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Legislation

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Contents

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[1] Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

EN

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

DECISION No 2/2012 OF THE ACP-EU COUNCIL OF MINISTERS

of 15 June 2012

concerning the status of the Republic of South Sudan in relation to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part

(2012/357/EU)

THE ACP-EU COUNCIL OF MINISTERS,

Having regard to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ([1]), as first amended in Luxembourg on 25 June 2005 ([2]) and as amended for the second time in Ouagadougou on 22 June 2010 ([3]) ('the ACP-EU Partnership Agreement'), and in particular Article 94 thereof,

Having regard to Decision No 1/2005 of the ACP-EC Council of Ministers of 8 March 2005 concerning the adoption of the Rules of Procedure of the ACP-EC Council of Ministers ([4]), and in particular Article 8(3) thereof,

Whereas:

(1) The second amendment to the ACP-EU Partnership Agreement has been provisionally applied since 31 October 2010.

(2) Article 94 of the ACP-EU Partnership Agreement stipulates that any request for accession by a State is to be presented to, and approved by, the Council of Ministers.

(3) On 20 March 2012, the Republic of South Sudan presented a request for accession in accordance with Article 94 of the ACP-EU Partnership Agreement and a request for observer status enabling it to participate in the joint institutions set up by that Agreement, until the accession procedure is completed.

(4) The observer status should be valid until 20 November 2012. South Sudan should deposit the Act of Accession with the Depositaries of the ACP-EU Partnership Agreement, namely, the Secretariat-General of the Council of the European Union and the Secretariat of the ACP States, no later than that date,

HAS ADOPTED THIS DECISION:

Article 1

Approval of requests for accession and observer status

The request of the Republic of South Sudan to accede to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 and as amended for the second time in Ouagadougou on 22 June 2010, is hereby approved.

South Sudan shall have observer status until 20 November 2012 under the ACP-EU Partnership Agreement.

South Sudan shall deposit its Act of Accession with the Depositaries of the ACP-EU Partnership Agreement, namely, the Secretariat-General of the Council of the European Union and the Secretariat of the ACP States, no later than that date.

([1]) OJ L 317, 15.12.2000, p. 3.
([2]) Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 209, 11.8.2005, p. 27).
([3]) Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 (OJ L 287, 4.11.2010, p. 3).
([4]) OJ L 95, 14.4.2005, p. 44.

Article 2

Entry into force

This Decision shall enter into force on the day following that of its adoption.

Done at Port Vila, 15 June 2012.

For the ACP-EU Council of Ministers
The President
A. BAPTISTE

REGULATIONS

COMMISSION REGULATION (EU) No 587/2012

of 7 June 2012

establishing a prohibition of fishing for blue marlin in the Atlantic Ocean by vessels flying the flag of Portugal

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [1], and in particular Article 36(2) thereof,

Whereas:

(1) Council Regulation (EU) No 44/2012 of 17 January 2012 fixing for 2012 the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreements [2], lays down quotas for 2012.

(2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2012.

(3) It is therefore necessary to prohibit fishing activities for that stock,

HAS ADOPTED THIS REGULATION:

Article 1

Quota exhaustion

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2012 shall be deemed to be exhausted from the date set out in that Annex.

Article 2

Prohibitions

Fishing activities for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. In particular it shall be prohibited to retain on board, relocate, tranship or land fish from that stock caught by those vessels after that date.

Article 3

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 June 2012.

For the Commission,
On behalf of the President,
Lowri EVANS
Director-General for Maritime Affairs and Fisheries

[1] OJ L 343, 22.12.2009, p. 1.
[2] OJ L 25, 27.1.2012, p. 55.

ANNEX

No	5/T&Q
Member State	Portugal
Stock	BUM/ATLANT
Species	Blue marlin (*Makaira nigricans*)
Zone	Atlantic Ocean
Date	13 May 2012

COMMISSION IMPLEMENTING REGULATION (EU) No 588/2012

of 3 July 2012

entering a name in the register of protected designations of origin and protected geographical indications [Kalocsai fűszerpaprika-őrlemény (PDO)]

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1], and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006 and having regard to Article 17(2) thereof, Hungary's application to register the name 'Kalocsai fűszerpaprika-őrlemény' was published in the *Official Journal of the European Union* [2].

(2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 3 July 2012.

For the Commission,
On behalf of the President,
Dacian CIOLOȘ
Member of the Commission

[1] OJ L 93, 31.3.2006, p. 12.
[2] OJ C 303, 14.10.2011, p. 16.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.8. other products of Annex I of the Treaty (spices etc.)

HUNGARY

Kalocsai fűszerpaprika-őrlemény (PDO)

COMMISSION IMPLEMENTING REGULATION (EU) No 589/2012

of 4 July 2012

approving the active substance fluxapyroxad, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC ([1]), and in particular Article 13(2) and Article 78(2) thereof,

Whereas:

(1) In accordance with Article 80(1)(a) of Regulation (EC) No 1107/2009, Council Directive 91/414/EEC ([2]) is to apply, with respect to the procedure and the conditions for approval, to active substances for which a decision has been adopted in accordance with Article 6(3) of that Directive before 14 June 2011. For fluxapyroxad the conditions of Article 80(1)(a) of Regulation (EC) No 1107/2009 are fulfilled by Commission Decision 2010/672/EU ([3]).

(2) In accordance with Article 6(2) of Directive 91/414/EEC the United Kingdom received on 11 December 2009 an application from BASF SE for the inclusion of the active substance fluxapyroxad in Annex I to Directive 91/414/EEC. Decision 2010/672/EU confirmed that the dossier was 'complete' in the sense that it could be considered as satisfying, in principle, the data and information requirements of Annexes II and III to Directive 91/414/EEC.

(3) For that active substance, the effects on human and animal health and the environment have been assessed, in accordance with the provisions of Article 6(2) and (4) of Directive 91/414/EEC, for the uses proposed by the applicant. The designated rapporteur Member State submitted a draft assessment report on 11 January 2011.

(4) The draft assessment report was peer reviewed by the Member States and the European Food Safety Authority (hereinafter 'the Authority'). The Authority presented to the Commission its conclusion on the peer review of the pesticide risk assessment of the active substance fluxapyroxad ([4]) on 16 December 2011. The draft assessment report was reviewed by the Member States and the Commission within the Standing Committee on the Food Chain and Animal Health and was finalised on 1 June 2012 in the format of the Commission review report for fluxapyroxad.

(5) It has appeared from the various examinations made that plant protection products containing fluxapyroxad may be expected to satisfy, in general, the requirements laid down in Article 5(1)(a) and (b) and Article 5(3) of Directive 91/414/EEC, in particular with regard to the uses which were examined and detailed in the Commission review report. It is therefore appropriate to approve fluxapyroxad.

(6) Without prejudice to the obligations provided for in Regulation (EC) No 1107/2009 as a consequence of approval, taking into account the specific situation created by the transition from Directive 91/414/EEC to Regulation (EC) No 1107/2009 the following should, however, apply. Member States should be allowed a period of six months after approval to review authorisations of plant protection products containing fluxapyroxad. Member States should, as appropriate, vary, replace or withdraw authorisations. By way of derogation from that deadline, a longer period should be provided for the submission and assessment of the update of the complete Annex III dossier, as set out in Directive 91/414/EEC, of each plant protection product for each intended use in accordance with the uniform principles.

(7) The experience gained from inclusions in Annex I to Directive 91/414/EEC of active substances assessed in the framework of Commission Regulation (EEC) No 3600/92 of 11 December 1992 laying down the detailed rules for the implementation of the first stage of the programme of work referred to in Article 8(2) of Council Directive 91/414/EEC concerning the placing of plant protection products on the market ([5]) has shown that difficulties can arise in interpreting the duties of holders of existing authorisations in relation to access to data. In order to avoid further difficulties it therefore appears necessary to clarify the duties of the Member States, especially the duty to verify that the holder of an authorisation demonstrates access to a dossier satisfying the requirements of Annex II to that Directive. However, this clarification does not impose any new

([1]) OJ L 309, 24.11.2009, p. 1.
([2]) OJ L 230, 19.8.1991, p. 1.
([3]) OJ L 290, 6.11.2010, p. 51.
([4]) *EFSA Journal* 2012; 10(1):2522. Available online: www.efsa.europa.eu
([5]) OJ L 366, 15.12.1992, p. 10.

obligations on Member States or holders of authorisations compared to the directives which have been adopted until now amending Annex I to that Directive or the Regulations approving active substances.

(8) In accordance with Article 13(4) of Regulation (EC) No 1107/2009, the Annex to Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances [1] should be amended accordingly.

(9) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS REGULATION:

Article 1

Approval of active substance

The active substance fluxapyroxad, as specified in Annex I, is approved subject to the conditions laid down in that Annex.

Article 2

Re-evaluation of plant protection products

1. Member States shall in accordance with Regulation (EC) No 1107/2009, where necessary, amend or withdraw existing authorisations for plant protection products containing fluxapyroxad as an active substance by 30 June 2013.

By that date they shall in particular verify that the conditions in Annex I to this Regulation are met, with the exception of those identified in the column on specific provisions of that Annex, and that the holder of the authorisation has, or has access to, a dossier satisfying the requirements of Annex II to Directive 91/414/EEC in accordance with the conditions of Article 13(1) to (4) of that Directive and Article 62 of Regulation (EC) No 1107/2009.

2. By way of derogation from paragraph 1, for each authorised plant protection product containing fluxapyroxad as either the only active substance or as one of several active substances, all of which were listed in the Annex to Implementing Regulation (EU) No 540/2011 by 31 December 2012 at the latest, Member States shall re-evaluate the product in accordance with the uniform principles, as referred to in Article 29(6) of Regulation (EC) No 1107/2009, on the basis of a dossier satisfying the requirements of Annex III to Directive 91/414/EEC and taking into account the column on specific provisions of Annex I to this Regulation. On the basis of that evaluation, they shall determine whether the product satisfies the conditions set out in Article 29(1) of Regulation (EC) No 1107/2009.

Following that determination Member States shall:

(a) in the case of a product containing fluxapyroxad as the only active substance, where necessary, amend or withdraw the authorisation by 30 June 2014 at the latest; or

(b) in the case of a product containing fluxapyroxad as one of several active substances, where necessary, amend or withdraw the authorisation by 30 June 2014 or by the date fixed for such an amendment or withdrawal in the respective act or acts which added the relevant substance or substances to Annex I to Directive 91/414/EEC or approved that substance or substances, whichever is the latest.

Article 3

Amendments to Implementing Regulation (EU) No 540/2011

The Annex to Implementing Regulation (EU) No 540/2011 is amended in accordance with Annex II to this Regulation.

Article 4

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 July 2012.

For the Commission
The President
José Manuel BARROSO

[1] OJ L 153, 11.6.2011, p. 1.

ANNEX I

Common Name, Identification Numbers	IUPAC Name	Purity [1]	Date of approval	Expiration of approval	Specific provisions
Fluxapyroxad CAS No 907204-31-3 CIPAC No 828	3-(difluoromethyl)-1-methyl-N-(3′,4′,5′-trifluorobiphenyl-2-yl) pyrazole-4-carboxamide	≥ 950 g/kg The impurity toluene must not exceed 1 g/kg in the technical material	1 January 2013	31 December 2022	For the implementation of the uniform principles as referred to in Article 29(6) of Regulation (EC) No 1107/2009, the conclusions of the review report on fluxapyroxad, and in particular Appendices I and II thereof, as finalised in the Standing Committee on the Food Chain and Animal Health on 1 June 2012 shall be taken into account. In this overall assessment Member States shall pay particular attention to the risk to groundwater, if the active substance is applied under vulnerable soil and/or climatic conditions. Conditions of use shall include risk mitigation measures, where appropriate. The purity given in this entry is based on a pilot plant production. The examining Member State shall inform the Commission in accordance with Article 38 of Regulation (EC) No 1107/2009 on the specification of the technical material as commercially manufactured.

[1] Further details on identity and specification of active substance are provided in the review report.

