

ADVOKATFIRMAET MIDTHJELL

Presented to the EFTA Court under N° E-1/17-3
17 January 2017

ORIGINAL

TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

APPLICATION FOR ANNULMENT

Pursuant to the second paragraph of Article 36 of the Surveillance and Court Agreement

Lodged by

Konkurrenten.no AS, established in Evje, Norway

Applicant

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- v -

EFTA Surveillance Authority

Defendant

Application for annulment of ESA decision no. 179/15/COL dated 7 May 2015, closing a formal investigation concerning state aid granted to Nettbuss Sør AS, which was published in EEA Supplement no. 59/1 to the Official Journal on 27 October 2016.

Oslo, 11 January 2017

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1. INTRODUCTION

- (1) Konkurrenten is a privately owned company that operates an express bus service between Oslo-Kristiansand, connecting the central and southern region of Norway. The company is owned by Olto Holding AS, which also owns a tour bus service and a taxi company. The group had in 2016 an annual turnover of NOK 90 million and owns and operates a fleet of 20 buses that yearly serve approximately 240 000 passengers.
- (2) Nettbuss Sør AS was the main competitor of Konkurrenten in the express bus market between Oslo-Kristiansand in 2004-2014. During the entire 10-years, Nettbuss Sør AS received significant state aid from the County of Aust-Agder.
- (3) This application seeks to annul ESA decision no. 179/15/COL by which ESA, after an investigation following a complaint from Konkurrenten in 2011, decided to classify virtually all of the aid granted to Nettbuss as existing and thus non-recoverable state aid.¹

2. BACKGROUND TO THE DISPUTE

- (4) Nettbuss Sør AS (formerly Aust-Agder Trafikkselskap AS) was established in 1986 and was jointly owned by the County of Aust-Agder and NSB AS, the state-owned national rail operator. Nettbuss Sør AS was the only operator that had been granted a concession by the government to operate an express bus service on the route Oslo-Kristiansand.
- (5) On 1 September 1988, NSB AS established a new division, NSB Biltrafikk, which acquired full ownership to Aust-Agder Trafikkselskap AS from the county. NSB Biltrafikk was reconstituted as a limited liability company on 29 November 1996 and was on 10 February 2000 renamed Nettbuss AS. Nettbuss Sør AS continued to operate as a wholly owned subsidiary until 16 December 2015, when it merged with its parent company, Nettbuss AS.
- (6) Nettbuss Sør AS will hereinafter be referred to as "Nettbuss".
- (7) On 27 December 2000, Konkurrenten (then named Risdal Touring AS) applied for a competing concession from the government, with the objective of breaking up the 14-year Nettbuss-monopoly. At the time, Nettbuss ran 58 weekly departures on the route Oslo-Kristiansand.²
- (8) The authority to decide on the application rested with the Ministry of Transport, which also owned and controlled NSB AS and thereby also Nettbuss. The County of Aust-Agder, which previously had owned Nettbuss jointly with NSB AS, conducted the preparatory case handling and was delegated the power to make a recommendation on Konkurrenten's application. The county recommended that the ministry should reject the application. In its recommendation, the county argued in particular that: "The

¹ A copy of the contested decision has been attached at **Annex A.1**.

² A copy of the official route schedule published in Rutebok for Norge has been attached at **Annex A.35**.

County of Aust-Agder has cooperated with NSB and Nettbuss to develop the best possible public service on the route Oslo-Kristiansand".³

- (9) In addition, both Nettbuss and NSB also opposed the application for the reason that competition from Konkurrenten would threaten the profitability of their own business. Nettbuss argued in particular that the average number of passengers per departure in 1996-1999 had fallen from 51.7 to 30.8, or by as much as almost 40 percent, because Nettbuss had already increased its weekly departures on the route from 27 to 58, or by as much as 214 percent.⁴
- (10) Nevertheless, while Konkurrenten's application pended before the ministry, Nettbuss, decided again to increase its weekly departures, this time from 58 to 64.
- (11) On 7 March 2002, after initially having rejected the application, the ministry reversed its decision and granted Konkurrenten the concession, after the labor government had lost the election and been replaced by a liberal coalition government.⁵ On the next day, Nettbuss informed the county that it again wanted to increase its weekly departures. In its letter, Nettbuss confirmed that it had already received "oral confirmation that [Konkurrenten] has been granted concession to operate on the route Oslo-Kristiansand with two daily departures".⁶
- (12) During Konkurrenten's first year operating the new route, Nettbuss decided yet again to increase its weekly departures, from 64 to 101, or by an additional 58 percent. Over the next three years, until mid-2006, Nettbuss continued to make significant increases in its number of weekly departures, from 101 to 138, or by an additional 37 percent.⁷
- (13) Overall, during the first four years that Nettbuss was exposed to competition, the total number of departures on the route Oslo-Kristiansand increased from 64 to 234, or by more than 366 percent.⁸ That number has, by and large, continued to hold until present day (by mid-2016 the total number of departures was 260).
- (14) In contrast, according to data collected by the Ministry of Transport and presented in a white paper on the business of NSB AS: "the statistic for the combined Norwegian bus sector [shows] an annual average passenger growth of about 1.5 percent in the period 2005-2010".⁹
- (15) The exorbitant capacity increases imposed severe financial hardship on Konkurrenten, which nearly went out of business on two occasions.

³ A copy of the recommendation from the County of Aust-Agder, dated 19 March 2001, has been attached at **Annex A.37**.

⁴ A copy of Nettbuss' letter, dated 19 February 2001, has been attached at **Annex A.36**.

⁵ A copy of the decision by the Ministry of Transport, dated 7 March 2002, has been attached at **Annex A.38**.

⁶ A copy of the letter from Nettbuss, dated 8 March 2002, has been attached at **Annex A.39**.

⁷ A copy of the official route schedules published in Rutebok for Norge has been attached at **Annex A.35**

⁸ See **Annex A.35**

⁹ An excerpt of the white paper, dated 26 April 2013, has been attached at **Annex A.40**.

