

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 179/15/COL

of 7 May 2015

on aid to public bus transport in the County of Aust-Agder (Norway) [2016/1890]

THE EFTA SURVEILLANCE AUTHORITY ('THE AUTHORITY'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 49, 61 to 63 and Protocol 26 thereto,

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

Having regard to Protocol 3 to the Surveillance and Court Agreement ('Protocol 3 SCA'), in particular to Article 1(1), (2) and (3) of Part I and Articles 7(5) and 14 of Part II thereof,

Whereas:

I. FACTS

1. PROCEDURE

- (1) By letter dated 23 March 2011 the Authority received a first complaint from the Norwegian bus company Konkurrenten.no, a privately owned bus transport operator, alleging that unlawful State aid is involved in the contracts awarded by the County of Aust-Agder, Norway (also referred to herein as 'Aust-Agder' or 'the County') to several bus operators for the supply of local bus transport services in Aust-Agder.
- (2) By letter of 10 November 2011, the Authority forwarded the complaint to the Norwegian authorities and requested further information.
- (3) By Decision No 60/13/COL of 6 February 2013, the Authority opened the formal investigation into potential unlawful state aid involved in the award of the contracts for local bus transport services in Aust-Agder ('the opening decision'). The opening decision was published in the Official Journal of the European Union and the EEA Supplement to it ⁽¹⁾. The Norwegian authorities, the complainant and two other third parties, Nettbuss Sør AS and Setesdal Bilruter L/L, submitted comments to the opening decision. The Norwegian authorities have further commented upon the comments sent by the complainant and the other third parties.
- (4) By letter dated 17 December 2013, the Authority requested further information from the Norwegian authorities.
- (5) Additional information from the Norwegian authorities was sent by letter of 30 January 2014 and from Nettbuss Sør AS by letter of 20 February 2014.

⁽¹⁾ OJ C 118, 25.4.2013, p. 4 and EEA Supplement No 24, 25 April 2013, p. 1.

- (6) By letter dated 8 July 2014, the Norwegian authorities submitted further information regarding the production of Nettbuss Sør AS. In the light of this information, the Authority asked for clarifications and supplementary information by letter dated 14 August 2014.
- (7) The Norwegian authorities responded by letters dated 15 October 2014 and 19 December 2014, whereas Nettbuss Sør AS responded by letter of 6 November 2014. A meeting also took place on 25 November 2014 with representatives of Nettbuss Sør AS and Aust-Agder.
- (8) Moreover, on 9 December 2013, the Authority received a second complaint from the company Agder Flyekspress, which runs a competing airport bus service to the one run by Nettbuss Sør AS. According to the complainant, Nettbuss Sør AS has been receiving at least as from 2013 onwards unlawful State aid through cross-subsidization of its commercial activities.
- (9) By letter dated 18 March 2014, the Authority forwarded the complaint to the Norwegian authorities and requested further information.
- (10) The Norwegian authorities submitted the requested information by letter of 22 April 2014. Nettbuss Sør AS has also replied by email of 9 April 2014.
- (11) By letter dated 10 October 2014 the Authority closed the second complaint case informing the complainant that in view of the information provided, and taking into account that both complaints refer to the public contracts awarded in Aust-Agder and to issues covered by the scope of the opening decision, the Authority has decided to deal with the issues brought forward in the present decision. The complainant did not object to this, neither did he submit any further information.

2. BACKGROUND — THE LEGISLATION ON LOCAL SCHEDULED AND SCHOOL BUS TRANSPORT

2.1. Local scheduled bus transport ⁽¹⁾

2.1.1. Centralised State responsibility

- (12) At the time of the entry into force of the Transport Act of 1976 ⁽²⁾, the Norwegian State (the Ministry of Transport) was responsible for local scheduled transport services. State transport agencies managed the local scheduled transport in each county.

2.1.2. De-centralisation process

2.1.2.1. Introduction

- (13) Shortly after the entry into force of the Transport Act of 1976, a de-centralisation process was initiated. From 1 January 1979, the powers of the Ministry of Transport could be delegated to county level. At the same time, the State transport agencies were turned into county administrative bodies.
- (14) In 1981, with the introduction of Article 24a to the Transport Act of 1976, by providing funding to the counties, the State could confer the responsibility for financing local scheduled transport to the counties ⁽³⁾.

2.1.2.2. The 1980 Regulation

- (15) Another important element of the de-centralisation process was the Regulation of 19 December 1980 on compensation for providing local scheduled transport ('the 1980 Regulation'). Its Article 1 stated that the county had the responsibility to finance local scheduled transport. Pursuant to Article 3, the amount of the compensation should be decided on an annual basis, based on the difference between estimated income according to the decided tariffs and discounts, and reasonable costs.

⁽¹⁾ This section is an extract from the EFTA Surveillance Authority Decision No 519/12/COL of 19 December 2012 closing the formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene (OJ L 276, 17.10.2013, p. 8) and EEA Supplement No 57, 17 October 2013, p. 1.

⁽²⁾ Act of 4 June 1976 No 63 (e.i.f. 1 July 1977).

⁽³⁾ See the preparatory works to the amendment of the Transport Act of 1976 — Ot.prp. No 16 (1980-81), p. 2.

- (16) The 1980 Regulation also contained rules on control and access to information and clarified the roles of, on the one hand, the Ministry of Transport and, on the other, the counties. Its Article 7 provided the legal basis for the Ministry to issue further rules and guidelines for the compensation of local scheduled transport.

2.1.2.3. The 1982 Regulation and the KS and NABC Standard Main Agreement

- (17) On 1 January 1983, the 1980 Regulation was replaced by the Regulation of 2 December 1982 on compensation for providing local scheduled transport ('the 1982 Regulation'). Article 4 of the 1982 Regulation imposed an obligation on the counties to enter into agreements with the concessionaires on the compensation for the provision of the scheduled public transport. On this basis, the Norwegian Association of Local and Regional Authorities ('KS') and the Norwegian Association of Bus Companies ('NABC') ⁽¹⁾, concluded a standard main agreement ('the KS and NABC Standard Main Agreement') and a standard yearly compensation agreement to be used by each county when concluding agreements for the provision of local scheduled bus transport. As regards the calculation of the compensation, the standard agreement was based on the same principles as Article 3 of the 1980 Regulation. The standard main agreement also provided for a separation of costs between the local bus transport services and other commercial services.

2.1.2.4. The 1985 Regulation

- (18) With the adoption of a new income system for the counties, a new Regulation on Compensation for Local Transport was adopted in 1985 ('the 1985 Regulation'). The new income system for the counties (and municipalities) entailed that the central contribution for local transport was given as a lump sum. The main focus of the 1985 Regulation was the relationship between the Ministry of Transport and the counties. The 1985 Regulation was repealed on 1 January 1987 by a new regulation ⁽²⁾ which remained in force until 30 April 2003 when it, in turn, was replaced by the Commercial Transport Regulation (see below).

2.1.3. Commercial Transport Act 2002 and Commercial Transport Regulation 2003

- (19) Presently, the local scheduled bus transport sector is regulated by the Commercial Transport Act of 2002 ('CTA') ⁽³⁾ and the Commercial Transport Regulation of 2003 ('CTR') ⁽⁴⁾. The CTA repealed and replaced the Transport Act of 1976 ⁽⁵⁾. The CTR repealed and replaced two regulations ⁽⁶⁾.
- (20) The Norwegian authorities have explained that the relevant provisions have not been significantly altered since the entry into force of the EEA Agreement in 1994.

2.1.4. Co-financing of local transport services by the State and counties

- (21) The counties partly finance the local transport services with tax revenue. In addition, under the CTA the counties receive state funding by way of annual block grants ⁽⁷⁾. The amount of the grants is determined on the basis of the extent to which the counties need contributions from the State. Therefore, the counties must provide the Ministry of Transport with budgets, accounts and other relevant information necessary to assess the need for contributions ⁽⁸⁾.

2.1.5. Concessions

2.1.5.1. Introduction

- (22) Under the CTA, concessions are required to carry out scheduled passenger transport services by bus for remuneration (i.e. for payment by the users (the passengers) of the transport services) ⁽⁹⁾.

⁽¹⁾ In Norwegian: *Norsk Rutebileierforbund*.

⁽²⁾ Regulation of 12 August 1986 No 2170 (e.i.f. 1 January 1987).

⁽³⁾ Act of 21 June 2002 No 45 (e.i.f. 1 January 2003).

⁽⁴⁾ Regulation of 26 March 2003 No 401 (e.i.f. 1 April 2003).

⁽⁵⁾ Act of 4 June 1976 No 63 (e.i.f. 1 July 1977). Repealed and replaced by the CTA on 1 January 2003.

⁽⁶⁾ Regulation of 12 August 1986 No 2170 (e.i.f. 1 January 1987) and Regulation of 4 December 1992 No 1013 (e.i.f. 1 January 1994). Both repealed and replaced by the CTR on 1 April 2003.

⁽⁷⁾ Article 22(3) CTA.

⁽⁸⁾ Article 22(4) CTA.

⁽⁹⁾ Articles 4 and 6 CTA.

- (23) Both a general and a special concession are required for operators of scheduled passenger transport services by bus for remuneration.

2.1.5.2. General concession for passenger transport

- (24) Undertakings providing passenger transport services for remuneration must have a general concession ⁽¹⁾. In order to obtain a general concession, the applicant must (i) provide a certificate of good conduct; (ii) have satisfactory financial means and abilities; and (iii) have satisfactory professional qualifications ⁽²⁾. General concessions are not time-limited ⁽³⁾.

2.1.5.3. Special concessions for scheduled passenger transport

- (25) In addition to the general concession, any undertaking wishing to carry out scheduled passenger transport for remuneration must have a special concession ⁽⁴⁾. There are two types of special concessions: (i) area concessions, and (ii) route specific concessions. The area concession is of a residual nature, in that it permits its holder to operate scheduled bus transport services in the entire area covered, in so far as other route specific concessions have not been granted in the area. The holder of a route specific concession is the sole entity entitled to operate scheduled bus transport on that route.
- (26) The special concession confers upon the concessionaire both a right and a duty to carry out the transport service as set out in the concession ⁽⁵⁾. When applying for a special concession, a proposal for a transportation schedule and tariffs must be submitted ⁽⁶⁾. Schedules and tariffs are subject to the control of the counties ⁽⁷⁾. The counties can order changes in the schedules and tariffs ⁽⁸⁾.
- (27) Special concessions can either be awarded for periods of up to 10 years (i) through tender procedures and granted for the period determined in the tender procedure ⁽⁹⁾, which in any event will not be for a longer period than 10 years ⁽¹⁰⁾; or (ii) directly, i.e. outside any tender procedure for a 10-year period ⁽¹¹⁾.

2.1.5.4. Contracts

- (28) To complement the concessions, the counties enter into contracts with the concessionaires about the provision of public services. The counties are free to determine the form of these contracts ⁽¹²⁾.

2.1.5.5. Compensation

- (29) The counties are responsible for compensating the concessionaires ⁽¹³⁾. The counties can choose whether to use gross or net contracts. Under gross contracts, concessionaires receive compensation for the cost of providing the service from the county and not the income from the ticket sales to passengers. Under net contracts, concessionaires receive the ticket revenue and compensation from the county in so far as the ticket revenue is not sufficient to cover the cost of the services plus a reasonable profit.

⁽¹⁾ Article 4(1) CTA.

⁽²⁾ Article 4(2) CTA and Chapter I of the CTR.

⁽³⁾ Article 27(1) CTA.

⁽⁴⁾ Article 6(1) CTA.

⁽⁵⁾ Article 25 CTR.

⁽⁶⁾ Articles 28 and 29 CTR. These are the requirements the Authority considers to be the most relevant for the purposes of describing the national scheme, however, a number of other detailed requirements for a special concession are also set out in the CTR.

⁽⁷⁾ The Ministry of Transport has delegated its competence for setting the tariffs to the counties. However, some rebates are determined on the national level. In practice, the Ministry has instructed all the counties to ensure that local scheduled bus transport operators carrying out a public service offer a 50 % price reduction to children, senior citizens and disabled citizens.

⁽⁸⁾ Articles 28 and 29(2) CTR. On the basis of Article 28(3) CTR, the Ministry of Transport has the competence to give guidelines on the content and publication of the transportation schedules. The Ministry of Transport's Circular Letter N-1/2006 contains supplementary guidelines on the publication of route schedules. Before 2006, Article 28 CTR regulated certain aspects of the publication of route schedules. These aspects were taken out in 2006. In practice, the Circular Letter N-1/2006 refers to the old provision (Article 28 CTR) as it was before the amendment, and states that the requirements of the old provision, until further notice, shall be considered as a guideline for the content of the route schedule.

⁽⁹⁾ Article 27(2) CTR.

⁽¹⁰⁾ As stated in the preparatory works, Chapter 10.1 of Prop. 113 L (2009-2010).

⁽¹¹⁾ Article 8 CTA. The possibility to tender the concessions was introduced by an amendment of the Transport Act of 1976 by Act of 11 June 1993 No 85 (e.i.f. 1 January 1994).

⁽¹²⁾ Article 22(5) CTA.

⁽¹³⁾ Article 22(1) CTA.

- (30) Under Article 22 CTA, counties have to compensate operators for the provision of the transport service on unprofitable routes that the counties seek to establish, or to maintain within their territories ⁽¹⁾.
- (31) The counties are free to determine the manner in which the concessionaires are to be compensated; the CTA and the CTR do not have any particular provisions on how compensation is to be provided.
- (32) The Authority understands that Article 22 CTA allows for compensation to cover the cost of the public service (minus the ticket revenues for net contracts) including a reasonable profit.