ANNEX II

In Part B of the Annex to Implementing Regulation (EU) 540/2011, the following entry is added:

Number	Common Name, Identification Numbers	IUPAC Name	Purity (*)	Date of approval	Expiration of approval	Specific provisions
'24	Fluxapyroxad CAS No 907204-31-3 CIPAC No 828	3-(difluoromethyl)-1-methyl-*N*-(3′,4′,5′-trifluorobiphenyl-2-yl)pyrazole-4-carboxamide	≥ 950 g/kg The impurity toluene must not exceed 1 g/kg in the technical material	1 January 2013	31 December 2022	For the implementation of the uniform principles as referred to in Article 29(6) of Regulation (EC) No 1107/2009, the conclusions of the review report on fluxapyroxad, and in particular Appendices I and II thereof, as finalised in the Standing Committee on the Food Chain and Animal Health on 1 June 2012 shall be taken into account. In this overall assessment Member States shall pay particular attention to the risk to groundwater, if the active substance is applied under vulnerable soil and/or climatic conditions. Conditions of use shall include risk mitigation measures, where appropriate. The purity given in this entry is based on a pilot plant production. The examining Member State shall inform the Commission in accordance with Article 38 of Regulation (EC) No 1107/2009 on the specification of the technical material as commercially manufactured.'

(*) Further details on identity and specification of active substance are provided in the review report.

COMMISSION IMPLEMENTING REGULATION (EU) No 590/2012

of 4 July 2012

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2], and in particular Article 136(1) thereof,

Whereas:

(1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.

(2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 July 2012.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 157, 15.6.2011, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	TR	50,2
	ZZ	50,2
0707 00 05	TR	103,7
	ZZ	103,7
0709 93 10	TR	119,0
	ZZ	119,0
0805 50 10	AR	63,5
	TR	54,0
	UY	93,7
	ZA	93,8
	ZZ	76,3
0808 10 80	AR	205,4
	BR	81,6
	CL	105,8
	CN	100,6
	NZ	131,5
	US	177,2
	UY	58,9
	ZA	106,0
	ZZ	120,9
0808 30 90	AR	173,5
	CL	108,9
	CN	83,4
	NZ	207,2
	ZA	112,5
	ZZ	137,1
0809 10 00	TR	187,1
	ZZ	187,1
0809 29 00	TR	328,9
	ZZ	328,9
0809 30	TR	214,9
	ZZ	214,9

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION IMPLEMENTING REGULATION (EU) No 591/2012

of 4 July 2012

amending the representative prices and additional import duties for certain products in the sugar sector fixed by Implementing Regulation (EU) No 971/2011 for the 2011/12 marketing year

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector [2], and in particular Article 36(2), second subparagraph, second sentence thereof,

Whereas:

(1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups for the 2011/12 marketing year are fixed by Commission Implementing Regulation (EU) No 971/2011 [3]. Those prices and duties were last amended by Commission Implementing Regulation (EU) No 574/2012 [4].

(2) The data currently available to the Commission indicate that those amounts should be amended in accordance with Article 36 of Regulation (EC) No 951/2006.

(3) Given the need to ensure that this measure applies as soon as possible after the updated data have been made available, this Regulation should enter into force on the day of its publication,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties applicable to imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Implementing Regulation (EU) No 971/2011 for the 2011/12 marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 July 2012.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and Rural Development

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[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 178, 1.7.2006, p. 24.
[3] OJ L 254, 30.9.2011, p. 12.
[4] OJ L 169, 29.6.2012, p. 55.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 5 July 2012

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 12 10 (1)	39,85	0,00
1701 12 90 (1)	39,85	2,65
1701 13 10 (1)	39,85	0,00
1701 13 90 (1)	39,85	2,95
1701 14 10 (1)	39,85	0,00
1701 14 90 (1)	39,85	2,95
1701 91 00 (2)	50,39	2,35
1701 99 10 (2)	50,39	0,00
1701 99 90 (2)	50,39	0,00
1702 90 95 (3)	0,50	0,22

(1) For the standard quality defined in point III of Annex IV to Regulation (EC) No 1234/2007.
(2) For the standard quality defined in point II of Annex IV to Regulation (EC) No 1234/2007.
(3) Per 1 % sucrose content.

DECISIONS

COMMISSION IMPLEMENTING DECISION

of 3 July 2012

establishing the financial contribution by the Union to the expenditure incurred in the context of the emergency measures taken to combat avian influenza in Germany in November 2010

(notified under document C(2012) 4359)

(Only the German text is authentic)

(2012/358/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Decision 2009/470/EC of 25 May 2009 on expenditure in the veterinary field [1], and in particular Article 4 thereof,

Whereas:

(1) In accordance with Article 75 of the Financial Regulation and Article 90(1) of the Implementing Rules, the commitment of expenditure from the Union budget shall be preceded by a financing decision setting out the essential elements of the action involving expenditure and adopted by the institution or the authorities to which powers have been delegated by the institution.

(2) Decision 2009/470/EC lays down the procedures governing the financial contribution from the Union towards specific veterinary measures, including emergency measures. With a view to helping to eradicate avian influenza as rapidly as possible the Union should contribute financially to eligible expenditure borne by the Member States. Article 4(3) first and second indents of that Decision lays down rules on the percentage that must be applied to the costs incurred by the Member States.

(3) Article 3 of Commission Regulation (EC) No 349/2005 of 28 February 2005 laying down rules on the Community financing of emergency measures and of the campaign to combat certain animal diseases under Council Decision 90/424/EEC [2] sets rules on the expenditure eligible for Union financial support.

(4) Commission Implementing Decision 2011/404/EU of 7 July 2011 on a financial contribution from the Union towards emergency measures to combat avian influenza in Germany in November 2010 [3] granted a financial contribution by the Union towards emergency measures to combat avian influenza in Germany in November 2010. An official request for reimbursement was submitted by Germany on 5 September 2011, as set out in Article 7(1) and 7(2) of Regulation (EC) No 349/2005.

(5) The payment of the financial contribution from the Union is to be subject to the condition that the planned activities were actually implemented and that the authorities provided all the necessary information within the set deadlines.

(6) Germany has in accordance with Article 3(4) of Decision 2009/470/EC without delay informed the Commission and the other Member States of the measures applied in accordance with Union legislation on notification and eradication and the results thereof. The request for reimbursement was, as required in Article 7 of Regulation (EC) No 349/2005, accompanied by a financial report, supporting documents, an epidemiological report on each holding where the animals have been slaughtered or destroyed and the results of respective audits.

(7) The Commission's observations, method of calculating the eligible expenditure and final conclusions were communicated to Germany on 16 March 2012.

(8) Consequently the total amount of the financial support from the Union to the eligible expenditure incurred in connection with the eradication of avian influenza in Germany in November 2010 can now be fixed.

(9) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

The financial contribution from the Union towards the expenditure associated with eradicating avian influenza in Germany in 2010 is fixed at EUR 177 181,83.

[1] OJ L 155, 18.6.2009, p. 30.
[2] OJ L 55, 1.3.2005, p. 12.
[3] OJ L 180, 8.7.2011, p. 50.

Article 2

This Decision constituting a financing decision in the meaning of Article 75 of the Financial Regulation is addressed to the Federal Republic of Germany.

Done at Brussels, 3 July 2012.

For the Commission
John DALLI
Member of the Commission

DECISION OF THE EUROPEAN CENTRAL BANK

of 28 June 2012

amending Decision ECB/2011/25 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral

(ECB/2012/11)

(2012/359/EU)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1 and Article 18.2 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro (hereinafter the 'NCBs') may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem ([1]).

(2) The Governing Council considers that in order to enhance the provision of liquidity to counterparties to Eurosystem monetary policy operations, the criteria for determining the eligibility of asset-backed securities to be used as collateral in Eurosystem monetary policy operations should be widened.

(3) Such measures need to apply temporarily, until the Governing Council considers that the stability of the financial system allows the application of the general Eurosystem framework for monetary policy operations.

(4) Therefore, Decision ECB/2011/25 of 14 December 2011 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral ([2]) should be amended accordingly,

([1]) OJ L 331, 14.12.2011, p. 1.
([2]) OJ L 341, 22.12.2011, p. 65.

HAS ADOPTED THIS DECISION:

Article 1

Amendment

Article 3 of Decision ECB/2011/25 is replaced by the following:

'*Article 3*

Admission of certain additional asset-backed securities

1. In addition to asset-backed securities (ABS) eligible under Chapter 6 of Annex I to Guideline ECB/2011/14, ABS which do not fulfil the credit assessment requirements under Section 6.3.2 of Annex I to Guideline ECB/2011/14 but which otherwise comply with all eligibility criteria applicable to ABS pursuant to Guideline ECB/2011/14, shall be eligible as collateral for Eurosystem monetary policy operations, provided that they have two ratings of at least triple B (*), at issuance and at any time subsequently. They shall also satisfy all the following requirements:

(a) the cash-flow generating assets backing the ABS shall belong to one of the following asset classes: (i) residential mortgages; (ii) loans to small and medium-sized enterprises (SMEs); (iii) commercial mortgages; (iv) auto loans; (v) leasing and consumer finance;

(b) there shall be no mix of different asset classes in the cash-flow generating assets;

(c) the cash-flow generating assets backing the ABS shall not contain loans which are any of the following:

(i) non-performing at the time of issuance of the ABS;

(ii) non-performing when incorporated in the ABS during the life of the ABS, for example by means of a substitution or replacement of the cash-flow generating assets;

(iii) at any time, structured, syndicated or leveraged;

(d) the ABS transaction documents shall contain servicing continuity provisions.

2. ABS referred to in paragraph 1 that have two ratings of at least single A (**) shall be subject to a valuation haircut of 16 %.

3. ABS referred to in paragraph 1 that do not have two ratings of at least single A shall be subject to the following valuation haircuts: (a) ABS backed by commercial mortgages shall be subject to a valuation haircut of 32 %; (b) all other ABS shall be subject to a valuation haircut of 26 %.

4. A counterparty may not submit ABS eligible pursuant to paragraph 1 as collateral, if the counterparty, or any third party with which it has close links, acts as an interest rate hedge provider in relation to the ABS.

5. For the purposes of this Article "small enterprise" and "medium-sized enterprise" shall have the meaning given to them in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (***).

6. An NCB may accept as collateral for Eurosystem monetary policy operations ABS whose underlying assets include residential mortgages or loans to SMEs or both and which do not fulfil the credit assessment requirements under Section 6.3.2 of Annex I to Guideline ECB/2011/14 and the requirements referred to in paragraph 1(a) to (d) and paragraph 4 above but which otherwise comply with all eligibility criteria applicable to ABS pursuant to Guideline ECB/2011/14 and have two ratings of at least triple B. Such ABS shall be limited to those issued before 20 June 2012 and shall be subject to a valuation haircut of 32 %.

(*) A "triple B" rating is a rating of at least "Baa3" from Moody's, "BBB-" from Fitch or Standard & Poor's or a rating of "BBB" from DBRS.

(**) A "single A" rating is a rating of at least "A3" from Moody's, "A-" from Fitch or Standard & Poor's or a rating of "AL" from DBRS.

(***) OJ L 124, 20.5.2003, p. 36.'.

Article 2

Entry into force

This Decision shall enter into force on 29 June 2012.

Done at Frankfurt am Main, 28 June 2012.

The President of the ECB

Mario DRAGHI

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 205/11/COL

of 29 June 2011

on the Supplementary Agreement on the Hurtigruten service (Norway)

THE EFTA SURVEILLANCE AUTHORITY ('THE AUTHORITY'),

HAVING REGARD to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 59(2), 61 and Protocol 26,

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

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

HAVING REGARD to 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 ('the Implementing Provisions Decision') [1],

HAVING called on interested parties to submit their comments pursuant to those provisions [2],

Whereas:

I. FACTS

1. PROCEDURE

By letter dated 28 November 2008 (Event No 500143), the Norwegian authorities informed the Authority about the renegotiation of the agreement between the Norwegian authorities and Hurtigruten ASA on acquisition of transport services between Bergen and Kirkenes in Norway.

After various exchanges of correspondence [3], by letter dated 14 July 2010 the Authority informed the Norwegian authorities that it had decided to initiate the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of the additional payments to Hurtigruten in 2008.