- (16) The financial hardship was exacerbated by the fact that the county allowed Nettbuss to freely use local routes paid by the county as feeding busses to interconnect passengers travelling on its local grid with Nettbuss' own departures on the express grid that it ran in direct competition with Konkurrenten, while Konkurrenten had to finance its own feeding busses.
- (17) Konkurrenten brought the matter before the national competition authority on 19 May 2003, which advised the county that it should take into account the competition in the express bus market when it granted local bus rights: "An operator with market power in the express bus market could exploit the advantages of having local bus rights to strengthen its market power. This can restrict competition in the express bus market in contravention of the objective of Section 1-1 of the Competition Act. Furthermore, it cannot be excluded that the granting of local bus rights could give rise to negative effects on competition and inefficient use of resources through cross-subsidization of business in adjacent markets, in this case the express bus market. The Authority therefore finds reasons to emphasize how important it is that public support for the running of local bus routes cannot be used to finance the express bus business. The Authority wants to stress that the County of Aust-Agder, in its procurement of local bus services, should choose a solution that provides for the most efficient use of public resources. This will be achieved by opening up for competition between suppliers, for example by using public tenders for local bus services".¹⁰
- (18) However, the county made no subsequent effort to prevent Nettbuss from freely using the routes paid by the county as feeding busses to interconnect passengers travelling on the local grid with Nettbuss' own departures on the express grid. Instead, the county decided to award to Nettbuss and extend a contract valued at more than NOK 1.2 billion for the period 2009-2014, yet again without any public tender or other forms of competition.
- (19) On 23 March 2011, Konkurrenten filed with ESA a combined state aid and public procurement complaint against Norway.¹¹ Konkurrenten contended that the County of Aust-Agder, at least since 2004, had awarded contracts for the provision of local bus services to Nettbuss in excess of NOK 1 billion (EUR 125 million) without any public tender or any other form of competition. Moreover, Konkurrenten submitted that the county had made substantial payments to Nettbuss in conjunction with these contracts that had resulted in unlawful aid. As a result of the aid, Nettbuss had been enabled to increase and maintain high overcapacity in the express bus market, and been allowed to freely use local routes paid by the county as feeding busses to interconnect passengers travelling on the local grid with Nettbuss' own departures on the express grid which was run in direct competition with Konkurrenten during the entire period, whereas Konkurrenten had to finance its own feeding busses.
- (20) Konkurrenten's complaint led ESA to open two separate investigations: one on the public procurement issues (ESA cases no. 69548 and 69656) and one on the state aid issues (ESA cases no. 69694 and 73321).

¹⁰ A copy of the letter dated 19 February 2004 has been attached at **Annex A.41**.

¹¹ A copy of the complaint has been attached at **Annex A.2**, which has been submitted into evidence pursuant to Article 25(3) RoP.

- (21) In relation to the public procurement complaint, ESA issued a letter of formal notice to Norway on 12 October 2011¹², which subsequently lead to the adoption of a reasoned opinion against Norway on 27 June 2012.¹³ ESA concluded: "that by allowing the County of Aust-Agder to award concessions for passenger transport services by bus without any form of publication, and to prolong these concessions without any form of publication, the Kingdom of Norway has failed to comply with the principles of non-discrimination and transparency in breach of Article 4 and Article 48 of the EEA Agreement. Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion, including suitable corrective measures to rectify the breach, within two months following notification thereof".
- (22) After the adoption of the reasoned opinion, the County of Aust-Agder refused to terminate the concessions that it had awarded in contravention of the EEA Agreement, including the concession to Nettbuss, which instead was allowed to run until it expired on its own terms on 31 December 2014.
- (23) On 10 November 2011, ESA sent to the Norwegian authorities the state aid complaint that it had received from Konkurrenten almost eight months earlier and requested further information.¹⁴ The Norwegian authorities responded in a letter dated 9 December 2011.¹⁵ ESA sent additional requests for information in two letters dated 13 March 2012¹⁶ and 17 October 2012¹⁷, respectively, to which the Norwegian authorities replied by letters dated 10 and 11 May 2012¹⁸ and 15 November 2012¹⁹, respectively. ESA asked for additional information by email on 15 January 2013²⁰ and 18 January 2013²¹, respectively, to which the Norwegian authorities responded on 18 January 2013.²²
- (24) On 6 February 2013, by way of ESA decision no. 60/13/COL, ESA opened a formal investigation of the matter, which was published in EEA Supplement no. 24/1 to the Official Journal on 25 April 2013.²³

¹² See Annex A.3.

¹³ See Annex A.4.

¹⁴ See Annex A.5.

¹⁵ See Annex A.6.

¹⁶ See Annex A.7.

¹⁷ See Annex A.9.

¹⁸ See Annex A.8.

¹⁹ See Annex A.10.

²⁰ See Annex A.11.

²¹ See Annex A.12.

²² See Annex A.14.

²³ See Annex A.15.

- (25) The Norwegian authorities and Konkurrenten responded to the opening decision by letters dated 5 April 2013²⁴ and 23 May 2013²⁵, respectively. On 21 and 26 June, ESA sent to the Norwegian authorities the comments from Konkurrenten and two other interested parties, including Nettbuss.²⁶ The Norwegian authorities responded by letter dated 12 August 2013.²⁷
- (26) ESA requested further information from the Norwegian authorities in a letter dated 17 December 2013²⁸ and received response by letter dated 31 January 2014²⁹ and email on 24 February 2014.³⁰
- (27) The Norwegian authorities sent additional and new information to ESA by letters dated 11 April 2014³¹ and 8 July 2014³², respectively. This information led ESA to ask for clarifications and supplementary information by letter dated 14 August 2014³³, to which the Norwegian authorities responded by letters dated 15 October 2014³⁴ and 22 December 2014³⁵, respectively.
- (28) On 7 May 2015, ESA adopted the contested decision. Article 1 ordered that:
- "The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes state aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed".
- (29) Article 2 ordered that:
- "The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute state aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement".
- (30) Article 3 ordered that:

²⁴ See **Annex A.16**.

²⁵ See **Annex A.17**.

²⁶ See **Annex A.18**.

²⁷ See **Annex A.19**.

²⁸ See **Annex A.20**.

²⁹ See **Annex A.21**.

³⁰ See **Annex A.22**.

³¹ See **Annex A.23**.

³² See **Annex A.24**.

³³ See **Annex A.25**.

³⁴ See **Annex A.26**.

³⁵ See **Annex A.27**.

"The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008".

(31) Article 4 ordered that:

"Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision".

(32) Article 5 ordered that:

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

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

(33) On 7 July 2015, in accordance with Article 5 of the contested decision, the Norwegian authorities informed ESA that the total amount of unlawful aid to Nettbuss was NOK 99 453 890.³⁶ The letter explained to ESA how the amount had been calculated.

(34) On 7 September 2015, the time limit in Article 4 of the contested decision for Norway to recover the unlawful aid from Nettbuss expired without any recovery taking place.

(35) On 25 September 2015, Konkurrenten filed a new complaint with ESA over the failure by the Norwegian authorities to abide by the contested decision and the corresponding recovery obligation in Article 14(3) of Part II to Protocol 3 SCA.³⁷ Konkurrenten called on ESA to bring Norway before the EFTA Court under the fast-track procedure

³⁶ See Annex A.42.

³⁷ See Annex A.28.

in Article 1(2) Part I of Article 23(1) of Part II to Protocol 3 SCA, which had been established for that purpose.

- (36) Nettbuss refused to pay the recovery claim. The conflict over the recovery claim led the Norwegian authorities to ask ESA for a clarification of the contested decision in a letter dated 6 October 2015,³⁸ to which ESA responded by letter dated 26 October 2015.³⁹ ESA explained that it did not agree with the interpretation of the Norwegian authorities and sided with Nettbuss.
- (37) On 12 November 2015, the Norwegian authorities wrote to ESA again and noted that ESA had been informed about the amount and how the calculation of the recovery claim had been made on 7 July 2015, without receiving any indications that the claim had been based on an erroneous reading of the contested decision.⁴⁰ The letter stated: "In light of case law from the EFTA Court, the County still disagrees that measures outside the concession contract, and with no entrustment act, could constitute existing aid". As a result of ESA's interpretation of the contested decision, the letter noted that the recovery claim would have to be "significantly reduced".
- (38) On 8 September 2016, the County of Aust-Agder and Nettbuss subsequently entered into a settlement agreement whereby Nettbuss agreed to pay back NOK 5 million.⁴¹
- (39) Consequently, the contested decision has left intact virtually all state aid that Nettbuss has received in the 10-year period from 2004-2014 from the County of Aust-Agder.