2.2. School Transport

- (33) Since before the entry into force of the EEA Agreement in Norway on 1 January 1994, the Norwegian counties have been responsible for providing primary and high or secondary school transportation of children residing in a certain distance from the school (normally four kilometres). At present, this responsibility is laid down in the Act on Education of 1998 (the 'Education Act') ⁽²⁾. This Act was preceded by the Act on Primary Schools of 1969 ⁽³⁾ and the Act on Secondary Schools of 1974 ⁽⁴⁾. In the mid-1980s, on the basis of an act amending the Act on Primary Schools and the Act on Secondary Schools ⁽⁵⁾, the counties became responsible for providing school transportation. For the sake of clarity, in this Decision the term 'Education Act' will be used throughout the text to refer also to the relevant legal provisions in force prior to the entry into force of the Education Act.
- (34) According to the Education Act, for primary school transportation, the municipalities are obliged to pay a tariff to the county. The county, thereafter, pays the bus operator for providing the service. For high or secondary school transportation, the counties pay for monthly tickets for the students, pursuant to contracts concluded with the bus operators.

3. ALLEGED AID RECIPIENTS

- (35) Since the entry into force of the EEA Agreement in Norway, Aust-Agder has awarded special concessions to, and concluded contracts for local scheduled and school bus transport services with, the following seven companies:
1. Birkeland Busser AS, owned by Setesdal Bilruter L/L;
 2. Frolandsruta Frode Oland, owned by Frode Stoltenberg Oland;
 3. Høyvågruta AS, until its merger with Nettbuss Sør AS in 2009;
 4. Nettbuss Sør AS, which is part of the Nettbuss-group and owned by the bus transport company Nettbuss AS, which is owned by Norges Statsbaner AS ⁽⁶⁾;
 5. Risør and Tvedestrand Bilruter AS ('RTB'), until its merger with Nettbuss Sør AS in 2008;
 6. L/L Setesdal Bilruter whose three main shareholders are Sigmund Aune, Brøvig Holding AS and Bykle Municipality. Additionally, several other municipalities within Aust-Agder and some in Vest-Agder are shareholders; and
 7. Telemark Bilruter whose main shareholders are Vinje Municipality, Seljord Municipality and Seljord Sparebank; in addition, several municipalities in the Telemark County own shares in the company.

⁽¹⁾ The Norwegian authorities, in their comments to the opening decision in Case 71524 concerning alleged aid to AS Oslo Sporveier and AS Sporveibussene, have confirmed this and explained, with reference to legal literature (*Norsk Lovkommentar*), that the preceding provision — Article 24a of the Transport Act of 1976 — was interpreted in the same way. In that regard, *Norsk Lovkommentar* to the Transport Act of 1976 (available on <http://www.rettsdata.no/> (access requires a paid subscription)) on the issue of compensation states the following in note 43 (in Norwegian): 'I rutetransporten vil det dog ofte være aktuelt å pålegge utøver en større rutetjeneste som sammenholdt med de takster som godkjennes, ikke gir et forsvarlig økonomisk grunnlag. I slike tilfeller kan plikten bare opprettholdes dersom det ytes tilskudd, jf. § 24 a'. Translation by the Authority: 'For scheduled transport it will, however, frequently be appropriate to require the transport operator to provide a more comprehensive service that, in light of the set maximum prices, would not be of sound financial interest. Under such circumstances, the public service obligation can only be maintained against compensation, cf. Article 24a.'

⁽²⁾ Act of 17 July 1998 No 61 (e.i.f. 1 August 1999).

⁽³⁾ Act of 13 July 1969 No 24.

⁽⁴⁾ Act of 21 June 1974 No 55.

⁽⁵⁾ Act of 31 May 1985 No 41.

⁽⁶⁾ Norges Statsbaner AS (NSB) is a train operator for passengers in Norway. It is owned by the Ministry of Transport and Communications. In addition to providing transport services by train or by bus, the company is also engaged in cargo trains, foreign train transport and real estate activity.

- (36) These companies have been operating local scheduled and school bus transport in Aust-Agder since before the entry into force of the EEA Agreement in Norway on 1 January 1994. As from 2009, and following the mergers of Nettbuss Sør AS with Høyvågruta AS and RTB, five operators remained to carry out the transport services under the Aust-Agder contracts⁽¹⁾. Following the expiry of the concession contract with Nettbuss Sør AS on 31 December 2014, there are only four transport operators that currently provide the services concerned under the existing legal framework.
- (37) The right and the obligation to provide local scheduled and school bus transport has been awarded through concessions, as well as, at a later stage, in combination with the award of separate contracts to the bus transport operators. The two most recent awards of concessions covered periods of approximately 10 years (1993-2003 and 2004-2012). The awards of concessions and contracts have routinely been extended to the same bus transport operators during the two concession periods.
- (38) All the operators carry out commercial activities outside the public service remit. These activities consist of freight transport, tour buses, taxi services and express bus routes.
- (39) Nettbuss Sør AS, in particular, has been operating since the 1960s, and as from 2014 through its subsidiary Nettbuss Ekspress AS, a direct airport bus in the area. This is regarded as a commercial route that is not entitled to public service compensation by Aust-Agder. It also operates, through its subsidiary Sørlandsekspressen, express bus routes outside the public service remit, as well as late night bus routes also outside the public service remit (*nattbuss*).
- (40) The Norwegian authorities have stated that Telemark Bilruter AS has commenced the practice of keeping separate accounts as from 2012.
- (41) Frolandsruta Frode Oland has not kept separate accounts.
- (42) Birkeland Busser AS, Nettbuss Sør AS and Setesdal Bilruter L/L introduced account separation in 2009.
- (43) As for RTB and Høyvågruta AS, the Norwegian authorities have not been able to provide information as to whether the companies have kept separate accounts. As from their merger with Nettbuss Sør AS in 2008 and 2009 respectively, their accounts have been incorporated into those of Nettbuss Sør AS.

4. THE AWARD OF CONTRACTS

4.1. The award of contracts from 1988 to 2003

- (44) From 1988 to the end of 2003, Aust-Agder concluded agreements with each bus operator holding a special concession. The duration of these agreements was for one year with the possibility of automatic renewal for a year at a time.
- (45) These agreements did not provide a formula on how to calculate the public service compensation. The compensation was based on negotiations. However, the contracts provided an obligation upon each bus company holding a special concession to prepare a production plan and a budget proposal indicating their expected income and costs. This proposal should, as far as possible, be based on the accounts, statistics and also on prognoses of predictable costs and income plus the traffic evolution. Further, the proposed production costs should correspond to the costs of a normal and well-run operator. This constituted the basis for the negotiations.

4.2. The award of contracts from 2004 to 2008 — introduction of the ALFA-method

- (46) Following a decision by its County Council of December 2002, Aust-Agder concluded new individual contracts. According to the Norwegian authorities, the introduction of these contracts did not entail any fundamental change compared to the prior system. All contracts continued to be awarded directly to the existing operators.

⁽¹⁾ The mergers were notified to the Norwegian company registry on 10 and 11 June 2009 and the companies Høyvågruta AS and RTB were removed from the registry on 3 and 5 September 2009. Throughout the text, the Authority will use the term 'five bus operators' to refer to the relevant companies, where appropriate.

- (47) As from 2004, the level of compensation continued to be concluded on the basis of negotiations between Aust-Agder and the bus companies, but the basis for the negotiations changed with the introduction of a new system on how to calculate the compensation, the so-called 'ALFA-method' ⁽¹⁾.
- (48) According to the Norwegian authorities, the ALFA-method was developed as an objective and transparent calculation model for costs connected to bus transport. A fundamental principle has been that the transport companies shall not have their compensation calculated based on their own, actual costs, but according to representative assumptions for their type of enterprises. This method simulates the costs of a well-run bus company. The normalised cost calculation of bus operations under the ALFA-method includes the following core elements:
- (a) calculation of production: number of kilometres per production period per vehicle; each scheduled route is registered by distance driven, time consumed, number of days per period and type of bus used. The calculation of the number of kilometres per vehicle and hours in traffic is included, as well as the average speed per period;
 - (b) calculation of costs: unit costs multiplied with numbers of kilometres per vehicle; the ALFA-method takes into account costs such as fuel, tires, spare parts, service, maintenance, carwash, costs of vehicle, cost of personnel (drivers), budgets costs (traffic costs such as ferries, toll, etc.), administration costs and other shared cost. The cost of each item is partially calculated on the basis of the prices for input factors multiplied by their consumption per kilometre, which gives the normalised figure per kilometre;
 - (c) revenue from traffic operations in the production period; and
 - (d) calculation of the need for subsidies. The calculation of subsidies is built on the normalised calculation plus budget costs minus traffic revenue.
- (49) The calculation has been based on the production of transport services (i.e. the number of kilometres driven by vehicles carried out in the various vehicle groups and scheduled service groups) by each of the companies; then on the ALFA-method's average costs for the various cost items; and finally on some adjustments based on costs that are specific to the individual company due to geographical and topographical conditions, traffic conditions and legislation, as well as tariff cited conditions.
- (50) The new individual contracts were initially in force from 1 January 2004 until 31 December 2006 and were prolonged by two years until 31 December 2008.

4.3. The award of contracts since 2009 — indexation

- (51) On 12 June 2007, the Aust-Agder County Council decided to award new contracts directly to the existing bus companies for the next period 2009 to 2012. Following negotiations with the bus transport companies, the County Council approved the new contracts on 9 December 2008.
- (52) The previous contracts remained largely unchanged. However, the ALFA-method was supplemented by a new indexation system linked to certain input factors in accordance with the following formula:
- $$0,55 \times L + 0,30 \times K + 0,15 \times D$$
- L = change in wage cost (Statistics Norway, statistics of wages within transport)
- K = change in the consumer price index (Statistics Norway)
- D = change in fuel cost (Platts Oilgram index).
- (53) The compensation granted for the new contracts as from 2009 onwards was no longer subjected to negotiations.
- (54) The new contracts initially ran from 1 January 2009 until 31 December 2012 and were prolonged until the end of 2016, except for the contract with Nettbuss Sør AS, which was only extended for two years, until 31 December 2014.

⁽¹⁾ There has been two parallel systems for calculation compensation for bus transport services in Norway, which share many of the same features. One system is called ALFA, as applied by Aust-Agder, while the alternative is called Busskost. Both systems are based on the same core elements, but the Busskost is developed and exclusively managed (for a fee) by the consultancy company Asplan-VIAK.

- (55) The County of Aust-Agder has already started tendering out new contracts for the period January 2015 onwards.

5. THE ATP PROJECT AND THE AIRPORT SHUTTLE BUS SERVICE

- (56) The complainant alleges that Aust-Agder has allocated NOK 1 million annually for 'research and environmental measures' to the bus operators.
- (57) According to the information provided by the Norwegian authorities, the municipalities of Kristiansand, Songdalen, Søgne, Vennesla, Lillesand, Birkenes and Iveland and the counties of Vest-Agder and Aust-Agder have established a cooperation project referred to as the ATP project.
- (58) On the basis of the ATP project, as from 2004, only Nettbuss Sør AS was granted directly by the project an annual amount of NOK 800 000 to increase the frequency of bus departures on the route Lillesand-Kristiansand, mainly from one bus per hour to two buses per hour. This payment was done through the county of Vest-Agder in 2005, 2006 and 2007, and through Agder Kollektivtrafikk AS ('AKT'), a public limited liability company, in 2008 and 2009. As from 2010, that amount was increased to NOK 2 million and was granted to Nettbuss Sør AS directly from Aust-Agder as part of their contract on local scheduled and school bus transport, in order to maintain improved bus connections to Aust-Agder, as well as to improve further the bus services on the route Kristiansand-Arendal (route 5). The order for increased production was made by Aust-Agder, and the payment was made from the County of Vest-Agder through AKT to the county of Aust-Agder, which made the payment to Nettbuss Sør AS. The amount was reduced to NOK 1,5 million as from 2011.
- (59) In addition, in conjunction to the above increased frequencies of Nettbuss Sør AS, a corresponding airport shuttle bus service was established in 2004 providing a link between route 5 of the local scheduled bus to Kristiansand and Kjevik airport, using one single ticket valid for both the local scheduled bus and the airport shuttle bus. This airport shuttle bus was not entrusted as a public service. To compensate the local scheduled bus for the transport service on route 5, Nettbuss Sør AS purchased 60 000 seats annually at the price of NOK 65 per ticket, totalling NOK 3,9 million. The ticket fare was calculated on the basis of the ticket price of Nettbuss Sør AS' commercially run direct airport route. The amount was used to finance increased frequencies on route 5.
- (60) In 2009, due to the low number of passengers using route 5, it was agreed between Nettbuss Sør AS and Aust-Agder that the amount for the annual seat purchases should be fixed at the level of NOK 2,1 million. This reduction in income was covered by the corresponding increase of NOK 2 million to the ATP project, as mentioned above.
- (61) In 2013, due to a further decrease in the number of airport passengers and the fact that the annual amount paid by Nettbuss Sør AS for the seats was found not to be commercially viable to maintain the airport shuttle bus service, it was agreed with Aust-Agder to reduce the Nettbuss Sør AS's obligation on two public service routes, namely routes 39 and 40, in order to finance the corresponding income reduction on the ATP project. In economic terms, this reduction was estimated by the Norwegian authorities to represent direct-cost saving of NOK 1 020 000 for Nettbuss Sør AS.
- (62) According to the information provided by the Norwegian authorities, the airport shuttle bus stopped purchasing seats on route 5 with effect as from 20 January 2014. The airport shuttle bus and route 5 are no longer marketed as one offering, and shuttle passengers taking line 5 have to buy their tickets separately. Also, the airport shuttle bus is as from 2014 no longer run by Nettbuss Sør AS, but by the company Nettbuss Ekspress AS.