The Authority's Decision No 325/10/COL to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* and the EEA Supplement to it [4]. The Authority called on interested parties to submit their comments on the decision. The Authority did not receive any third party comments.

By letter dated 30 September 2010 (Event No 571486) the Norwegian authorities forwarded their comments on the opening decision (Event No 563570). Subsequent emails with additional information were sent by the Norwegian authorities on 20 April 2011 (Event No 595326), on 4 May 2011, (Event No 596802) and on 6 May 2011 (Event No 597151).

2. BACKGROUND – THE HURTIGRUTEN AGREEMENT

Hurtigruten ASA operates maritime transport services consisting of the combined transport of persons and goods along the Norwegian coastal line from Bergen to Kirkenes, serving 34 ports of call on a daily basis throughout the year.

(1) Available at: http://www.eftasurv.int/media/decisions/195-04-COL.pdf.

(2) Published in OJ C 320, 25.11.2010 p. 6 and EEA Supplement to the Official Journal No 65, 25.11.2010 p. 4.

(3) For more detailed information on the various correspondence between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 325/10/COL. See footnote 2 for the publication references.

(4) See footnote 2 for the publication references.

The operation of the service for the period 1 January 2005 to 31 December 2012 was the subject of a tender procedure initiated in June 2004. *Ofotens og Vesteraalens Dampskipsselskap ASA* and *Troms Fylkes Dampskipsselskap* ('the Hurtigruten companies') ([5]) were the only bidders and signed a contract with the Norwegian authorities on 17 December 2004 ('the Hurtigruten Agreement'). The two companies merged in March 2006 to form the entity now operating the service, Hurtigruten ASA ('Hurtigruten'). The Hurtigruten Agreement signed in 2004 was not notified to the Authority and has not, as such, been subject to any assessment under the state aid rules of the EEA Agreement by the Authority.

Under the Hurtigruten Agreement, Hurtigruten provides for daily services at 34 predetermined ports of call throughout the year, based on a fixed schedule, capacity based on the requirement to operate the route with 11 vessels approved by the Norwegian authorities in advance and maximum prices as regards the distance passenger routes. Hurtigruten is free to set its prices for roundtrips, cabins, catering and the transport of cars and goods.

For the services covered by the Hurtigruten Agreement, the Norwegian authorities pay a total compensation of NOK 1 899,7 million for the eight years of duration of the agreement, expressed in 2005 prices:

For 2005	NOK 217,5 million
For 2006	NOK 247,5 million
For 2007	NOK 247,5 million
For 2008	NOK 240,0 million
For 2009	NOK 236,8 million
For 2010	NOK 236,8 million
For 2011	NOK 236,8 million
For 2012	NOK 236,8 million

The payments are adjusted according to a price index clause in Article 6.2 of the Hurtigruten Agreement, taking into account the price of marine gas oil, salary costs in the marine sector and NIBOR ([6]).

According to the Norwegian authorities, Hurtigruten is obliged to keep separate accounts for the company's services on the Bergen-Kirkenes route and for the activities that are not part of this route, but there is no obligation on Hurtigruten in the current agreement to keep separate accounts for the public service obligation part of the Bergen-Kirkenes route and the commercial part of the same route.

In addition to the service covered by the Hurtigruten Agreement, Hurtigruten is a commercial operator and offers round trips, excursions, and catering on the route Bergen-Kirkenes. Moreover, in connection with this route, Hurtigruten also provides transport services in the *Geiranger* fjord, outside the scope of the Hurtigruten Agreement. Furthermore, Hurtigruten operates a number of different cruises in different European states, Russia, Antarctica, Spitsbergen and Greenland.

On 30 June 2010, the Norwegian authorities initiated a tender procedure on the route between Bergen and Kirkenes for the period of eight years as of 1 January 2013 at the latest. The Norwegian authorities informed the Authority that a new contract for the provision of the service from 1 January 2012 to 31 December 2019 was signed on 13 April 2011 with Hurtigruten. This contract is not assessed in the current decision.

3. DESCRIPTION OF THE THREE MEASURES UNDER ASSESSMENT

3.1. **The three measures**

The Norwegian authorities have explained that on 27 October 2008, the Norwegian authorities and Hurtigruten concluded an agreement on the basis of which the state's payment for the provision of the transport services between Bergen and Kirkenes was increased as follows (hereinafter referred to collectively as 'the three measures'):

1. reimbursement of 90 % of the so-called Nox tax for 2007 and 90 % of the contributions to the Nox Fund from January 2008 onwards for the remaining duration of the Hurtigruten Agreement, i.e. until 31 December 2012 ([7]);

2. a 'general compensation' NOK 66 million was granted for 2008 due to the weak financial situation of Hurtigruten resulting from a general increase in costs for the service provided. A general compensation is provided for annually for the remaining duration of the contract, i.e. until 31 December 2012, provided the financial situation of the company related to the public service does not significantly improve ([8]); and

([5]) For the period from 1.1.2002 to 31.12.2004 the two maritime companies *Ofotens og Vesteraalens Dampskipsselskap ASA* and *Troms Fylkes Dampskipsselskap* had been entrusted with the provision of the service.

([6]) The Norwegian InterBank Rate.

([7]) On page 13 of a report from BDO Noraudit dated 23.3.2009 submitted by the Norwegian authorities, it is explained that the *Geirangerfjord* operation amounted to 2 % of the total fuel consumption in 2007. When calculating the 90 % figure the fuel consumption of the *Geirangerfjord* operation was deducted in advance which implied that 88,2 % of the NOx tax was reimbursed.

([8]) In the Supplementary Agreement: 'I tråd med St. prp. nr. 24 (2008-2009) har Hurtigruten ASA fått en generell kompensasjon på 66 mill kr for 2008. Denne ordningen videreføres på årlig basis i resten av avtaleperioden forutsatt at selskapets lønnsomhet knyttet til det statlige kjøpet ikke forbedres vesentlig. Det forutsettes dog at denne kompensasjonen bare er nødvendig for å sikre kostnadsdekning relatert til statens kjøp av denne tjenesten'.

3. a reduction in the number of ships from 11 to 10 in the winter season (from 1 November to 31 March) until the Hurtigruten Agreement expires, without reducing the remuneration for the service as foreseen under the provisions of the Hurtigruten Agreement ([9]). This reduced service is intended to continue throughout the remaining duration of the Hurtigruten Agreement, i.e. until 31 December 2012.

3.2. **The renegotiation of the Hurtigruten Agreement**

3.2.1. *The renegotiation clause*

Article 8 of the Hurtigruten Agreement contains a revision clause, whereby both parties may initiate a renegotiation procedure. The revision clause reads as follows (translation by the Authority):

> 'Official acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee, are grounds for either of the contracting parties to demand a renegotiation about extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures. In such negotiations, the other party shall be entitled to access all necessary documentation.' ([10])

3.2.2. *The Supplementary Agreement*

As referred to above, the renegotiation of the Hurtigruten Agreement was concluded on 27 October 2008, which increased the public service compensation to Hurtigruten by way of the three different measures referred to also above.

This agreement was confirmed in writing by way of a letter signed by the Norwegian authorities on 5 November 2008, referring to the renegotiation concluded on 27 October 2008.

On 8 July 2009 and 19 August 2009 respectively, the Norwegian authorities and Hurtigruten signed a document formalizing the renegotiations concluded in respect of the original Hurtigruten Agreement ('the Supplementary Agreement'), referring to the letter signed by the Norwegian authorities on 5 November 2008.

3.2.3. *The payments which have taken place under the three measures*

In accordance with the revised agreement and the subsequent budgetary allocation of the Norwegian Parliament ([11]), NOK 125 million ([12]) was paid to Hurtigruten in December 2008 as an additional compensation for 2007 and 2008.

According to the information available to the Authority, the following additional payments have already taken place following the renegotiation and the Supplementary Agreement:

<table>
<tr><th></th><th>NOx tax / NOx Fund reimbursement</th><th>General compensation</th><th>Reduction of services; 10 vessels instead of 11 during the winter season (Nov – March)</th></tr>
<tr><td>For 2007</td><td>NOK 53,4 million</td><td></td><td></td></tr>
<tr><td>For 2008 1st half</td><td>NOK 5,4 million</td><td rowspan="2">NOK 66 million</td><td></td></tr>
<tr><td>For 2008 2nd half</td><td></td><td rowspan="2">NOK 11,3 million</td></tr>
<tr><td>For 2009 1st half</td><td>NOK 5,9 million</td><td></td></tr>
</table>

The Norwegian authorities have informed the Authority that, with respect to the NOx tax/NOx Fund reimbursements, a NOK 7,2 million payment for the second half of 2008 was, due to an administrative error, not paid out. Furthermore the payments for the second half of 2009 and the three first quarters of 2010 have not been paid out as a consequence of the Authority's decision to open the formal investigation procedure. Furthermore, the Norwegian authorities have informed the Authority that no 'general compensation' has so far been paid out for 2009, 2010 or 2011 and no further payments under the Supplementary Agreement will be made until a final decision is taken by the Authority.

In addition, effective as from 16 November 2008, Hurtigruten was authorised to reduce the number of ships from 11 to 10 in the winter season (1 November to 31 March) without any deduction in the public service compensation. According to the information provided by the Norwegian authorities, this reduction corresponds to a further NOK 11,3 million ([13]) in additional compensation in the winter season 2008 to 2009, calculated on the basis of the deduction in compensation Hurtigruten would otherwise be subject to under the Hurtigruten Agreement for reduced service. This arrangement was also in force in the winter season 2009 to 2010 and, according to information available to the Authority, for the winter season 2010 to 2011, but calculations have not been provided for this period.

([9]) Article 4 of the Hurtigruten Agreement provides for a deduction in the compensation in the case of reduced service.

([10]) In the Hurtigruten Agreement: 'Offentlige pålegg som medfører betydelige kostnadsendringer samt radikale endringer av priser på innsatsfaktorer som partene ikke med rimelighet kunne forutse, gir hver av partene rett til a kreve forhandlinger om ekstraordinære reguleringer av statens godtgjørelse, endring av produksjonen eller andre tiltak. Motparten har i slike forhandlinger krav på all nødvendig dokumentasjon'.

([11]) St.prp. nr. 24 (2008-2009), Innst. S. nr. 92 (2008-2009), Prop. 50 S (2009-2010), Innst. 74 S (2009-2010) and Prop. 125 S (2009-2010).

([12]) This figure is composed as follows: (i) NOK 53.4 million as NOx tax reimbursement for 2007; (ii) NOK 5,4 million as compensation for contributions to the NOx Fund for the first half of 2008; and (iii) NOK 66 million as a general compensation for 2008.

([13]) NOK 3,6 million for the period 16.11.2008 to 31.12 2008 and NOK 7,7 million for for the period 1.1.2009 to 31.3.2009.

According to the Norwegian authorities, the Supplementary Agreement results in a total 26 % increase in the contributions for the year 2008, on top of the price adjustment under Article 6.2 of the Hurtigruten Agreement ([14]).

4. GROUNDS FOR INITIATING THE PROCEDURE

The Authority opened the formal investigation procedure on the basis that the additional payments to Hurtigruten could involve state aid. In particular, the Authority had doubts as to whether the increased compensation provided for by the renegotiation and the Supplementary Agreement could be considered as covered by the contract signed following the tender procedure carried out in 2004.

The Authority harboured further doubts as to whether the measures adopted by the Norwegian authorities complied with the requirements of Article 59(2) of the EEA Agreement in the sense that they only correspond to the compensation for the provision of the public service. Moreover, the Authority expressed doubts as to whether the interventions could be considered compatible with the functioning of the EEA Agreement, especially on the basis of Article 61(3) of the EEA Agreement in conjunction with the Authority's Guidelines on Rescuing and Restructuring Firms in Difficulty ('the Rescue and Restructuring Guidelines') ([15]).

5. COMMENTS BY THE NORWEGIAN AUTHORITIES

5.1. **The additional payments do not constitute state aid or are a necessary compensation for the provision of a public service under Article 59(2) EEA**

The Norwegian authorities have argued that the three measures do not constitute state aid. They have submitted that by confining the additional payments to what was strictly necessary to ensure a continuation of the public service, the additional payments did not represent an economic advantage within the meaning of Article 61(1) of the EEA Agreement and the *Altmark* case law.

