61 and 59 of the EEA Agreement, is centred around the following allegations:

1. The compensation for providing the PSO routes has increased substantially as compared to the previous contract period.

2. Hurtigruten continues to receive compensation for services that are not rendered:

   a. Hurtigruten has cancelled all sailings to and from the port of Mehamn from 6 January 2014 onwards without any objective justification or professional verification, after having itself partially demolished the terminal quay in April 2012, which Hurtigruten was actually using to dock for over 20 months. At the same time, the corresponding compensation granted by the Norwegian authorities has not been reduced, enabling Hurtigruten to receive monthly cost savings amounting to NOK 314 500. As a result, both the second and third Altmark conditions would not be fulfilled. The second condition is not fulfilled because the Norwegian authorities have not established a framework or policy for objectively and professionally evaluating loss of service after technical or operational claims by the company, and have not engaged any agency to verify the contested claims. The third condition would not be fulfilled, according to the complainants, because Hurtigruten is paid full compensation for PSO routes where it enjoys a substantial cost reduction as a result of the interruption of the services.

   b. Numerous complaints from several ports and regional authorities regarding frequent and arbitrary Hurtigruten cancellations have been dismissed by the Norwegian authorities and have not resulted in any reduction of the compensation. According to the complainants, certain ports are especially plagued by cancellations due to low passenger numbers and low profitability, especially during the winter season.

([6]) If Statistics Norway's cost index is unavailable, Statistics Norway's Consumer Price Index would be used.

([7]) As mentioned in the Authority's Decision No 205/11/COL *'[i]n addition to the service covered by the Hurtigruten Agreement, Hurtigruten is a commercial operator and offers round trips, excursions, and catering on the route Bergen – Kirkenes. Moreover, in connection with this route, Hurtigruten also provides transport services in the Geiranger fjord, outside the scope of the Hurtigruten Agreement. Furthermore, Hurtigruten operates a number of different cruises in different European states, Russia, Antarctica, Spitsbergen and Greenland'*, section 1.2.

([8]) Doc Nos 748323 and 715314.

The complainants particularly question the *force majeure* definition of section 8 of the HA referring to 'extreme weather conditions' without the use of objective criteria. ([9]) They also refer to such conditions as not constituting *force majeure* in line with section 8 of the HA, which particularly states that '[o]bstacles that the contracting party should have considered upon entering into the agreement, or could reasonably be expected to avoid or circumvent, shall not be considered to constitute *force majeure*'. At the same time, the complainants question Hurtigruten's discretion to abuse the absolute sovereignty of the master of the ship, when justifying cancellations that are not due to scheduled maintenance or technical reasons pursuant to section 4-1(3) of the HA.

In conclusion, the complainants submit that the cancellations that do not result in any reduction of the compensation have an adverse effect on the performance of the PSO routes and do not fulfil the second and third *Altmark* conditions.

3. Hurtigruten has shown reluctance to pay port fees, rent and service charges. It stopped paying from January 2014 until May 2014. Furthermore, it attempts to secure special price agreements and seeks repayments of such costs from all relevant ports going back to 2011, while maintaining the public service compensation at the same level.

4. Hurtigruten does not reserve capacity for public service passengers, but rather sells the berth capacity to cruise passengers. Hence, Hurtigruten is paid twice for the same capacity, which provides it with an advantage of NOK 50 to 100 million per year.

4. **Comments by the Norwegian authorities** ([10])

(14) On the allegation that the compensation for the PSO routes under the HA is much higher than under the former agreement of 2005-2012, the Norwegian authorities submit that this reflects the actual costs of running the service with the conditions set in the tender specifications. In this regard, it is also submitted that Hurtigruten suffered considerable losses in the period 2005-2010 while running its PSO routes.

(15) Nevertheless, as there was only one bid after the call for tenders, the Norwegian authorities made use of their right to initiate subsequent negotiations, resulting in the reduction of the compensation by NOK [400 - 1200] million in relation to the initial offer, i.e. from NOK [6320 – 5520] million to NOK 5120 million.

(16) Concerning the allegations regarding Hurtigruten cancellations not resulting in any reduction of the compensation, the Norwegian authorities submit that the HA indeed foresees, in section 3, cancellations within the agreed quotas for technical reasons or cultural events, or due to extraordinary weather conditions in line with the *force majeure* clause of section 8, which do not lead to reductions in the compensation nor to liquidated damages. ([11]) It is submitted that the benefit gained by Hurtigruten in 2012 and 2013 by not having the compensation reduced in case of extreme weather conditions is significantly lower than a proportional part of the reduction in compensation of NOK [400 – 1200] million so far (i.e. the benefit was NOK [14 – 19] million in 2012 and around NOK [16 – 22] million in 2013).