6. GROUNDS FOR OPENING THE FORMAL INVESTIGATION

- (63) The Authority expressed doubts as regards whether the compensation awarded since 2004 for the local scheduled and school bus transport service obligations in Aust-Agder constitutes state aid within the meaning of Article 61 of the EEA Agreement, and in particular as regards the application of the *Altmark* ⁽¹⁾ conditions, especially conditions two to four.

⁽¹⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft* ECLI:EU:C:2003:415.

- (64) The Authority doubted whether the second criterion was met given the fact that negotiations took place to adjust the exact amount of compensation to be granted after the ALFA-method had been applied. Further, the Authority doubted whether the third criterion has been fulfilled, given that the companies concerned have not consistently kept separate accounts since 2004, and none of the companies have kept proper allocation of common costs to show that the final compensation covered solely the cost of the public service. Finally, the Authority could not conclude on the applicability of the fourth *Altmark* criterion and the benchmarking exercise, and expressed doubts as to whether the ALFA-method and the negotiations used to determine the final compensation ensured that the compensation was limited to covering the costs of an adequately equipped and well-run operator.
- (65) In relation to the ATP project, the Authority expressed doubts, due to the absence of adequate information, as to whether the amounts granted to Nettbuss Sør AS are connected to the award of compensation by Aust-Agder, or whether they constitute, or form part of, a separate scheme.
- (66) In addition, the Authority could not conclude as to whether the modifications introduced in the existing aid scheme (that is put in place in Aust-Agder based on the CTA, the CTR, the Act on Education and the administrative practice) with the ALFA-method as from 1 January 2004 and its indexation as from 2009, substantially altered that scheme, turning it into new aid. Although the introduction of this new method does not appear to have changed the legal basis and the aim for awarding the compensation or the beneficiaries involved, the Authority expressed doubts as to whether the substance of the scheme remained unaffected, given that the basic features on how to calculate the compensation might have been significantly altered.
- (67) Having concluded that an existing aid scheme has been in place in Aust-Agder, at least until the end of 2003, the Authority doubted, however, given the lack of separate accounts and proper allocation of common costs between the public service and the commercial activities of the beneficiaries concerned, whether the compensation amounts have been granted on the basis of that scheme. Pursuant to recent jurisprudence of the EFTA Court, the Authority was of the view that payments not made on the basis of the provisions providing for the scheme cannot be protected by the existing nature of that scheme ⁽¹⁾. The Authority also stressed in the opening decision that in line with the above cited judgment, any aid not granted on the basis of the existing aid scheme would have to be qualified as new aid.
- (68) As regards the compatibility of the measures concerned, the Authority pointed out that any potential overcompensation granted outside the existing aid scheme would not be compatible with the EEA Agreement. Likewise, concerning the potential new aid granted after 2004 with the introduction of the ALFA-method, the Authority could not conclude as to whether the compensation granted complies with the EEA Agreement, given the doubts expressed concerning the parameters on the basis of which the compensation payment is to be calculated, as well as the arrangement for cost allocation to avoid overcompensation.
- (69) Finally, concerning the ATP project, in the absence of sufficient information, the Authority could not appraise the compatibility of that measure with the EEA Agreement.

7. COMMENTS BY THE NORWEGIAN AUTHORITIES

- (70) The Norwegian authorities submitted comments on the opening decision, as well as thereafter, initially taking a common approach as regards the State aid assessment for all the transport operators referred to in the present decision.
- (71) However, later in the process the Norwegian authorities identified and communicated to the Authority, by letters dated 8 July, 15 October and 19 December 2014, additional information regarding the production of Nettbuss Sør AS. On the basis of this new information, it appears that the Norwegian authorities' opinion regarding the compensation granted to Nettbuss Sør AS and the compatibility assessment thereto, has materially changed (see Section 7.1.6 below).

⁽¹⁾ Case E-14/10, *Konkurrenten.no AS v EFTA Surveillance Authority* [2011] EFTA Court Report 266, paragraphs 74 and 76.

7.1. Compensation for bus transport in Aust-Agder

7.1.1. *New or existing aid*

- (72) The Norwegian authorities argue that the introduction of the ALFA-method has not caused any substantial change in the existing compensation system in place in Aust-Agder. The aim, basis and principles for compensating the bus companies have been the same both before and after 2004.
- (73) It is also important and it should suffice, according to the Norwegian authorities, that the legislation (i.e. the CTA, the CTR and the Act on Education) has remained unaltered throughout the whole relevant period. The Norwegian authorities further submit that the administrative practice in Aust-Agder has not changed over the years and throughout the period the compensation has consisted of the same elements (i.e. compensation for bus operations, payment for school transportation and compensation for subcontractor costs).
- (74) The amount of compensation has always been the difference between the estimated costs for discharging the public service obligations minus the estimated income. It was determined on the basis of certain factors that remained unchanged throughout the relevant period (i.e. costs of bus operations, costs of subcontractors, primary school income, high school income, other income, ticket rates and rebates and route production). The final amount was concluded through negotiations and was set before the public service transport obligations were conducted.
- (75) The factors, as mentioned above, to determine the compensation were taken into account regardless of the type of agreement applied to establish the compensation. Therefore, according to the Norwegian authorities, the ALFA-method was just introduced as a tool to calibrate one of the factors (namely the cost of bus operations) more precisely. Therefore, it did not change the compensation system as such, nor did it introduce a severable new aid measure.
- (76) As a result, the Norwegian authorities state that the aid scheme put in place in Aust-Agder remains existing in nature, and the Authority should therefore close the formal investigation procedure, as any potential aid would have to be addressed under the procedure for existing aid laid down in Articles 17 to 19 of Part II of Protocol 3 SCA.

7.1.2. *The ALFA-method and the Altmark conditions*

- (77) To the extent that the ALFA-method is considered to be a new measure, the Norwegian authorities reiterate their view that the present compensation scheme in Aust-Agder as from 2004, with the exception of aid granted to Nettbuss Sør AS, does not entail State aid within the meaning of Article 61(1) of the EEA Agreement because it fulfils the conditions laid down in the *Altmark* judgment.
- (78) The Norwegian authorities submit that the introduction of the ALFA-method as from 2004, complies with the first *Altmark* condition ⁽¹⁾. The bus operators conduct local scheduled transport and school bus transport in accordance with concessions, contracts and the relevant acts and regulations.
- (79) As regards the second *Altmark* condition, the Norwegian authorities submit that the costs, revenues and the compensation from Aust-Agder are determined in advance in an objective and transparent manner indicating all the different elements of the formula that are relevant for the calculation. The calculation has been based on the production of transport services (i.e. the number of kilometres driven by vehicles carried out in the various vehicle groups and scheduled service groups) by each of the companies; then on the ALFA-method's average costs for the various cost items; and finally on some adjustments based on costs that are specific to the individual company due to geographical and topographical conditions, traffic conditions and legislation, as well as tariff-cited conditions.

⁽¹⁾ The Norwegian authorities do not address the *Altmark* conditions for the period before 2004, as the Authority in its opening decision concluded that any aid granted before 2004 would be existing aid.

- (80) With regard to the third *Altmark* condition, the Norwegian authorities argue that the calculation of the compensation according to the ALFA-method and its indexation does not exceed what is necessary to cover the costs of the discharge of the public service obligations, taking into account relevant income and a reasonable profit. They point out that the compensation in this case is calculated to cover the difference between estimated income and estimated costs of the company, being applied in an objective and transparent manner. The operating profit is also relatively low and limited for most of the companies. According to the Norwegian authorities, based on available information, the normal profit in the public bus transport sector appears to be around 3-5 %.
- (81) The Norwegian authorities have submitted figures per company to show that the compensation granted from 2004 until 2011, has not exceeded the estimated costs plus a reasonable profit. As the cost estimates, and thereby the compensation, are based on objective methods, the Norwegian authorities argue that there is no reason to believe that the bus companies have been overcompensated under the contracts.
- (82) Further, according to the Norwegian authorities, the fact that separate accounts have not been kept for all companies during the relevant periods does not mean that overcompensation is present. If, they state, the method for compensating the public service providers ensures that no overcompensation takes place, there is no added obligation under the present case law regarding the *Altmark* conditions that, in addition, separate accounts must be held by the recipient companies.
- (83) It is also submitted that the negotiations, on the basis of which the final amount of compensation is set for each year from 2004 to 2008, had very limited impact on the amount of compensation paid by Aust-Agder to the bus companies. There have been a few slight increases in the level of compensation after negotiations. However, the Norwegian authorities argue, the bigger picture reveals that the level of compensation after negotiations has been the same or lower, and that the negotiations seem to have worked as a sort of a safety valve in favour of Aust-Agder.
- (84) In reference to the fourth *Altmark* condition, the Norwegian authorities submit that the ALFA-method and the later system of indexation as from 2009 are both based on a benchmarking exercise. The compensation is calculated on the basis of the costs and income of a well-run undertaking and not only the average in the sector concerned.
- (85) That said, the ALFA-method provides a basis for the assumption that costs shall correspond to a lower threshold. For example, normalised consumption of fuel for a certain number of operations shall correspond to a level which will mean that 33 % of measured values will lie below the norm and 67 % higher than the norm. This means that the system is not based on average cost, but on the cost of the 33 % best-run companies.

7.1.3. *Compensation outside the scheme*

- (86) The Norwegian authorities have further commented as to what has been done to ensure that, with the exception of aid granted to Nettbuss Sør AS, no compensation for local scheduled bus transport and school transport in Aust-Agder has been granted in excess of what is allowed for under the scheme.
- (87) They submit that the introduction of the ALFA-method did not cause any substantial change in the compensation system. As a result, the compensation system (before as well as after 2004) consisted of the same elements, basing the compensation on the actual cost figures of the companies. In the view of the Norwegian authorities this practice has ensured that no overcompensation has taken place and the public service compensation is only calculated for costs connected to the public service obligations.
- (88) That said, according to the Norwegian authorities, with the exception of Nettbuss Sør AS, all other transport operators have been reporting only public service productions and income in the spreadsheets for receiving the compensation under the ALFA-method. Consequently, there is no reason to believe that these operators have been compensated for anything other than the public service transport.

7.1.4. Compatibility

- (89) The Norwegian authorities also submit that, with the exception of aid granted to Nettbuss Sør AS, the scheme of compensation for public service bus transport would, in case the changes in 2004 or from 2009 must be regarded as altering the classification of the scheme to new aid, in any event complies with the requirements of Regulation (EEC) No 1191/69 of the Council ⁽¹⁾. Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽²⁾ (collectively referred to below as 'the transport regulations') is said not to be applicable, as the latter Regulation had not yet entered into force in the EEA when these changes were introduced. The Norwegian authorities refer to the judgment in case *Andersen v Commission*, where the General Court held that the Regulation cannot be regarded as having retroactive effect ⁽³⁾.
- (90) In particular, the Norwegian authorities argue that there is no violation of the provisions of Regulation (EEC) No 1191/69. This is underpinned by the facts, as the parameters of compensation were determined in advance for the whole of the period from 2004 until today and no negotiation could take place after 2009 to adjust the level of compensation. Therefore no company, with the exception of Nettbuss Sør AS, has been overcompensated from 2004 until today.

7.1.5. The ATP project

- (91) As regards the ATP project, the Norwegian authorities have stated that the amount paid annually to Nettbuss Sør AS was compensation for an increase in production on the routes Kristiansand-Lillesand and Kristiansand-Arendal. Taking into account 253 days a year, the production increase was approximately 100 000 kilometres per year. A price per hour of NOK 200 leads to approximately NOK 350 000 in additional costs. Thus, the combined costs would be approximately NOK 950 000. With estimated income of NOK 150 000, the net costs would be around NOK 800 000.
- (92) Given that the funds allocated from the ATP project have been used to increase the production under the existing contracts with Aust-Agder, the Norwegian authorities state that this production does not differ from any other production increases under the contract (since the routes were already operated). As a result, the increased production constitutes part of an existing aid scheme.

7.1.6. Additional information regarding the production of Nettbuss Sør AS

- (93) The Norwegian authorities have further submitted additional information regarding the production of Nettbuss Sør AS.
- (94) According to the Norwegian authorities, the production reported by Nettbuss Sør AS appears to deviate from what should have been reported as production for public service compensation, and there are significant errors in the production spreadsheets, as analysed below in recitals 237 to 246, that might have led to too-high compensation for Nettbuss Sør AS over the period 2004 onwards.
- (95) Specifically, the Norwegian authorities have identified in the spreadsheets numerous instances of errors for the Nettbuss Sør AS production regarding: late night buses (*nattbuss*), school bus services (*midtskyss*) ⁽⁴⁾, transportation of schoolchildren to and from swimming lessons (*badekjøring*), school years and 'duplication school years', express bus activities, cancellation or reduction of routes and certain specific routes that are not part of the public service contract.

⁽¹⁾ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1), incorporated into the EEA Agreement in Annex XIII.

⁽²⁾ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1), incorporated in the EEA Agreement in Annex XIII. Regulation (EC) No 1370/2007 entered into force in Norway on 1 January 2011 (see Regulation of 17 December 2010 No 1673).