The Norwegian authorities maintain that the measures taken in October 2008 were emergency measures adopted to remedy the acute difficult economic situation of Hurtigruten in 2008, to ensure continuous service in the interim period until a new tendering procedure could be finalised, and in doing so, they acted like a rational market operator. To support this argument, the Norwegian authorities refer to the *Linde* judgment ([16]) of the Court of First Instance.

Further, the Norwegian authorities argue that the compensation for NOx tax and NOx tax Fund contributions fail to satisfy the requirement of selectivity as the same reimbursement applies to all maritime passenger transport services carrying out public service obligations. Alternatively, in case the Authority were to find that the three measures do constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian authorities put forward that the measures constitute necessary compensation for a public service obligation in accordance with Article 59(2) of the EEA Agreement.

In order to substantiate that Hurtigruten has not been excessively compensated for the provision of a public service under Article 59(2) of the EEA Agreement, the Norwegian authorities have provided the Authority with one report commissioned from PWC and two from BDO Noraudit. The reports note that Hurtigruten has not implemented a proper separation of accounts for the public service activities and other activities outside the public service remit ([17]). Due to this, an *ex post* cost and income allocation is simulated.

These three reports contain the following:

(i) *PWC Report of 14 October 2008*

The PWC Report of 14 October 2008 with its underlying material ('the PWC Report') ([18]) provides three alternative methods for demonstrating the extent to which Hurtigruten has been undercompensated for the provision of the public service.

The first two methods used are production cost models where an attempt is made at separating the costs and revenues connected with both the public service activities and the commercial activities. The first method involves using the costs and revenues of one ship '*MS Narvik*' for the year 2006 to demonstrate how Hurtigruten has been undercompensated for the provision of the public service. The second method is similar to the first, but instead of restricting the assessment to *MS Narvik*, the costs and revenues of the whole Hurtigruten fleet for 2006 is used as a basis for the calculations.

([14]) The compensation under the Hurtigruten Agreement would have been NOK 288 million for 2008 adjusted under the price adjustment clause. The additional payments under the three measures agreed in the Supplementary Agreement amount to NOK 75 million for 2008. Thus the total compensation for 2008 resulted in NOK 363 million, or 26 % increase on top of the price adjustment foreseen under the Hurtigruten Agreement. See letter from the Norwegian authorities dated 3.4.2009 (Event No 514420) p. 5.

([15]) Available at: http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/
OJ L 107, 28.4.2005, p. 28, EEA Supplement No. 21, 28.4.2005, p. 1

([16]) Case T-98/00 *Linde* [2002] ECR II-3961.

([17]) See the PWC Report's underlying Report *Hurtigruteavtalen – økonomiske beregninger* of 27.9.2007, p. 3, the first BDO Report, p. 7 (both Event No 514420) and the Second BDO Report, p. 4 (Event No 571486).

([18]) The PWC Report consists of the letter from PWC to Hurtigruten dated 14.10.2008 and the underlying material in the form of three separate documents: (i) Hurtigruteavtalen –økonomiske beregninger dated 27.9.2007, (ii) Tilleggsopplysninger knyttet til Hurtigruteavtalen – økonomiske beregninger dated 4.10.2007, and (iii) Hurtigruteavtalen – økonomiske beregninger dated 12.10.2007 (all the documents can be found in Event No 514420 at p. 52-96).

The third method involves not distinguishing between the public service and the commercial activities. Its calculations are based on the 2006 accounts for the whole Hurtigruten fleet. The idea is that the Norwegian authorities, with the aid, can ensure that the combined operation of the public service and the commercial activities is profitable for Hurtigruten, in the sense that all costs are covered and that Hurtigruten gets a return on capital within the range of 3-5 % on income before tax or 10 % on EBITDA ([19]).

With the third method of the PWC Report, the Norwegian authorities appear to argue that no distinction between the public service and the commercial activities needs to be made, and that aid can be granted in order to ensure the profitability of the contract (taking account of the costs and revenues of both the public service activities and the commercial activities).

(ii) *BDO Noraudit Report of 23 March 2009*

The first BDO Noraudit Report of 23 March 2009 ('the first BDO Report') provides an explanation of how the three measures ([20]) did not entail any over-compensation when examined in light of the combined increased costs for the whole Hurtigruten fleet related to (i) the introduction of the NOx tax (for 2007 and the first half of 2008), and (ii) the increased fuel prices in 2008. In the report, BDO Noraudit argues that the costs and benefits related to Hurtigruten's hedging of fuel costs should not be taken into account when calculating the fuel costs.

(iii) *BDO Noraudit Report of 27 September 2010*

The second BDO Noraudit Report of 27 September 2010 ('the second BDO Report') provides an alternative explanation as to how the three measures ([21]) did not involve any over-compensation. Two substantial differences from the first report being that (i) instead of examining the verifiable cost of operating the entire Hurtigruten fleet, the actual costs related to the operation of the ship which, of those subject to the NOx tax, is closest to the minimum requirements of the public service obligation ([22]) (*MS Vesterålen*) is used to calculate the cost of providing the public service, and (ii) the compensation is linked to the total 2007 and 2008 deficits of what is classified as Hurtigruten's public service operations instead of the increased fuel prices in 2008.

Regarding the method of cost allocation followed in the reports, the first two methods of the PWC Report and the two BDO Reports tend to classify only the extra incremental cost connected to the commercial activities (*i.a.* the extra fuel and NOx cost incurred by the cruise in the Geirangerfjord), as commercial costs. The rest of the costs tend to be allocated to the public service side. In other words, *fixed costs* common to the public service and the commercial activities tend to be allocated to the public service side. On the other hand, the *income generated* by the public service activities is allocated to the public service side, whilst the revenue stemming from the activities outside the public service remit is allocated to the commercial side.

This method of allocation can be illustrated by the example provided in the PWC Report which provides an overview of the allocation cost (Figure 1) and income (Figure 2) of the ship *MS Narvik* (the ship closest to meeting the minimum requirements of the public service obligation, but not subject to the NOx tax) ([23]):

Figure 1

Costs

	Narvik faktisk 06	Anslag tjenestekjøp
Varekostnader	5 728	2 635
Personalkostnader	32 009	25 607
Bunkers	16 554	16 089
Havnekostnader	4 798	4 798
Vedlikehold	6 709	6 709
Forsikring	1 001	801
Administrajonskostnader	7 993	3 997
Landturkostnader	2 348	
Salgs- og makedskostnader	5 635	1 127
Andre kostnader	4 615	2 308
Sum kostnader	**87 390**	**64 070**

([19]) Earnings Before Interest, Tax, Depreciation and Amortisation.

([20]) More precisely: (i) the NOx reimbursement for 2007 and the first half of 2008, (ii) the general allocation of NOK 66 million, and (iii) the 2008 NOK 3,6 million advantage of the reduction of the requirement relating to the number of ships operated under the public service contract.

([21]) More precisely: (i) the NOx reimbursement for 2007 and 2008, (ii) the general allocation of NOK 66 million, and (iii) the 2008 NOK 3,6 million advantage of the reduction of the requirement relating to the number of ships operated under the public service contract.

([22]) *I.e.* capacity for transporting 400 passengers, sleeping cabin accommodation for 150 passengers and capacity for 150 EURO pallets.

([23]) See the underlying material for the PWC Report, *Hurtigruteavtalen – økonomiske beregninger* of 27.9.2007 (Event No 514420, at page 57).

Figure 2

Income

	Narvik faktisk 06	Anslag tjenestekjøp
Rundtursinntekter	18 756	
Distanseinntekter	14 231	14 231
Godsinntekter	4 722	4 722
Bilinnteker	987	987
Salg kost rundreise	6 205	
Salg kost distansereise	1 104	1 104
Cateringinntekter	6 853	5 482
Landturinntekter	3 645	
Andre inntekter	3 346	1 673
Sum inntekter	**59 849**	**28 199**

The above figures show that whilst all the common fixed costs for *i.a.* fuel (less the consumption stemming from the cruise in the Geirangerfjord), harbour charges and maintenance (at a total of NOK 27,6 million) is allocated to the public service (*tjenestekjøp*), only the revenue from the transport of certain passengers, all goods and cars as well as a portion of the revenue stemming from food, catering and other activities (at a total of NOK 28,2 million) is allocated to the public service. The revenue generated by its cruise activities (see *i.a. Rundtursinntekter* at NOK 18,8 million) however, is allocated to the activities outside the public service remit.

5.2. **The additional payments must be considered compatible on the basis of Article 61(3)(c) EEA**

As a second alternative, if the Authority is to find that the three measures do constitute state aid within the meaning of Article 61(1) of the EEA Agreement and that the exception set out in Article 59(2) is not applicable, the Norwegian authorities argue that at the time of the renegotiation of the Hurtigruten Agreement in October 2008, Hurtigruten was a firm in difficulty, therefore the compensation should be regarded as compatible restructuring aid under Article 61(3) of the EEA Agreement and the Rescue and Restructuring Guidelines.

To substantiate this argument, the Norwegian authorities have submitted information on a four-point improvement programme introduced at Hurtigruten's annual general assembly on 15 May 2008 ([24]).

This plan contained the following points:

1. Increase in revenue – the improvement programme 'Black Belt';

2. Reduction of debt – sale of business outside core activities;

3. Cost reduction programme – cost reduced annually by NOK 150 million with full effect from 2010; and

4. Hurtigruten Agreement – new and higher payments for the public service.

Subsequently, in February 2009, this improvement programme was expanded by adding:

5. Financial restructuring. Its main elements were:

   a. new equity from the largest shareholders NOK 314 million with the possibility of an additional NOK 170 million from other shareholders/employers;

   b. a short term loan of NOK 300 million due end 2009;

   c. refinancing by three years instalment deferral of NOK 3,3 billion, albeit with a possible down payment through a 'cash sweep' solution;

   d. three years instalment deferral in the bareboat-rent to Kystruten KS/KirBerg Shipping KS, albeit both may participate in the mentioned 'cash sweep' solution; and

   e. three years deferral on a convertible bond loan of NOK 150 million due June 2009, and one year exemption from the payment of interest.

The Norwegian authorities submit that the above restructuring plan is in line with the material conditions of the Rescue and Restructuring Guidelines. The Norwegian authorities put forward that the Authority should consider the Norwegian authorities' letter dated 4 March 2010 as a formal notification of the aid as restructuring aid.

II. **ASSESSMENT**

1. THE PRESENCE OF STATE AID

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.'

In the following, the Authority assesses whether the three measures (being (i) the NOx tax/NOx Fund reimbursements, (ii) the 'general compensation', and (iii) the reduction of the requirement relating to the number of ships operated during the winter season under the public service contract) constitute state aid within the meaning of Article 61(1) of the EEA

([24]) The information is contained in two memoranda prepared by the legal counsel of Hurtigruten, dated 23.3.2009, which was annexed to a letter from the Norwegian authorities dated 3.4.2009 (Event No 514420), and a memorandum dated 24.2.2010, with annexes, which was annexed to a letter from the Norwegian authorities to the Authority dated 8.3.2010 (Event No 549465).

Agreement. The Authority considers that the three measures must be assessed collectively as a scheme ([25]) as they entail an additional remuneration mechanism in favour of Hurtigruten that extends its application from 2007 until the expiry of the contract, originally foreseen for 31 December 2012.

1.1. **State resources**

The payments under the first two measures involve state resources within the meaning of Article 61(1) of the EEA Agreement as they are financed through budgetary allocations from the national budget ([26]). As concerns the third measure, the reduction from 11 to 10 vessels during the winter season without a corresponding decrease in compensation implies that the service is reduced but not the payment. Consequently, state resources within the meaning of Article 61(1) of the EEA Agreement are involved.

1.2. **The concept of undertaking**

In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, a measure must confer a selective economic advantage on an undertaking.

An undertaking is any entity engaged in economic activity ([27]). Economic activities consist of offering goods and services on a given market ([28]). Hurtigruten offers transport and cruise services (NACE Codes 50.1 and 50.2). Consequently, Hurtigruten is an undertaking within the meaning of Article 61(1) of the EEA Agreement.