(17) As regards in particular the cancellations due to extreme weather conditions, the Norwegian authorities note that the guiding principle is the safety of the passengers, the crew and the ship, irrespective of whether such conditions are expected. Moreover, also in accordance with section 135 of the Norwegian Maritime Act of 24 June 1994 no. 39, the master of the vessel has the sole responsibility and absolute sovereignty when deciding to avoid servicing ports of call due to extreme weather conditions.

(18) Nevertheless, the HA also provides in section 9.2 that cancellations for other reasons, including cancelled calls at ports, will result in reduced compensation and possible liquidated damages (or claim for compensation in cases of negligence or intent) ([12]).

(19) In any case, according to the Norwegian authorities, the cancellations do not represent savings for the company as such cancellations involve several additional costs in changing the passengers' bookings, and finding alternative transportation of passengers and cargo.

([9]) The complainants point to the fact that in the call for tender for the 2005-2012 contract period *force majeure* as a result of extreme weather conditions was defined as wind speeds over 25 m/s (full storm). However, in the current HA, 'extreme weather conditions' are defined as 'conditions where ocean and/or wind conditions are such that the ship's captain judges it to be unsafe to continue the sailing and/or arrive at a specific port'. This, according to the complainants, has resulted in the majority of the cancellations during the period 2012-2013 in select ports to have occurred at wind conditions below 15 m/s.

([10]) Doc Nos 723002 and 742652.

([11]) The Norwegian authorities submit that according to Hurtigruten's reports, ships were out of production for 171 operating days in 2012 and 186.7 operating days in 2013 due to maintenance and unforeseen operational disturbances, for 5 operating days in 2012 and 12.8 operating days in 2013 due to the ships being used for cultural or similar activities, and finally for 87 operating days in 2012 and 99.8 operating days in 2013 due to extraordinary weather conditions.

([12]) On 12 December 2014, Hurtigruten paid back to the Norwegian authorities the amount of NOK [24 – 32] million due to cancellations in 2012 and 2013.

(20) In reference to the cancellation of services to the port of Mehamn, the Norwegian authorities consider that the decision to leave out the port of Mehamn as from January 2014 and until the port was repaired, was a result of a risk assessment made by Hurtigruten, taking into account the challenging port and weather conditions in line with the *force majeure* provision of section 8 of the HA. The passengers were informed in advance and a land-based transport of cargo was also established between Mehamn and Kjøllefjord. The question of reduction of compensation must be assessed in line with the *force majeure* provision of section 8 of the HA, pursuant to the accounting and other reporting requirements of section 4-4 of the HA. The repairs of the port of Mehamn were completed on 9 September 2014, and Hurtigruten has resumed its sailing.

(21) As far as the allegations regarding the port fees, rent and service charges are concerned, the Norwegian authorities state that their level is based on the new Norwegian Ports Act (NPA) in force as from 1 January 2012 for most ports, replacing the previous NPA of 1984 ([13]). As from that date onwards, the ports can sell services at fair and non-discriminatory prices on a normal contractual basis.

(22) The Norwegian authorities acknowledge that Hurtigruten has indeed approached some of the ports arguing that it is overcharged. This is because, as explained, some ports have conceived the new NPA as giving them the legal basis to increase radically their prices.

(23) It is further stressed that the HA is a net contract, which means that Hurtigruten has the risk for costs and revenues during the period of the agreement and is therefore free to influence its costs, including the port fees, in such a way as to operate the service in the most cost efficient manner. The price adjustment clause of section 5-2 of the HA covers only the compensation under the HA. Any amendments of the port fees and charges to Hurtigruten do not thus lead to compensation reduction.

(24) In this context, the Norwegian authorities point to the mechanism provided in section 7 of the HA for avoiding overcompensation under particular circumstances. This mechanism ensures that each of the parties may demand renegotiations concerning extraordinary adjustment of the compensation, a change in production or other measures, in the event of amendments to acts, regulations or statutory orders, which the parties could not have reasonably foreseen when signing the contract and which entail material extra costs or savings for the contract procuring the service.

(25) The Norwegian authorities submit that the requirement of section 4-2, paragraph 1 of the HA for a minimum capacity is understood to mean that Hurtigruten is obliged to have sufficient capacity available for the public service passengers up to the set capacity requirements. On the other hand, Hurtigruten is allowed to sell tickets to other passengers e.g. cruise passengers, in order to avoid sailing with empty berths and to the extent that this does not prejudge the rights of the public service passengers. In any case, as submitted, it has seldom occurred that there is not enough capacity for the public service passengers as the vessels' capacity for other passengers is higher than the actual demand.

(26) For the contingency, when access is denied to public service passengers, Hurtigruten has introduced a travel guarantee to ensure that these passengers may require either a free travel without berth on the planned journey or a travel with berth on the next scheduled ship, or alternative transport free of charge.