⁽³⁾ Case T-92/11, EU:T:2013:143, paragraphs 44-48 (judgment under appeal, see Case C-303/13 P *Commission v Andersen*, pending).

⁽⁴⁾ The term 'Midtskyss' was used in the past to describe all school bus services that brought children home from school at the end of their school day, except the last school bus of the day and transportation of injured and handicapped children with a need of prepositioned transportation.

- (96) The Norwegian authorities have submitted the table below showing that the deviations in kilometres not covered by the public service contract under the scheme for the period 2004 to 2009 amount to a bit more than 1,7 million kilometres:

Table 1

Summary of deviations

| Type of production/deviation | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 |
|--|----------------|----------------|----------------|----------------|----------------|----------------|
| Kitron | 0 | 0 | 0 | 19 176 | 0 | 0 |
| Express bus | 0 | 0 | 0 | 406 | 19 737 | 19 737 |
| Late night buses | 47 561 | 51 966 | 52 533 | 62 833 | 65 243 | 65 243 |
| Badekjøring | 31 184 | 29 620 | 27 027 | 14 754 | 29 449 | 29 449 |
| Midtskyss | 82 485 | 80 311 | 142 608 | 54 905 | 95 272 | 95 272 |
| Midtskyss or badekjøring ⁽¹⁾ | 3 213 | 4 233 | 0 | 731 | 492 | 492 |
| Karjolen | 15 946 | 15 946 | 11 669 | 16 128 | 12 647 | 12 647 |
| 255 schooldays instead of 192 | 0 | 0 | 124 314 | 73 549 | 56 574 | 51 693 |
| Production cancelled as from 18 August 2008 | 0 | 0 | 0 | 0 | 51 125 | 137 210 |
| Sum deviations/kilometres not covered by the contract | 180 389 | 182 076 | 358 151 | 242 480 | 330 538 | 411 742 |

⁽¹⁾ According to the Norwegian authorities, this refers to cases where it is difficult to assess whether the reported transport is 'midtskyss' or 'badekjøring'.

- (97) The Norwegian authorities also submitted that such errors and deviations in the production spreadsheets of Nettbuss Sør AS had economic impacts until the contract with the company expired on 31 December 2014.

8. COMMENTS BY INTERESTED PARTIES

8.1. The complainant — Konkurrenten.no

- (98) The complainant, Konkurrenten.no maintains its contention that Nettbuss Sør AS has received substantial overcompensation for its services and that the County of Aust-Agder has not awarded the concessions on the basis of a competitive procedure ⁽¹⁾. The complainant claims that all aid granted by the County in the form of unlawful concessions, or in conjunction to such concessions, constitutes State aid pursuant to Article 61(1) of the EEA Agreement which the complainant claims to be incompatible with Article 49 of the EEA Agreement in conjunction with Regulations (EEC) No 1191/69 and (EC) No 1370/2007.
- (99) Further, the complainant questions the link between the administration of the County of Aust-Agder and Nettbuss Sør AS, as compared to arms-length relations that normally exist between a professional supplier and a professional purchaser of major public transport contracts.

⁽¹⁾ See recitals 6 to 11 of the opening decision.

8.2. Nettbuss Sør AS

- (100) Nettbuss Sør AS contends that the introduction in 2004 of a new financing system through the ALFA-method and its later indexation are only minor administrative changes of the scheme. In its view, the new calculation method does not alter the legal basis under which Nettbuss Sør AS receives compensation, and as such it would thus not constitute new aid.
- (101) As regards the ATP project, Nettbuss Sør AS argues that this is part of the existing aid scheme put in place in Aust-Agder, given that no new contracts were signed, but Aust-Agder instead has taken advantage of existing clauses in the contract referring to amendments in the production during the contract period.
- (102) Even if the ALFA-method and its subsequent indexation are to be considered as new aid measures, Nettbuss Sør AS states, as regards the presence of State aid that the compensation granted to it from Aust-Agder only covers the cost, including, at the most, a marginal profit.
- (103) Concerning the first and fourth *Altmark* conditions, Nettbuss Sør AS supports the comments submitted by the Norwegian authorities, as above mentioned.
- (104) With reference to the second *Altmark* condition, Nettbuss Sør AS stresses the fact that the contracts signed are 'net contracts', meaning that they cover the cost of discharging the public service obligation after deducting all revenues associated with such obligations, taking into account also a marginal profit.
- (105) In addition, Nettbuss Sør AS claims that the actual compensation that it received for the period 2004-2008 as a result of adjustments following the negotiations is lower than what the ALFA-method calculations estimated, and that in any case, as from 2009, the final amount of the compensation was not negotiated, but it was indexed based on publicly available sources.
- (106) Concerning the application of the third *Altmark* condition, Nettbuss Sør AS argues that it is difficult to assess the necessary compensation level without looking at the actual performance of the service provider under the contract, on the basis of which the profit margin for the period 2009-2011 has been negative or marginal. It further submits that, in determining the reasonable profit, the risk sharing in the contracts must be taken into account, particularly in the period 2009-2011, as well as the different kinds of contracts involved i.e. net contracts versus gross contracts, the size and the different activities of the operators. Nettbuss Sør AS argues that a profit in the range of 3-5 %, as reported by the Norwegian authorities, is fairly low and does not take into account the individual market segments for bus operations. Nettbuss Sør AS submits that a reasonable rate of return in the market segment where the company operates should rather be closer to [7-13 %].
- (107) With reference to the compatibility aspect of the case, Nettbuss Sør AS submits that to the extent the Authority concludes that the company has been conferred, through the annual compensation or the ATP project, an economic advantage pursuant to Article 61(1) of the EEA Agreement, this would be compatible with Article 49 of the EEA Agreement and the applicable Regulation (EEC) No 1191/69. According to Nettbuss Sør AS, Regulation (EC) No 1370/2007 cannot be applied as the changes introduced with the ALFA-method and the indexation in 2004 and 2009 respectively, took place at a time when that Regulation was not yet in force.
- (108) On the additional information submitted by the Norwegian authorities as regards deviations in Nettbuss Sør AS's production, the company submits that the facts presented are to some extent wrong and misleading, and do not take into account the fact that the final compensation was based on negotiations between the company and Aust-Agder, and that the ALFA-method was merely a tool for the County of Aust-Agder.
- (109) These negotiations also included adjustments throughout the year in the actual annual production (i.e. number of kilometres produced) which depended on Aust-Agder's available budget and demand for transport. That said, Aust-Agder could cancel, reduce or add new routes during the production year that required new negotiations

between the parties about the level of compensation granted. Subsequent amendments of the production and costs were also made, based on the performance of the company under the contract. Therefore, according to Nettbuss Sør AS, the production reported to the County with the kilometres driven for the purposes of calculating the costs, can be seen as a point of departure for the negotiations between the parties, and not as the actual base for the compensation paid at the end of the year ⁽¹⁾.

- (110) Nettbuss Sør AS, further, makes references to the particular settlements and negotiations between the company and the County that resulted in the latter setting off payments against Nettbuss Sør AS's compensation for the 2010 production. In particular, the company argues that the compensation paid for the 2010 production was NOK 3,55 million less, given that this amount was used to set off following changes in the production schedule (new transport schedule for RTB) and to take account of efficiency gains stemming from the merger with RTB.
- (111) As regards the income generated by the commercial activities of Nettbuss Sør AS and the fact that parts of that income have been identified by the Authority indeed to have been included in the income calculations under the public contract, Nettbuss Sør AS's view is that this has not led to a higher degree of compensation than what the ALFA-method would have provided for. On the contrary, as all the income (i.e. income derived from public as well as commercial activities) is deducted when calculating the compensation to be granted, the result has led to a lower compensation for Nettbuss Sør AS, irrespective of the fact that certain commercial routes were included as part of production for public service compensation.
- (112) Indeed, Nettbuss Sør AS admits that certain production (e.g. express bus, transportation of schoolchildren to and from swimming lessons and the Karjolen route) should not have been reported as production for public service compensation. Nevertheless, by having these routes included, the County has been favoured, as this has actually meant a lower compensation for the company.
- (113) Finally, as regards the number of school days, Nettbuss Sør AS submits that the figures provided by Aust-Agder in reference to the company being compensated for 51 instead of 38,4 weeks in a normal school year are incorrect.

8.3. Other transport operators

- (114) Setesdal Bilruter L/L concurs with the views of the Norwegian authorities. It holds that the compensation does not constitute State aid as the four *Altmark* conditions are met.
- (115) If the Authority were to find that the compensation constitutes State aid, the company argues that it would in its entirety have been granted on the basis of a system of existing aid, and that the aid would be compatible with the functioning of the EEA Agreement on the basis of its Article 49 and Regulation (EEC) No 1191/69.
- (116) The company specifically emphasises that the introduction of the ALFA-method did not cause any substantial change in the compensation system. Furthermore, the company stresses that it is not correct that the compensation determined on the basis of indexation was based on negotiations, given that each year up until 2009 the County and the bus operators went through the changes in the annual production in order to feed the correct data into the ALFA-method. As the changes from year to year were marginal, so were the changes in compensation. Setesdal Bilruter L/L argues that the ALFA-method ensures that there is no overcompensation for the provision of the bus services and that the costs of commercial activities are not included in the ALFA-method. Birkeland Busser AS, Frolandsruta Frode Oland and Telemark Bilruter AS have all concurred with that view.

⁽¹⁾ Particularly, Nettbuss Sør AS refers to the production years 2008 and 2009, where several amendments were made on both the cost and income side when calculating the final compensation amount. As an example, due to increased production costs, exceeding the level of compensation as initially budgeted (NOK 38,5 million), the parties agreed, as Nettbuss Sør AS argues, during the production year 2008, that the County would compensate the company with an additional amount of NOK 550 000. Nettbuss Sør AS was compensated NOK 39,05 million, although it was also entitled, as submitted, to adapt the production by reducing the traffic up to a value of NOK 1 million.

9. COMMENTS BY THE NORWEGIAN AUTHORITIES ON THE COMMENTS MADE BY INTERESTED PARTIES

- (117) The Norwegian authorities refer to the complainants' argument that 'all new aid' granted to Nettbuss Sør AS must be held incompatible with the EEA Agreement and subject to recovery, and indicate that the complainant has not addressed the issue of new or existing aid nor has it referred to how any potential aid (e.g. the introduction of the ALFA-method in 2004) should be classified in the present case. The Norwegian authorities restate that no substantial change to the existing aid scheme has been caused by the introduction of the ALFA-method, and that with the exception of Nettbuss Sør AS, no overcompensation has been identified.
- (118) With reference to the comment submitted by Nettbuss Sør AS on what could constitute a reasonable profit within the bus transport sector, the Norwegian authorities stress that the reference to the figure 3-5 % as a normal profit in the sector does not imply that any higher profit level (e.g. a profit closer to [7-13 %] that Nettbuss Sør AS refers to) would constitute overcompensation. The reference to that publicly available figure only served the purpose of showing that no overcompensation could be identified.
- (119) With reference to the comments submitted by Nettbuss Sør AS in relation to the additional information submitted by the Norwegian authorities concerning deviations in Nettbuss Sør AS's production, the Norwegian authorities have submitted that the role of the ALFA-method to calculate compensation cannot be downplayed by the fact that the final compensation was based on negotiations and subsequent amendments of the productions and costs were also made. The costs estimates following from the ALFA-method were vital and the compensation granted never deviated much compared to the results of the ALFA-method. Further, any amendments made during the production year constitutes common practice in the transport sector and such a possibility has also been covered by the provisions of the contracts with the transport operators. In any case, any such amendments should have either led to an increase, in case of additional production, or a decrease, in case of reduction of production, of the compensation granted. But, they could never be considered separately and set off against irrelevant costs taken into account when the compensation was estimated according to the ALFA-method.
- (120) The Norwegian authorities submit that the reporting of incorrect production figures has a direct effect on the accuracy of the compensation's calculation and the County was thus entering into negotiations on incorrect assumptions.
- (121) It is also submitted that, as the compensation granted is based on the previous year's production, any reduction made by the company after August 2008 should have been reflected in the compensation granted for 2009, which was not the case. The same logic also applies, the Norwegian authorities argue, in the case of the company having received an additional amount of NOK 550 000 for 2008, given that the 2008 compensation was based on incorrect figures provided from 2007. Given that the contract signed with Nettbuss Sør AS is a public service concession contract, the commercial risk shall lie with the company.
- (122) As regards the settlements and adjustments made in relation to the Nettbuss Sør AS's and RTB's contracts — in view of the ongoing merger process between the two companies — for the production of a new transport schedule run by RTB, the Norwegian authorities are of the view that these are the result of a unilateral decision from the side of Nettbuss Sør AS that has led to over-reporting for the production of kilometres in order to receive higher compensation than what was already calculated and reported under the ALFA-method. Instead, the contracts should have been amended subsequent to the corporate changes, in order to reflect all these adjustments. In this context, the Norwegian authorities do not share the view that the County has granted NOK 3,55 million less compensation for reductions in the production stemming from alterations in the transport schedule during 2008 and 2009. On the contrary, this reduction of compensation follows the logic of the ALFA-method and its later indexation, reflecting the production of fewer kilometres than anticipated by the County, as a result of Nettbuss Sør AS's incorporating a new transport schedule for RTB.
- (123) Concerning the income generated by the commercial activities of Nettbuss Sør AS, the Norwegian authorities disagree with Nettbuss Sør AS's allegations that the County has been credited revenues from the income-side that correct errors on the cost side. Given the lack of separate accounts, Nettbuss Sør AS carries the risk and it cannot simply allege that irrelevant revenues have been deducted for the benefit of the County, without any further documented justification. In addition, according to the Norwegian authorities, there has not been any documented justification as regards the cost allocation between the commercial and the public service activities of the company. That said, it may well be the case that the commercial activities have been cross-subsidized by the public service activities and not vice-versa.