1.3. **The existence of an advantage**

For the measures to constitute state aid they must have conferred on Hurtigruten advantages that relieved it of charges normally borne from its budget.

1.3.1. *The State as a private market operator – the relevance of the Linde case*

The Norwegian authorities have argued that they acted in a manner similar to a rational market operator during the renegotiation process, holding that they simply enabled Hurtigruten to overcome serious financial difficulties so that it could continue to provide the important public services that no other undertaking could provide in the short or medium term. In light of this, they have alleged that the three measures did not confer an advantage on Hurtigruten. In order to substantiate this argument, the Norwegian authorities make reference to the CFI judgment in the *Linde* case ([29]).

The Authority fails to see a link between the facts of the *Linde* case ([30]) and the behaviour of the State in the case under assessment in the current decision.

The *Linde* case concerned a group of agreements on the privatisation of an industrial undertaking. The Court found that the payment to Linde AG to fulfil engagements the German authorities had entered into in a contract with a third party represented a normal commercial transaction where the German authorities acted as rational market operators in a market economy and that the transaction was justified on commercial grounds ([31]). The case does not in any way concern public service compensation, which is what the three measures under assessment in this decision represent. When buying a public service, the state is not acting in its capacity of a buyer of goods and services on a market. To the contrary, the reason why the state has to intervene by buying the public service is that the market can either not deliver what the state wants or does not deliver it under the conditions required by the state. When it comes to public services, the compensation shall be given on the basis of the costs of the provider and not on the basis of the value of the service for the state.

1.3.2. *Public service compensation – the private market operator principle and Altmark*

The ECJ has explicitly clarified what can and cannot be considered as state aid within the realm of public service compensation. According to the *Altmark* jurisprudence, state compensation for the provision of a public service that

([25]) In accordance with Article 1(d) in Part II of Protocol 3, aid scheme means 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.

([26]) St.prp. nr. 24 (2008-2009), Innst. S. nr. 92 (2008-2009), Prop. 50 S (2009-2010), Innst. 74 S (2009-2010) and Prop. 125 S (2009-2010).

([27]) Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. p. 62 at paragraph 78.

([28]) Joined cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451 at paragraph 75.

([29]) Case T-98/00 *Linde* [2002] ECR II-3961.

([30]) In that case the public-law body responsible for the administration, restructuring and privatisation of undertakings of the former German Democratic Republic ('the THA') sold the business activities of Leuna Werke AG (the legal predecessor to Leuna-Werke GmbH ('LWG')) to UCB Chemie GmbH ('UCB'). The contract of that sale was supplemented by a number of ancillary contracts which included an agreement in which the THA and LWG undertook to supply specific quantities of carbon monoxide (CO) to UCB at market price for a period of 10 years renewable for an indefinite period. The LWG was only entitled to terminate the agreement if UCB concluded another supply agreement with a third party on 'terms not less favourable' than those contained in that agreement or if UCB built its own CO production facility. In the latter case, the THA would pay UCB an 'investment subsidy' of DEM 5 million. The THA and LWG incurred substantial losses under the agreement. As UCB did not want to build its own facility and no other producer was active in the area, the German authorities were not entitled to terminate the agreement. They eventually paid the undertaking Linde AG DEM 9 million to build and operate a CO production facility and to ensure, in their place, the long-term supply of CO to UCB, see T-98/00 *Linde* [2002] ECR II-3961, paragraphs 2-6.

([31]) *Ibid.* paragraphs 49-50.

cumulatively fulfils the four criteria laid down in that case ([32]) ('the *Altmark* criteria') does not constitute state aid within the meaning of Article 61 of the EEA Agreement ([33]). Conversely, state measures which do not comply with one or more of the conditions must be regarded as state aid within the meaning of Article 61 of the EEA Agreement ([34]).

The Authority will in the following section assess whether the *Altmark* criteria are fulfilled regarding the three measures under assessment.

As a subsidiary point, the Authority notes, in any event, that the Norwegian authorities have neither explained in any detail how the implementation of the three measures can be likened to the behaviour of a private market operator, nor provided any evidence that a private investor would have acted in this way. In that regard, the Authority notes that the Norwegian authorities have only made general remarks on how they had to implement the measures due to Hurtigruten's weak financial position ([35]) in order to ensure that it would continue to provide the public service, as it would be difficult, for the Norwegian authorities, to find another undertaking to provide the service (at least in the short to medium term). The Norwegian authorities have not made any attempt at comparing their actions to that of a private market operator in any detail, but have only made a general reference to the fact that the three measures represented the least costly alternative and that the negotiations were carried out on the basis of the findings in the underlying material of the PWC Report. Furthermore, they have submitted *ex post* explanations (the two BDO Reports) as to how the three measures do not involve any over-compensation, without comparing their actions to that of a private market operator in any detail.

1.3.3. *Public service compensation – assessment of the Altmark criteria*

The Norwegian authorities have argued that the increase in compensation was made within the scope of the Hurtigruten Agreement (which had been the subject of a tender process in 2004), and that the *Altmark* criteria have been satisfied. In light of this they hold that the three measures did not confer an advantage on Hurtigruten.

The Hurtigruten Agreement (which was concluded on 17 December 2004) was not notified to the Authority and accordingly has not been subject to a state aid assessment to verify whether it complied with the Altmark criteria.

In the following, the Authority will assess whether the three measures contained in the Supplementary Agreement comply with the *Altmark* criteria.

1.3.3.1. The fourth and second *Altmark* criteria

According to the fourth *Altmark* criterion, the beneficiary must be chosen in a public tender. Alternatively, the compensation cannot exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service ([36]).

This criterion should be read in light of the second criterion which requires that the parameters for calculating the compensation payments must be established in advance in an objective and transparent manner ([37]).

Hurtigruten was chosen as a public service provider following a public procurement procedure carried out in 2004, resulting in the conclusion of the Hurtigruten Agreement. The adjustment of the compensation agreed upon on 27 October 2008 was made on the basis of Article 8 of the Hurtigruten Agreement. The Authority recalls that Article 8 is a revision clause which allows both parties to require the renegotiation of the contract regarding extraordinary adjustments to the state's remuneration, and reads as follows (the Authority's translation):

> 'Official acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee, are grounds for either of the contracting parties to demand a renegotiation about extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures. In such negotiations, the other party shall be entitled to access all necessary documentation.' ([38])

Although the revision clause was part of the public tender procedure, in the Authority's view it needs to be assessed whether the exercise of this provision later in the contract period is covered by the original tender procedure within the meaning of the fourth *Altmark* criterion.

The Norwegian authorities have stated that Article 8 is a traditional and common renegotiation/revision provision and have argued that the three measures did not imply any substantial

([32]) Case C-280/00 *Altmark Trans* [2003] ECR p. I-7747 at paragraphs 89-93.
([33]) *Ibid.* paragraph 94 and C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR p. I-2941 at paragraph 60.
([34]) Case C-280/00 *Altmark Trans* [2003] ECR I-7747 at paragraph 94.
([35]) As explained by the Norwegian authorities in their letter dated 8.3.2010 (Event No 549465).
([36]) Case C-280/00 *Altmark Trans* [2003] ECR p. I-7747 at paragraph 93: 'Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'
([37]) Case C-280/00 *Altmark Trans* [2003] ECR p. I-7747 at paragraphs 90-91: 'Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty.'
([38]) For the original text in Norwegian, see footnote 10.

amendment to the Hurtigruten Agreement as the extra compensation is related to documented cost increases on the public service side. Therefore, according to the reasoning put forward by the Norwegian authorities, there is no over-compensation, but rather a restoration of the balance in the contract in a manner similar to what would be the result of the application of Article 36 of the Norwegian Contract Act and other similar provisions in Norwegian law.

The Authority firstly notes that general procurement principles dictate that substantial adjustments to contracts normally require a new tender procedure ([39]). Given that the application of Article 8 in this case – under which 'considerable changes of costs' and 'radical changes of prices of input factors' permit renegotiation – has had the effect that the State's remuneration in favour of Hurtigruten has been substantially increased ([40]) by virtue of the three measures contained in the Supplementary Agreement, the Authority is of the view that such an increase in the compensation could in principle have triggered a call for a new tender procedure.

The Authority is of the view that the increased state remuneration under the three measures contained in the Supplementary Agreement cannot be held to be covered by the original tender.

The Authority does not necessarily hold that any extraordinary compensation granted under a renegotiation clause of a contract that has been put out to tender will fail to clear the fourth *Altmark* criterion and hence involve state aid. However, Article 8 does not, as explained in the following, provide objective and transparent parameters on the basis of which the compensation in the form of the three measures was calculated in line with the requirement of the second *Altmark* criterion.

The Authority observes that Article 8 does not give Hurtigruten a right to an increased compensation on the basis of predetermined parameters. This clause merely gives the company a right to initiate renegotiations either (i) in case official acts entail considerable changes of cost that were not reasonably foreseeable, or (ii) when prices of input factors change radically.

Furthermore, Article 8 does not provide specific guidance on how the extra compensation should be calculated. According to the text of the provision there are no parameters defining which input factors are covered by the renegotiation clause or how such costs should be compensated. Moreover, there are no limitations on how much extra compensation can be granted. Judging solely by the text of the renegotiation clause, the concrete application of the provision appears to largely depend on the discretion of the Norwegian authorities as well as the negotiation skills of the concerned parties. On the other hand, the Norwegian authorities have argued that the text of Article 8 must be interpreted on the basis of its context, purpose and objective of striking a fair balance between the parties' rights and obligations ([41]). However, even when those factors are taken into account, the concrete application of the clause in the case at hand, as explained in the following, demonstrates that it does not meet the requirements of transparency and objectivity of the second *Altmark* criterion.

With regard to the NOx tax specifically, the Norwegian authorities have explained that the outcome of the negotiations with Hurtigruten set the level for reimbursements at 90 % ([42]) and that the Norwegian authorities did not wish to take away any incentive on Hurtigruten's side to reduce NOx emissions by fully reimbursing all NOx tax-related expenses. However, the Norwegian authorities have not provided the Authority with an explanation of the parameters for the calculation. On the contrary, the Norwegian authorities have showed that the application of Article 8 is highly discretionary, as they explain that other public service contracts such as those pertaining to regional car ferry services include similar clauses ([43]), and that under these similar clauses, the regional car ferry operators have been reimbursed at 100 % for NOx taxes paid and contributions to the NOx Fund ([44]).

Furthermore, the Norwegian authorities have not presented the Authority with the parameters for the calculation of (i) the general compensation (of NOK 66 million) and, (ii) the reduction of the requirement relating to the number of ships operated under the public service contract (evaluated at NOK 3,6 million for the period from 16 November 2008 to 31 December 2008 and NOK 7,7 million for the period from 1 January 2009 to 31 March 2009). Instead, the Norwegian authorities initially made reference to the weak financial position of Hurtigruten ([45]) and the documents underlying the PWC Report which lay the basis for the extensive negotiations that led them to agree to make the additional payments to ensure the continuation of the public service based on allegedly commercial considerations and the extra cost of performing the public service. Thereafter, the Norwegian authorities have simply provided the Authority with two commissioned reports prepared by BDO Noraudit in order to justify *ex post* that the three measures do not involve over-compensation. However, contrary to the opinion of the Norwegian authorities, in the view of the Authority the three reports indicate that the three measures actually involve over-compensation - in the sense that the compensation is not limited to the increased cost of providing the public service – and do not provide clarification regarding the parameters used to determine these costs ([46]).

([39]) Case C-454/06 *Pressetext Nachrichtenagentur GmbH* [2008] ECR I-4401 at paragraphs 59-60 and 70.

([40]) The Authority recalls that the Norwegian authorities put forward a calculation demonstrating that the additional payments agreed upon on 27.10.2008 amounted to 26 % increase of the 2008 compensation under the Hurtigruten Agreement, on top of the adjustment under the price adjustment clause in Article 6.2 of the Hurtigruten Agreement. See footnote 14.

([41]) Letter from the Norwegian authorities dated 30.9.2010 (Event No 571486), p. 11.