4.1 ***The BDO report*** ([14])

(27) The Norwegian authorities commissioned a report from the consultancy BDO, which looked at Hurtigruten's budgeted and actual financial performance in 2012 and 2013, for, separately: a) the services purchased by the government on the Bergen-Kirkenes route and, b) the totality of services provided by Hurtigruten on the same route (i.e. including both commercial and government-procured services).

(28) In this exercise, BDO distinguished between capacity costs, passenger costs, and costs relating to marketing and sales activities. Capacity costs were then allocated to the government-procured services on the basis of the share of capacity reserved by the government compared to the total capacity of the fleet, whereas passenger costs were allocated on the basis of actual passenger kilometres sailed by distance travellers over the total number of passenger kilometres for all travellers on the fleet. The marketing and sales costs were allocated to the government-procured services on the basis of the share of actual net passenger revenue relating to the PSO passengers compared to the total number of travellers.

(29) […]

([13]) The previous NPA of 1984 distinguished between port fees and service charges. There were several different port fees, e.g. quay fees covering quay costs, approach fees covering costs of keeping the fairway and port approach open and safe, passenger fees covering costs of special passenger facilities etc. Ports could additionally levy service charges for services they sold, which were not covered by the port fees.

([14]) BDO Memo, '*An assessment of Hurtigruten's reported income statements*', Oslo 14 January 2015, p. 7.

II. **ASSESSMENT**

1. **The presence of state aid**

1.1 ***The concept of state aid***

(30) Article 61(1) of the EEA Agreement reads as follows:

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

(31) This implies that a measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled. The measure: (i) is granted by the State or through state resources; (ii) confers a selective economic advantage on the beneficiary; (iii) is liable to have an impact on trade between Contracting Parties and to distort competition.

1.2 ***State resources***

(32) The Norwegian authorities, following a tender procedure, concluded a contract with Hurtigruten for the performance of maritime services over the period 2012-2019 against remuneration, as stipulated in detail in the HA. It is thus not disputed that the aid measure has been granted by the State or through state resources.

1.3 ***Impact on trade and distortion of competition***

(33) The measure in question must be liable to have an impact on trade between the Contracting Parties and to distort competition.

(34) According to established case law, when the financial support granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-EEA trade, then there is at least a potential effect on trade between Contracting Parties and on competition ([15]). In this regard, the Authority is of the view that any potential economic advantage granted to Hurtigruten through state resources would fulfil this condition. As the Authority stated in its Decision No 205/11/COL the market for domestic maritime services (maritime cabotage) ([16]), within which Hurtigruten operates, was opened to EEA-wide competition in 1998 ([17]). Moreover, Hurtigruten is also engaged in the tourism sector, in particular through the offer of cruises/round trips along the Norwegian coast. Other operators offer cruises along the same parts of the Norwegian coast ([18]). Moreover, Hurtigruten also operates a number of cruises in various European States.

(35) The only criterion of the notion of state aid that is thus in question is whether the HA has conferred a selective undue economic advantage on Hurtigruten.

1.4 ***Selective economic advantage on Hurtigruten***

(36) The aid measure must confer on Hurtigruten an advantage that relieves it of charges that are normally borne from its budget.

(37) It follows from the *Altmark* judgment that where a State measure must be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, such a measure is not caught by Article 61(1) of the EEA Agreement. In the *Altmark* judgment, the Court of Justice held that compensation for public service obligations does not constitute state aid when four cumulative criteria are met:

i. *'First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined;*

ii. *Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner […];*

([15]) Judgment in *Philip Morris Holland BV* v *Commission*, 730/79, EU:C:1980:209, paragraph 11; judgment in *Regione Friuli Venezia Giulia* v *Commission*, T-288/97, EU:T:2001:115, paragraph 41; and judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH (Altmark)*, C-280/00, EU:C:2003:415, paragraph 75.

([16]) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

([17]) The maritime cabotage regulation was incorporated at point 53a in Annex XIII to the EEA Agreement (OJ L 30, 5.2.1998, p. 42).

([18]) Norwegian Cruise Line, MSC Cruises, Royal Caribbean, Holland America Line, etc.

iii. *Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;*

iv. *Fourth, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'* ([19])

1.4.1 *The first Altmark condition*

(38) The fulfilment of the first *Altmark* condition must be assessed with regard to Article 4, paragraph 2 of the Maritime Cabotage Regulation, which sets out the specifications that should be part of the definition of a public service obligation, namely: ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

(39) Further, in accordance with section 9 of the Authority's Maritime Guidelines, '[p]ublic service obligations may be imposed or public service contracts may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92' ([20]).

(40) In the absence of specific EEA rules defining the scope of the existence of a service of general economic interest (SGEI), the Norwegian authorities have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Authority's competence in this respect is limited to checking whether Norway has made a manifest error when defining the service as an SGEI ([21]).