3. ADMISSIBILITY

3.1 The application is timely

- (40) The contested decision is addressed to Norway and was published on 27 October 2016 in EEA Supplement no. 59/1 to the Official Journal in accordance with Article 26(3) of Part II to Protocol 3 SCA.⁴² Pursuant to Article 77 RoP and the third paragraph of Article 36 SCA, the time limit for bringing these proceedings is 11 January 2017. The application is therefore timely.

3.2 The applicant has a legal interest in bringing these proceedings

- (41) The applicant has a vested and present legal interest in bringing this action. According to settled case law such an interest requires that the annulment sought must be capable,

³⁸ See **Annex A.29**.

³⁹ See **Annex A.30**.

⁴⁰ See **Annex A.43**.

⁴¹ See **Annex A.44**.

⁴² See Case T-354/05 *TFI v Commission*, EU:T:2009:66, para. 31-48. See also Joined cases T-273/06 and T-297/06 *ISD Polska and Others v Commission*, EU:T:2009:233, para. 55-58; and Case T-327/04 *SNIV v Commission*, EU:T:2008:146, para. 32-35; and Case T-144/04 *TFI v Commission*, EU:T:2008:155, para. 18-23; see also Case T-17/02 *Fred Olsen v Commission*, EU:T:2005:218, para. 72-83; see Case T-321/04 *Air Bourbon v Commission*, EU:T:2005:328, para. 32-36; see also Case T-426/04 *Tramarin v Commission*, EU:T:2005:405, para. 47-50; and Case T-190/00 *Regione Siciliana v Commission*, EU:T:2003:316, para. 29-32.

in itself, of having legal consequences and that the action therefore may, through its outcome, procure an advantage to the party which brought it.⁴³

- (42) The contested decision concerns state aid granted to Nettbuss from 2004 to 2014. The applicant was a direct competitor of Nettbuss during the entire period in the market for express bus services between Kristiansand and Oslo. Furthermore, the aid in question concerns operating aid which, as a rule, distorts the conditions of competition.⁴⁴ Moreover, part of the aid was used directly towards financing the running of feeding busses, that interconnected passengers travelling on the local grid that the County of Aust-Agder subsidized, with Nettbuss' own departures on its express route to Oslo, which was run in direct competition with Konkurrenten during the entire 10-year period, whereas Konkurrenten had to finance its own feeding busses to interconnect with its own express bus departures, without benefitting from any form of state aid. By bringing this action, Konkurrenten seeks to level the playing field on the contention that the contested decision defined too narrowly and incorrectly the scope of the unlawful state aid that Norway had to recover from Nettbuss (currently calculated by the Norwegian authorities at NOK 5 million, in contrast to the more than NOK 99.4 million that Norway otherwise would have had to recover from Nettbuss).
- (43) In addition, the applicant also seeks to support a damages claim that it brought against Nettbuss on 6 May 2016.⁴⁵ Konkurrenten seeks to recover the losses that it sustained as a consequence of the unlawful state aid. The claim contends that the unlawful state aid enabled Nettbuss to undertake exorbitant and loss-making capacity expansions in an effort to marginalize Konkurrenten, which Nettbuss otherwise would not have been able to subsidize. The contested decision is therefore undermining the damages claim by incorrectly and too narrowly defining the scope of the unlawful aid that Nettbuss received during the relevant 10-year period.⁴⁶ Consequently, the applicant has a legal interest in bringing these proceedings.

⁴³ See Case C-33/14 P *Mory et al v Commission*, EU:C:2015:609, para. 55. See also Case T-287/11 *Heitkamp BauHolding v Commission*, EU:T:2016:60, para. 82. See also Case T-620/11, *GFKL Financial Services v Commission*, EU:T:2016:59, para. 76.

⁴⁴ See Case C-156/98 *Germany v Commission*, EU:C:2000:467, para. 30 ("In principle, operating aid, that is to say aid which ... is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition").

⁴⁵ A copy of the application has been attached at **Annex A.32**. The application has been submitted into evidence pursuant to the second paragraph of Article 25(3) RoP to prove the existence of the claim. At the joint request of the parties, the Oslo Conciliation Board on 2 August 2016 deferred the matter to the Oslo District Court.

⁴⁶ See also Case C-33/14 P *Mory et al v Commission*, EU:C:2015:609, para. 69-79 ("It should be noted that, according to the Court's settled case-law, an application for annulment may retain an interest as a basis for a possible action for damages ... It is apparent from the Court's case-law referred to in paragraphs 56-69 of this judgment that the possibility of an action for damages suffices to justify such an interest in bringing proceedings, in so far as that interest is not hypothetical. In the present case, it is not disputed that the appellants referred to the commencement of that action for damages in their application lodged before the General Court and that that action, as is apparent from paragraph 42 of the order under appeal, was indeed brought before the adoption of the order under appeal").

3.3 The contested decision is of direct and individual concern

- (44) The contested decision is of direct and individual concern to the applicant pursuant to the second paragraph of Article 36 SCA.
- (45) Konkurrenten is directly concerned because the contested aid has already been distributed by the Norwegian authorities to Nettbuss in the 10-year period from 2004 to 2014. Konkurrenten and Nettbuss were direct competitors in the market for express bus services during the 10-year period that Nettbuss received the contested aid.⁴⁷
- (46) Furthermore, Konkurrenten is individually concerned by the contested decision because the applicant belongs to a closed class of operators that can no longer be extended after the adoption of the contested decision. The members of that closed class was readily identifiable at the time of the contested decision.⁴⁸
- (47) Pursuant to Section 6(1) of the Commercial Transport Act of 21 June 2002 no. 45 bus operators must hold a special concession: a discretionary ("quantity-regulated") concession for regular passenger transport services by motor vehicle.⁴⁹ Pursuant to Article 28 of the Commercial Transport Regulation of 26 March 2003 no. 401, such concession holders are obliged to regularly publish and update their route schedules in accordance with specific requirements laid down by the government.⁵⁰ These concession holders are therefore readily identifiable in any given market.

⁴⁷ See Case 169/84 *Cofaz v Commission*, EU:C:1986:42, para. 30. See also Joined cases T-447/93 to T-449/93 *Aitec et al v Commission*, EU:T:1995:130, para. 41 and also Case T-266/94 *Skibsværftsforeningen et al v Commission*, EU:T:1996:153, para. 49. See also Case T-220/13 *Scuola Elementare Maria Montessori v Commission*, EU:T:2016:484, para. 41.

