Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia o nadzorze i trybunale w sprawie rekompensaty za wzrost składek ubezpieczenia społecznego przyznanej na rzecz spółek „Hurtigruten" (sprawa nr 56343)

(2006/C 314/14)

Na mocy decyzji 215/06/COL z dnia 5 lipca 2006 r., zamieszczonej w języku oryginału na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA rozpoczął postępowanie zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia pomiędzy Państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (Porozumienia o nadzorze i trybunale). Rząd Norwegii został poinformowany — otrzymał egzemplarz wymienionej decyzji.

Urząd Nadzoru EFTA wzywa niniejszym państwa EFTA, państwa członkowskie UE i zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia na poniższy adres Urzędu Nadzoru EFTA w Brukseli:

EFTA Surveillance Authority
35, rue Belliard/Belliardstraat 35
B-1040 Bruksela

Wymienione uwagi zostaną przekazane rządowi Norwegii. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

STRESZCZENIE

Dnia 2 sierpnia 2004 r. Urząd Nadzoru EFTA (zwany dalej „Urzędem") wystosował do władz norweskich wniosek o udzielenie informacji dotyczących przyszłej płatności na rzecz spółek Ofotens og Vesteraalens Dampskibsselskap ASA i Troms Fylkes Dampskibsselskap ASA (zwanych dalej: „spółkami Hurtigruten").

Dnia 2 lipca 2006 r. po obszernej wymianie korespondencji między Urzędem i władzami norweskimi, Urząd zdecydował o wszczęciu formalnego postępowania wyjaśniającego w odniesieniu do płatności na rzecz spółek Huritgruten.

Spółki Hurtigruten prowadzą działalność usługową w zakresie transportu morskiego, na którą składa się transport osób i towarów wzdłuż wybrzeża na odcinku Bergen — Kirkenes. Od dnia 1 stycznia 2002 r. do 31 grudnia 2004 r. usługi te były świadczone na mocy porozumienia pomiędzy władzami norweskimi a spółkami Hurtigruten, dotyczącego świadczenia w zakresie transportu morskiego wzdłuż wybrzeża Norwegii. „Porozumienie Huritgruten" zostało zgłoszone Urzędowi przez władze norweskie w lipcu 2000 r., a następnie zatwierdzone przez Urząd dnia 19 grudnia 2001 r. Usługi świadczone przez spółki Hurtigruten są częściowo ekonomicznie opłacalne, zwłaszcza w sezonie letnim, natomiast zazwyczaj nie są opłacalne w sezonie zimowym. Urząd w swojej decyzji z 2001 r. uznał, że rekompensata w ramach Porozumienia Hurtigruten może zostać zatwierdzona na mocy art. 59 ust.2 Porozumienia EOG, ponieważ usługi nią objęte uznane zostały za usługi świadczone w ogólnym interesie gospodarczym.

Sekcja 10 Porozumienia Hurtigruten zawiera klauzulę, zgodnie z którą obie jego strony mogą zażądać wszczęcia procedury renegocjacji w przypadku, gdy w warunkach Porozumienia zajdą istotne zmiany. Tak jak zakładano, Porozumienie Hurtigruten wygasło dnia 31 grudnia 2004 r., a nowe porozumienie ze spółkami weszło w życie dnia 1 stycznia 2005 r., w następstwie przetargu z czerwca 2004 r.

Obecna spawa dotyczy płatności na rzecz spółek Hurtigruten określonej w poz. 70, rozdział 1330 (*Særskilte transporttiltak*) norweskiego budżetu państwowego na rok 2004, w ramach której spółki Hurtigruten otrzymałyby do 8,5 mln NOK (około 1,1 mln. EUR) w ramach rekompensaty za koszty związane ze zmianami w norweskim systemie zróżnicowanych składek na ubezpieczenie społeczne. Przyznanie pomocy nie zostało zgłoszone Urzędowi. Wypłata rekompensaty przyznanej spółkom Hurtigruten miała na celu całkowite pokrycie wzrostu kosztów ubezpieczenia społecznego, bez względu na różnicę pomiędzy częścią kosztów ubezpieczenia społecznego ponoszoną w związku z komercyjną działalnością spółek, a tą ponoszoną w związku z działalnością, którą można uznać za świadczenie usług publicznych w rozumieniu art. 59 ust. 2 Porozumienia EOG.