- (124) Finally, the Norwegian authorities submit that the economic impact of the deviations is estimated at NOK 80 437 962 for the period 2004-2014, without including interest and compound interest. This is according to a study that Asplan Viak AS had been commissioned by the Norwegian authorities to write in order to provide estimates of the overcompensation paid by the County due to the deviations.

II. ASSESSMENT

1. SCOPE OF THE AID ASSESSMENT

- (125) In the opening decision the Authority concluded that there was an existing aid scheme in Aust-Agder for local scheduled and school bus transport services covering the period before 2004.
- (126) In view of the doubts expressed in the opening decision, the scope of the present aid assessment shall examine the following aspects:
- (i) the ALFA-method and its indexation as part of the existing aid scheme in place in Aust-Agder or as a separate new aid measure (Section 3 below);
 - (ii) the nature of the alleged aid involved in the ATP project and whether this is part of the same existing aid scheme (section 3 below);
 - (iii) identification of any new aid that may have been granted outside the existing aid scheme (Section 4 below).
- (127) In the opening decision the Authority expressed doubts concerning the nature of the ALFA-method and its indexation as a potential no-aid measure. In this context the Norwegian authorities and interested parties submitted information on the application of the *Altmark* conditions.
- (128) The opening decision does not oblige the Authority to examine in the context of the present assessment the nature of the aid in reference to the ALFA-method and its indexation. This, with the exception of any aid involved in the ATP project, has already been assessed during the preliminary examination where it was concluded that the public compensation for local scheduled and school bus transport services remains existing aid at least until 2004, and that what remains to be assessed is whether this already established existing aid scheme has been substantially altered.

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

- (129) 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.'

2.1. The presence of State resources

- (130) The Authority notes that the compensation for both local scheduled and school bus transport is paid from the public budget of Aust-Agder. In the context of Article 61(1) of the EEA Agreement, both local and regional authorities are considered to be equivalent to the State⁽¹⁾. Hence, Aust-Agder is equivalent to the State for the purposes of the EEA State aid rules. On this basis, the Authority concludes that the compensation measure is funded through the use of State resources.
- (131) The same considerations apply also to the ATP project as it is paid for by grants made from the budget of municipalities and the counties of Aust-Agder and Vest-Agder. Therefore, the Authority finds that State resources are involved.

⁽¹⁾ Article 2 of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

2.2. Undertaking

- (132) As provided by Article 61(1) of the EEA Agreement, it must also be established whether the public service compensation to the five operators, as well as the financing from the ATP project, grant a selective economic advantage in favour of certain undertakings or the production of certain goods.
- (133) The beneficiaries in the present case are bus operators that engage in economic activities, inter alia scheduled and school bus transport against remuneration (see recitals 35 to 38 above). Thus, they all constitute undertakings within the meaning of Article 61(1) of the EEA Agreement.

2.3. Selectivity

- (134) The compensation measure is limited to bus companies operating services in the County of Aust-Agder. Particularly, the public service compensation has been limited to the companies listed in recital 35 above. Therefore, the Authority concludes that the award of public service compensation is selective.
- (135) Furthermore, the financing of NOK 1 million (NOK 2 million as from 2010 and NOK 1,5 million as from 2011) from the ATP project, as well as the reduction in 2013 of the costs associated with running the public service routes 39 and 40 in order to finance the airport shuttle bus and the corresponding income reduction on the ATP project, have only been granted to Nettbuss Sør AS. It is, thus, a selective measure.

2.4. Advantage — Compensation for a public service obligation for local scheduled and school bus transport

2.4.1. *Altmark* conditions

- (136) In order to constitute State aid, the measure must also confer an advantage that relieves an undertaking of charges that are normally borne from its budget.
- (137) As regards the grant of a selective economic advantage, 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 of the European Union (the 'Court') held that compensation for public service obligations does not constitute State aid when four cumulative conditions are met:
- 'First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
 - 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.
 - Fourth, and finally, 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 tender capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of analysis of the costs which a typical undertaking, well-run and adequately equipped, would have incurred.'⁽¹⁾

2.4.2. 1994-2003

- (138) The Authority concluded already in the opening decision that before 2004, the *Altmark* conditions were not cumulatively met⁽²⁾.
- (139) Neither the Norwegian authorities nor any of the other parties that lodged observations during the formal investigation have disputed this view. The Authority therefore maintains its according findings for the reasons set out in the opening decision.

⁽¹⁾ The *Altmark* judgement, recitals 87-93.

⁽²⁾ See recitals 84 and 85.

2.4.3. Since 2004

2.4.3.1. The first *Altmark* condition

- (140) The relevant bus operators continued to be entrusted with public service obligations to provide local scheduled and school bus transport services in Aust-Agder.
- (141) The public service obligations have been based on (1) the CTA and the CTR, and on provisions in the Education Act, all stating that the grant of a concession involves an obligation to carry out the transport services stipulated in the concession; (2) the concessions granted to the relevant operators, which cover the provision of local scheduled and school bus transport services in Aust-Agder; and (3) the individual contracts between Aust-Agder and the operators.
- (142) Further, it is possible to identify in the relevant contracts the service providers, the duration of the service period, the nature of the public service obligations of operating collective transport services in the local network. Hence, the Authority concludes that the first condition of the *Altmark* judgement has been fulfilled.

2.4.3.2. The fourth *Altmark* condition

- (143) The bus operators' compensation has not been determined on the basis of a public procurement procedure. According to the Authority's Guidelines on the application of the State aid rules to compensation granted for the provision of services of general economic interest, in the absence of a tender, a generally accepted market remuneration for the given services shall provide the best benchmark for the compensation in the absence of a tender⁽¹⁾. The Norwegian authorities, however, have not argued that such remuneration exists for the given service. Rather, they submit that the compensation scheme in Aust-Agder was based on a benchmarking exercise that ensures that the compensation granted covers the cost of a well-run operator. Consequently, the Authority has to examine the second alternative stipulated in the fourth *Altmark* condition.
- (144) According to the information submitted, the Norwegian authorities compared the cost structures of all companies in the bus transport sector and isolated the 33 % best-run bus companies at average levels (i.e. fuel costs, maintenance costs, driver costs and administration costs). Although this may constitute evidence of good performance in comparison to other companies, it cannot be taken as a basis for the average costs of a well-run and adequately equipped undertaking.
- (145) The Authority's Guidelines on the application of the State aid rules to compensation granted for the provision of services of general economic interest indicate that 'the aim is to ensure that the high costs of an inefficient undertaking are not taken as a benchmark'. The Authority notes that the ALFA-method and its indexation does not specify in detail the sample of undertakings that were taken into account for benchmarking purposes. Therefore, although 67 % of bus companies have been considered by the Norwegian authorities as inefficient companies, that in itself does not lead to the conclusion that the remaining companies should be considered well-run operators for the purposes of an *Altmark* assessment. There is no proof that the average of their costs represents the costs of an efficient undertaking. The Norwegian authorities have not provided sufficient information on this point.
- (146) In addition, this does not provide the full picture of the cost structure of a representative well-run and adequately equipped undertaking, as higher costs are not covered (e.g. higher fuel consumption in morphologically inaccessible areas). Likewise, no analytical ratios representative of productivity (such as turnover to capital employed, total cost to turnover, turnover per employee, value added per employee or staff costs to value added) or quality of supply have been submitted by the Norwegian authorities⁽²⁾. Therefore, the Authority is not in a position to assess any quantified objectives in terms of return on equity or productivity gains.

⁽¹⁾ See <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>, paragraph 69.

⁽²⁾ *Ibid*, paragraphs 72 and 73.

- (147) In any event, the fact that the final compensation is set on the basis of negotiations allows for discretionary cost adjustments that cannot reflect the costs of an efficient operator. In some instances, the Authority notes that the negotiations have led to a decrease of compensation compared to the result given by the ALFA-method. In other instances, the compensation has been higher. In any case, the existence of negotiations for calculating the final compensation does not give any information as to whether the undertakings operating in the market are necessarily considered to be well-run operators.
- (148) Moreover, as the transport production was subject to amendments by the County throughout the year, with cancellations, reductions or additions of routes, this naturally had a material impact on the cost side of the contract. Often, transport operators were offered the opportunity to reduce their traffic in order to have their actual costs covered. Or, they were compensated more in order to be able to maintain the existing level of production. The final amount of compensation to be granted was thus subject to negotiations between the parties.
- (149) Therefore, the Authority cannot conclude that the amount of compensation granted was determined on the basis of an analysis of the costs of a well-run and adequately equipped undertaking.
- (150) Thus, the Authority concludes that the fourth *Altmark* condition has not been fulfilled.

2.4.3.3. Conclusion on the *Altmark* test

- (151) Since the four conditions laid down by the Court in *Altmark* judgement must be met cumulatively, it is not necessary to examine whether the other two conditions have been satisfied.
- (152) Based on the information submitted, the Authority concludes that the compensation awarded since 2004 for the local scheduled and school bus transport service obligations in Aust-Agder does not comply with all the *Altmark* conditions. The compensation has therefore conferred an advantage on the recipient undertakings within the meaning of Article 61(1) of the EEA agreement.

2.5. Advantage — ATP Project

- (153) In the opening decision the Authority did not exclude the possibility of the ATP project (see recitals 56 to 58) providing an economic advantage to Nettbuss Sør AS, which it is unlikely that it would have obtained under normal market conditions.
- (154) In reference to the *Altmark* conditions, the Authority notes that ATP project refers to public service transport routes and is thus governed by the same legal provisions as the compensation for local scheduled and school bus transport. It can therefore be said that the first *Altmark* condition is met. However, the Authority has not received any further information as regards the application of the remaining *Altmark* conditions.
- (155) Applying *ex officio* the fourth *Altmark* condition, the Authority takes note of the fact that Nettbuss Sør AS provided the transport routes envisaged under the ATP project without any public procurement procedure having been carried out. Further, the Norwegian authorities have not provided any information to show that the compensation granted has been based on an analysis of the costs of a typical, well-run and adequately equipped undertakings. Even if the assessment mentioned above under recitals 143 to 150 were to be applied *mutandis mutandis*, the conclusion would be the same, i.e. that the fourth *Altmark* condition is not satisfied.
- (156) Therefore, the Authority concludes that the annual amounts of NOK 800 000 (as from 2004), increased to NOK 2 million (as from 2010) and reduced again to NOK 1,5 million (as from 2011) that were granted in order to increase the frequency of bus departures on the route Lillesand-Kristiansand and Kristiansand-Arendal, conferred an advantage on Nettbuss Sør AS.

2.6. Distortion of competition and effect on trade between Contracting Parties

- (157) The Authority must examine whether the contested aid measures are liable to affect trade and to distort competition ⁽¹⁾.
- (158) The aid beneficiaries compete with other transport operators in markets that are open to competition ⁽²⁾. The Authority thus concludes that the annual compensation has been liable to distort competition by strengthening the commercial position of the aid beneficiaries in the given markets.
- (159) With respect to the effect on trade and the fact that the present case concerns a local market for scheduled and school bus transport in Aust-Agder, the Authority recalls that in the *Altmark* judgment, which also concerned regional bus transport services, the Court held that:

'A public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States [...]. The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.' ⁽³⁾

- (160) This means that even if — as in the present case — only a local or regional bus transport market (Aust-Agder) may be concerned, public funding made available to one operator in that market is still liable to affect trade between Contracting Parties ⁽⁴⁾. Consequently, the Authority considers that the annual compensation is liable to affect trade between Contracting Parties.
- (161) Moreover, the Authority takes the view that the same considerations apply, *mutatis mutandis*, both to the school transport activities ⁽⁵⁾ and to the ATP project.

2.7. Conclusion on the presence of State aid within the meaning of Article 61(1) of the EEA Agreement

- (162) In the opening decision the Authority considered that the compensation awarded prior to 2004 by Aust-Agder to the five bus operators for local scheduled and school bus transport constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.
- (163) Furthermore, the Authority concludes that the compensation awarded by Aust-Agder from 2004 until today to the five bus operators for local scheduled and school bus transport constitutes State aid within the meaning of Article 61(1) of the EEA agreement.
- (164) Finally, the Authority concludes that the State financing of Nettbuss Sør AS as from 2004 onwards on the basis of the ATP project constitutes State aid within the meaning of Article 61(1) of the EEA agreement.

3. THE CLASSIFICATION OF THE ALFA-METHOD AND ITS INDEXATION AND OF THE ATP PROJECT AS NEW OR EXISTING AID

- (165) In the opening decision, the Authority concluded that there was an existing aid scheme at place in Aust-Agder for local scheduled and school bus transport until the end of 2003.

⁽¹⁾ See Joined Cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnjord and Others v EFTA Surveillance Authority* [2005] EFTA Court Report 117, paragraph 93; Case C-518/13, *Eventech Ltd* EU:C:2015:9, paragraphs 64-70 and the case law cited therein.

⁽²⁾ Moreover, the Court observed in its *Altmark* judgment that since 1995, several EU Member States had voluntarily opened up certain urban, suburban or regional transport markets to competition from undertakings established in other EU Member States. The risk to inter-Member State trade was thus not hypothetical but real, as the market was open to competition (paragraphs 69 and 79).

⁽³⁾ Paragraphs 77 and 82 of the *Altmark* judgment.