⁴⁸ See Case T-236/10 *Asociación Española de Banca v Commission*, EU:T:2012:176, para. 39 ("Furthermore, it should also be noted that, in order for the contested measure to be of individual concern to the applicant, the applicant must establish that he belongs to a closed class, that is to say, a group which cannot be extended after the adoption of the contested measure"). See Case T-238/14 *European Gaming and Betting Association and The Remote Gambling Association v Commission*, EU:T:2016:259, para. 66. See Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, EU:C:2006:416, para. 60 ("In that regard, the Court has held that, where a contested measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders". See also Case C-519/07 P *Commission v Koninklijke Friesland Campina*, EU:C:2009:256, para. 54. See also Case T-287/11 *Heitkamp BauHolding v Commission*, EU:T:2016:60, para. 67 and Case T-620/11, *GFKL Financial Services v Commission*, EU:T:2016:59, para. 56. See also Case C-152/88 *Sofrimport v Commission*, EU:C:1990:259, para. 11 and Case 11/82 *Piraiki-Patraiki et al v Commission*, EU:C:1985:18, para. 31.

⁴⁹ A copy of the Commercial Transport Act, with an English translation prepared by the Norwegian authorities, has been attached at **Annex A.33**.

⁵⁰ Article 28 states that: "Route schedules must be approved by the licencing authority. Proposed changes to the route schedules are to be sent to the licencing authority no later than 4 months before the change takes effect. The licencing authority may reduce the time limit under the first paragraph and may stipulate that changes must be implemented in less time or that implementation must be postponed. The licensing authority may also issue an order amending the route schedule. The Ministry shall establish detailed guidelines on what route schedules for passenger routes shall contain and how these should be made public". A copy of the Commercial Transport Regulation has been attached at **Annex A.34** and has been submitted into evidence pursuant to the second paragraph of Article 25(3) RoP

- (48) Konkurrenten received its concession on 7 March 2002 from the Ministry of Transport. Apart from the aid beneficiary, Konkurrenten was the only operator which held such a concession to serve the express bus market between Kristiansand and Oslo during the entire 10-year period that Nettbuss received the contested aid. A third operator, Sporveien, only entered the market in 2006.
- (49) The effect of the contested decision is that it leaves intact and prevents from recovery almost all of the aid that Nettbuss received from 2004 to 2014, including aid to operate the feeding busses that allowed Nettbuss to coordinate the local bus grid with its own express bus departures. Consequently, at the time of the contested decision, the only non-aid beneficiaries that had competed with Nettbuss during the period under review in the express bus market between Kristiansand and Oslo were Konkurrenten and Sporveien.⁵¹ Konkurrenten therefore belongs to a closed class of operators that was readily identifiable at the time of the contested decision on the basis of the time the concession were granted by the government. This class cannot be extended after the contested decision was adopted on 7 May 2015 because the distribution of aid to Nettbuss ceased on 31 December 2014. Consequently, Konkurrenten is individually concerned by the contested decision.
- (50) The applicant is in any event individually concerned by the contested decision because Konkurrenten has been substantially affected by the contested aid that the Norwegian authorities distributed to Nettbuss during the applicable 10-year period.
- (51) According to settled case law, whether an applicant has been substantially affected does not necessarily depend on factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question: "The grant of state aid can have an adverse effect on the competitive situation of an operator in other ways too, in particular by causing the loss of an opportunity to make a profit or a less favorable development than would have been the case without such aid".⁵² This will depend on the specific market situation, in particular how concentrated the market is where the applicant and the aid beneficiary competes, whether there was overcapacity in that market, the nature of the contested aid, and how important the market is to the applicant's business.⁵³
- (52) In this case, the market structure of the market in which Nettbuss and Konkurrenten have been competing is characterized by the presence of very few operators and a high market concentration: only two operators until 2006 and thereafter three operators. On the basis of the weekly departures published by the operators in Rutebok for Norge 2002-2016⁵⁴ Nettbuss has held an average market share of 59.5 percent, Konkurrenten 34.1 percent, and Sporveien 6.9 percent. In 2016, Nettbuss held 51.5 percent (134

⁵¹ A copy of the official bus routes and schedules for Nettbuss ("Sørlandsespressen"), Konkurrenten and Sporveien ("Lavprisekspressen") in the period 2002-2016 have been attached at **Annex A.35**.

⁵² See Case C-525/04 P *Spain v Commission*, EU:C:2007:298, para. 34-35. See also Case C-487/06 P *British Aggregates Association v Commission*, EU:C:2008:757, para. 53. See also Case T-58/10 *Phoenix-Reisen and DRV v Commission*, EU:T:2012:3, para. 50.

⁵³ See Case C-525/04 P *Spain v Commission*, EU:C:2007:298, para. 37-39. See also Case T-36/99 *Lenzing v Commission*, EU:T:2004:312, para. 81. See also Case T-57/11 *Castelnou v Commission*, EU:T:2014:1021, para. 31.

⁵⁴ See **Annex A.35**.

departures), Konkurrenten 36.2 percent (94 departures); and Sporveien 12.3 percent (32 departures).⁵⁵

- (53) Konkurrenten was the first operator to challenge the monopoly that Nettbuss until then had had since 1986. The applicant's first mover advantage was immediately impeded by Nettbuss' decision to make exorbitant increases in its number of weekly departures, resulting in a serious overcapacity in the market. As explained above in Section II, whereas Nettbuss in 2001 had sought to prevent Konkurrenten from obtaining a concession from the Ministry of Transport by invoking that Nettbuss had already increased its weekly departures by 214 percent (from 27 to 58) in the period 1996-1999, which had resulted in a 40 percent decline in the average number of passengers per departure, Nettbuss decided to rapidly increase its weekly departures to defend its monopoly: by an additional 10 percent (from 58 to 64) while Konkurrenten's application was pending; again the day after Konkurrenten received its concession from the ministry and by as much as 58 percent (from 64 to 101) in the first year that Konkurrenten operated the new route in competition with Nettbuss, and again by an additional 37 percent (from 101 to 138) over the next three years until mid-2006.
- (54) In order not to become completely marginalized on the market and deemed irrelevant by the consumers before having established its new brand, Konkurrenten was forced to offer a comparable schedule on its competing route. Overall, during the first four years that Nettbuss was exposed to competition, the total number of departures on the Oslo-Kristiansand route increased from 64 to 234, or by more than 366 percent.⁵⁶ As explained in para. 14 above, by contrast, according to data collected by the Ministry of Transport and presented in a white paper on the business of NSB AS: "the statistic for the combined Norwegian bus sector [shows] an annual average passenger growth of about 1.5 percent in the period 2005-2010".⁵⁷
- (55) The Oslo-Kristiansand route is the only market in which Konkurrenten operates and is therefore of ultimate importance to the company. The significant overcapacity in the market has resulted in extremely low profitability. In 2004-2014, Konkurrenten's average profit margin was a negative 1.04 percent.⁵⁸
- (56) This financial hardship was exacerbated by the fact that the county allowed Nettbuss to use local routes paid by the county as feeding busses to interconnect passengers travelling on its local grid with Nettbuss' own departures on the express grid, whereas Konkurrenten had to finance its own feeding busses to compete against Nettbuss.
- (57) The magnitude and duration of the contested aid has been instrumental to Nettbuss. The aid only for the years from 2009 to 2014 amounts to more than NOK 1.2 billion and has been the main source of income of Nettbuss during most of the period 2004-

⁵⁵ See **Annex A.46**.

⁵⁶ See **Annex A.35**

⁵⁷ An excerpt of the white paper, dated 26 April 2013, has been attached at **Annex A.40**.