([42]) Of Hurtigruten's NOx tax/NOx Fund contributions less the Geirangerfjorden operation.

([43]) Emails from the Norwegian authorities dated 15.4.2011 (Event No 595326) and 6.5.2011 (Event No 597151).

([44]) Email from the Norwegian authorities dated 6.5.2011 (Event No 597151).

([45]) As substantiated by the information provided by the Norwegian authorities by letter dated 8.3.2010 (Event No 549465).

([46]) See Section II.3.2 below.

Additionally, the second BDO Noraudit Report appears to be based on the tenet that all increased costs of providing the public service can be covered by extra compensation granted under Article 8, regardless of whether they represent radical changes that could have been reasonably foreseen (or otherwise fulfil the criteria of Article 8).

With regard to the increase of fuel costs, the Hurtigruten Agreement already had a price adjustment mechanism (Article 6-2). The Authority holds that potential tender participants would reasonably expect this provision to deal with the issue of increased fuel costs. As the price of fuel is an important cost element for cruise/ferry operators, the Authority assumes that operators within the sector usually take steps to ensure that price fluctuations do not expose them to undue financial risk. In practice, Hurtigruten did in fact hedge some of its fuel costs. Regardless of this, the Norwegian authorities opted to make additional payments in the framework of the revision clause of Article 8.

In light of the above, the Authority holds that these results of the concrete application of Article 8 demonstrates its lack of transparency and objectivity and finds it highly unlikely that any market player could have been expected to anticipate that Article 8 would have been applied in this manner.

The fourth *Altmark* criterion provides that in the absence of a tender procedure, the level of required compensation is to be determined on the basis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Norwegian authorities have not provided any information to substantiate that the 'efficiency' criterion ([47]) of the fourth *Altmark* criterion is fulfilled. On the contrary, the reports submitted to the Authority indicate that Hurtigruten has been over-compensated for the provision of the public service ([48]). Hence, the Authority cannot accept that the three measures satisfy the fourth *Altmark* criterion.

Consequently, in light of the above, the Authority concludes that the second *Altmark* criterion is not met. Furthermore, the Authority concludes that in light of the application of Article 8 and the result of the 2008 renegotiation (i.e. the three measures), the resulting Supplementary Agreement cannot be held to be covered by the tender within the meaning of the fourth *Altmark* criterion. In addition, the Norwegian authorities have not shown that the 'efficiency' criterion of the fourth *Altmark* criterion has been satisfied. The authority therefore concludes that the fourth *Altmark* criterion is also not met in the present case.

1.3.3.2. The third *Altmark* criterion

The third criterion requires that compensation does not exceed the cost incurred in the discharge of the public service minus the revenues earned with providing the service (the compensation may, however, include a reasonable profit) ([49]).

Hurtigruten carries out commercial activities outside the public service remit by *i.a.* transporting cruise passengers on the Hurtigruten ships. The third *Altmark* criterion must be read in conjunction with the general principles of cost allocation as *i.a.* laid down in the *Chronopost* judgment ([50]). This entails that in cases where public service providers carry out commercial activities next to the public service, the commercial activities must carry a proportionate share of fixed common costs ([51]).

The reports provided by the Norwegian authorities indicate that the three measures did not only cover the increased costs of the public service, but also served to compensate the costs of the activities outside the public service remit ([52]). Additionally, the second BDO Report indicates that the three measures also covered increased costs that did not represent radical changes that could not have been reasonably foreseen (*i.e.* the costs actually covered were not all costs that could legitimately be covered in accordance with Article 8) ([53]).

Moreover, Hurtigruten has not implemented separate accounts for the public service and the activities falling outside the public service remit ([54]), and the calculation of the three measures appears either (i) to be based on the tenet that the public service operation should carry all or most of the fixed costs common to the public service operation and the services falling outside the public service remit or, (ii) on the premise that no distinction between the public service and the services falling outside the public service remit needs to be made and that aid can be granted in order to render profitable all activities of Hurtigruten (*i.e.* both the public service activities and the services falling outside the public service remit) ([55]). Thus, no proportionate share of fixed common costs is allocated to the commercial activities and thus deducted when determining the State's compensation for the service.

([47]) *I.e.* that 'the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

([48]) See Section II.3.2 below.

([49]) Case C-280/00 *Altmark Trans* [2003] ECR p. I-7747 at paragraph 92. 'Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.'

([50]) Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost* [2003] p. I-6993.

([51]) *Ibid.* paragraph 40.

([52]) See Section I.5.1 below

([53]) See Section I.4.2. above.

([54]) Loco .citato.

([55]) See Section II.3.2 with further references.

As explained in the more detailed assessment in Section II.3.2 below (on the question of over-compensation), since there is no proper separation of accounts in place and the calculation of the measures does not comply with the above-mentioned criteria - in particular in using unrepresentative hypothetical costs and revenues where the real costs and revenues are known - the Authority concludes that the third *Altmark* criterion is not fulfilled in this case.

1.3.3.3. The Altmark criteria – conclusion

As three of the four *Altmark* criteria are not met, and as only one of the criteria need not be satisfied for state compensation for the provision of a public service to constitute state aid, the three measures cannot be held to not confer an advantage on Hurtigruten within the meaning of Article 61 of the EEA Agreement.

1.4 **The selective nature of the three measures**

The measures must be selective in that they favour '*certain undertakings or the production of certain goods*'. A selective economic advantage is considered to exist when it is found that a measure does not apply generally to all the undertakings in an EEA State ([56]).

The Authority considers that the three measures increased the State's remuneration for Hurtigruten and are the result of individual negotiations with this company. Only Hurtigruten enjoyed the possibility to renegotiate an increase in the compensation for the service as it was the only service provider. Therefore, the Authority concludes that the three measures constitute a selective advantage for Hurtigruten.

However, with regard to the reimbursement of the NOx tax/NOx Fund contributions, the Norwegian authorities have provided the Authority with additional information on the administrative practice concerning reimbursements of such charges to public service providers. The Norwegian authorities have explained that they do not consider the reimbursements as selective since 'the same reimbursement is applied to all maritime passenger transport services carrying out public service obligations (…) all other transport services performed under similar conditions are treated in the same manner. These other transport services include scheduled national and regional car ferries as well as scheduled high speed passenger ferries ([57]).'

After the introduction of the NOx tax, the administrative practice of the Norwegian authorities has been to fully reimburse the NOx tax/NOx Fund contributions to transport undertakings with public service obligations to the extent that the contributions were related to such obligations ([58]). However, in the case of Hurtigruten, the Norwegian authorities decided to limit the reimbursement to what they held to constitute 90 % of the NOx tax/NOx Fund contribution related to the public service obligation. Fully covering the NOx costs was found to be undesirable as it would result in Hurtigruten having less of an incentive to lower emissions ([59]).

The courts have found tax measures conferring advantages on certain undertakings to be non-selective as they have been justified by the nature and overall structure of the general system of which they are part ([60]). In the *Adria-Wien Pipeline* case ([61]) the ECJ assessed an Austrian scheme where an environmental tax on energy consumption was levied on all undertakings, and where undertakings producing goods were entitled to a partial reimbursement of the taxes paid. Undertakings providing services were not eligible for a similar reimbursement. The question was whether the reimbursement to the goods-producing undertakings constituted state aid. The ECJ did not find any justification in the nature or general scheme of the system, as the ecological considerations underlying the national legislation did not justify treating the consumption of energy by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. The Court stated that energy consumption by each of those sectors is equally damaging to the environment ([62]).

In the case at hand, similar observations can be made. The purpose of the NOx tax is to lower NOx emissions ([63]). The question is whether the reimbursement of the NOx tax/NOx Fund contribution to public service providers is justified by the nature or general scheme of the NOx tax system. The NOx tax system has the objective of encouraging undertakings to lower their NOx emissions and thereby reduce environmental pollution. These considerations that underlie the NOx tax do not justify treating public service providers differently to those not providing a public service. The NOx emitted by public service operators are equally damaging to the environment. Even if it would be justified within the logic of the NOx tax system, Hurtigruten is carrying out public service obligations at the same time as commercial activities and a proper separation between these two types of activities has not been made when reimbursing the NOx tax/NOx Fund contributions ([64]).

([56]) Case C-256/97 *Déménagements-Manutention Transport SA* [1999] ECR I-3913 at paragraph 27.

([57]) Letter from the Norwegian authorities dated 30.9.2010, p. 14 (Event No 571786).

([58]) Letter from the Ministry of Transport and Communications to *Næringslivets Hovedorganisasjon* dated 13.5.2008 (Event No 595326) and email from the Norwegian authorities dated 3.5.2011 (Event No 596802).

([59]) Email from the Norwegian authorities dated 6.5.2011 (Event No 597151).

([60]) Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and others* v *EFTA Surveillance Authority* (OJ C 294, 6.10.2011, p. 7 and EEA Supplement No. 53, 6.10.2011, p. 1.) at paragraph 87, and C-143/99 *Adria-Wien Pipeline* [2001] ECR p. I-3913 at paragraph 41.

([61]) Case C-143/99 *Adria-Wien Pipeline* [2001] ECR p. I-3913.

([62]) Case C-143/99 *Adria-Wien Pipeline* [2001] ECR p. I-3913 at paragraphs 49-53.

([63]) See Section I.2.1 of the Authority's Decision No 501/08/COL approving the NOx Fund scheme, available online: http://www.eftasurv.int/?1=1&showLinkID=14653&1=1.

([64]) See Section II.3.2. below.

Therefore, the Authority can only conclude that the compensation of 90% of the NOx tax/NOx Fund contribution in favour of Hurtigruten constitutes a selective measure since other undertakings carrying out similar non-public service transport activities have to carry the full cost of the NOx tax/NOx Fund contributions.

Thus, the Authority concludes that the three measures constitute a selective advantage in favour of Hurtigruten.

1.5. **Distort competition and affect trade between Contracting Parties**

When financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid ([65]).

As shown above, the three measures confer a selective economic advantage on Hurtigruten. The market for domestic maritime services (maritime cabotage) within which Hurtigruten operates was opened to EEA-wide competition in 1998 ([66]). Moreover, Hurtigruten is also engaged in the tourism sector, in particular through the offer of cruises/round trips along the Norwegian coast. Other operators offer cruises along the same parts of the Norwegian coast ([67]). Moreover, Hurtigruten also operates a number of different cruises in various European states.

Hence, the Authority concludes that compensation granted to Hurtigruten is liable to distort competition and affect intra-EEA trade.

2. PROCEDURAL REQUIREMENTS

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

The Norwegian authorities did not notify the three measures to the Authority. The Authority therefore concludes that the Norwegian authorities have not respected their obligations to do so set out in Article 1(3) of Part I of Protocol 3.

3. COMPATIBILITY OF THE AID

The Norwegian authorities invoke Article 59(2) of the EEA Agreement and maintain that the measures constitute necessary compensation for public service obligation within the framework of the Authority's guidelines on aid to maritime transport and the general principles of public service compensation. Furthermore, they have invoked Article 61(3)(c) and claim that the measures under scrutiny can be deemed compatible with the EEA Agreement as restructuring measures under the Rescue and Restructuring Guidelines.

In the following, the Authority assesses the compatibility of the aid with the functioning of the EEA Agreement as public service compensation on the basis of Article 59(2) of the EEA Agreement and a rescue and restructuring measure, or an 'emergency measure', under Article 61(3).

3.1. **The legal framework for assessing state aid in the form of maritime public service compensation**

It follows from Article 4 of the Maritime cabotage regulation and Section 9 of the Authority's Guidelines on aid to maritime transport that EFTA States may impose public service obligations or conclude public service contracts for certain maritime transport services provided that the compensation fulfils the rules of the EEA Agreement and the procedure governing state aid.

Article 59(2) of the EEA Agreement reads as follows:

> 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.'

The Authority notes that although they are not applicable to the transport sector ([68]), the Authority's Guidelines for state aid in the form of public service compensation ('the Guidelines on public service compensation') to a large extent summarise generally applicable principles of public service compensation. In the following, the Guidelines on public service compensation are referred to only insofar as they express such generally applicable principles.