⁽⁴⁾ See also Case 102/87 *France v Commission* ECLI:EU:C:1988:391, paragraph 19; Case C-305/89 *Italy v Commission* ECLI:EU:C:1991:142, paragraph 26.

⁽⁵⁾ See Commission decision to open the investigation in case C54/2007 (Germany) *State aid to Emsländische Eisenbahn GmbH* (OJ C 174, 9.7.2008, p. 13), paragraph 119.

- (166) However, the Authority expressed doubts as to whether the introduction of the ALFA-method and its indexation entailed that the compensation awarded by Aust-Agder to the five bus operators for local scheduled and school bus transport from 2004 until today has materially altered the existing aid scheme.
- (167) The Authority furthermore doubted whether any new aid may be present regarding potential compensation for local scheduled and school bus transport services outside of what was allowed for under the existing aid scheme (until 2004, or alternatively, until today, if the nature of the aid was not altered by the introduction of the ALFA-method and its indexation).
- (168) Also, the Authority questioned whether the amounts related to the ATP project are connected to the award of compensation by Aust-Agder, or whether they constitute, or form part of a separate scheme.

3.1. The legal provisions

- (169) According to Article 1(c) in part II of Protocol 3 SCA; 'new aid' shall mean:

'All aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.'

- (170) The relevant provisions, Article 1(b)(i) and (v) in Part II of Protocol 3 SCA provide that 'existing aid' shall mean:

'All aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement; [...]

and

'Aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State [...].'

3.2. The procedural regime for existing aid

- (171) The Authority will first clarify its position as regards the procedure followed pursuant to the EEA Agreement and Protocol 3 SCA, for measures found to constitute existing aid.
- (172) The EEA Agreement establishes different procedures according to whether the aid is existing or new. Under Article 1(1) in Part I of Protocol 3 SCA, 'the EFTA Surveillance Authority shall in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement'. Thus, existing aid may be duly implemented as long as the Authority has not found it incompatible with the functioning of the EEA Agreement ⁽¹⁾.
- (173) On the other hand, under Article 2(1) in Part II of Protocol 3 SCA, '[...] any plans to grant new aid shall be notified to the EFTA Surveillance Authority in sufficient time by the EFTA State concerned'. Thus, any new aid must be notified in advance to the Authority and cannot be implemented without the Authority's final decision.
- (174) Further, existing aid can be the subject only to a decision finding it incompatible as to the future. Therefore, the Authority '[...] is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine' ⁽²⁾.

⁽¹⁾ Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others v Commission* EU:T:2000:151, paragraph 148.

⁽²⁾ *Ibid*, paragraphs 147 and 148.

- (175) Also, it is settled case law that in providing for aid to be kept under constant review and supervised by the Authority the intention of the EEA Agreement '[...] is that the finding that an aid may be incompatible with the Common Market is to be determined, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion' ⁽¹⁾.
- (176) Therefore, in view of the above, the Authority concludes that only under the procedure for existing aid laid down in Articles 17 to 19 in Part II of Protocol 3 SCA, could it assess whether an existing aid measure is compatible with the functioning of the EEA Agreement.
- (177) The sections below will analyse the question of new or existing aid in reference to the ALFA-method and its indexation and of the ATP project.

3.3. Definition of an aid scheme

- (178) Article 1(d) in Part II of Protocol 3 SCA provides that an 'aid scheme':

'[...] shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;'

- (179) Article 1(e) in Part II of Protocol 3 SCA provides that 'individual aid':

'[...] shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;'

- (180) This distinction is of particular importance in the context of existing aid, as Protocol 3 SCA provides the Authority with the competence to keep under constant review existing systems of aid ⁽²⁾. Likewise, Section V of Part II of Protocol 3 SCA applies only to existing aid schemes ⁽³⁾.
- (181) The Authority in the opening decision provided more information on the rationale of the concept of existing aid scheme and how it has been interpreted in its own case practice and that of the European Commission ⁽⁴⁾.
- (182) The Authority concluded in the opening decision that an aid scheme has been in place in Aust-Agder since 1994 ⁽⁵⁾. The provisions providing for that aid scheme are the CTA, the CTR and the Education Act in connection with the relevant administrative practice in Aust-Agder.
- (183) The Authority has observed that the compensation for carrying out local scheduled bus transport in Aust-Agder has from before the entry into force of the EEA Agreement in Norway on 1 January 1994, been provided on the basis of the CTA and the CTR (and the relevant legislation preceding them). Furthermore, since before the entry into force of the EEA Agreement, compensation for the provision of school transport services has been awarded on the basis of the Education Act (and the relevant legislation preceding it).
- (184) In the opening decision, the Authority examined whether the legal framework for the financing of scheduled and school bus transport in Aust-Agder meets the three criteria of Article 1(d) of Part II of Protocol 3 SCA: (i) an act on the basis of which aid can be awarded, (ii) an act that shall not require any further implementing measures, and (iii) an act that shall define the potential aid beneficiaries in a general and abstract manner ⁽⁶⁾.
- (185) Nevertheless, as regards the ATP project, in the opening decision the Authority doubted whether it is connected to the award of compensation by Aust-Agder, or whether it constitutes, or forms part of, a separate scheme.

⁽¹⁾ Joined Cases C-72/91 and C-73/91 *Sloman Neptun* EU:C:1993:97, paragraph 11; Case C-6/12 P *Oy EU*:C:2013:525, paragraph 36. See also Joined Cases E-4/10, E-6/10 and E-7/10, *The Principality of Liechtenstein and others v EFTA Surveillance Authority* [2011] EFTA Court Report p. 16, paragraph 113.

⁽²⁾ See Article 1.1 in Part I of Protocol 3 SCA.

⁽³⁾ The Authority considers that the terms 'aid schemes' and 'systems of aid' are synonyms.

⁽⁴⁾ See opening decision, paragraph 121.

⁽⁵⁾ See opening decision, paragraphs 133 and 162.

⁽⁶⁾ See opening decision, paragraphs 123-133.

- (186) Despite the fact that the ATP-project is a collaboration between different municipalities and the counties of Vest-Agder and Aust-Agder, and the fact that the payments have originated from different sources the operations involved are within the scope of the scheme in Aust-Agder.
- (187) The Authority notes that the bus routes involved in the ATP project, i.e. Kristiansand-Lillesand and Kristiansand-Arendal, as described above in recitals 57 and 58, are already under operation in the current scheme in Aust-Agder.
- (188) The increased production through the ATP project on those routes was compensated pursuant to the same legal provisions as the local scheduled and school bus transport.
- (189) The calculation of compensation for the increased production of the project was based on exactly the same principles as the local scheduled and school bus transport, i.e. cost of public service, minus ticket revenues for net contracts, plus a reasonable profit.
- (190) On the basis of the above, the Authority concludes that the ATP project is part of the scheme, which the Authority has already considered in the opening decision as being in place in Aust-Agder since 1994.

3.4. Definition of existing aid

- (191) Article 1(b)(i) of Part II of Protocol 3 SCA provides that existing aid encompasses all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after the entry into force of the EEA Agreement.
- (192) Here, the provisions providing for the scheme have been in place since the EEA Agreement entered into force in Norway on 1 January 1994. As the market for local bus transport was already exposed to some competition on that date, the Authority is of the view that the financing of local scheduled and school bus transport on the basis of the CTA, the CTR and the Education Act constitutes an existing aid scheme that existed in January 1994 and remained applicable thereafter.
- (193) In its judgment *Namur*, the Court stated the following:
- ‘[...] 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 amounts 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.’⁽¹⁾
- (194) Moreover, as Advocate-General Trabucchi pointed out in his Opinion in *Van der Hulst*, modifications are substantial if the main elements of the scheme have been changed, such as the nature of the advantage, the purpose pursued with the measure, the legal basis, the beneficiaries or the source of the financing⁽²⁾. Such changes may affect the evaluation of the compatibility of that scheme and they need to be notified separately as new aid in order to assess their compatibility with the EEA Agreement⁽³⁾.
- (195) Purely formal or administrative changes to an aid scheme do not lead to the reclassification of existing aid as new⁽⁴⁾.

⁽¹⁾ Case C-44/93 *Namur-Les Assurances du Crédit* EU:C:1994:311, paragraph 28.

⁽²⁾ Opinion of Advocate General Trabucchi in Case 51/74 *Van der Hulst* EU:C:1975:9.

⁽³⁾ Joined Cases C-630/11 P to C-633/11 P *HGA srl a.o. v Commission* EU:C:2013:387, paragraphs 92 to 94.

⁽⁴⁾ See Article 4(1) of the consolidated version of the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 (available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>). See also the opinion of Advocate General Lenz in *Namur*.

- (196) As shown above, the financing of bus transport services in Aust-Agder has been provided on the basis of an aid scheme consisting of the CTA, the CTR, the Education Act and the administrative practice in Aust-Agder. In 2004 the ALFA-method was introduced, on the basis of which new contracts were concluded for the period 2004-2008. This ALFA-method was supplemented by the introduction of a new indexation system, on the basis of which new contracts with the same operators were signed to cover the period 2009-2012 with the possibility of prolongation for up to additional four years (see recital 53). The question is whether the introduction of the ALFA-method and its later indexation can be considered as features that change the existing aid scheme to new aid.
- (197) The ALFA-method, as described in recitals 46 to 50 above, is a system used to calculate the costs connected to bus transportation. The system of indexation, as described in recitals 51 to 53 above, supplemented the method by introducing several cost relevant parameters, such as fuel costs or wage costs, on the basis of which the compensation is indexed.
- (198) The introduction of this system has not substantially changed the legal basis and the aim of awarding the compensation.
- (199) The provisions of the CTA, the CTR and the Education Act, as well as the administrative practice have been interpreted and applied in an identical manner. These provisions and the practice have remained unaltered throughout the period concerned, i.e. even before the entry into force of the EEA Agreement.
- (200) The purpose has always been to compensate transport operators (be it local scheduled and school bus transport) for the provisions of services which the County of Aust-Agder seeks to establish or maintain.
- (201) The compensation granted has always covered the cost of the public service, minus the ticket revenues for net contracts, plus a reasonable profit. Any compensation outside the remits of the above mentioned legal provisions and the administrative practice is not allowed.
- (202) From a State aid law point of view, the ALFA-method has not provided for any substantial changes as regards the aid beneficiaries involved in the scheme. It applied, and continues to apply, to all concessionaires that have been entrusted with the provision of the local scheduled and school bus services in Aust-Agder. Most importantly, the system does not alter the entitlement of the beneficiaries to the aid under the scheme. The scheme therefore was not extended in this respect.
- (203) The introduction of the ALFA-method and the indexation merely served the purpose of calibrating the costs of the transport services, on the basis of which the compensation is granted, more precisely. The amount of the compensation granted was based on the same factors throughout the period, such as costs of bus operations, costs of subcontractors, ticket revenue etc. Consequently, the ALFA-method and the indexation provided for a better mechanism to grant compensation to the same beneficiaries under the scheme and on the basis of the same legal basis.
- (204) Therefore, the Authority concludes that the ALFA-method and the indexation have not substantially altered the existing aid scheme.
- (205) Likewise, the increased production provided by the ATP project on the routes Lillesand-Kristiansand and Kristiansand-Arendal cannot be said to have altered substantially the scheme. The purpose of the ATP project was merely to increase the activities of Nettbuss Sør AS under the same concession contracts.
- (206) The changes were made to already existing routes without any amendment of the aid scheme as established by the legislation. As a result, the ATP project's increased production does not constitute an amendment of a scheme leading to aid for new activities being considered as new aid.
- (207) Further, the payments made under the ATP project are in conformity with the compensation principle established under the scheme, in that they cover the cost of the public service, minus the ticket revenues for net contracts, plus a reasonable profit.

- (208) In addition, the fact that the composition of the public entities that contributed to or made the compensatory payments, as mentioned above in recital 58, was different to that of the existing aid scheme, has not substantially altered the scheme. The services paid for were within the scope of that scheme and the payments were made in conformity with the legal and financial rules applicable for the scheme, irrespective thus of the origin of the payments.
- (209) The above changes introduced by the ATP project do not call into question the nature of the scheme as an existing aid scheme. Therefore, the Authority concludes that the ATP-project has not substantially altered the existing aid scheme.