Zgodnie z orzecznictwem spełnione zostać muszą cztery warunki, tak aby art. 59 ust. 2 Porozumienia EOG mógł zostać zastosowany. Po pierwsze, musi istnieć akt nałożenia zobowiązania, w którym państwo nakłada odpowiedzialność za wykonywanie pewnych zadań przedsiębiorstwu. Po drugie, nałożenie zobowiązań musi dotyczyć usług świadczonych w ogólnym interesie gospodarczym. Po trzecie, odstępstwo musi być konieczne do wykonywania powierzonych zadań i proporcjonalne do tego celu (warunek zwany dalej „wymogiem konieczności"). Nie może dojść do zakłócenia rozwoju handlu w stopniu pozostającym w sprzeczności z interesami Umawiających się Stron.

Na podstawie dostępnych informacji Urząd wyraża wątpliwość, czy pomoc przyznana spółkom Hurtigruten jest zgodna z art. 59 ust. 2 Porozumienia EOG. Szczególnie wątpliwe jest, czy pomoc spełnia wymóg konieczności przytoczony powyżej, ponieważ zwiększona pomoc na rzecz spółek Hurtigruten z 2004 r. została przyznana również w odniesieniu do działalności komercyjnej spółek Hurtigruten. Rekompensata została przyznana bez różnicy zarówno w odniesieniu do części kosztów ubezpieczenia społecznego ponoszonej w związku z komercyjną działalnością spółek, jak i tą ponoszoną w związku z działalnością, którą można uznać za służbę publiczną w rozumieniu art. 59 ust. 2 Porozumienia EOG.

Ponadto Urząd wyraża wątpliwość, czy pomoc przyznana na rzecz spółek Hurtigruten powinna być uznana za istniejącą pomoc na podstawie sekcji 10 Porozumienia Hurtigruten. Sekcja 10 Porozumienia jedynie dopuszcza *możliwość* wprowadzenia zmian do kontraktu ze względu na niedające się przewidzieć istotne zmiany okoliczności. Nie zaleca ona automatycznego zwiększenia rekompensaty na rzecz spółek Hurtigruten w przypadku wzrostu kosztów, a jedynie dopuszcza możliwość wszczęcia przez obie strony Porozumienia Hurtigruten procedury renegocjacji, bez przesądzania o wyniku tych renegocjacji. Tym samym Urząd wstępnie stwierdza, że pomoc przyznana na rzecz spółek Hurtigruten nie może być traktowana jako istniejąca pomoc.

Urząd wyraża wątpliwość, czy pomoc przyznana na rzecz spółek Hurtigruten jest zgodna z zasadami dotyczącymi pomocy państwa zawartymi w Porozumieniu EOG, w szczególności z jego art. 59 ust. 2. W konsekwencji Urząd jest zobowiązany do wszczęcia formalnego postępowania wyjaśniającego przewidzianego w art. 1 ust. 2 część I protokołu 3 do Porozumienia o nadzorze i trybunale.

EFTA SURVEILLANCE AUTHORITY DECISION

No 215/06/COL

of 5 July 2006

on compensation to the 'Hurtigruten companies' for increased social security contributions

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ([1]),

Having regard to the Agreement on the European Economic Area ([2]), in particular to Articles 59 (2) and 61 to 63, and to Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ([3]), in particular to Article 24 thereof and Article 1(2) in Part I of Protocol 3 thereof,

Having regard to the Authority's decision 417/01/COL of 19 December 2001 on compensation for maritime transport services under the 'Hurtigruten Agreement' ([4]),

Having regard to the Authority's decision 172/02/COL of 25 September 2002 to propose appropriate measures to Norway with regard to State aid in the form of regionally differentiated social security taxation,

Having regard to the Authority's decision 218/03/COL of 12 November 2003 on a three-year transition period in Zones 3 and 4 for the regionally differentiated social security contributions,

([1]) Hereinafter referred to as the 'Authority'.
([2]) Hereinafter referred to as the 'EEA Agreement'.
([3]) Hereinafter referred to as the 'Surveillance and Court Agreement'.
([4]) The Authority's decisions are available on http://www.eftasurv.int/.