⁵⁸ See the annual reports for 2004-2014 which have been attached at **Annex A.45**. Profit margin = operating result x 100/ revenue. In 2004 (page 2): -14.7; in 2005 (page 2): -5.1; in 2006 (page 2): -5.6; in 2007 (page 2): 0.4; in 2008 (page 1): -0.3; in 2009 (page 1): 5.2; in 2010 (page 1): 8.3; in 2011 (page 1): -1.8; in 2012 (page 1): 1.9; in 2013 (page 1): -0.8; in 2014 (page 1): 1.1. The reports have been submitted into evidence pursuant to Article 25(3) RoP.

2014. In 2004-2014, the combined net result in Nettbuss was NOK 64.9 million.⁵⁹ By contrast, according to the Norwegian authorities, Nettbuss received at least NOK 99.4 million in unlawful aid during that period.⁶⁰ Konkurrenten contends for its part that all aid that Nettbuss received from 2004 to 2014 must be reclassified from existing aid to new aid with the result that all overcompensation of its services must be deemed unlawful and recoverable aid, including a 37 percent increase from 2009 and onwards without any corresponding increase in Nettbuss' production level for the county from the year before.⁶¹

- (58) The applicant was therefore substantially affected by the contested aid. The applicant is therefore individually concerned by the contested decision.
- (59) Konkurrenten will in any event have standing pursuant to the fundamental right to effective judicial protection in EEA law and Article 6 ECHR because the applicant has no other venue to challenge the validity of the contested decision.⁶²
- (60) In contrast to the protection afforded to applicants in the Union pursuant to Article 267 TFEU, Article 34 SCA does not provide Konkurrenten with an indirect venue for a validity review of the contested decision, through national court. The first paragraph of Article 34 SCA provides only for advisory opinions which are not formally binding, unlike the preliminary rulings provided by the Court of Justice under the first paragraph of Article 267 TFEU. Furthermore, the second paragraph of Article 34 SCA does not establish a legal obligation for a court of last instance to make a preliminary reference to the EFTA Court, unlike the situation under the third paragraph of Article 267 TFEU for the national courts in EU Member States. Moreover, even if a request for an advisory opinion from the EFTA Court should be made on a voluntary basis by a national court under Article 34 SCA, the EFTA Court has not been empowered by the SCA to annul the contested decision in an advisory opinion.
- (61) Consequently, unlike the situation in Union law, the SCA does not provide applicants with "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions", which is the premise that the Court of Justice has relied on to find that the restrictive test for individual concern in case law does not infringe the fundamental right to effective judicial protection in Article 47 of the Charter of Fundamental Rights and Article 6 ECHR.⁶³
- (62) Therefore, if Konkurrenten were to be denied standing in this case, it would result in a complete denial of access to justice, in violation of the fundamental right to effective judicial protection and Article 6 ECHR.

⁵⁹ See the annual reports for 2004-2014 which have been attached at **Annex A.47**. In 2004 (page 2): 6.1 mill; in 2005 (page 2): 6.1 mill; in 2006 (page 2): 5.8 mill; in 2007 (page 2): -0.7 mill; in 2008 (page 1): 6.7 mill; in 2009 (page 1): 30.2 mill; in 2010 (page 1): 19.8 mill; in 2011 (page 1): 25.6 mill; in 2012 (page 1): -10.1 mill; in 2013 (page 1): -36.6 mill; in 2014 (page 1): 12 mill. The reports have been submitted into evidence pursuant to Article 25(3) RoP.

⁶⁰ See **Annex A.42**.

⁶¹ See **Annex A.2**, para. 12.

⁶² See Case E-15/10 *Posten Norge v ESA*, judgment of 18 April 2012, para. 86.

⁶³ See Case C-50/00 P *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, para. 38-40.

- (63) The applicant recalls that the three contracting parties to the SCA have acceded to the ECHR. Furthermore, all contracting parties to the EEA Agreement have sought to promote the protection of human rights through their Agreement, see the first recital to the preamble: "Convinced of the contribution that a European Economic Area will bring to the construction of a Europe based on peace, democracy and human rights".
- (64) Moreover, the differences between Article 34 SCA and Article 267 TFEU are rooted in constitutional and political needs by the three contracting parties to the SCA to retain wider sovereignty than if they had become EU Member States.⁶⁴ The legislative history does not support that the contracting parties to the SCA construed Article 34 SCA to differ from Article 267 TFEU with the intention that applicants should receive significantly less opportunity to challenge the validity of ESA's decisions in state aid cases in the EFTA pillar than EFTA based operators receive under Union law to challenge the validity of the Commission's decision in similar state aid cases, either directly before the Union courts or indirectly through the national courts pursuant to Article 267 TFEU. Nor would such a difference in access to justice serve the purpose of homogeneity under the EEA Agreement. The objective of having equal rules in the EEA Agreement presupposes equal access to justice, as confirmed by the third recital to the preamble to the SCA: "Recalling the objective of the Contracting Parties to the EEA Agreement, in full deference to the independence of the courts, to arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". There is no reason to assume that there is less need for legal scrutiny of ESA's decisions than of the Commission's decisions in state aid cases.
- (65) Thus, denying Konkurrenten standing would not only lead to an infringement of the fundamental right to effective judicial protection and Article 6 ECHR. It would also run counter to the interests of genuine reciprocity and homogeneity on which the EEA Agreement was based.
- (66) Consequently, Konkurrenten will in any event have standing to challenge the legality of the contested decision in this case.

4 PLEAS IN LAW

4.1 First plea: Infringement of Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA by classifying payments erroneously made by the County of Aust-Agder to Nettbuss outside of an existing aid scheme as existing aid

- (67) At a late stage in the investigation, by letters dated 8 July 2014, 15 October 2014, and 19 December 2014, respectively, the Norwegian authorities informed ESA that they had discovered that Nettbuss had received payments to which it was not entitled.⁶⁵
- (68) Nettbuss had obtained these payments by erroneously inflating the production reports that it had submitted to the County of Aust-Agder and on which the county relied to

⁶⁴ See Opinion 1/91, EU:C:1991:490, and Opinion 1/92, EU:C:1992:189.