3.5. Conclusion

- (210) The Authority concludes that there is an aid scheme in place in Aust-Agder based on the CTA, the CTR, the Education Act and the administrative practice. The Authority is of the view that the scheme is existing in nature as no substantial changes were introduced by the application of the ALFA-method or the indexation, nor by the increased production on existing bus routes provided for by the ATP project.
- (211) Protocol 3 SCA empowers the Authority to keep under constant review existing systems of aid ⁽¹⁾. However, only where an existing aid is found to be incompatible with the functioning of the EEA Agreement, such aid should be subject to appropriate measures pursuant to the provisions laid down in Articles 17 to 19 in Part II of Protocol 3 SCA, with a view to abolish or amend the scheme.
- (212) In the circumstances, the Authority does not consider that the present situation calls for it to address appropriate measures to the Kingdom of Norway with regard to future changes to the existing aid scheme. In this regard, the Authority notes the following.
- (213) Firstly, the Authority takes account of the fact that the concession contract with Nettbuss Sør AS has already expired. As a result, any compatibility assessment of the existing aid scheme in respect of Nettbuss Sør is devoid of purpose.
- (214) Secondly, the Authority has not identified any competition concerns concerning the application of the scheme by the other transport operators mentioned in recital 35, whose contracts with Aust-Agder are still valid. The Authority considers that in respect of those transport operators, the ALFA-method has been properly implemented to take into account only costs and revenues stemming from the public services, in compliance with Article 49 of the EEA Agreement and the provisions of the Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007.
- (215) Thirdly, the Authority takes account of its pending infringement proceedings against Norway concerning alleged breaches of the EEA procurement rules. On 12 October 2011, the Authority issued a letter of formal notice to Norway for failure to comply with the principles of non-discrimination and transparency laid down in Articles 4 and 48 of the EEA Agreement by allowing Aust-Agder to award, and prolong bus transport concessions without any form of publication. On the same grounds, on 22 June 2012, the Authority delivered a reasoned opinion to Norway. The purpose of that pre-litigation procedure is to give the EFTA State concerned an opportunity, on the one hand, to comply with its obligations under EEA law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Authority. Here, the Norwegian authorities have committed to adopt national legislation with a view to prevent future breaches of EEA rules on public procurement in the area of concessions in the transport sector.
- (216) In view of these factors, the Authority exercises its surveillance discretion to the effect that, as mentioned above, it does not see at present any need to initiate the appropriate measures procedure laid down in Articles 17 to 19 in Part II of Protocol 3.
- (217) Further, the Authority closes the present formal investigation of potential new aid in respect of the existing aid scheme in Aust-Agder. Nevertheless, following Article 1(1) in Part I of Protocol 3 SCA, the Authority will keep the scheme under constant review until its expiry and monitor its application.

⁽¹⁾ See Article 1.1 in Part I of Protocol 3 SCA.

4. NEW AID OUTSIDE THE EXISTING AID SCHEME

4.1. General considerations

- (218) As regards existing aid, it follows from case-law ⁽¹⁾ that any overcompensation must be examined in the light of the aid scheme first. If the existing aid scheme, by its design or otherwise, allows for overcompensation, the excess or overcompensatory amounts are to be considered existing aid and thus subject to the appropriate measures procedure laid down in Articles 17 to 19 in Part II of Protocol 3 SCA.
- (219) If, on the other hand, the overcompensation is paid to the beneficiary outside the scope of the existing aid scheme, the excess or overcompensatory amounts should be dealt with under the new aid procedure.
- (220) It follows that only payments made on the basis of an existing aid scheme can be considered as existing aid disbursed under that scheme. Conversely, payments which are in excess of the losses actually incurred and which have been executed outside the scope of the aid scheme must thus be treated as new aid ⁽²⁾.

4.2. Aid granted outside the existing aid scheme in Aust-Agder

- (221) In the opening decision the Authority expressed doubts as regards any potential new aid to the local scheduled and school bus operators in Aust-Agder that has not been granted on the basis of the existing aid scheme since 1994.
- (222) The existing aid scheme in place in Aust-Agder provides for local scheduled and school bus transport in Aust-Agder since before the entry into force of the EEA Agreement in Norway on 1 January 1994. The provision of these services are carried out by the following transport operators: Birkeland Busser AS, Frolandsruta Frode Oland, Høyvågruta AS, Nettbuss Sør AS, RTB, L/L Setesdal Bilruter and Telemark Bilruter. As from 2009, and following the mergers of Nettbuss Sør AS with Høyvågruta AS and RTB, five operators remained to carry out the transport services under the Aust-Agder contracts. The concession contract with Nettbuss Sør AS expired on 31 December 2014. Currently there are only four transport operators that provide the services concerned under the existing aid scheme. Their concession contracts expire on 31 December 2016.
- (223) The Authority notes that the EFTA States enjoy a wide margin of discretion in defining services of general economic interest, as well as the conditions of its implementation, including an assessment of the costs and revenues of such a service and the appropriate methodology for cost and revenue allocation in cases of operators carrying out also commercial activities. The scope and the control which the Authority is entitled to exercise in that regard is limited to one of manifest error ⁽³⁾.
- (224) In the present case, the local scheduled and bus transport services in Aust-Agder have been defined by the Norwegian authorities as services of general economic interest pursuant to the provisions of the CTA, the CTR, the Education Act and the administrative practice. The Authority has agreed with this definition and it has now also concluded that the aid scheme in Aust-Agder is existing in nature.
- (225) The legal provisions under the existing aid scheme allow for compensation to cover the cost of the local scheduled and school bus transport services in Aust-Agder (minus the ticket revenues for the net contracts) plus a reasonable profit.
- (226) Therefore, only compensatory payments for the provision of the said services can be part of the existing aid scheme in Aust-Agder, including payments in excess of losses actually incurred, which are within the scope of that scheme ⁽⁴⁾.

⁽¹⁾ Case C-47/91 *Italy v Commission* EU:C:1994:358; Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* [2011] EFTA Court Report 266, paragraphs 74 and 76.

⁽²⁾ The same logic applies for schemes that have been approved by the Authority or the European Commission. See for example C-47/91 *Italy v Commission* (ibid), paragraphs 25-26.

⁽³⁾ Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA v EFTA Surveillance Authority* [2012] EFTA Court Report p. 758, paragraph 150.

⁽⁴⁾ In this respect, the Authority's decision is without any prejudice to the application of national rules (e.g. commercial law) under which any overcompensation paid, which is within the scope of the existing aid scheme, may have to be recovered.

- (227) In the context of the present case, the following payments cannot be based on the legal provisions and the administrative practice of the scheme:
- direct payments for transport services that have not been defined as services of general economic interest (e.g. commercial services);
 - direct payments for other transport services that are not the subject of the concession contracts signed (e.g. certain routes); and
 - direct payments for public transport services that used to be part of the existing aid scheme but have long ceased to exist.
- (228) Such payments borne from state resources, as described above, provide a selective advantage to the transport operators that cannot be covered by the provisions and the administrative practice of the existing aid scheme in Aust-Agder, as they refer either to services that the market already provides, or to transport services that have not been defined as such to receive public service compensation, or finally to situations that exceed the boundaries of the aid scheme as originally constructed. That said, in reference to the latter situation, a compensatory payment of a public service that does not longer exist cannot be held to have been made on the basis of the provisions providing for the scheme, simply because such services are no longer subjected to that scheme.
- (229) Further, it appears that these payments that were made not on the basis of the scheme cover costs that should have been borne by the transport operators themselves and costs that have not even been incurred. As a result, such payments constitute a form of operating aid that distorts competition and affects trade between the Contracting Parties.
- (230) In this context, the Authority has assessed the information provided by the Norwegian authorities concerning the different activities of all transport companies involved in the provision of the local scheduled and school bus services in Aust-Agder.
- (231) The Norwegian authorities have maintained, with an exception for Nettbuss Sør AS, that the way of calculating the compensation, taking into account that the income generated corresponded to the estimated costs of performing the transport services, has ensured that the bus operators have been compensated only for the public services.
- (232) For the period before 2004, the Authority has not identified, on the basis of the information provided by the Norwegian authorities, any payments that could be held to fall outside the remit of the existing aid scheme.
- (233) Nevertheless, for the period after 2004 and the introduction of the ALFA-method (and its indexation as from 2009) the Authority notes that certain payments were indeed made outside the existing aid scheme in favour of Nettbuss Sør AS.
- (234) The Authority has not identified, for the period after 2004, any such payments as having been made in favour of any other transport operator in Aust-Agder.

4.2.1. *Payments outside the scheme made to Nettbuss Sør AS for the period 2004-2014*

- (235) The company introduced account separation in 2009, distinguishing between public and commercial activities.
- (236) As the Norwegian authorities have submitted, the ALFA-method is materially a cost-based model and has been a system based on trust. Prior to each production year, Nettbuss Sør AS submitted estimated costs and revenues connected to the public services. Aust-Agder assumed that the company has also been properly allocating the revenues between public and commercial services. As the Norwegian authorities admit, on the basis of the information they lately identified, this seems not to have been the case.
- (237) As mentioned above in recitals 93 to 94, on the basis of the information submitted by the Norwegian authorities regarding the production of Nettbuss Sør AS, the production reported deviates from what should have been reported as production for public service compensation.

- (238) According to the production spreadsheets submitted, Nettbuss Sør AS has been compensated also directly for the company's commercial activities. For example, the spreadsheets reveal that Nettbuss Sør AS has been receiving compensation for late night services, although these constitute part of the company's commercial activities. Nettbuss Sør AS has not objected to the fact that these commercial routes have indeed been included in the calculations for compensation under the ALFA-method.
- (239) It is also revealed from the information submitted that Aust-Agder continued to pay public service compensation for some routes (e.g. Grimstad-Heggedalen and Heggedalen-Grimstad) although these routes ceased to operate.
- (240) The Authority, moreover, notes that public service compensation has been paid for routes that are not part of the public service contract (e.g. the stretch Kilsund-Kitron, Tangen Hisøy-Kitron, Tangen Hisøy-Kilsund and transportation without passengers to the first bus stop for 'Sørlandsekspressen', which is the express bus from Kristiansand to Oslo).
- (241) Consequently, all the above compensatory payments for activities that have wrongly or mistakenly been included in the production spreadsheets under the ALFA-method have not been based on the legal provisions and the administrative practice of the existing aid scheme in Aust-Agder.
- (242) The table below summarizes the reported production, the gross costs, the adjustments due to deviations and the production and cost differences as calculated by Asplan Viak using the ALFA spreadsheets and the indexation ⁽¹⁾:

Table 2

Production and cost differences for the period 2004-2014

| Year | Reported production (km) | Production adjustments due to deviations (km) | Gross costs (NOK) | Cost adjustments due to deviations (NOK) | Indexation % | Production and cost difference (NOK) |
|------|--------------------------|---|-------------------|--|---------------------|--------------------------------------|
| 2004 | 3 975 228 | 3 794 839 | 76 696 086 | 73 472 776 | | 180 389 3 223 310 |
| 2005 | 4 255 732 | 4 073 656 | 80 615 271 | 77 330 623 | | 182 076 3 284 648 |
| 2006 | 4 527 693 | 4 169 542 | 87 502 717 | 81 365 293 | | 358 151 6 137 424 |
| 2007 | 4 255 080 | 4 012 600 | 85 848 541 | 81 109 328 | | 242 480 4 739 212 |
| 2008 | 4 471 364 | 4 140 826 | 88 417 220 | 81 963 624 | | 330 538 6 453 596 |
| 2009 | 4 471 364 | 4 059 622 | 94 960 094 | 86 302 626 | 7,40 ⁽¹⁾ | 411 742 8 657 469 |
| 2010 | | | | | 2,50 | 8 873 906 |

⁽¹⁾ The Norwegian authorities submit that the calculations made cannot be regarded as final, given that the starting points used for each year may not be entirely accurate. However, the total amount would still be close to NOK 80 million.

| Year | Reported production (km) | Production adjustments due to deviations (km) | Gross costs (NOK) | Cost adjustments due to deviations (NOK) | Indexation % | Production and cost difference (NOK) |
|------------|--------------------------|---|-------------------|--|--------------|--------------------------------------|
| 2011 | | | | | 5,00 | 9 317 601 |
| 2012 | | | | | 3,50 | 9 643 717 |
| 2013 | | | | | 3,33 | 9 964 853 |
| 2014 | | | | | 1,78 | 10 142 227 |
| Sum | | | | | | 80 437 962 |

(¹) This figure shows that the cost in 2009 was adjusted with 7,4 % compared to 2008, taking into account cost and price adjustments. As from 2009 onwards, the indexation system established was used to supplement the ALFA-method's results.

- (243) The Norwegian authorities have submitted production deviations also in reference to well-defined public service obligations. The Authority shall assess whether these deviations are made within or outside the scope of the existing aid scheme.
- (244) The Authority notes that, in conjunction with Table 1 as displayed above in recital 96, the table above includes as part of the production deviations instances of school bus services. Particularly, as it has been reported by the Norwegian authorities, in reference to the transportation of schoolchildren to and from swimming lessons and for a specific bus route, it appears that Nettbuss Sør AS has been receiving compensation from two different sources at the same time, i.e. the County of Aust-Agder and the municipalities (¹).
- (245) Also, concerning the production regarding school years and 'duplication school years' as well as for school bus services, it has been reported that Nettbuss Sør AS has been receiving compensation for a longer period during the year than required, e.g. 51 school weeks (255 school days) instead of 38 (192 school days).
- (246) Additionally, the Norwegian authorities have submitted that some public transport stretches (no examples of specific routes are provided) have been shortened without the County's approval and without having this reflected in the production spreadsheets for the granting of the compensation. The Authority is of the view that these production deviations refer to transport services for which compensation has been granted on the basis of the existing aid scheme. It cannot thus be submitted that this alleged overcompensation constitutes new aid granted outside the boundaries of the scheme. The mere fact that the aid scheme has been ill-designed to allow for compensation in excess of the losses actually incurred, but which are within the scope of the aid scheme, does not render this overcompensation new aid. These overcompensatory payments therefore remain within the scope of the existing aid scheme.
- (247) Finally, concerning Nettbuss Sør AS's airport shuttle bus service integrated into the ATP project, as referred to above in recitals 56 to 62, the Authority notes that Aust-Agder, by reducing the costs associated with running the public service routes 39 and 40, has provided direct cost-savings for the company at the estimated amount of NOK 1 020 000, as submitted by the Norwegian authorities, enabling thus Nettbuss Sør AS to maintain its airport shuttle bus service.

