EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
Belgium

Our ref.: 314034-018\3235819
E-mail: amie.eliassen@kluge.no
Lawyer responsible: Bjørnar Alterskjær

Oslo, 30 August 2019

NORWAY'S COMMENTS TO DECISION NO 032/19/COL OPENING A FORMAL INVESTIGATION REGARDING A NUMBER OF MEASURES RELATED TO TRONDHEIM SPEKTRUM AS

1 INTRODUCTION

Reference is made to the EFTA Surveillance Authority's decision No 032/19/COL opening a formal investigation procedure ("the opening decision") regarding a number of measures related to Trondheim Spektrum AS ("Spektrum"), and the meetings of 11 June and 15 July 2019 between the Authority and the Norwegian authorities. Reference is also made to the Authority's confirmation dated 20 June 2019 that the deadline for the Norwegian authorities to comment on the opening decision is extended to 30 August 2019. Finally, reference is made to the comments by a third party on the opening decision, forwarded to the Norwegian authorities on 27 June 2019.

In the present comments, the Norwegian authorities focus on those aspects of the Authority's decision that appear to be most relevant for the conclusion of the Authority's investigation.

2 THE MEASURES SUBJECT TO THE FORMAL INVESTIGATION PROCEDURE

In the opening decision, the Authority assessed nine measures. For four of those measures – a loan, a guarantee, a leasehold agreement and grants from the gaming fund – the Authority concluded that those would be existing aid and chose not to investigate further if these measures entailed state aid. Furthermore, the Authority narrowed its investigation regarding the lease agreements to those dating from 2007 or later, due to the limitation period.

Accordingly, the Norwegian authorities will exclusively comment on the following measures, in regard of which the Authority has opened a formal investigation procedure:

- Measure 4: Lease agreements from 2007
- Measure 5: Lease agreement of 2019
- Measure 6: Capital increase
- Measure 7: "Financing of infrastructure costs"
- Measure 9: "Implicit guarantee"

3 NONE OF THE MEASURES COVERED BY THE AUTHORITY'S OPENING DECISION ENTAIL (UNLAWFUL) STATE AID

3.1 Measures 4 and 5: The lease agreements from 2007

As a preliminary point, the Norwegian authorities consider that most considerations regarding the notion of state aid apply (*mutatis mutandis*) to both measures 4 and 5 alike. Consequently, the Norwegian authorities' comments in the following are meant to apply to both measures, unless specifically stated otherwise.

3.1.1 The Authority's preliminary view

Regarding measures 4 and 5, the Authority took the preliminary view that they may have granted Spektrum an advantage, that advantage (presumably) being the potential difference between a market price and the lease the municipality of Trondheim ("the municipality") pays Spektrum.

The Authority also states, in paragraph 127 of its decision, that the Norwegian authorities had argued that the lease agreements were *market conform*, but not that the municipality had acted in accordance with the *market investor* principle.

In terms of substance, the Authority's doubts appear to stem from the following reasons:

- The Authority doubts whether benchmarking can be an appropriate method to establish a market price in this sector, cf. NoA paragraph 98.
- In any event, the Authority appears to doubt whether the benchmarks provided are sufficiently comparable.
- Furthermore, the Authority considers the following elements as indications against the market-conformity of the lease agreement: (i) the taking into account Spektrum's cost structure (paragraph 147), (ii) unilateral *reductions* in the rent and (iii) the absence of a compensation mechanism when Spektrum "re-claims" hours (paragraph 148).

Finally, the Authority asked for some clarifications regarding the BDO report in the meeting with the Norwegian authorities on 11 June 2019.

Before commenting on the Authority's assessment and providing some additional information in support of the Norwegian authorities' view, the Norwegian authorities would like to make a few factual clarifications of importance to the assessment.

3.1.2 Factual clarifications

Firstly, and regarding the Authority's request to submit the lease agreement in force for 2007 (cf. paragraph 119), the Norwegian authorities are unable to provide said agreement. It would appear that no written agreement was concluded. As rent was paid in accordance with the lease agreement for the preceding period, this would indicate that the agreement was prolonged tacitly, in accordance with Norwegian contract law. In any event, the information provided by the Norwegian authorities indicates how much rent the municipality paid for a specific amount of capacity.

Second, as regards the unilateral reductions in the rent the Authority has referred to, those have occurred prior to the investigated period 2007-2019.