(41) However, according to the case law, PSOs may only be imposed if justified by the need to ensure adequate regular maritime transport services, which cannot be ensured by market forces alone. It is important for the national authorities therefore to demonstrate that there is a real public service need ([22]). The Communication on the interpretation of the Maritime Cabotage Regulation confirms that '[i]t is for the Member States […] to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services' ([23]).

(42) The Norwegian authorities submit that the public service pursuant to the HA relates to the capacity reserve requirement as defined in section 4-2, and that the public service should not be assessed at the level of the actual use of the service.

(43) Based on the information provided to the Authority ([24]), it appears however that in both 2012 and 2013, less than [10 – 30] per cent of the passenger capacity reserved for public service passengers was utilised. This would indicate that the compensation received by Hurtigruten for reserving capacity for PSO passengers in those two years vastly exceeded actual demand for PSO passenger services. Moreover, the BDO report shows that the capacity utilisation for commercial passengers amounted to [35 – 65] per cent and [35 – 65] per cent in 2012 and 2013 respectively. Given this level of spare capacity for commercial passengers (and the low level of capacity utilisation for PSO passengers), the Authority cannot exclude that a capacity reservation provision for PSO passengers may be unnecessary, especially during the winter season, where the utilisation by commercial passengers would naturally be much lower.

(44) For these reasons, the Authority doubts whether the reserve capacity requirement of section 4-2 of the HA can be classified by Norway as an SGEI and invites the Norwegian authorities to provide objective justification regarding the need for such a PSO, taking into account the seasonal fluctuations of commercial passengers transportation.

(45) The Authority has not received any information on berth utilisation. As regards the cargo transportation for the Tromsø – Kirkenes – Tromsø route, this is not price regulated and according to section 4-3 of the HA, Hurtigruten has full freedom to set the fares. It is doubtful therefore whether the cargo transportation is in compliance with Article 4(2) of the Maritime Cabotage Regulation, which explicitly mentions the elements needed for an adequate definition of a PSO, i.e. among others the rates to be charged.

([19]) Paragraphs 87-93.
([20]) Available at http://www.eftasurv.int/?1=1&showLinkID=15132&1=1.
([21]) Available at http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf.
([22]) Judgment in *Alanir and others*, C-205/1999, EU:C:2001:107, paragraph 34.
([23]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), COM(2003) 595 final, 22.12.2003, section 5.2.
([24]) BDO Memo, page 7.

(46) In light of the above, the Authority doubts whether the PSO for cargo transportation has been clearly defined under the HA.

(47) The Authority however, does not doubt that other obligations are clearly defined in section 4-1 of the HA, as regards the supplier obligations in terms of route production requirements, in section 4-2 of the HA, as regards the vessel requirements and in section 4-3 of the HA, as regards fare and discount requirements, with the exception of cargo transportation.

(48) In view of the above, the Authority doubts that the first *Altmark* condition is met.

1.4.2 *The second Altmark condition*

(49) The Norwegian authorities must define *ex ante* the methodology to calculate the compensation for discharging the PSO obligations.

(50) Pursuant to section 4-2 of the HA '[v]essels used on the coastal route shall as a minimum have a passenger capacity for 320 passengers, berth capacity in cabins for 120 passengers and freight capacity for 150 euro pallets (in cargo hold with a normal load height)'.

(51) It is the view of the Norwegian authorities that this condition has been satisfied given that the compensation is calculated on the basis of the elements specified in Annex D to the tender specification, which provides the following:

Table 2 – The elements in the budget scheme for the public service

A: Total revenues distance passengers
B: Passengers cost distance passengers
C: Net passenger revenues (A+B)
D: Revenues from on board sales
E: Net revenues from goods and cars
F: Other revenues
G: Total own revenues (C+D+E+F)
H: Government procurement of service
I: Total revenue (G+H)
J: Safety crew
K: Oil and fuel
L: Repairs and maintenance
M: Port costs
N: Insurance costs
O: Depreciation own vessels/bareboat
P: Net financial costs
Q: Total capacity costs (J+K+L+M+N+P)
R: Cost of goods sold
S: Crew not included in the safety crew
T: Marketing costs and sales provision
U: Administration costs
V: Other costs
W: Total passenger costs (R+S+T+U+V)
X: Total costs public service (Q+W)
Y: Net result before taxes (I-X)

(52) In concluding that the parameters were established in advance in an objective and transparent manner, the Norwegian authorities asked the independent consultant BDO to study Hurtigruten's financial accounts for 2012-2013 and compare the accounts for the public service and the total accounts.

(53) According to the Norwegian authorities, it is thus ensured that the PSO passengers do indeed receive their transport within the capacities set by the HA and that that capacity should be available to the extent that there is actual demand from PSO passengers.

(54) At this stage, it is not clear to the Authority whether the capacity reserve requirement is linked to actual PSO passenger numbers. For example, there seems to be no objective and transparent methodology to calculate in advance the cost per passenger/kilometre.