⁶⁵ Copies of the letters have been attached at **Annex A.24**, **Annex A.26**, and **Annex A.27**, respectively.

calculate the compensation that Nettbuss was entitled to under their contract. In total, Nettbuss had erroneously claimed compensation for 1.7 million kilometers in the period 2004-2008.⁶⁶ In 2008, the parties agreed on a new contract for the period 2009-2014 that used the production that Nettbuss had reported in 2008 as a floor for an indexed calculation of the payments that Nettbuss would be entitled to in the future. Without the county's knowing, Nettbuss had inflated its production reports in that year by 330 538 kilometers. The Norwegian authorities informed ESA that: "Consequently, any previous errors in the production spreadsheet from 2008 will continue to have effects during the following years, until the contract expires 31 December 2014".⁶⁷

- (69) The Norwegian authorities informed ESA that Nettbuss had inflated its production reports with commercial activities that fell outside the scope of the contract with the county, including the initial leg of the express bus route from Kristiansand to Oslo, night busses, and certain other commercial routes. In addition, Nettbuss had inflated its reports with routes even though they had ceased to exist. Furthermore, Nettbuss had included transportation of school-children to and from swimming lessons which fell outside the remit of the county until 2013. At the same time, Nettbuss had invoiced and received payment from several municipalities for the same services. Moreover, Nettbuss had also included in its production reports transport of school-children 51 weeks per year although there was only 38 weeks in a school year and consequently no school buses operating outside of that period.⁶⁸
- (70) According to the media, in 2014 the County of Aust-Agder contacted and met with the National Authority for Investigation and Prosecution of Economic Crime (Økokrim) and the economic crimes unit of the Southern District Police to discuss the discoveries and whether to file a criminal complaint for serious fraud.
- (71) After the adoption of the contested decision, the Norwegian authorities informed ESA in a letter dated 7 July 2015 that it had filed a recovery claim against Nettbuss in the amount of NOK 99 453 890.⁶⁹ The letter made it clear to ESA that the claim had been calculated on the basis of paragraph 242 in the contested decision, which sets out the total deviations that the county had discovered in Nettbuss' production reports. ESA did not object to the calculation of the claim at that time.
- (72) When Nettbuss refused to pay the recovery claim, the Norwegian authorities wrote to ESA in a letter dated 6 October 2015 to ask for a clarification that they had correctly interpreted the contested decision.⁷⁰ In response, ESA then concluded, in a letter dated 26 October 2015, that the Norwegian authorities had failed to correctly interpret the contested decision.⁷¹

⁶⁶ See **Annex A.26**, page 8: "To sum up, the deviations between 2004-2009 amount to more than 1.7 million kilometres. As mentioned, the errors continue to have effect until the contract expires" [i.e. 31 December 2014].

⁶⁷ See **Annex A.26**, page 8.

⁶⁸ See in particular **Annex A.26**, page 2-8, and **Annex A.24**, page 2-6.

⁶⁹ A copy of the letter has been attached at **Annex A.42**.

⁷⁰ A copy of the letter has been attached at **Annex A.29**.

⁷¹ A copy of the letter has been attached at **Annex A.30**.

- (73) Specifically, ESA concluded that "the following overcompensatory payments shall be deducted from the recovery claim: i. Transportation of schoolchildren to and from swimming lessons and for a specific route (paragraph 244); ii. Production regarding school years and "duplication school years", as well as for school bus services (paragraph 245); and iii. Shortening of stretches without the County's approval (paragraph 246)".⁷²
- (74) Konkurrenten submits that the contested decision on that interpretation comes in clear conflict with Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA by classifying payments erroneously made outside of an existing aid scheme as existing aid.
- (75) As confirmed in the judgment in *Konkurrenten*, which concerns the same aid scheme, aid must have been granted on the basis of and in accordance with the provisions of an existing aid scheme in order to classify as existing aid covered by that scheme.⁷³
- (76) In this case, the Norwegian authorities have never claimed that any of the payments above could be regarded as existing aid granted on the basis of and in accordance with the provisions of an existing aid scheme. According to the Norwegian authorities, such an interpretation of the provisions governing the aid scheme in question has not even been discussed with ESA in the course of the investigation.⁷⁴
- (77) These payments concern rather costs which Nettbuss had never incurred and costs that were covered by other contractual parties than the county.
- (78) According to the Norwegian authorities:

"The overcompensation has never been paid under an existing aid scheme – the payments have been incorrect and they have been made without any contractual basis. Hereunder, the payments have been made due to reported kilometers which have not been produced and/or which have never been imposed as a service of general economic interest.

Based on established case law (in particular regarding public transport in Oslo) drawing the line between new and existing aid, the Norwegian authorities fail to see that there can be doubt as to the fact that all overcompensation stemming from errors in the spreadsheets submitted by Nettbuss is new aid.

The reasoning behind the Authority's conclusion regarding existing aid in point 246 does not fit for the deviations mention in point 244 and 245. The scheme was not *ill-designed to allow for compensation in excess of the losses actually occurred*. Further, the relevant deviations in point 244 and 245 were not *within the scope of the aid scheme*.

⁷² See **Annex A.30**, page 2.

⁷³ See Case E-14/10 *Konkurrenten v ESA*, judgment of 22 August 2011, para. 87, 72-76 and 57.

⁷⁴ See **Annex A.29**, page 6: "It should also be borne in mind that the County has never alleged that overcompensation due to the deviations could be regarded as existing aid. Neither has such an interpretation been discussed between the Norwegian authorities and the Authority. Finally it is underlined that the errors started to occur long after the entry into force of the EEA Agreement".

In the present case the overcompensation received by Nettbuss has not been obtained in accordance with the compensation mechanism under the contract as a part of the existing aid scheme (e.g. an agreed mechanism which allows for a much higher profit than what is normal in the market). It is quite the opposite: the overcompensation has been paid in contradiction to what follows from the contract and the aid scheme. As the Authority states in footnote 74 of the decision, *Nettbuss Sør AS admits that this production should not have been part of the spreadsheets*. Consequently: by including kilometer production which was not part of the public service remit (e.g. transport paid by another public body or including costs for 51 weeks a year instead of 38.4 weeks as agreed), the overcompensation has been paid outside the scope of the existing aid scheme and not in accordance with an ill-designed scheme allowing for overcompensation".⁷⁵

- (79) In sum, none of the payments above to Nettbuss concern aid measures covered by the contracts that the county awarded and there are no other entrustments acts to support that these payments have been made by the county on the basis of and in accordance with the provisions governing the existing aid scheme.⁷⁶
- (80) Konkurrenten has not been able to find any evidentiary support to the contrary in the correspondence between ESA and the Norwegian authorities, neither before nor after the formal investigation was opened. The aid scheme is funded by the state. It does not stand to reason that the state would have wanted to establish an aid scheme with the intent to finance erroneous payments that the counties should be misled by fraudulent behavior to pay out.
- (81) Clearly, if ESA were of the serious opinion that the aid scheme in question allowed for such payments, it would presumably have intervened against Norway to curtail that allegedly "ill-designed" scheme in accordance with Section V of Part II to Protocol 3 SCA. From what the applicant can ascertain, ESA has not taken any initiative to that effect, although the aid scheme has been, more or less, under continuous investigation by ESA since 2006 and the aid scheme also has national coverage.⁷⁷
- (82) Konkurrenten must therefore respectfully ask that the contested decision be annulled.
- 4.2 Second plea: Infringement of the duty to state reasons in Article 16 SCA by describing in vague and confusing terms how the contested decision classified the various aid that Nettbuss received as falling inside or outside of an existing aid scheme**
- (83) An essential part of the reasoning in the contested decision is set out in para 235-248. The subtitle to this section reads: "Payments outside the scheme made to Nettbuss Sør AS for the period 2004-2014".

⁷⁵ See **Annex A.29**, page 5 (original emphasis in the letter).

⁷⁶ See to that effect the letter from the Norwegian authorities to ESA, dated 12 November 2015, page 1, which has been attached at **Annex A.43**: "In light of case law from the EFTA Court, the County still disagrees that measures outside the confession contract, and with no entrustment act, should constitute existing aid".

⁷⁷ See Case E-14/10 *Konkurrenten v ESA*, judgment of 22 August 2011.