Having regard to the decision of the Standing Committee of the EFTA States No 2/2003/SC of 1 July 2003 whereby it was decided that the regionally differentiated social security contributions in Zone 5 was compatible with the EEA Agreement due to exceptional circumstances in this zone,

Whereas:

I. FACTS

1. Procedure

On 2 August 2004, the Authority sent an information request to the Norwegian authorities regarding a prospective payment to Ofotens og Vesteraalens Dampskibsselskap ASA and Troms Fylkes Dampskibsselskap ASA ([1]) as a possible compensation due to the changes in the Norwegian differentiated social security system (Event No 289240).

The Norwegian authorities replied by letter from the Ministry of Trade and Industry dated 1 September 2004, forwarding a letter from the Ministry of Transport and Communications of the same date, received and registered by the Authority on 1 September 2004 (Event No 291435).

By letter dated 12 October 2004, the Authority asked for further information (Event No 294990). In this letter, the Authority's Competition and State Aid Directorate stated its view that as the payment was not notified to the Authority and was apparently already put into effect, it would have to be considered as unlawful aid in the meaning of Article 1 f) in Part II of Protocol 3 to the Surveillance and Court Agreement.

The Norwegian authorities replied by letter from the Norwegian Mission dated 18 November 2004, forwarding letters from the Ministry of Modernisation dated 17 November 2004 and the Ministry of Transport and Communications dated 16 November 2004. The letter was received and registered by the Authority on 22 November 2004 (Event No 300326).

By letter dated 26 October 2005, the Authority's Competition and State Aid Directorate informed the Norwegian authorities that it had doubts concerning the compatibility of the payment to the Hurtigruten companies with the functioning of the EEA Agreement (Event No 329347).

The Norwegian authorities replied by letter from the Norwegian Mission dated 22 December 2005, forwarding letters from the Ministry of Modernisation dated 15 December 2005 and the Ministry of Transport and Communications dated 15 December 2005, received and registered by the Authority on 3 January 2006 (Event No 355950).

By letter dated 9 March 2006 the Authority commented on the Norwegian reply (Event No 364024). The Norwegian authorities responded by letter from the Norwegian Mission dated 29 March 2006, forwarding letters from the Ministry of Government Administration and Reform dated 27 March 2006 and the Ministry of Transport and Communications dated 24 March 2006. The letter was received and registered by the Authority on 30 March 2006 (Event No 368446).

2. Background

The Hurtigruten companies operate maritime transport services consisting of the combined transport of persons and goods along the coastal line from Bergen to Kirkenes. From 1 January 2002 until 31 December 2004, these services were covered by the agreement between the Norwegian authorities and the Hurtigruten companies concerning operation of maritime services along the Norwegian coast ([2]). The 'Hurtigruten Agreement' was notified by the Norwegian authorities to the Authority in July 2000 and subsequently approved by the Authority on 19 December 2001 ([3]). The Hurtigruten companies are also engaged in commercial business activities which are not part of the Hurtigruten service, such as operating high-speed ferries. The Hurtigruten service itself is partly commercially viable, notably during the summer season, whereas it is, in general, not commercially viable during the winter season. The Authority in its 2001 Decision considered that compensation under the Hurtigruten Agreement could be authorised under Article 59 (2) of the EEA Agreement as the services covered by it were considered to be services of general economic interest.

([1]) Hereinafter referred to as the 'Hurtigruten companies'.
([2]) Hereinafter referred to as the 'Hurtigruten Agreement'.
([3]) Decision 417/01/COL, hereinafter referred to as the '2001 Decision'.

On 25 September 2002, the Authority decided to propose appropriate measures to Norway with regard to the Norwegian system concerning regionally differentiated social security contributions ([1]). In the appropriate measures the Authority proposed that Norway should take any legislative, administrative and other measures necessary to eliminate State aid resulting from the system of regionally differentiated social security contributions or render such aid compatible with the EEA Agreement with effect from 1 January 2004. However, the appropriate measures also stated that the Authority might agree to a later date should that be considered objectively necessary and justified by the Authority in order to allow an appropriate transition for the undertakings in question to the adjusted situation. The appropriate measures were accepted by Norway on 31 October 2002.