(55) Hurtigruten, in compliance with the tender specifications, has established a separate budget incorporating all costs and revenues attributed to the PSO routes. According to section 4.9.2 of the tender specifications, this separate accounting aims at ensuring predictability of which cost additions/savings/extra revenues/shortfalls form the basis of any renegotiation, as provided for in sections 6 and 7 of the HA. A further aim is to document that the public procurement process does not entail any unlawful cross-subsidisation. The separate accounting however does not aim at establishing in advance the parameters of the compensation, which shall be directly linked to the actual losses and costs (capacity and passenger costs) incurred by Hurtigruten. ([25]) Instead, the HA has only fixed the annual compensation to be paid for the maritime services for each individual year from 2012 to 2019 based on a minimum commitment for passengers/kilometres per year, without this having any link to the fixed costs (i.e. the capacity costs).

(56) In addition, although the compensation is based on the elements stipulated in table 2, as mentioned above, the Authority has not received any information as to how these costs have been calculated. For instance, sections 6 and 7 of the HA contain certain provisions on the adjustment of compensation in case of changes in production or in case of unforeseen events. Even though certain indications are provided, i.e. a calculation based on the costs and revenues ensuing from the changes in production or an aggregated calculation in the case of unforeseen events, the exact parameters of these adjustments are not known in advance and there are no limitations on how much extra compensation can be granted ([26]).

(57) In this context, as the EFTA Court pointed out in the *Hurtigruten* case, the principle of transparency could have been observed: '*[…] Norway could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any supplementary compensation intended to cover unforeseen losses and costs*' ([27]).

(58) In addition, section 4-1, item 3 of the HA, provides that '[o]mission of up to 10 days of operation in agreed production per ship per annum due to planned maintenance and unforeseen operational disruption linked to agreed production (off-hire) is considered to be proper fulfilment and shall not entail a deduction in the agreed remuneration in accordance with section 9-2'. The Authority fails to see how this loss in production is calculated and certified in advance in a transparent and objective manner. The 10 days ceiling appears arbitrary and as such does not appear to qualify as an objective estimate of provable loss (e.g. cancellations of service to the port of Mehamn).

(59) The Authority notes that neither HA nor the tender specifications specify whether the compensation awarded includes any profit margin for Hurtigruten, and if so, what the methodology used to calculate this profit margin is, taking into account the risks incurred by the operator in the provision of the service.

(60) Lastly, concerning Hurtigruten's attempts to negotiate lower port fees whilst the Norwegian authorities maintain the compensation at the same level, the Authority underlines that the amount of compensation awarded should be fully reflected in the parameters established in advance including a reasonable profit. As mentioned above, the Authority is of the preliminary view that no parameters have been established to calculate a reasonable profit margin. Therefore, any attempts by Hurtigruten to get lower prices on the port fees while maintaining the compensation at the same level would seem not to satisfy the second *Altmark* condition.

(61) As a result, in view of the above, it is the Authority's preliminary opinion that the second Altmark condition is not fulfilled.

1.4.3 *The third Altmark condition*

(62) When granting compensation, the Norwegian authorities should ensure that it does not exceed what is necessary to cover all or part of the costs incurred in discharging the PSO, taking into account relevant receipts and a reasonable profit.

(63) In this regard, the EFTA Court already held in the *Hurtigruten* case:

'If it is shown that the compensation paid to the undertakings operating the public service does not reflect the costs actually incurred by that undertaking for the purposes of that service, such a system does not satisfy the requirement that compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public services obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations' ([28]).

([25]) Joined Cases E-10/11 and E-11/11 *Hurtigruten* [2012] EFTA Ct. Rep. 758, paragraph 117.
([26]) Ibid, paragraphs 128-129.
([27]) Ibid, paragraph 127.
([28]) Paragraph 170. See for comparison, judgment in *Enirisorse*, C-34/01 to C-38/01, EU:C:2003:640, paragraphs 37-40.

(64) Briefly, according to the complainants' arguments, presented in further detail in paragraph (13) above:

i) Hurtigruten does not reserve capacity for public service passengers, but rather sells the capacity to cruise passengers, while maintaining the public service compensation at the same level;

ii) The compensation for providing the public service has increased substantially as compared to the previous contract period;

iii) Hurtigruten continues to receive compensation for services that are not rendered; and, lastly

iv) Hurtigruten further attempts to get lower prices for the harbour fees, while maintaining the public service compensation at the same level;

(65) As regards the first point, the Authority reminds the Norwegian authorities that under the third *Altmark* condition, only the costs incurred in discharging the PSO shall be covered. Any compensation granted to cover costs outside the public service remit cannot be held to constitute compensation for PSO. Therefore, when the capacity (passengers and berth) for PSO passengers is sold to commercial cruise passengers, and given that the BDO report does not provide any information on the capacity utilisation to justify the opposite, it appears that Hurtigruten is paid twice for the same service, which would in principle constitute a form of overcompensation.