Third, as for the absence of a compensation mechanism for reclaimed hours, the Norwegian authorities are under the impression that the previously submitted information was not sufficiently clear or has been misunderstood. The gist of this "reclaim-mechanism" and the pricing thereof is the following:

The municipality pays lease for a specific period (1 January – 30 April, and 1 September – 31 December), and a specific number of hours (19.848 hours, cf. point 2.1 of the (new) lease agreement). The "lease period" covers more hours than the municipality pays for. Hence, during that period, Spektrum can also make use of the infrastructure during a specific number of hours (3000 under the new lease agreement). At no point does the municipality pay for the hours that Spektrum can "claim back", i.e. use during the lease period. Therefore, there is no need for a compensation mechanism. In other words, the fact that Spektrum can also make use of the infrastructure for a certain number of hours ("can reclaim") is priced in the agreements. Conversely, if Spektrum wants to use more than 3000 hours in the lease period, this is subject to the municipality's consent, and Spektrum has to pay for those additional hours.

The key point regarding this issue is however that the municipality never pays for the hours that Spektrum can use pursuant to the lease agreement during the lease period.

As for how it is decided which hours Spektrum can "claim back" during the period of the year when Spektrum is rented by the municipality, the Norwegian authorities refer to points 2.3, 3.2 and 4.1-4.4 of the (new) lease agreement, enclosed as annex 1 to the notification. These provisions lay down the principles for the use of the infrastructure by Spektrum during the municipality's lease period. Which hours Spektrum can use itself is decided in an annual meeting of the sports council. Furthermore, longer periods of use by Spektrum during the lease period are subject to the municipality's agreement, see point 2.3 of the (new) lease agreement.

Finally, the Norwegian authorities provide the following clarifications sought by the Authority concerning the BDO report:

- Regarding the Authority's question as to how depreciation costs are allocated between the various activities in Spektrum, and specifically the cost centres of the BDO report, the Norwegian authorities confirm that the depreciation costs are generally speaking (i.e. unless they can be attributed specifically to a specific activity) considered as common cost, meaning that they are allocated to the different activities in accordance with the proportion of overall capacity used.

- As for costs linked to championships for handball, they are allocated in general to the municipal lease agreement. The reason for this is that the municipality has decided to put some of the time it purchases from Spektrum at the disposal of the handball federation, which arranges these events. No additional income for Spektrum results from this arrangement between the municipality and the handball federation.[1]

- Concerning the estimated income for Spektrum going forward, it will be necessary for Spektrum to generate a significant amount of income through commercial activities. Under the new lease agreement, the municipality will dispose over 61,7% of Spektrum's total capacity. As indicated in the notification, page 4, Spektrum will over time have to generate more than half of its income from the remaining 38,3 % of capacity in order to break even.[2]

[1] However, Spektrum may sell hours to external third parties for access to other areas of the stadium during the handball championships, for example conference rooms.
[2] See the notification of the new lease agreement.

3.1.3 Assessment and additional factual information

3.1.3.1 The lease agreements are to be considered as being market-conform (in the absence of evidence to the contrary)

Before addressing the substance of the Authority's concern, the Norwegian authorities recall that the burden of proof for a conclusion in a final decision that the lease agreements are not market conform rests with the Authority[3].

This also entails that it is in principle for the Authority to request the submission of all relevant information required to conclude. In *Frucona*[4], for example, the EU Court of Justice clarified that *"where it appears that the private creditor test might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied"*[5].

To date, the Authority has not clearly indicated what type of information the Norwegian authorities could potentially submit in order to comply with the test, or at least facilitate the Authority's assessment. It will not suffice, in the Norwegian authorities' view, to conclude on the *presence* of an advantage solely based on the potential non-applicability of the benchmark methodology in this sector, and on the absence of lease agreements of similar duration for quasi-identical infrastructure. The MEO test would be meaningless if it was – from the outset and in abstract – excluded that it could be met for a measure such as a lease agreement entered into by a public authority in a specific sector.

Furthermore, the Norwegian authorities consider that in order to determine whether a lease agreement confers an advantage on the lessor (here: Spektrum), the market *investor* principle is not applicable. The lessee (here: the municipality) does not invest, it purchases hall hours. Therefore, the broader market economy *operator* principle applies, meaning that the relevant test for the presence of a potential advantage is whether the rent the municipality pays is market conform, i.e. in line with market prices. In that regard, it is also useful to recall that *"only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention"*[6].

As for public entities commercial relations with (multifunctional infrastructure), the Commission's decision concerning the Ahoy sports complex[7] illustrates the forgoing. The Commission stated the following:

> *"[...], the Commission cannot exclude the possibility that in its decision to invest in the project the municipality did not behave as a profit-maximising private investor. The conditions imposed on the operator regarding the multifunctionality of the complex and the types of events that are to take place*

---

[3] See for example C-290/07 P *Commission v Scott*, paragraph 90 : "[...] *the Commission is required, in the interests of sound administration of the fundamental rules of the EC Treaty relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose", and* C-559/12 P *France v Commission*, paragraph 62 and 63: *"the General Court in any event was right to find, at paragraph 119 of the judgment under appeal, that the Commission 'cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage'.*
Such an assessment is consistent with the case-law of the Court relating to the principles on the administration of proof in the sector of State aid that the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose."