On 12 November 2003, the Authority accepted a three-year transitional period for the differentiated social security contributions in Zones 3 and 4 in order to achieve a smooth facing-out of the system ([2]).

On this basis, the Norwegian Parliament, during the autumn of 2003, adopted changes to the differentiated social security system, which entered into force on 1 January 2004. The changes led to higher social security costs for the Hurtigruten companies.

Section 10 of the Hurtigruten Agreement contained a clause whereby both parties to the Agreement could demand a re-negotiation procedure in the event of substantial changes in the prerequisites of the Hurtigruten Agreement. The Hurtigruten Agreement ended as foreseen on 31 December 2004, and a new agreement with the companies entered into force on 1 January 2005, following a tender in June 2004.

3. **Description of the measure**

The current case concerns a payment to the Hurtigruten companies contained in Position 70, Chapter 1330 (*Særskilte transporttiltak*) of the Norwegian 2004 State budget, whereby the Hurtigruten companies would be granted up to NOK 8,5 million (approximately EUR 1,1 million) as compensation due to the changes in the differentiated social security system ([3]).

The compensation payment granted to the Hurtigruten companies was paid out to fully compensate the increased social security costs without making a distinction between the part of the social security costs pertaining to the commercial activities of the companies and those activities which might be considered public service within the meaning of Article 59 (2) of the EEA Agreement.

In addition to the compensation granted to the Hurtigruten companies, the companies also received aid as a consequence of the Authority's decision of 12 November 2003. However, the present case only concerns the aid granted as compensation for higher social security contributions. In this respect, an amount of NOK 7,352 million (approximately EUR 900 000) was paid out to the companies.

4. **Comments by the Norwegian authorities**

The Norwegian authorities are of the opinion that the compensation was within the limits of the compensation authorised by the Authority in its 2001 Decision, and should therefore be classified as 'existing aid' in line with the definition of Article 1 b (ii) in Part II of Protocol 3 to the Surveillance and Court Agreement.

The Norwegian authorities consider the payment to be covered by the Hurtigruten Agreement in force at the time when the payment was granted. They rely, in this respect, on Section 10 of the Hurtigruten Agreement, a clause whereby both parties to the Hurtigruten Agreement may demand a re-negotiation procedure in the event of substantial changes in the prerequisites of the Hurtigruten Agreement. The Norwegian authorities state that they regard the changes in the differentiated social security system to fulfil this criterion. They could not have been foreseen by the Hurtigruten companies. As a result of the negotiations with the companies, the compensation for these costs was set to NOK 7,352 million for 2004. The purpose of compensating for the amendments in the social security scheme was, according to the Norwegian authorities, to ensure status quo with regard to the agreed level of transport along the Norwegian coastline, by enabling the Hurtigruten companies to continue to carry out the public service obligation entrusted on them in the Agreement.

([1]) Decision 172/02/COL.

([2]) Decision 218/03/COL. The transitional period did not apply to Zone 5, as the EFTA States by decision No 2/2003/SC of 1 July 2003 decided that the regionally differentiated social security contributions in Zone 5 was compatible with the EEA Agreement due to exceptional circumstances in this zone.

([3]) The comments to Position 70 read as follows: *Av budsjettforslaget på 200,8 mill. kr for 2004, er 192,3 mill. kr direkte relatert til den gjeldende avtalen med hurtigruterederiene. Restbeløpet på 8,5 mill. kr er knyttet til ev. kompensasjon som følge av endringer i ordningen med differensiert arbeidsgiveravgift. Endelig kompensasjonsbeløp vil bli bestemt når forhandlingene mellom hurtigruteselskapene og departementet er avsluttet*. [Unofficial translation by the Authority: Of the budget proposal of NOK 200,8 million for 2004, NOK 192,3 million are directly related to the current agreement with the Hurtigruten companies. The remainder of NOK 8,5 million is related to possible compensation as a consequence of amendments to the system concerning differentiated social security contributions. The final compensation will be determined when the negotiations between the Hurtigruten companies and the Ministry are finished.]