(66) The Authority is conscious that the figures presented in the BDO report are annual figures and therefore correspond to average capacity utilisation throughout the year. Accordingly, there may be periods of the year where capacity utilisation for public service passengers is higher, and where it is indeed also necessary to have in place a capacity reservation mechanism. The Authority, however, cannot rule out that the mechanism used in the HA overcompensates Hurtigruten in that it does not take into account different (e.g. seasonal) levels of capacity utilisation during the year.

(67) The Authority takes note of the travel guarantee subsequently introduced, as mentioned above in paragraph (26), to 'compensate' the public service passengers for their lost travel and correct any alleged overcompensation. However, until the introduction of that travel guarantee, public service passengers appear at times to have been unable to benefit from the public service, although the costs were evidently covered by the compensation already granted to Hurtigruten. Also, at this stage it is not clear to the Authority whether the cost of providing a free travel without berth on the planned journey or a travel with berth on the next scheduled ship or alternative transport free of charge equals the compensation that Hurtigruten has received to cover the cost of public service berth capacity, which is sold to commercial cruise passengers. It appears therefore that such a mechanism, due to the limited (on average) capacity utilisation in both the PSO and cruise segment, is an ineffective and relatively costless service for Hurtigruten that does not offset the advantage gained through the excess capacity reservation, which is freely sold to cruise passengers.

(68) Concerning the second point, as noted above in paragraph (13), and as evident from the Authority's Decision No 205/11/COL, the Norwegian authorities paid Hurtigruten a total compensation of NOK 1 899.7 million to carry out the same PSO routes during the period 2005-2012. More specifically, the annual compensation for the year 2011 amounted to NOK 236.8 million ([29]). Taking into account that the compensation for 2012 under the current HA amounted to NOK 700 million, the Authority expresses its doubts as to whether the increase in compensation is justified under the HA. The Norwegian authorities claim that there have been considerable losses for Hurtigruten in the period 2005-2012 to justify the increase of the compensation. However, the Authority is of the preliminary view that due to the fact that the previous HA had not envisaged separation of accounts, it is not possible to determine whether these losses were caused by commercial or PSO activities. In any case, it is questionable how such a higher compensation can be justified, when the scope of the PSO remains the same as in the previous contract period (in terms of sailing frequency and number of ports served) and the capacity reservation has decreased from 400 passengers to 320 and from 150 berths to 120.

(69) In relation to the third point, the Authority notes that when Hurtigruten keeps on its books compensation that has been granted to cover the costs of transporting PSO passengers, without however rendering the service to them (or when the service is not required), overcompensation cannot be excluded.

(70) Particularly, section 8 of the HA provides for the operator to keep the compensation granted in case of interruptions of sailings due to events that constitute *force majeure*. It is generally accepted that the decision to avoid servicing ports of call due to extreme weather conditions lies with the master of the vessel. However, the Authority questions at this stage the fact that, as provided for in section 8 of the HA, '[…] any cancelled production ensuing from force majeure shall not be considered as a non-conformity in the production under section 4-1, item 3' and thus not lead to any reduction in the compensation.

(71) On the basis of the information provided ([30]), it appears to the Authority that the phenomenon of extreme weather condition constitutes a normality in the maritime business along the Norwegian coast. It might thus be considered as a foreseen event. However, it is not reflected as such in the compensation calculations. The compensation has been calculated as a lump sum *ex ante* for the whole contract period, without taking into account an objective estimate of a provable loss due to foreseen extreme weather conditions.

([29]) Section 2.
([30]) See footnote 11.

(72) In reference to the cancellation of services to the port of Mehamn, which, according to the complainant, resulted in Hurtigruten receiving monthly cost savings at the amount of NOK 314 500 over a period of around 8 months, the Authority is not at this stage convinced by the Norwegian authorities' suggestion that this situation should be assessed in the context of the *force majeure* provision of the HA. According to the information provided by the complainants, the port was damaged in 2012 by Hurtigruten itself, which nevertheless continued serving the port until January 2014. Therefore, the Authority cannot see at this stage how this cancellation could be held to have taken place due to unforeseen events, which would entitle the operator to keep the compensation granted.

(73) Finally, concerning the last point and Hurtigruten's attempts to negotiate lower port fees whilst the Norwegian authorities maintain the compensation at the same level, it should be noted that there should not be any overcompensation above the level of a reasonable profit. Therefore, a reduction in port fees should result in lower compensation, whereas higher port fees would respectively mean a higher compensation. In light of this, at this stage the Authority is of the opinion that any attempts by Hurtigruten to get better prices of the port fees while maintaining the compensation at the same level, would not ensure that overcompensation is excluded.