- (84) Para 238-241 then set out to describe aid which ESA does not consider to be part of the existing aid scheme. Para 243 states that what follows is an assessment of whether production deviations "in reference to well defined public service obligations" have been made within or outside the scope of the existing aid scheme.
- (85) Para 244-245 then appear to examine the classification of the payments that the county made to Nettbuss on the basis of its inflated production reports concerning school transport and swimming lesson transport, which represent a significant part of the inflated production reports.
- (86) However, no clear conclusion is drawn on whether these payments were classified as existing aid or new aid. The reasoning, even when read in context with the preceding and following parts, is vague and confusing, as evidenced also by the fundamental disagreement between the Norwegian authorities and ESA on the reading of this part of the contested decision.⁷⁸
- (87) Konkurrenten must therefore respectfully ask that the contested decision be annulled.

4.3 Third plea: Infringement of the duty to conduct a diligent and impartial investigation into whether the national provisions providing for an existing aid scheme were altered by the state in 1994 and has become a new aid scheme

- (88) The aid scheme for local bus transport is based on Section 22 of the Commercial Transport Act (CTA) of 2002 and Section 24a of the preceding Public Transport Act (PTA) of 1976, which remain under the supervision of the Ministry of Transport.
- (89) After the EEA Agreement had entered into force on 1 January 1994, the government embarked on a liberalization of the market for local bus transport in Norway. This led to an amendment of Section 24a PTA which took effect on 15 April 1994.⁷⁹ Whereas the aid scheme previously was based on direct granting of concessions, the counties were now allowed to use public tenders. The counties could also phase in the new award mechanism by gradually tendering out parts of their local markets rather than all at once.
- (90) Section 2.1 (para 12 to 32) in the contested decision examines the development of the aid scheme from its origin in 1976 until 2002, in particular several amendments that were made in the 1980'ies. However, there is no description of the amendments that were made in 1994. The examination stops in 1985 and continues only from 2002.
- (91) The liberalization of the local bus markets was, as in most such cases, controversial. In order to ensure the necessary political support and buy-ins from the industry, the aid scheme included specific advantages for the existing concession holders.
- (92) Previously, a concession holder had no right of redemption: it could not demand that the county buy its production assets (buses, garages, office, etc) if the business for the

⁷⁸ Compare **Annex A.29** and **Annex A.30**.

⁷⁹ A copy of the enabling act, with an English translation, and a separate regulation under the Public Transport Act, regulation no 26 of 11 March 1994 on the use of public tenders in the markets for local bus transport, have been attached at **Annex A.48**.

county did not work out as it had hoped. However, the amendment in 1994 created a new redemption right for the existing concession holders.⁸⁰

- (93) The new redemption right was extensive: a concession holder was guaranteed that the county would redeem all his production assets at full market value, even if the county should decide to only gradually open up its local market to competition. For example: a decision to put 35 percent of the local market up for public tender under the new amendment of Section 24a would trigger the right of redemption for all production assets that the existing concession holder had used in that county.⁸¹
- (94) As admitted by the government in its proposal for the amendment, the new redemption right meant that the counties would pay the concession holder "twice" because the existing concession holders had already been compensated for the capital expenditure on their production assets through the contractual payments that they had received from the counties before under the aid scheme.⁸²
- (95) Importantly, the amendment did not include any provision that excluded operators that elected to exercise their new redemption right, from reinvesting in new production assets and participating in future public tenders in the same county or other counties.
- (96) The government has conceded that the amendments of the aid scheme were motivated by an intent to safeguard the interest of the local transport operators.⁸³ None of the changes to the aid scheme were notified to ESA.
- (97) Under established case law, ESA is required to conduct a diligent and impartial investigation, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose.⁸⁴ When investigating aid possibly granted under an existing aid scheme, it is necessary to assess whether the aid scheme has been altered, because that would affect the classification of aid granted under that aid scheme. Classifications of aid "must be determined by reference to the provisions providing for it", which in this case was rooted in national law.⁸⁵

⁸⁰ A copy of the preparatory works to the amendment, with an English translation, has been attached at **Annex A.49**. See page 53: "nr 3: it is the ministry's assessment that a concession holder does not have a general right of redemption in the eventual transition to a system of public tenders, ref ch. 8. Normally, those who are engaged in business must accept amendments of the law that lead to the cancellation of previously exclusive rights".

⁸¹ See **Annex A.49**, page 38: "The right of redemption must result in a redemption of everything (with the abovementioned limitations) belonging to the business serving the local routes; if the county should e.g. put 35 percent of the company's routes up for public tender, then redemption cannot only be demanded for 35 percent of what has been used in the business serving the local routes."

⁸² See **Annex A.49**, page 38: "It may be objected against a potential right of redemption that the counties in the case must "pay twice", given that the companies have earlier received annual grants from the public".

⁸³ See **Annex A.49**, page 38: "With the transitional steps that the Ministry has proposed, with the option to phase in public tenders, the interests of the local transport companies will be reasonably well safeguarded".

⁸⁴ See Case E-9/12 *Iceland v ESA*, judgement of 22 July 2013, at para. 117. See Case C-367/95 P *Commission v Sytraval and Brink*, EU:C:1998:154, para. 62 See also Case T-103/14 *Frucona Košice v Commission*, EU:T:2016:152, para. 141.

⁸⁵ See Case E-14/10 *Konkurrenten v ESA*, judgment of 22 August 2011, para. 57.

- (98) However, ESA failed to investigate the changes that were made in 1994 to the national law governing the aid scheme. By contrast, the contested decision sets out in detail several amendments that were made to the aid scheme on a national level in 1980, 1982, and 1985, before the EEA Agreement. There is no reason why ESA should not also have investigated the changes above that were made *after* the EEA Agreement took effect, and the failure to do so in this case constitutes an infringement of ESA's duty to conduct a diligent and impartial investigation that must lead to an annulment of the contested decision.
- (99) In the event that ESA should produce evidence showing that it did in fact investigate the changes but without disclosing its findings in the contested decision, the decision would in any event infringe the duty to state reasons in Article 16 SCA and have to be annulled on that basis.
- (100) In the alternative, the applicant will also submit that the amendments above constitute substantial alterations that has affected the substance of the existing aid scheme for the reasons stated above, and that the contested decision therefore rests on a manifest error of assessment under Article 1(c) cf Article 1(f) of Part II to Protocol 3 SCA that must lead to an annulment.⁸⁶

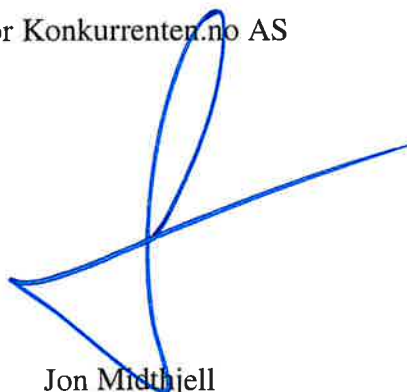
5. FORM OF ORDER SOUGHT

- (101) The applicant respectfully ask that the Court:

1. **Annul ESA decision no. 179/15/COL dated 7 May 2015; and**
2. **Order the defendant and any intervener to pay the costs.**

* * * * *

For Konkurrenter.no AS



Jon Midtjell
Oslo, 11 January 2017

⁸⁶ See Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 *Regione autonoma della Sardegna and others v Commission*, EU:T:2011:493, para. 176 ("where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme"), upheld in Joined Cases C-630/11 P to C-633/11 P *HGA and others v Commission*, EU:C:2013:387, para. 90-94. See also Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani v Commission*, EU:2008:T.537, para. 358.