The Norwegian authorities take the position that Section 10 of the Hurtigruten Agreement constitutes a legal basis for the re-negotiation of the Agreement and that the clause was recognised by the Authority in its 2001 Decision. On this basis, the compensation for increased social security contributions would, according to the Norwegian authorities, not constitute new aid provided that the compensation was within the scope of the State aid provisions of the EEA Agreement.

Concerning the compatibility of the aid, the Norwegian authorities claim that the compensation for the changes in the social security scheme was granted to the Hurtigruten companies, in order to maintain the transport standard fixed by the Norwegian Parliament. Without the compensation, the standard of the public service obligations entrusted to the companies would have declined; either by the application of higher fares or by reduced frequency of the services. On this background, the Norwegian authorities consider the compensation to be necessary.

The Norwegian authorities declare that, on the basis of § 1 of the Hurtigruten Agreement, the Hurtigruten companies had been compensated without making a distinction between the part of the social security costs pertaining to the commercial activities of the companies and those activities which might be considered public service within the meaning of Article 59 (2) of the EEA Agreement. This provision states that a substantial part of the profits generated by the Hurtigruten companies in the summer season should be used to finance the unprofitable activity in the winter season. The Norwegian authorities are of the opinion that the Authority, by accepting the principle laid down in this provision, has accepted that no clear separation of the commercial and non-commercial services of the Hurtigruten companies is made. On this basis, the Norwegian authorities argue that it is '*difficult to separate the PSO activity from other commercial activities*' of the companies and thus to grant compensation only to the public service part of the activities. The Norwegian authorities furthermore take the view that the separation between commercial and non-commercial services is not decisive in this connection, and claim that the cross subsidy in this case is clearly in support of the non-commercial services. Moreover, the Norwegian authorities stress that the compensation granted for 2004 does not alter the fact that the commercial services covered by the Hurtigruten Agreement support the activities linked to the public service obligation of the Hurtigruten companies.

Finally, the Norwegian authorities point out that the financial performance of the Hurtigruten companies indicates lower profit than expected ([1]), and maintain that this shows that no over-compensation takes place.

II. **APPRECIATION**

1. **The presence of State aid within the meaning of Article 61(1) EEA**

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'.*

According to the Authority's 2001 Decision, the compensation granted to the Hurtigruten companies under the Hurtigruten Agreement constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The Authority's assessment of the grants to the Hurtigruten companies in the 2001 Decision is relevant when assessing the additional aid granted to the companies for the year 2004. The following assessment will therefore, to a large extent, be based on the appreciation made in the 2001 Decision.

The increased compensation to the Hurtigruten companies is financed directly through a budgetary allocation and is thus granted directly by the State. Furthermore, the compensation relieves the companies of social security charges which they normally would have to bear in the ordinary course of business, and thus strengthens the position of these undertakings compared with other undertakings competing in intra-EEA trade. Moreover, the Hurtigruten companies are active on the markets for passenger and cargo transport and on the tourism market, in particular by offering cruises/round trips along the Norwegian coast. The Hurtigruten service to a large extent attracts foreign tourists, and the Hurtigruten companies thus compete with other undertakings offering similar services in attracting these customers. The compensation granted to the Hurtigruten companies can therefore have an effect on the competition on these markets, and is liable to affect trade between the Contracting Parties to the EEA Agreement. The Authority thus considers the payment to the Hurtigruten companies to constitute State aid within the meaning of Article 61 (1) of the EEA Agreement.

([1]) In this regard, the Norwegian authorities refer to a report prepared by Arthur Andersen in 2000 called *Behov for statlige tjenestekjøp etter 2001*, which analysed the Hurtigruten activities.

2. **New or existing aid**

The Norwegian authorities argue that the compensation was in line with the Authority's 2001 Decision, since Section 10 of the Hurtigruten Agreement contained a clause whereby both parties to the Hurtigruten Agreement may demand a re-negotiation procedure in the event of substantial changes in the prerequisites of the Hurtigruten Agreement. According to the Norwegian authorities, the compensation should thus be regarded as existing aid. The Norwegian authorities have stated that they regard the changes in the differentiated social security system to constitute a substantial change, and thus consider the compensation to be reasonable.