(74) The Norwegian authorities point to section 7 of the HA as establishing a mechanism to avoid overcompensation. Section 7, however, refers to unforeseen costs resulting from events that are independent of Hurtigruten's management decisions, such as amendments to acts, regulations or statutory orders. To claim compensation for such costs, it must be proved by the operator that those costs are genuinely incurred in the discharge of the PSO, and the costs must be well documented, so as to ensure that the ultimate compensation received by Hurtigruten does not exceed its actual costs. The Authority at this stage cannot see how section 7 of the HA can ensure that overcompensation is avoided.

(75) Lastly, the contract does not contain any claw back clause such that if any agreed profit margin is exceeded, the surplus must be returned to the State or deducted from the compensation paid in the next year or perhaps over the contract period.

(76) In view of the above, the Authority cannot exclude that Hurtigruten has been overcompensated for the provision of the public service. As a result, the Authority doubts whether the third *Altmark* condition has been fulfilled.

1.4.4 *The fourth Altmark condition*

(77) Referring to the tender procedure carried out which resulted in only one bid, Hurtigruten's, the Norwegian authorities argue that the tender was designed in such a way as to attract more bidders. In this respect, it is argued that the tender was widened to include maritime services that would not run on a daily basis throughout the year and that the required minimum capacity was reduced from 400 to 320 passengers and from 150 to 120 berth bunks. Additionally, the deadline for submitting the bids was extended from 30 September until 8 November 2010 on request from an interested operator, whereas overall there was sufficient time allowed from the deadline for submitting bids (8 November 2010) until the date of commencement of the services (1 January 2013).

(78) Despite the above arguments as well as the fact that subsequent negotiations took place between the Norwegian authorities and Hurtigruten, which resulted in a reduction of the compensation for the whole contract period in relation to the initial offer, see paragraph (15), the Authority at this stage doubts whether a tender procedure such as the one at issue, where only one bid is submitted, can be deemed sufficient to ensure 'the least cost to the community' ([31]), for the reasons listed below.

(79) Hurtigruten had already run this particular maritime service consisting of the combined transport of persons and goods along the Norwegian coast from Bergen to Kirkenes for years ([32]). As the incumbent operator, Hurtigruten thus had a significant competitive advantage that reinforced its position in the tender procedure, given that it had already in its possession vessels adapted to the requirements of the tender specifications.

(80) Furthermore, according to the tender specifications, the assignment for carrying out the PSO was advertised as three alternatives:

i. Alternative 1: Daily sailing throughout the year to 34 ports;

ii. Alternative 2: Sailings 7 days a week in summer (8 months), 5 days a week in winter (4 months), to 34 ports; and

iii. Alternative 3: Sailings 5 days a week throughout the year to 34 ports.

([31]) Paragraph 68, http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf.

([32]) For background information on the Hurtigruten Agreement, see Decision No 205/11/COL on the Supplementary Agreement on the Hurtigruten service, section 2, OJ L 175, 5.7.2012, p. 19 and EEA Supplement No 37, 5.7.2012, p. 1.

(81) However, the tender specifications do not provide any clarifications as to the criteria used to award the service. The Procurement Notice refers to the lowest price as the sole award criterion used for the service in question. Although, in itself the 'lowest price' criterion could satisfy the fourth *Altmark* condition, nevertheless in the case at hand, this reference is very abstract and cannot be assessed in isolation. The fact that there were three alternatives would indicate the existence of further information and/or weighting criteria among those alternatives. In view of the fact that such information was not included in the tender documents, the Authority doubts whether the tender as designed has provided incentives to potential bidders, apart from Hurtigruten, that would have been willing to bid in accordance with the requirements of the three different alternatives and for a different alternative than the one actually chosen (i.e. alternative 1).

(82) The Norwegian authorities have not submitted any information on the second leg of the fourth *Altmark* condition, concerning whether the level of compensation needed is determined on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped.

(83) In view of the above, the Authority doubts that the fourth *Altmark* condition is met.

1.4.5 *Conclusion on the Altmark conditions*

(84) Based on the information submitted, the Authority cannot, at this stage, conclude that the compensation awarded under the Coastal Agreement for Hurtigruten Maritime Services for the period 2012-2019 complies with all the four conditions in the *Altmark* judgement. The Authority thus cannot exclude the presence of an advantage within the meaning of Article 61(1) EEA, granted to an undertaking for performing public service obligations.

2. **Conclusion on the presence of aid**

(85) The Authority takes the preliminary view that the compensation awarded under the Coastal Agreement for Hurtigruten Maritime Services for the period 2012-2019 may entail state aid within the meaning of Article 61(1) of the EEA Agreement.

3. **Procedural requirements**

(86) Pursuant to Article 1(3) of Part I of Protocol 3: '*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. […] The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*'.

(87) The Norwegian authorities did not notify the HA to the Authority. Should the Authority therefore conclude that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3, there would be a breach of the standstill obligation, without prejudice to the application of the SGEI Decision as below mentioned.