6. SCHEDULE OF ANNEXES

Number	Description	No. pages	References
Annex A.1	A copy of ESA decision no. 179/15/COL on aid to public bus transport in the County of Aust-Agder, dated 7 May 2015.	45	Throughout
Annex A.2	A copy of a combined public procurement and state aid complaint from Konkurrenten against Norway (County of Aust-Agder), dated 23 March 2011.	228	Fn 11
Annex A.3	A copy of ESA's letter of formal notice to Norway for failure to comply with the fundamental principle of non-discrimination laid down in Article 4 and Article 48 of the EEA Agreement, dated 12 October 2011.	8	Fn 12
Annex A.4	A copy of ESA decision no. 23/12/COL on a reasoned opinion delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of the principle of non-discrimination laid down in Article 4 and Article 48 of the EEA Agreement, dated 27 June 2012.	16	Fn 13
Annex A.5	A copy of a letter from ESA to the Ministry of Government Administration, dated 10 November 2011.	3	Fn 14
Annex A.6	A copy of a letter from the Ministry of Government Administration to ESA, dated 9 December 2011.	156	Fn 15
Annex A.7	A copy of a letter from ESA to the Ministry of Government Administration, dated 12 March 2012.	3	Fn 16
Annex A.8	A copy of two letters from the Ministry of Government Administration to ESA, dated 10 and 11 May 2012.	54	Fn 18
Annex A.9	A copy of a letter from ESA to the Ministry of Government Administration, dated 17 October 2012.	2	Fn 17
Annex A.10	A copy of a letter from the Ministry of Government Administration to ESA, dated 15 November 2012.	24	Fn 19
Annex A.11	A copy of an email from ESA to the County of Aust-Agder, dated 15 January 2013.	1	Fn 20
Annex A.12	A copy of an email from ESA to the County of Aust-Agder, dated 18 January 2013.	1	Fn 21

Annex A.13	A copy of an email from the County of Aust-Agder to the Ministry of Transport, dated 18 January 2013.	1	Fn 21
Annex A.14	A copy of an email from the County of Aust-Agder to ESA, dated 18 January 2013.	1	Fn 22
Annex A.15	A copy of ESA decision no. 60/13/COL on opening the formal investigation into potential aid to public bus transport providers in Aust-Agder County, dated 6 February 2013.	29	Fn 23
Annex A.16	A copy of a letter from the Ministry of Government Administration to ESA, dated 5 April 2013.	44	Fn 24
Annex A.17	A copy of a letter from Konkurrenten to ESA, dated 23 May 2013.	3	Fn 25
Annex A.18	A copy of a letter from ESA to the Ministry of Government Administration, dated 21 June 2013.	11	Fn 26
Annex A.19	A copy of a letter from the Ministry of Government Administration to ESA, dated 12 August 2013.	5	Fn 27
Annex A.20	A copy of a letter from ESA to the Ministry of Government Administration, dated 17 December 2013.	2	Fn 28
Annex A.21	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 31 January 2014.	10	Fn 29
Annex A.22	A copy of an email from the Ministry of Trade, Industry and Fisheries to ESA, dated 24 February 2014.	55	Fn 30
Annex A.23	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 11 April 2014.	4	Fn 31
Annex A.24	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 8 July 2014.	42	Fn 32
Annex A.25	A copy of a letter from ESA to the Ministry of Trade, Industry and Fisheries, dated 14 August 2014.	3	Fn 33
Annex A.26	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 15 October 2014.	17	Fn 34
Annex A.27	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 22 December 2014.	18	Fn 35
Annex A.28	A copy of a complaint from Konkurrenten against Norway on the failure to recover unlawful state aid from Nettbuss Sør in accordance with ESA decision no. 179/15/COL, dated 25 September 2015.	3	Fn 37

Annex A.29	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 6 October 2015.	14	Fn 38,70, 74, 75, 78
Annex A.30	A copy of a letter from ESA to the Ministry of Trade, Industry and Fisheries, dated 26 October 2015.	3	Fn 39, 71, 72, 78
Annex A.31	A copy of an email from ESA to the Ministry of Government Administration, dated 25 June 2013.	1	Fn 72
Annex A.32	A copy of an application for damages from Konkurrenten against Nettbuss before the Oslo Conciliation Board (Oslo forliksråd), dated 6 May 2016.	15	Fn 45
Annex A.33	A copy of the Commercial Transport Act of 21 June 2002 no. 45 with an English translation.	35	Fn 49
Annex A.34	A copy of the Commercial Transport Regulation of 26 March 2003 no. 401.	14	Fn 50
Annex A.35	Extracts of route schedules Oslo-Kristiansand from "Rutebok for Norge" from 2002-2016.	55	Fn 2, 7, 8, 54, 56
Annex A.36	A copy of a letter from Nettbuss Sør AS to the County of Aust-Agder, dated 19 February 2001.	3	Fn 4
Annex A.37	A copy of a recommendation from the County of Aust-Agder to the Ministry of Transport, dated 19 March 2001.	5	Fn 3
Annex A.38	A copy of a decision by the Ministry of Transport, dated 7 March 2002.	3	Fn 5
Annex A.39	A copy of a letter from Nettbuss Sør AS to the County of Aust-Agder, dated 8 March 2002.	2	Fn 6
Annex A.40	A copy of an excerpt from a White paper from the Ministry of Transport, dated 26 April 2013.	2	Fn 9, 57
Annex A.41	A copy of a letter from the Competition Authority to the County of Aust-Agder, dated 19 February 2004.	4	Fn 5
Annex A.42	A copy of a letter from the Ministry of Trade, Industry and Fisheries to ESA, dated 7 July 2015.	13	Fn 36, 69
Annex A.43	A copy of a letter from the County of Aust-Agder to ESA, dated 12 November 2015	3	Fn 40, 76
Annex A.44	A copy of a settlement agreement between the County of Aust Agder and Nettbuss AS, dated 8 September 2016	1	Fn 41
Annex A.45	A copy of the annual reports of Konkurrenten.no AS from 2004-2014	179	Fn 58
Annex A.46	A copy of a calculation of market shares based on weekly departures on Oslo-Kristiansand for 2001-2016 as published by the operators in Rutebok for Norge.	1	Fn 55

Annex A.47	A copy of the annual reports of Nettbuss Sør AS from 2004-2014	277	Fn 59
Annex A.48	A copy of enabling act no 197 of 11 March 1994 giving effect to an amendment of the Public Transport Act of 1976 and regulation no. 26 of 11 March 1994	13	Fn 79
Annex A.49	A copy of the copy of the preparatory works to the amendment of the Public Transport Act of 1976 that became effective on 11 March 1994, with a translation into English of the relevant excerpts.	58	Fn 80, 81, 82, 83