The Authority would like to point out that annual compensation of NOK 170 million, expressed in 1999-prices, under the Hurtigruten Agreement had been approved by the Authority. In contrast, the Authority's decision did not deal with Section 10 of the Hurtigruten Agreement as such, and nothing in the Authority's decision suggested that any future amendments of the Hurtigruten Agreement based on this clause would automatically be considered to be in compliance with the State aid provisions of the EEA Agreement.

Section 10 of the Agreement merely allows for the *possibility* of amending the contract due to unforeseen substantial changes of circumstances. It does not prescribe an automatic increase in the compensation to the Hurtigruten companies in the event of raised costs, but merely opens up for the possibility for both parties to the Hurtigruten Agreement to request a re-negotiation procedure without prescribing the result of such re-negotiation. Furthermore, the provision does not explicitly mention augmentation of the costs as a result of a tax increase as a reason for renegotiation, let alone as a fact that would require an automatic adjustment of the agreement with the exact amount flowing from the tax increase. A change in the tax situation of one contracting party is normally not a factor that the other party is obliged to bear. Hence, even if the Hurtigruten Agreement in its entirety was sent to the Authority, the Authority could not reasonably have been expected to foresee all the possible effects of the provision, and the Authority's silence about the provision in its decision cannot be held to imply that all uses of the provision was hereinafter automatically acceptable from a State aid point of view.

It is the view of the Authority that the contractual provision needs to be distinguished from the separate question of whether the chosen re-adaptation complies with the EEA Agreement, and in particular with the State aid provisions. This question needs to be assessed on its own merits for each case of re-adaptation.

In this case, the Norwegian argumentation can only be considered valid, if at all, for the part of the Hurtigruten activities which are covered by public service obligations within the meaning of Article 59 (2) of the EEA Agreement, as it was the public service obligation compensation which the Authority authorised. Any compensation under Section 10 of the Hurtigruten Agreement cannot be deemed to be in compliance with the State aid provisions of the EEA Agreement. In the case at hand, compensation was granted for the full increase in social security costs, also for those costs that were related to commercial activities not being services of general economic interest. As stated by the Norwegian authorities themselves, it cannot be excluded that the compensation also benefits the commercial parts of the Hurtigruten activities.

The Authority thus considers the aid to be new aid within the meaning of Article 1 c) in Part II of Protocol 3 to the Surveillance and Court Agreement.

3. **Procedural requirements**

Pursuant to Article 1 (3) in Part I of Protocol 3 to the Surveillance and Court Agreement, *'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 Authority considers the aid to the Hurtigruten companies to be new aid within the meaning of Article 1 c) in Part II of Protocol 3 to the Surveillance and Court Agreement. This implies that the compensation should have been notified to the Authority, according to Article 1 (3) in Part I and Article 2 in Part II of Protocol 3 to the Surveillance and Court Agreement, and should not have been put into effect until the Authority approved the compensation. The Norwegian authorities, however, decided to grant the compensation and not to notify it to the Authority. The compensation is therefore considered as 'unlawful aid' within the meaning of Article 1 f) in Part II of Protocol 3 to the Surveillance and Court Agreement and, thus, possibly subject to recovery.

4. **Compatibility of the State aid**

Direct aid aimed at covering operating losses is, in general, not compatible with the functioning of the EEA Agreement. Since the increased compensation granted to the Hurtigruten companies covers costs concerning the day-to-day operation of the Hurtigruten service, this payment is to be regarded as operating aid. Such operating aid may be approved, exceptionally, if the conditions set out in derogation provisions of the EEA Agreement are fulfilled.

As in the 2001 Decision, the Authority takes the view that the aid under examination does not qualify for an exemption from the general prohibition of State aid in Article 61 (1) of the EEA Agreement on the basis of Article 61 (2) or (3) of the EEA Agreement.