4 C-300/16 P.

[5] C-300/16 P *Frucona*, paragraph 24.

[6] NoA, paragraph 67.

[7] Commission decision in case C 4/08.

there in effect reduce the value of the investment. However, the Commission's assessment has demonstrated that the operator did not receive any undue advantage from its contractual relationship with the municipality, taking into account the restrictions imposed in the contracts. As explained above, the level of the rent and the price of the shares in Ahoy Rotterdam NV were in line with market conditions."[8]

In short, the municipality's motivations, the background for concluding the lease agreement, and any kind of (external) factors influencing the negotiations leading to the conclusion of the lease agreement are not relevant to determine if the rent is in line with the MEO principle. In order to conclude that a lease agreement entails an advantage pursuant to Article 61 (1) of the EEA Agreement, the Authority would have to *demonstrate* that the rent paid by the municipality is higher than the market price.

In the Norwegian authorities' view, the factual information available is not capable of supporting such a conclusion.

Conversely, in the Norwegian authorities' view, the Authority could conclude that the lease agreements are free of aid. In order to assist the Authority in reaching that conclusion, the Norwegian authorities have in essence provided the following so far:

(i) External benchmarks, i.e. hourly rates for the rent or lease of hall time in comparable multifunctional infrastructures.
(ii) "Internal" benchmarks i.e. documentation showing that Spektrum's other activities create approximately the same level of income while consuming less capacity.
(iii) Documentation that Spektrum does not sell its capacity to third-parties at artificially low prices, thus indicating that its "commercial" activities are not cross-subsidised.

The Authority has expressed doubts that external benchmarks are an appropriate means to assess the presence of an advantage, given the high degree of public intervention in this sector. The Norwegian authorities would point out in this regard that the Commission accepted a single (external) benchmark to exclude that a leasehold agreement would entail an advantage:

"Concerning the site leasehold, Sweden has provided evidence of comparable rent levels for other sports facilities in Uppsala. Therefore, it cannot be demonstrated that the terms of the lease would contain additional aid to the Property Company"[9]. [emphasis added]

Aside from the fact that the Commission here accepted the benchmark methodology in this sector, the case also illustrates that it was for the Commission to *demonstrate* that a measure was not in line with market conditions. Unable to demonstrate that this was the case, the Commission had to conclude that it was free of aid.

As for the potential insufficient "degree of comparability" (cf. paragraph 142 of the opening decision), resulting from the fact that the external benchmarks relate to shorter rental periods and different infrastructure, the Norwegian authorities consider that the Authority should take account of the following elements:

Firstly, most multifunctional infrastructures in Norway are directly owned by public entities. As a result, the Norwegian authorities could not identify a municipal lease agreement of similar nature and duration. Furthermore, such infrastructures are evidently somewhat different in terms of size, use, location, etc. If an infrastructure such as Spektrum existed in Trondheim, it would not be necessary to expand and renovate the facility. The foregoing should, in the Norwegian authorities' view, not mean that those benchmarks cannot be relied upon. Rather, they will naturally result in a broader range of prices and rent levels, reflecting the varying nature of these infrastructures and the lease/rent agreements. For benchmarks, this is not unusual, as also highlighted in the NoA, paragraph 100:

---

[8] Commission decision in case C 4/08, paragraph 62.
[9] (Final) Commission decision in SA.33618. See in particular paragraph 37 and footnote 18.

"Benchmarking often does not establish one precise reference value but rather establishes a range of possible values by assessing a set of comparable transactions. Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency such as the average or the median of the set of comparable transactions." [emphasis added]

This approach would also be consistent with ESA's case practice, as illustrated for example by decision 305/09/COL, concerning a power sales agreement entered into by Notodden municipality and Becromal Norway.