For state aid to constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of Article 59(2), firstly the service in question must constitute a service of general economic interest. Secondly, the undertaking in question must be entrusted by the EFTA State with the provision of that service. Thirdly, the amount of compensation must be granted in a transparent manner ([69]), and be proportionate ([70]) in the sense that it shall not exceed what is necessary ([71]) to cover the costs incurred in discharging the public service obligations including a reasonable profit ([72]).

([65]) Case 730/79 *Philip Morris* [1989] ECR p. 2671, paragraph 11.
([66]) OJ L 30 of 5.2.1998, incorporated as point 53a in Annex XIII to the EEA Agreement.
([67]) *I.a.* Seabourn Cruise Line Limited and Silversea Cruises Ltd.
([68]) Point 2 of the Authority's Guidelines on state aid in the form of public service compensation.
([69]) See section 2.2 of the Authority's Guidelines on Maritime transport: 'State aid must always be restricted to what is necessary to achieve its purpose and be granted in a transparent manner.'
([70]) See the Commission Decisions in Cases N 62/05 (Italy) at paragraph 46 and N 265/06 (Italy) at paragraph 48.
([71]) See section 2.2 of the Authority's Guidelines on Maritime transport.
([72]) See Chapter 2.4 of the Guidelines on public service compensation.

In the Decision to open the formal investigation procedure, the Authority did not question whether the two first criteria were fulfilled ([73]). In the Authority's view, however, on the basis of the information provided by the Norwegian authorities, it cannot be concluded that the third criterion is complied with. At the outset the Authority reiterates that the Hurtigruten Agreement was concluded on the basis of a public tender. On a general level, the Authority notes that a proper tender procedure will usually ensure that no aid is involved in the ensuing contract. In certain circumstances, public authorities must be able to cancel public service contracts entered into on the basis of a tender procedure and instead conclude a new public service contract involving state aid. However, this was not the approach favoured by the Norwegian authorities in the case at hand. As mentioned above, the amount of compensation paid in the form of the three measures was not granted in a transparent manner in the context of the tender but was the result of bilateral renegotiation carried out years after the conclusion of the contract.

When granting aid in the form of public service compensation, the Norwegian authorities must ensure that that aid is compatible with the rules applicable to such aid. Importantly, when the aided undertaking carries out activities falling outside the public service remit, the commercial activities must carry an appropriate share of the fixed costs common to both types of activities ([74]).

3.2. **The amount of compensation for the public service**

According to the explanations provided by the Norwegian authorities, the three measures were intended to compensate Hurtigruten for: (i) new costs related to the introduction of the NOx tax related to the provision of the public service, and (ii) the general increase of the costs of input factors connected to the provision of the public service. The Authority is of the view that the approach of the Norwegian authorities to cost allocation does not demonstrate that the three measures do not lead to over-compensation of the public service.

3.2.1. *Inconsistent approach to fixed common costs*

In cases where public service providers carry out commercial activities next to the public service, the commercial activities must, as a general principle, carry a proportionate share of fixed common costs ([75]). According to the Guidelines on public service compensation:

> 'The costs to be taken into consideration include all the costs incurred in the operation of the service of general economic interest. Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, an appropriate contribution to fixed costs common to both the service of general economic interest and other activities and an adequate return on the own capital assigned to the service of general economic interest' ([76]).

Only exceptional circumstances can justify deviations from this principle; the Authority's Guidelines on the application of state aid rules to public service broadcasting states that allocation of common costs between the public service activity and other activities is not mandatory when separation of costs is not 'possible in a meaningful way' ([77]). In those cases however, the net benefits stemming from the activities outside the public service remit that share costs with the public service obligation, must be allocated to the public service side ([78]). The Authority cannot see that Hurtigruten is in such an exceptional position. Even if it may be argued that separating the fixed common costs of Hurtigruten's activities inside and outside the public service remit may not always be a straightforward task, separation based on *i.a.* the revenue stemming from the turnover of the two forms of activities is indeed possible ([79]).

On this basis, the Authority concludes that the generally applicable principle of cost sharing applies in the present case. Therefore the Authority cannot accept the approach taken under the third method of the PWC Report, where no distinction is made between the public service and the commercial activities of Hurtigruten.

Although Hurtigruten carries out activities outside the public service remit, the three reports do not consistently take into consideration the fact that the commercial activities must carry a proportionate share of fixed costs common to the public service and the commercial activities as required by the case-law mentioned above.

In the reports, several categories of such costs are fully allocated to the public service side (*i.a.* harbour charges, maintenance, fuel (less the Geirangerfjorden consumption)) whilst other categories of fixed common costs, while not fully covered by the public service side, do not appear to be allocated according to the proportions of the public service obligation on the one hand and the commercial activities on the other (the public service side carries 90 % of the NOx cost related to the fuel consumption) ([80]).

([73]) Chapter II.3 of Decision No 325/10/COL.

([74]) See Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost* [2003] p. I-6993 at paragraph 40. See also point 15 of the Guidelines on public service compensation.

([75]) See Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost* [2003] p. I-6993 at paragraph 40.

([76]) The first four sentences of point 15 of the Guidelines on public service compensation.

([77]) Point 66-67 of the Authority's Guidelines on the application of state aid rules to public service broadcasting, see OJ L 124, 11.5.2012, p. 40 and EEA Supplement No. 26, 11.5.2012, p. 1, also available on: http://www.eftasurv.int/media/state-aid-guidelines/Part-IV-The-application-of-the-state-aid-rules-to-public-service-broadcasting.pdf.

([78]) *Ibid.* point 67.

([79]) This was the approach accepted by the Court in Case T-106/95 *Fédération française des sociétés d'assurances (FFSA)* v *Commission* [1997] ECR II-229 at paragraph 105.

([80]) The two first methods of the PWC Report (see the underlying material *Hurtigruteavtalen – økonomiske beregninger* of 27.9.2007), the first BDO Report p. 11-21, and the second BDO Report pp. 5-11.

Due to the insufficient allocation of fixed common costs, the Authority cannot conclude that the two first methods of the PWC Report or the two BDO Reports demonstrate that the three measures do not involve over-compensation for the public service.

In sum, based on the inconsistent approach to fixed common costs as described above, the Authority concludes that in none of the three methods of the PWC Report or the methods of the two BDO Reports have the common costs been properly allocated to public service and commercial activities so that only costs associated with the service of general economic interest are taken into consideration. Therefore, it cannot be demonstrated that the three measures do not involve over-compensation for the public service.

3.2.2. *No separation of accounts*

Although Hurtigruten carries out activities outside the public service remit, it has not implemented a separation of accounts between the public services and the other activities ([81]). It can thus be established that an essential prerequisite for a transparent system of public service compensation is missing ([82]).

3.2.3. *Based on unrepresentative hypothetical costs and revenues where the real costs and revenues are known*

Hurtigruten's actual costs and revenues should be used as the basis for the calculation of compensation.

The Authority notes, firstly, that the PWC Report and the second BDO Report calculate the cost of the public service on the basis of the costs and revenues related to the operation of a hypothetical minimum fleet ([83]). The Norwegian authorities appear to justify the lack of allocation of common cost to the activities outside the public service remit by emphasising that the calculations are not based on the actual costs and revenues of operating the entire Hurtigruten fleet, but rather on the costs and profits of *MS Narvik* or *MS Vesterålen*. The argument appears to be that when the costs of the public service are calculated strictly on the basis of the costs related to operating a hypothetical 'minimum fleet', the cost of which is likely to be lower than the cost of operating the actual Hurtigruten fleet, the compensation will not exceed the actual costs incurred in the operation of the public service.

However, this method does not take into consideration the fact that the activities outside the public service remit must carry a proportionate share of the common costs. The Authority assumes that the actual fleet and the hypothetical minimum fleet will not have an identical ratio of public service activity on the one hand, and activities outside the public service remit on the other. The 'minimum fleet' method, as the name implies, is based on a minimum capacity fleet. It is most likely that the actual (higher capacity) fleet carries out a larger part of its activities outside the public service remit than the hypothetical minimum fleet. If that is the case, the activities outside the public service remit should carry a larger share of the fixed common costs.

On this basis, the Authority rejects the argument that calculations related to the hypothetical minimum fleet demonstrate that Hurtigruten has not been over-compensated.

Secondly, in the context of an *ex-post* calculation of the compensation for the provision of a public service, the actual fuel costs must be used as a basis for the calculation of the cost of providing the public service. The Norwegian authorities cannot simply disregard Hurtigruten's hedging activities, as that could lead to over-compensation whenever the hedging activities prove successful (as a lower price is attained by hedging).

Thirdly, the Authority has no reason to believe that the Norwegian authorities do not have access to the actual costs and revenues of Hurtigruten; indeed the second method in the PWC Report and the first BDO Report appears to be based on the costs of the actual fleet. As indicated above, it is the actual and representative costs that are relevant in calculating the public service cost. An assessment of unrepresentative hypothetical costs is not a substitute.

3.2.4. *Conclusion*

The absence of separate accounts for public service activities and other commercial activities, the inconsistent approach to cost allocation and the reliance on unrepresentative hypothetical (and not actually incurred) costs, entails that the Authority cannot conclude that the three measures do not involve any over-compensation. On this basis, the Authority concludes that the three measures cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of its Article 59(2).

3.3. **Compatibility of the measures as an 'emergency measure' or restructuring aid**

The Authority recalls that direct aid aimed at covering operating losses is, in general, not compatible with the functioning of the EEA Agreement.

([81]) See the PWC Report's underlying Report *Hurtigruteavtalen – økonomiske beregninger* of 27.9.2007, p. 3, the first BDO Report, p. 7 (both Event No 514420) and the second BDO Report, p. 4 (Event No 571486).

([82]) See section 2(2) of the Authority's Guidelines on Maritime transport: 'State aid must always be (…) granted in a transparent manner.' See also point 18 of the Guidelines on public service compensation: 'When a company carries out activities falling both inside and outside of the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues.'

([83]) *I.e.* calculations based on *MS Narvik* (the first alternative of the PWC Report, *Hurtigruteavtalen – økonomiske beregninger* of 27.9.2007 (Event No 514420, at page 57) or *MS Vesterålen* (the second BDO Report at page 4 (Event No 571486)).

Since the additional compensation under investigation in this decision cover costs related to the day-to-day operation of Hurtigruten, the measures are to be regarded as operating aid ([84]).

Such operating aid may, exceptionally, be approved if the conditions set out in derogation provisions of the EEA Agreement are fulfilled. Article 61(3) of the EEA Agreement provides for such exemptions. The Norwegian authorities have, in their reply to the opening decision, invoked the exemption under Article 61(3)(c) and the Rescue and Restructuring Guidelines. This will be assessed below, but first the Authority will address the submission the Norwegian authorities have made referring to '*emergency measures*'.

3.3.1. *Emergency measures – 61(3)(b), or rescue measure under Article 61(3)(c)EEA*

The Norwegian authorities have referred to the financial situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement. In the Authority's view, this argument cannot be assessed as rescue aid under Article 61(3)(c) and the Rescue and Restructuring Guidelines, as rescue aid under the guidelines is by nature a temporary and reversible assistance. The three measures are not.

Furthermore, the Authority has examined whether the situation described by the Norwegian authorities could be regarded as a serious disturbance within the meaning of Article 61(3)(b), even though not invoked by the Norwegian authorities, and therefore compatible aid.

It is clear from case-law that the exemption in Article 61(3)(b) of the EEA Agreement needs to be applied restrictively and it must tackle a disturbance in the entire economy of a Member State (and not a sector or a region) ([85]).

There is nothing in the information submitted by the Norwegian authorities indicating that the aid was aimed at tackling a disturbance in the entire economy of Norway. Even in the worst case scenario that Hurtigruten would have stopped providing the service and the State would have been compelled to sign a new contract for the whole or parts of the route, a temporary discontinuation of providing this transport service cannot be considered a serious disturbance in the entire economy of Norway, even taking into account the cultural, social and economic importance of the Hurtigruten service.

Therefore, the Authority does not consider the derogation under Article 61(3)(b) to be applicable in this case. However, the Authority will address this argument put forward by the Norwegian authorities also under Article 61(3)(c) of the EEA Agreement, discussed below.