Aid granted to undertakings performing a service in the general economic interest may, however, be regarded as compatible with the functioning of the EEA Agreement, provided that the conditions laid down in Article 59 (2) of the EEA Agreement are respected.

Pursuant to Article 59 (2) of the EEA Agreement '*undertakings entrusted with the operation of services of general economic interest…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 of the interests of the Contracting Parties.*'

According to case law, four criteria must be met in order for Article 59 (2) of the EEA Agreement to apply. Firstly, there must be an act of entrustment whereby the State confers responsibility for the execution of a certain task to an undertaking. Secondly, the entrustment must relate to a service of general economic interest. Thirdly, the measure has to be necessary for the performance of the tasks assigned and proportional to that end (hereinafter 'the necessity requirement'). Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

In its 2001 Decision, the Authority assessed the compatibility of the compensation to the Hurtigruten companies, as defined in the Hurtigruten Agreement, with Article 59 (2) of the EEA Agreement. When carrying out that assessment, the Authority took into account sector specific rules, as laid down in the Maritime Cabotage Regulation ([1]) and Chapter 24A of the Authority's State Aid Guidelines: Aid to maritime transport. The Authority will base its assessment of the increased compensation for 2004 on the appreciation of the Hurtigruten Agreement in the 2001 Decision.

In the 2001 Decision, the Authority regarded parts of the Hurtigruten service as covered by the concept of a service of general economic interest. It furthermore concluded that the Hurtigruten Agreement constituted a public act through which the Hurtigruten companies were entrusted with the operation of services in the general economic interest. Moreover, the agreed payment to Hurtigruten under the Hurtigruten Agreement was, in the Authority's opinion, necessary in order to compensate for the public service obligations imposed on the Hurtigruten companies. Finally, the Authority concluded that the Hurtigruten Agreement would not affect trade to an extent contrary to the interests of the Contracting Parties to the EEA Agreement.

As the Norwegian authorities have paid an increased compensation to the Hurtigruten companies for 2004, the question arises whether the compensation can still be considered to meet the criteria of Article 59 (2) of the EEA Agreement, and in particular whether the necessity requirement is still met.

The necessity requirement implies that the amount of compensation shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on own capital necessary for discharging those obligations. This compensation must be used for the functioning of the service of general economic interest concerned. It furthermore follows that 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 shall be taken into consideration.

However, the increased aid to the Hurtigruten companies in 2004, paid out in order to compensate them for changes in the differentiated social security scheme, has been granted — as stated by the Norwegian authorities — also in favour of commercial activities, as the compensation did not make a distinction between the part of the social security costs related to the commercial activities of the companies and those activities which might be considered public service within the meaning of Article 59 (2) of the EEA Agreement.

([1]) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

The Norwegian authorities have agued that it follows from the Hurtigruten Agreement that no clear separation of the commercial and non-commercial services of the Hurtigruten companies has to be made, as a substantial part of the profits generated by the Hurtigruten companies in the summer season should be used to finance the unprofitable activity in the winter season. However, the fact that Norwegian authorities have chosen this solution in order to minimize the need for public service compensation does not imply that an increased new aid partially in favour of commercial activity can be considered as necessary for the provision of the public service.

Furthermore, the Authority would like to point out that the 2001 Decision clearly stated that the compensation granted to the Hurtigruten companies may only cover activities in relation with the public service obligation of the companies. The Authority did not accept State aid for the commercially viable part of the service. Moreover, the 2001 Decision was based on a report prepared by Arthur Andersen which analysed the Hurtigruten activities and the need for public service compensation in order to uphold the level of the public service. The public service cost, and thus the allowed State aid set out in the 2001 Decision, was established based on this report.

In addition, the Authority underlines that in order to increase the level of State aid granted to the Hurtigruten companies in line with the 2001 Decision, the Norwegian authorities would have to document that the increased aid is granted only to the public service part of the activity. However, the Norwegian authorities have not denied that the increased State aid to the Hurtigruten companies does partially finance the commercial part of the activity. Neither have the Norwegian authorities made any attempt to calculate the split between the public service part and the commercial part of the Hurtigruten activity in order to grant compensation only to the public service related part of the activity.