4. **Compatibility of the aid**

4.1 ***The legal framework***

(88) The compatibility of public service compensation for maritime transport is assessed on the basis of Article 59(2) of the EEA Agreement in conjunction with the Authority's Framework for state aid in the form of public service compensation ('the Framework') ([33]).

(89) The principles set out in the Framework apply to public service compensation only in so far as it constitutes state aid not covered by Commission Decision 2012/21/EU on the application of Article 106(2) of the Treaty of the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ('SGEI Decision') ([34]).

(90) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds for compatibility and to demonstrate that the conditions of compatibility are met ([35]). The Norwegian authorities consider that the measure at hand does not constitute state aid pursuant to the *Altmark* jurisprudence, and therefore has not provided any grounds for compatibility.

4.2 ***Applicability of Decision 2012/21/EU***

(91) The SGEI Decision lays down the conditions under which certain types of public service compensation are to be regarded as compatible with the functioning of the EEA Agreement pursuant to its Article 59(2) and exempt from the requirement of prior notification under Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

([33]) Available at http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Framework-for-state-aid-in-the-form-of-public-service-compensation.pdf.
([34]) OJ L 7, 11.1.2012, p. 3, incorporated at point 1h of Annex XV of the EEA Agreement.
([35]) Judgment in *Italy* v *Commission*, C-364/90, EU:C:1993:157, paragraph 20.

(92) There is one exception from the notification requirement of Article 2 of the SGEI Decision, which might be relevant in the present case:

> *'(d) compensation for the provision of services of general economic interest as regards air or maritime links to islands on which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers';*

(93) The Authority has not received any information from the Norwegian authorities as regards the applicability of the said exception. The Authority therefore doubts whether the Bergen – Kirkenes public service route concern an annual traffic not exceeding the threshold of 300 000 passengers.

(94) In light of the doubts expressed above under paragraphs (49) to (85) on alleged overcompensation, the Authority further doubts whether the Norwegian authorities have ensured, pursuant to Article 5 of the SGEI decision, that Hurtigruten does not receive compensation in excess of the amount needed to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.

(95) The Authority additionally invites the Norwegian authorities, in the event of the measure falling under the above exception, to justify whether the provisions of Article 4 (entrustment), Article 6 (control of overcompensation) and Article 7 (transparency) of the SGEI Decision are complied with.

4.3 ***Applicability of the Framework***

(96) On the basis of the provisions of the Framework, one of the compatibility conditions that must be fulfilled is that the entrustment act which specifies the public service obligation, in this case the HA, shall include *'[a] description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation'*.

(97) Further, according to the Framework, *'[t]he amount of compensation must* not *exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit'*. The Framework also clarifies that *'[t]he net cost necessary, or expected to be necessary, to discharge the public service obligations should be calculated using the net avoided cost methodology […]'*. ([36])

(98) On the basis of the considerations in paragraphs (49) to (85), at this stage the Authority considers that Hurtigruten may have been overcompensated for the provision of the public service.

(99) The compatibility of the HA shall also be assessed against the following conditions as provided for by the Framework:

a. Paragraph 14: proper consideration to the public service needs;

b. Paragraph 19: compliance with EEA public procurement rules;

c. Paragraph 20: absence of discrimination;

d. Paragraph 24 to 38: calculation of the net cost necessary to discharge the PSO;

e. Paragraphs 39 to 50: efficiency incentives;

f. Paragraphs 51 to 59: no affectation of trade development to an extent contrary to the interests of the EEA;

g. Paragraph 60: transparency.

(100) The Norwegian authorities have not put forward any compatibility considerations. Therefore at this stage, the Authority raises doubts as to whether the compensation awarded under the Coastal Agreement for Hurtigruten Maritime Services for the period 2012-2019 is compatible with the functioning of the EEA Agreement.

5. **Conclusion**

(101) As set out above, the Authority has doubts as to whether the HA entails state aid within the meaning of Article 61(1) of the EEA Agreement.

(102) The Authority also has doubts as to whether the HA is compatible with the functioning of the EEA Agreement.

([36]) See also paragraphs 27 and 28 of the Framework for alternative calculation methods.

(103) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the HA does not constitute aid or that it is aid compatible with the functioning of the EEA Agreement.

(104) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit, within one month of the date of receipt of this Decision, their comments and to provide all documents, information and data needed for the assessment of the HA in light of the state aid rules.

(105) The Authority requests the Norwegian authorities to forward a copy of this decision to Hurtigruten.

(106) The Authority must remind the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted will in principle have to be recovered, unless this recovery would be contrary to a general principle of EEA law.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the Coastal Agreement for Hurtigruten Maritime Services 2012-2019.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month of the date of receipt of this Decision. They are further requested to provide, also within one month of the date of receipt of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English language version of this decision is authentic.

Done at Brussels, on 9 December 2015.

For the EFTA Surveillance Authority

Sven Svedman
President

Helga Jónsdóttir
College Member