3.3.2 *Restructuring measures - Article 61(3)(c)EEA*

The Norwegian authorities have referred to the exemption under Article 61(3)(c) of the EEA Agreement and argued that the State's intervention constitutes restructuring aid.

The Norwegian authorities have put forward their view that the material criteria for restructuring aid under the Authority's Rescue and Restructuring Guidelines may be fulfilled. They claim that Hurtigruten was and is an important company in accordance with Section 1(7) of the Rescue and Restructuring Guidelines and that it was a firm in difficulty according to the definition of the same guidelines ([86]).

The general principle in the Rescue and Restructuring Guidelines is to allow restructuring aid to be granted only in circumstances in which any distortions of competition will be offset by the benefits flowing from the firm's survival. Authorisation will be granted only if strict conditions are met, including (i) that the aid must be conditional on implementation of a restructuring plan that restores the firm's long-term viability within a reasonable timescale; (ii) the beneficiary is required to finance a substantial proportion of its restructuring costs (at least 50 % for large firms); (iii) compensatory measures must be taken to prevent or to minimise the risks of distortion of competition (divestment of assets, reductions in capacity or market presence, etc.); (iv) the aid must be limited to the strict minimum; (v) the restructuring plan must be implemented in full; and (vi) the Authority must be in a position to make sure that the restructuring plan is being implemented properly, through regular reports communicated by the EFTA State concerned.

In the Authority's view, the three measures do not fulfill the conditions for authorisation of the aid laid down in Section 3.2.2 of the Rescue and Restructuring Guidelines. Firstly,

([84]) Case T-459/93 *Siemens SA v Commission* [1995] ECR II-1675, paras. 76 and 77.

([85]) Cf. Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG Commission* [1999] ECR II-3663, p. 167. Followed in Commission Decision in case C 47/1996 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28, point 10.1), Commission Decision in case C 28/02 *Bankgesellshaft Berlin* (OJ L 116, 4.5.2005, p. 1, points 153 et seq), and Commission Decision in Case C 50/06 *BAWAG* (point 166). See Commission Decision of 5 December 2007 in Case NN 70/07, *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision 30 April 2008 in Case NN 25/08, Rescue aid to *WestLB* (OJ C 189, 26.7.2008, p. 3), Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB* (OJ C 71, 18.3.2008, p. 14).

([86]) See point 32 and points 8-12 of the Rescue and Restructuring Guidelines.

the grant of the aid must be conditional on implementation of a restructuring plan ([87]), which should be notified and endorsed by the Authority ([88]). The Norwegian authorities did not notify a restructuring plan to the Authority, although negotiations were carried out with Hurtigruten in application of Article 8 of the Agreement.

As confirmed by case-law ([89]), the State must be in possession of and bound to a credible restructuring plan at the time when it grants the aid. The Authority questions whether the adjustments to the State's remuneration constitutes restructuring aid and the information submitted by the Norwegian authorities regarding the reorganisation and reform undertaken by Hurtigruten mainly in 2008 to face the financial difficulties of the company can be considered as a restructuring plan within the meaning of the Rescue and Restructuring Guidelines.

The Authority also fails to see a link between the amount of additional payments agreed between Hurtigruten and the State in application of Article 8 of the Hurtigruten Agreement for the provision of the public service and the costs of restructuring the company.

The Authority has not been provided with any information demonstrating that the restructuring of Hurtigruten was a condition to the aid measures. On the contrary, the letter dated 5 November 2008 signed by the Norwegian authorities does not refer to any restructuring or a restructuring plan. The same applies to the Supplementary Agreement signed 8 July 2009 and 19 August 2009 by the Norwegian authorities and by Hurtigruten respectively; but rather, it confirms the granting of additional compensation to the original contract entered into in 2004 for the provision of a public service and does not make any reference to the payments constituting restructuring aid. Moreover, when the grant of aid was authorised by the Norwegian Parliament in December 2008, there was no reference to it being part of the restructuring of Hurtigruten ([90]). Finally, the letter from Hurtigruten to the banks on 9 January 2009 ([91]), where a reference is made to a 'comprehensive restructuring plan' seems not to have been submitted to the Norwegian authorities, and even if it was, the letter was not in the possession of the authorities at the time it took its decision to grant the aid, since it was issued only after the decision to grant aid was taken. Furthermore, neither the two memoranda from the legal counsel of Hurtigruten nor the subsequent submission from the Norwegian authorities have supported the conclusion that the authorities were in possession of a restructuring plan when they took their decision regarding the three measures in 2008.

([87]) See point 33 of the Rescue and Restructuring Guidelines. Hurtigruten is not an SME.

([88]) Point 34 of the Rescue and Restructuring Guidelines.

([89]) Case C-17/99 *France v Commission* [2001], ECR I-2481, paragraph 46 and Joined Cases C-278/92, C-279092 and C-280/92 *Spain v Commission* [1994] ECR I-4103 paragraph 67.

([90]) St.prp. nr. 24 (2008-2009) 14 November 2008 and Innst. S. nr. 92 (2008 – 2009) 4 December 2008.

([91]) Referred to on page 9 in the Norwegian authorities' letter of 8.3.2010 (Event No 549465).

In summary, the information provided by the Norwegian authorities in the case at hand seems to demonstrate that when granting the three measures in 2008, the State did not take any restructuring consideration into account but were only concerned with the coverage of additional costs linked to the provision of a public service obligation ([92]).

The Authority takes the view that the material existence of a restructuring plan at the time when an EFTA State grants aid is a necessary precondition for the applicability of the Rescue and Restructuring Guidelines. The EFTA State granting the aid has to possess 'when the disputed aid was granted, a restructuring plan meeting the requirements [of the Rescue and Restructuring Guidelines]' ([93]).

In line with the Rescue and Restructuring Guidelines, had the three measures been granted as restructuring aid, the Norwegian authorities should have had a restructuring plan for Hurtigruten at the latest when they made the payment of 125 million NOK in December 2008. The information provided by the Norwegian authorities does not show that the Norwegian authorities were in the position to verify whether a restructuring plan was viable or whether it was based on realistic assumptions, as required under the Rescue and Restructuring Guidelines. The Authority thus concludes that the aid to Hurtigruten was granted without a restructuring plan being available to the Norwegian authorities.

In the absence of a link between the aid measures identified in this decision to a viable restructuring plan to which the EFTA State concerned commits itself ([94]), the conditions under the Rescue and Restructuring Guidelines are not met in this case.

Moreover, according to Section 2.2 of the Rescue and Restructuring Guidelines, restructuring shall be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. Restructuring operations cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses.

As described above in Section I.5.2, the Norwegian authorities have submitted information on a four-point improvement programme introduced at the Hurtigruten's annual general assembly on 15 May 2008 (increased revenue; reduction of debt; reduction of costs and new and higher payments for the public service) and subsequently, in February 2009, a financial restructuring as a fifth point.

([92]) It is evident from the information submitted by the Norwegian authorities that their commitment in 2008 to grant the additional compensation was not made conditional upon restucturing of Hurtigruten.

([93]) See case C-17/99 *France v Commission* [2001] ECR I-2481, paragraph 46.

([94]) See points 33 and 34 of the Rescue and Restructuring Guidelines.

The Norwegian authorities request that the two memoranda from the legal counsel of Hurtigruten dated 23 March 2009 and 24 February 2010 with annexes are to be considered as the restructuring plan of the company. The Authority notes that the documents submitted do not meet the condition set out in the Rescue and Restructuring Guidelines. In particular, they do not in any detail describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing the appropriateness of the aid measures, and the memoranda did not include a market survey as required by the Guidelines. Considering the general competition concerns and the strict conditions for the authorisation of aid under the Rescue and Restructuring Guidelines, the Authority concludes that the aid measures are not compatible under Article 61(3)(c) of the EEA Agreement in conjunction with the Rescue and Restructuring Guidelines.

As an additional point, the Norwegian authorities have put forward their view that the Authority should take into consideration that the maritime services provided by Hurtigruten is to a great extent in assisted areas.

Section 3.2.3, point 55, of the Rescue and Restructuring Guidelines foresees that the Authority takes the need of regional development into account when assessing restructuring aid in assisted areas in applying less stringent conditions as regards the implementation of compensatory measures and the size of the beneficiary's contribution. As the restructuring plan presented by Hurtigruten does not include such compensatory measures ([95]) and the Norwegian authorities have not put forward any argumentation as to how this provision of the Guidelines might justify less own contribution to the restructuring in the case at hand, the Authority rejects this argument.

4. CONCLUSION ON COMPATIBILITY

On the basis of the foregoing assessment, the Authority considers the three measures to be incompatible with the state aid rules of the EEA Agreement.

5. RECOVERY

According to the EEA Agreement and the established case-law of the Court of Justice of the European Union, the Authority is competent to decide that the State concerned must abolish or alter aid ([96]) when it has found that it is incompatible with the functioning of the EEA Agreement. The Court has also consistently held that the obligation on a State to abolish aid regarded by the European Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([97]). In this context, the Court has established 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 ([98]).

For the reasons set out above, the Authority considers the three measures may entail over-compensation for a public service obligation which constitutes state aid incompatible with the functioning of the EEA Agreement. As these measures were not 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 beneficiaries.

The Authority must respect the general principle of proportionality when requiring recovery ([99]). In accordance with the aim of the recovery and the principle of proportionality, the Authority will only require recovery of the portion of the aid that is incompatible with the functioning of the EEA Agreement. Part of the payments made under the three measures can be considered compatible as a compensation for the provision of a public service obligation. Thus, only the portion of the payments under the three measures that constitutes over-compensation shall be recovered.

The Norwegian authorities are invited to provide detailed and accurate information on the amount of over-compensation granted to Hurtigruten. To determine how much of the payments can be held to be compatible with the functioning of the EEA Agreement on the basis of its Article 59(2) as public service compensation, due account must be taken of the general principles applicable in this field, and in particular the following:

(i) there needs to be a proper allocation of cost and revenue for the public service and the activities outside the public service remit,

(ii) the public service compensation cannot cover more than a proportionate share of fixed costs common to the public service and the activities outside the public service remit, and

([95]) In their reply to the opening decision (Event No 571486), the Norwegian authorities have, on page 28, referred to section 3.2 of the second memorandum (dated 24.2 2010) from the legal counsel of Hurtigruten annexed to the Norwegian authorities' letter to the Authority dated 8.3.2010 (Event No 549465). This memorandum merely cites a few assets and activities that the company has disposed of in order to reduce debts and plans to dispose of further assets, but does not provide any credible plan to put in place compensatory measures in the Authority's view.

([96]) Case C-70/72 *Commission v Germany* [1973] ECR 813, point 13.

([97]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

([98]) Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paras 64 and 65. See Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord, PIL and others and Norway* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 121 at paragraph 178 and C-310/99 *Italy* v *Commission* [2002] ECR I-2289 at paragraph 98. See also Chapter 2.2.1 of the Authority's Guidelines on the recovery of unlawful and incompatible aid, see OJ L 105, 21.4.2011, p. 32, EEA Supplement No. 23, 21.4.2011, p. 1, available online at: http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/.

([99]) See Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord, PIL and others and Norway* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 121 at paragraphs 178-181 and Case 301/87 *France* v *Commission* [1990] ECR I-307 at paragraph 61.

(iii) the calculation of the public service compensation cannot be based on unrepresentative hypothetical costs where real costs are known.

In this context, it is important to recall that in accordance with point 22 of the Public service compensation guidelines, any amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the EEA Agreement on the basis of other provisions or guidelines unless authorised.

HAS ADOPTED THIS DECISION:

Article 1

The three measures provided for in the Supplementary Agreement constitute state aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement in so far as they constitute a form of over-compensation for public service.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Hurtigruten the aid referred to in Article 1 and unlawfully made available to Hurtigruten.

Article 3

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Hurtigruten until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 4

By 30 August 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

By 30 October 2011, Norway must have executed the Authority's decision and fully recovered the aid.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English language version of this Decision is authentic.

Done at Brussels, 29 June 2011.

For the EFTA Surveillance Authority

Per SANDERUD	Sabine MONAUNI-TÖMÖRDY
President	*College Member*

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