Concerning the argument made by the Norwegian authorities that the compensation has been paid without distinction because it was difficult to separate the public service obligations from the commercial activities of the Hurtigruten companies, this is not sufficient to accept an aid which is not in line with the necessity requirement. The concept of public service compensation presupposes that a separation of the costs relating to the public service activities and costs relating to commercial activities has been performed.

Furthermore, the Norwegian authorities argue that even if the grant to the Hurtigruten companies has been increased, this does not involve overcompensation, as the financial performance of the Hurtigruten companies indicates lower profit than was expected when the amount of compensation for public services activities carried out by the companies was calculated. However, even if the companies' profits should indeed be lower than expected, this does not give the Norwegian authorities the right to give a higher compensation than that approved by the Authority in the 2001 Decision, unless it is established that this compensation is necessary to cover the public service costs. In any event, it cannot justify the granting of aid for commercial activities, which are not covered by the application of Article 59 (2) of the EEA Agreement.

In the view of the Authority, it follows from the above that the increased aid paid to the Hurtigruten companies seems to exceed the amount of compensation necessary in order for the companies to fulfil their public service obligations. Such over-compensation would not be compatible with Article 59 (2) of the EEA Agreement, and would thus constitute State aid which is incompatible with the EEA Agreement.

It follows from the above that, according to the preliminary appreciation of the Authority, the part of the compensation granted to the commercial activities of the Hurtigruten companies is to be regarded as State aid incompatible with the EEA Agreement and, thus, possibly subject to recovery. Only the part of compensation directly relating to the performance of the **public service obligation would be compatible and, hence, not subject to recovery.** Should it, as argued by the Norwegian authorities, prove impossible to make a separation between the increased costs incurred in relation with the public service activities and with the commercial activities of the Hurtigruten companies, the Authority might be forced to regard the compensation in its entirety as State aid incompatible with the EEA Agreement. The compensation would in this case also be subject to recovery in its entirety.

5. **Conclusion**

Based on the information submitted by the Norwegian Government, the Authority cannot exclude that the compensation to the Hurtigruten companies for increased social security contributions constitutes aid within the meaning of Article 61 (1) of the EEA Agreement. The Authority cannot see that any exceptions under Article 61 (2) or (3) to the general prohibition of State aid under Article 61 (1) of the EEA Agreement applies to the aid. Furthermore, the Authority has doubts that the measure can be regarded as complying with Article 59 (2) of the EEA Agreement. Consequently, the Authority has doubts that the above measure is compatible with the functioning of the EEA Agreement.

Furthermore, it is the Authority's preliminary view that the aid is to be considered as new aid within the meaning of Article 1 c) in Part II of Protocol 3 to the Surveillance and Court Agreement. This implies that the compensation should have been notified to the Authority, according to Article 1 (3) in Part I and Article 2 in Part II of Protocol 3 to the Surveillance and Court Agreement. The compensation is therefore considered as 'unlawful aid' within the meaning of Article 1 f) in Part II of Protocol 3 to the Surveillance and Court Agreement and subject to possible recovery.

Consequently, and in accordance with Articles 13 (1) and 4 (4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measure in question is compatible with the functioning of the EEA Agreement.

In the light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1 (2) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests Norway to submit its comments and to provide all such information as may help to assess the compensation to the Hurtigruten companies for increased social security contribution, within two months from receipt of this decision.

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the compensation granted to the Hurtigruten companies for increased social security contributions.
2. The Norwegian Government is invited; pursuant to Article 6 (1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within two months from the notification of this decision and to provide all such information as may help to assess the aid measure.
3. The Norwegian Government shall be informed by means of a letter containing a copy of this decision.
4. The EC Commission shall be informed in accordance with Protocol 27(d) to the EEA Agreement, by means of a copy of this decision.
5. Other EFTA States, EC Member States and interested parties shall be informed by the publishing of this decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*, inviting them to submit comments within one month from the date of the publication.
6. This Decision is addressed to Norway.
7. This Decision is authentic in the English language.

Done at Brussels, 5 July 2006

For the EFTA Surveillance Authority

Bjørn T. GRYDELAND
President

Kristján A. STEFÁNSSON
College Member