

## NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY

**Invitation to submit comments pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on State aid issues concerning potential aid to AS Oslo Sporveier and AS Sporveisbussene in Norway**

(2012/C 197/07)

By means of Decision No 123/12/COL of 28 March 2012, reproduced in the authentic language on the pages following this summary, the EFTA Surveillance Authority initiated proceedings pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. The Norwegian authorities have been informed by means of a copy of the decision.

By means of this notice the EFTA Surveillance Authority gives the EFTA States, EU Member States and interested parties notice to submit their comments on the measure in question within one month of the date of publication to:

EFTA Surveillance Authority  
Registry  
Rue Belliard/Belliardstraat 35  
1040 Bruxelles/Brussel  
BELGIQUE/BELGIË

The comments will be communicated to the Norwegian authorities. The identity of the interested party submitting the comments may be withheld following a request in writing stating the reasons for the request.

## SUMMARY

**Background**

In Norway, the local bus transport sector is regulated by the Commercial Transport Act of 2002 (the 'CTA') and the Commercial Transport Regulation of 2003 (the 'CTR'). Both the CTA and the CTR repealed preceding legislation that was in substance similar. This legislative framework provides inter alia for a system of concessions that are necessary for undertakings to be eligible for being entrusted with the discharging of public bus services, and confers on counties, such as Oslo Municipality, the responsibility for compensating undertakings that operate unprofitable routes. Such compensation can be granted to cover the difference between the revenue generated from the sale of tickets and the cost of operating the service.

In Oslo, since before the entry into force of the EEA Agreement, annual compensation was granted to the concessionaires for unprofitable routes in line with the city's budget procedure. Compensation was paid by means of an annual lump sum, which was based on costs incurred in the preceding years, taking into account a variety of correction factors. Since 2008, all contracts for scheduled bus services have been awarded to undertakings following a public tender. Since then no compensation as described above has been granted to AS Oslo Sporveier for scheduled bus services.

AS Oslo Sporveier and later its subsidiary, AS Sporveisbussene, were entrusted with the provision of scheduled bus services in Oslo in accordance with the provisions briefly described above since long before the entry into force of the EEA Agreement until the 2008.

AS Oslo Sporveier has undergone many reorganisations since 1994. For example, the operation of all bus services, including commercial tour bus services in addition to the scheduled bus services in Oslo, was outsourced to its subsidiary AS Sporveisbussene in 1997. As a result, AS Oslo Sporveier and AS Sporveisbussene entered into a so-called Transport Agreement so that AS Sporveisbussene could become the effective recipient of the annual compensation. Under the Transport Agreement compensation for the scheduled bus service was paid in accordance with the provisions described above. The Norwegian authorities maintain that throughout the entire period under investigation — 1994 to 2008 — separate accounts were kept for commercial and public service activities in the AS Oslo Sporveier group, and that the commercial activities were always charged market prices for services they received from public service activities.

In 2004, Oslo Municipality — then a 98,8 % shareholder of AS Oslo Sporveier — injected NOK 111 760 000 of capital to cover the underfunding of AS Sporveisbussene's pension funds. The underfunding had accrued in the period prior to 1997, and related to pension liabilities of employees both in the public service as well as in the tour bus division of AS Oslo Sporveier. AS Oslo Sporveier was obliged to remedy the underfunding. The capital injection was chosen by Oslo Municipality, in its capacity as owner, as the least expensive means to do so.

### Assessment of the measure

#### *The presence of State aid*

The Authority considers that both the capital injection and the annual compensation payments entail State aid.

As for capital injection to cover the underfunding of the pension accounts of the commercial activity, the Authority is currently unable to exclude that it confers an economic advantage on AS Oslo Sporveier, as no information has been submitted demonstrating that it had been granted in line with the market economy investor principle.

Moreover, it is the preliminary view of the Authority that both the annual compensation as well as the capital injection to cover the underfunding relating to public service pension accounts (which linked to cost that could also form the basis for the annual compensation) have not been determined through a public procurement procedure and are not similar to the cost that an undertaking, well run and adequately equipped, would have incurred. Thus the fourth criterion of the *Altmark* case law is not met and therefore both measures constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

#### *The nature of the aid*

The Authority is at this stage not able to conclude whether the aid was granted under an existing aid scheme, which would be based on the CTA and the CTR as applied in Oslo since before the entry into force of the EEA Agreement. It should be noted that no further aid was granted in accordance with the above provisions since 2008. Assuming that an existing aid scheme has been in place since 1994, the Authority is currently unable to determine the exact delineation of the scheme, and whether all aid awarded was based on that scheme. Moreover, it is not capable of excluding that the measures entail, at least to some minor extent, in particular as regards the covering of pension liabilities relating to the commercial activities, illegal and incompatible State aid.

*Compatibility of the aid*

At this stage it would appear to the Authority that the payments made until the directly awarded concession had run its course in 2008, and the 2004 capital injection to offset the underfunding of the pension fund could at least in large parts be compatible public service compensation under Article 49 of the EEA. The compatibility assessment in the final decision would thus focus in particular on whether there has been overcompensation. Moreover, the aid could, at least in part, be compatible under Article 61(3)(c).

**Conclusion**

In light of the above considerations, the Authority decided to open the formal investigation procedure in accordance with Article 1(2) of the EEA Agreement. Interested parties are invited to submit their comments within one month from publication of this notice in the *Official Journal of the European Union*.

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