(¹) According to case number 158 of 18 December 2001, the County of Aust-Agder decided not to take responsibility for 'midtskysst' for the future. From then on, the responsibility was transferred to the municipalities and Nettbuss Sør AS started to invoice the municipalities for this transport instead of Aust-Agder. The municipalities paid for 'midtskysst' until 2013, when the responsibility went back to Aust-Agder, which decided to cover also the cost already incurred by the municipalities in 2011 and 2012. As from 2013, Aust-Agder is invoiced directly from Nettbuss Sør AS. As regards swimming lessons, in Norway these are part of the primary school education, for which the responsibility, according to the Education Act, lies with the municipalities. Further, Nettbuss Sør AS has reported to Aust-Agder production for public service compensation concerning a route named Karjolen. According to the Norwegian authorities, this route has for several years been funded by the municipality of Arendal and should not have been reported in the spreadsheets. Nettbuss Sør AS admits that this production should not have been part of the spreadsheets.

- (248) The above amount had initially been included in the overall compensation granted to Nettbuss Sør AS for the discharge of transport public service obligations in Aust-Agder. Considering that these obligations ceased to exist (i.e. the routes 39 and 40) with effect from October 2013 until 20 January 2014, the estimated amount of NOK 1 020 000 should have been deducted from the overall compensation paid annually to Nettbuss Sør AS. Not deducting this amount from the overall compensation, but instead using it for the benefits of commercial activities constitutes a form of overcompensation that is paid outside the scope of the existing aid scheme. It is also thus considered to be new aid that constitutes operating aid.

4.2.2. Procedural requirements

- (249) Pursuant to Article 1(3) of Part I of Protocol 3, '[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'.
- (250) By not submitting a notification of the aid measures identified above, the Norwegian authorities have not complied with the notification requirement. Also, by having put into effect the aid measures, the standstill obligation has not been respected.
- (251) The Authority can therefore conclude that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

4.2.3. Compatibility of payments outside the scheme made to Nettbuss Sør AS for the period 2004-2014

- (252) The Authority has examined whether the aid measures at issue can be found compatible with the EEA Agreement. As describe above, the aid consists in financing services that the market already provides, or transport services that have not been defined as such by the legal provisions governing the existing aid scheme in Aust-Agder to receive public service compensation, or finally transport services that have ceased to exist. This financing constitutes operating aid that reduces Nettbuss Sør AS's current expenditure.
- (253) The Norwegian authorities have not presented any grounds for such aid being considered compatible with the EEA Agreement. On the contrary, they have themselves reported the production deviations as not being part of the existing aid scheme under which Nettbuss Sør AS was entitled to receive public service compensation.
- (254) Nettbuss Sør AS in principle argues that following particular settlements and negotiations as referred to above in recitals 109 and 110, no overcompensation has actually taken place, given that the errors made in the reporting of production costs for the granting of the public compensation, as well as the modifications introduced in the production schedule have been 'corrected' by setting off payments against Nettbuss Sør AS's compensation. Also, as referred to above in recital 111, the commercial revenues generated have been deducted in the calculation of the compensation, as a consequence of the fact that certain commercial routes were included in the production spreadsheets for calculating the compensation. Eventually, Nettbuss Sør AS submits that the actual compensation granted was below what the ALFA-method would have provided for.
- (255) With respect to Nettbuss Sør AS's argumentation, the ALFA-method, as referred to above in recital 48, contains core elements for normalised cost calculation of bus operations, such as: (i) calculation of production on the basis of the number of kilometres per production period per vehicle; (ii) calculation of costs on the basis of unit costs multiplied by the number of kilometres per vehicle; and (iii) calculation of revenues during the production period. Also, the estimated income for the next year is adjusted taking into account the income of the bus companies in the present year, as well as any fare increases proposed by Aust-Agder for the next year. The income is then deducted from the compensation granted.
- (256) However, it is apparent that in the present case, the calculation of the public service compensation for Nettbuss Sør AS by means of the ALFA-method included activities that were not subject to a public service obligation or other activities that were not eligible for public service compensation under the existing aid scheme in the first place. Also, the Norwegian authorities have been unable to confirm and document over the years after 2004 the type of production costs for which public service compensation were to be granted, as well as the relevant

deductible income. As a result, the Authority cannot ascertain, on the basis of the information provided, the difference between the costs imputable to the public service activities and the corresponding income ⁽¹⁾. This in itself is evidence that any payment made to Nettbuss Sør AS outside the remit of the ALFA-method constitutes new aid providing an undue advantage to the transport operator.

- (257) The argument that negotiations and settlements have already taken place to adjust the compensation paid to Nettbuss Sør AS which, as Nettbuss Sør AS submits, was below what the ALFA-method would have provided for, does not bring the contested measures within the remit of Article 49 of the EEA Agreement and the transport regulations. Moreover, this cannot make up for the production errors that were included in the production spreadsheets, which were used as a basis to calculate the compensation to be granted.
- (258) The ALFA-method (with its indexation as of 2009) has been put in place to calculate the compensation under the existing aid scheme; however, in the case at hand, that method was erroneously also applied to include transport production by Nettbuss Sør AS that should have been omitted by the Norwegian authorities when calculating the public service compensation. In not forming part of the existing aid scheme in Aust-Agder, the latter constitutes new aid not granted on the basis of the scheme, which the Authority assesses on its own merits. Therefore, Nettbuss Sør AS's endeavours to provide a nexus between those two separate aid procedures are devoid of purpose for the purposes of the Authority's State aid assessment of the payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014.
- (259) Likewise, on the income side, the Authority cannot accept Nettbuss Sør AS's line of reasoning that the commercial revenues under the ALFA-method have led to a corresponding reduction of the actual compensation granted, as a consequence of the fact that, as Nettbuss Sør AS admits, certain commercial production was included therein for calculation purposes.
- (260) Nettbuss Sør AS has submitted a spreadsheet showing an overview of the commercial revenues deducted in the calculation of compensation for the period 2007-2010. Although this sheet reveals commercial revenues that have indeed been deducted when calculating the compensation to be granted, the Authority finds that these revenues should not have been part of the ALFA-method at all, as this method has been designed to include costs and revenues stemming solely from the public service activities. As above, this does not bring the contested measures within the remit of Article 49 of the EEA Agreement and the transport regulations for compatibility purposes and any endeavour to provide a nexus between those two separate aid procedures is devoid of purpose, for the purposes of the Authority's State aid assessment of the payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014.
- (261) In this context, the Authority is not in a position to assess the merits of what seems to be an ongoing dispute between Nettbuss Sør AS and the County over the actual aid amounts due under the scheme, in particular as it cannot be established without doubt that any aid paid to Nettbuss Sør AS outside the scope of the existing aid scheme has indeed been fully or partly paid back to the County.
- (262) Given that the new aid activities do not refer to public service obligations entrusted to the transport operator, Article 49 of the EEA Agreement and the Regulations (EEC) No 1191/69 and/or (EC) No 1370/2007 are not applicable.
- (263) Further, the derogations provided for in Article 61(2) of the EEA Agreement concerning aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.
- (264) Nor does the derogation provided for in Article 61(3)(a) of the EEA Agreement apply, which authorises aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, because the aid measures are not conditional on realising any type of activity in specific regions.
- (265) Likewise, the payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014 cannot be regarded as promoting the execution of a project of common European interest or remedying a serious disturbance in the economy of Norway, as provided for in Article 61(3)(b) of the EEA Agreement.

⁽¹⁾ Case C-504/07 *Antrop and Others v Conselho de Ministros and Others* EU:C:2009:290, paragraphs 26-27.

- (266) Finally, the payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014 cannot be considered compatible in the light of Article 61(3)(c) of the EEA Agreement, which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such an aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In this respect, it shall be stressed that the direct grants at issue do not fall under any of the Authority's guidelines, which define the conditions to consider certain types of aid compatible with the functioning of the EEA Agreement.
- (267) The payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014 constitute therefore operating aid that artificially reinforces the competitive position of Nettbuss Sør AS over other similar undertakings by relieving it of charged normally borne by similar transport operators.
- (268) According to case law, such operating aid is in principle incompatible with the functioning of the EEA Agreement and cannot fall within the scope of Article 61(3)(c) since it distorts competition in the sectors in which it is granted and is at the same time incapable, by its very nature, of achieving any of the objectives laid down in that provision ⁽¹⁾.
- (269) In light of the above, the Authority concludes that the payments that Nettbuss Sør AS received outside the existing aid scheme for the period 2004-2014 are incompatible with the functioning of the EEA Agreement.

4.3. Conclusion on the aid granted to Nettbuss Sør AS outside the existing aid scheme in Aust-Agder for the period 2004-2014

- (270) The Authority concludes that the Norwegian authorities have provided Nettbuss Sør AS with State aid within the meaning of Article 61(1) EEA Agreement during the period 2004-2014, which is outside the scope of the existing aid scheme in Aust-Agder. This new aid constitutes operating aid that is incompatible with the functioning of the EEA Agreement.

5. CONCLUSION OF THE PRESENT FORMAL INVESTIGATION

- (271) The Authority considers that the compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.
- (272) The Authority is of the view that the aid for local scheduled bus transport, referred to above, has been granted on the basis of an existing aid scheme based on the CTA, the CTR and the administrative practice. The Authority is furthermore of the view that the aid for school bus transport, referred to above, has been granted on the basis of an existing aid scheme based on the Education Act.
- (273) In view of what was said in recitals 211 to 215, the Authority decides to close the formal investigation procedure in respect of the existing aid scheme in Aust-Agder.
- (274) The Authority additionally concludes that the Norwegian authorities have provided Nettbuss Sør AS with State aid within the meaning of Article 61(1) EEA Agreement during the period 2004-2014 which is outside the scope of the existing aid scheme in Aust-Agder. The Norwegian authorities have unlawfully implemented this aid in breach of Article 1(3) of Part I of Protocol 3. This aid constitutes operating aid that is incompatible with the functioning of the EEA Agreement and shall be recovered from the beneficiary.

6. RECOVERY

- (275) According to the EEA Agreement, the Authority is competent to decide that the State concerned must abolish aid when it has found it to be incompatible with the functioning of the EEA Agreement. The EFTA Court has also consistently held that the obligation on a State to abolish aid regarded as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽²⁾.

⁽¹⁾ Case T-211/05 *Italy v Commission* EU:T:2009:304, paragraph 173.

⁽²⁾ Joined Cases E-4/10, E-6/10 and E-7/10, *The Principality of Liechtenstein and others v EFTA Surveillance Authority* [2011] EFTA Court Report p. 16, paragraph 142; Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA v EFTA Surveillance Authority* [2012] EFTA Court Report p. 758, paragraph 286.

- (276) Further, it is established case-law that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽¹⁾.
- (277) For the reasons set out above, the Authority considers that the Norwegian authorities have provided compensatory payments in excess of the losses actually incurred and which are outside the scope of the existing aid scheme in Aust-Agder. The payments constitute new State aid measures that are incompatible with the functioning of the EEA Agreement. As this measures have not been notified to the Authority, it follows from Article 14 of Part II of Protocol 3 that the Authority shall decide that unlawful aid which is incompatible with the State aid rules under the EEA Agreement must be recovered from the beneficiary.
- (278) Moreover, the Authority orders the recovery of incompatible new aid subject to a limitation period of 10 years prior to when it first acted. In this case, the Authority first acted, by sending a request for information to the Norwegian authorities, on 10 November 2011 ⁽²⁾. The Authority has identified the existence of incompatible new aid during the period 2004-2014. Thus, all incompatible aid granted during this period is subject to recovery.
- (279) The Norwegian authorities are invited to provide detailed and accurate information on the amount of aid granted to Nettbuss Sør AS during the period 2004-2014.
- (280) In particular, the Authority hereby wishes to supply the Norwegian authorities with the following information and guidance concerning the recovery process:
- (a) by reducing the costs associated with running the public service routes 39 and 40, for Nettbuss Sør AS has been provided with direct cost-savings at the amount of NOK 1 020 000, as estimated by the Norwegian authorities. This amount, which does not represent public service compensation, must be recovered with compound interest calculated from the date the amount remained at the disposal of the company in order to benefit the airport shuttle bus service, i.e. October 2013;
 - (b) recovery is ordered only from production deviating from what should have been reported as production for public service compensation under the ALFA-method. That said, the following cases fall within the recovery order:
 - (i) direct payments for transport services that have not been defined as services of general economic interest (e.g. commercial services);
 - (ii) direct payments for other transport services that are not the subject of the concession contracts signed (e.g. certain routes); and
 - (iii) direct payments for public transport services that used to be part of the existing aid scheme but have long ceased to exist.
 - (c) The Authority concludes that the amounts to be recovered shall reflect the number of actual deviated kilometres over the period 1 January 2004 till the expiry of the contract on 31 December 2014, taking into account the cost calculation principle determined by the ALFA-method. Any revenue from public as well as commercial activities that was paid back to the County shall be deducted from the total recoverable amount. Compound interest shall apply from the date the aid was paid out to Nettbuss Sør AS,

HAS ADOPTED THIS DECISION:

Article 1

The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes State aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

⁽¹⁾ Case C-75/97 *Belgium v Commission* EU:C:1999:311, paragraphs 64 and 65. See Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 121 at paragraph 178 and C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, paragraph 98. See also Chapter 2.2.1 of the Authority's Guidelines on the recovery of unlawful and incompatible aid, available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

⁽²⁾ Article 15 of Part II of Protocol 3 SCA. See also Case C-276/03 *Scott v Commission* ECLI:EU:C:2005:590.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute State aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

Article 4

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 Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. the total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;
2. to the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;
3. a detailed report on the progress made and the measures already taken to comply with this Decision; and
4. documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued, etc.).

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version of this Decision is authentic.

Done at Brussels, 7 May 2015.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Frank BÜCHEL
College Member