In that case, the Authority could not identify a fully comparable agreement that would enable it to establish a clear market price against which the alleged aid could be measured. The Authority concluded:

"In order to establish that the price in the contract conferred an advantage on Becromal within the meaning of the state aid rules, the Authority must find that price deviates sufficiently from the established market price to justify such a finding. As described above, the exact market price for the contract at the time of conclusion cannot be established. However, the general price picture during the relevant period [...] give a good indication of the market price range. [...] In light of the general price tendencies during the relevant period, as described above, and in particular the seemingly most comparable prices, the Authority considers that the contract price does not seem to differ sufficiently from the likely market price for the Authority to conclude that the contract gave Becromal an economic advantage."[10] [emphasis added]

ESA's approach in the *Becromal* case was in particular based on two judgements of the EU's General Court, case *Territorio Histórico de Álava - Diputación Foral de Álava*[11] and *Valmont Nederland BV*[12]. In both cases, the General Court concluded that there has to be a sufficient deviation from market prices for the Commission to conclude on the presence of an advantage.

As regards the present case, it would thus appear that as long as the hourly rate under the lease agreements falls broadly within the ranges indicated by the submitted benchmarks, the Norwegian authorities consider that it can at least not be *demonstrated* that the rent the municipality pays is higher than the market price.

Second, as regards the issue of shorter rental periods that in the Authority's preliminary view may bar the comparability of the provided benchmarks, and as regards the internal benchmarks that have been provided, the Norwegian authorities consider that a more holistic assessment is in order. If commercial users of Spektrum pay a similar or higher hourly rate than the municipality, and cumulatively the business from these users is similarly or even more profitable for Spektrum than the municipal lease agreement, this

---

[10] 305/09/COL, second paragraph on page 11.

[11] T-127/99, T-129/99 and T-148/99, see in particular paragraph 85: *"First, the Commission had to examine whether the sale price paid by Demesa was a market price. It therefore should have compared the sale price actually paid by Demesa - not the price determined by Price Waterhouse - with the prices given in the various reports of experts which were available to it during the administrative procedure in order to assess whether the price paid by Demesa deviated so far from the prices given in those reports as to provide grounds for concluding that there had been State aid"*.

[12] T-274/01, see in particular paragraph 45: *"When applied to the sale of land to an undertaking by a public authority, the consequence of that principle is that it must be determined whether, in particular, the sale price could not have been obtained by the purchaser under normal market conditions (see, to that effect, Joined Cases T-127/99, T-129/99 and T-148/99 Diputación Foral de Álava and Others v Commission [2002] ECR II-1275, paragraph 73, a paragraph which was not subject to appeal). Where the Commission carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit (see, to that effect, Diputación Foral de Álava and Others, cited above, paragraph 85, a paragraph which was not subject to appeal). That method makes it possible to take into account the uncertainty of such a determination, which is by nature retrospective, of such market prices"*.

would appear to be a very strong indication for the market-conformity of the lease agreement. If one were to rent out two identical rooms, one to a long-term tenant, one to various short-term tenants, and overall, taking account of costs associated with both activities, the renting of each room yields a comparable result, it can in the Norwegian authorities' view not be assumed that the long-term tenant has paid a price below market levels. In any event, it would entail that it cannot be *demonstrated* that an advantage has been granted. In short, rentals for shorter periods of time may well be used as a benchmark to assess the market-conformity of longer-term arrangements, provided that the differences are reflected in the comparison, and/or the *aggregated* income from different short-term rentals is taken into account.

As regards the "*other indications that the lease agreement has not been entered into on market terms*" (cf. paragraph 145 et seq of the opening decision), the Norwegian authorities refer to the factual clarifications provide above. Furthermore, the Norwegian authorities consider that none of these elements, to the extent they are relevant at all, are advantageous for Spektrum:

- As explained above, the municipality does not pay for hours Spektrum can re-claim. There is nothing to suggest that a market economy operator would not include similar terms in a lease agreement. Furthermore, there is nothing to suggest that Spektrum would be able to use the infrastructure during particularly valuable times, as the municipality can effectively veto longer periods of use, and the sports council is involved in the planning of Spektrum's use during the lease period (cf. in this regard in particular points 3.2 and 4.1 of the (new) lease agreement, enclosed as annex 1 to the notification).

- Unilateral changes *reducing* the rent (which occurred prior the investigated period) can in the Norwegian authorities view not entail that the municipality has not acted in line with the MEO principle, in that it concluded an agreement that was too advantageous for Spektrum to be market conform. It may be argued that *Spektrum* has accepted terms a private lessor would not have accepted. However, Spektrum's behaviour, including if Spektrum operated in line with the MEO principle, is irrelevant to the assessment of whether the municipality has granted it aid.

- Similar considerations apply with regard to the fact that Spektrum's cost structure was a factor in determining the level of rent. Allowing the lessor to just about break even could arguably rather be seen as an indication that the rent is set below the market price. A private lessor would most likely not have accepted a rent level that wouldn't enable it to make a reasonable profit. Indeed, as also illustrated by a third-party report enclosed to as Annex 1, a market operator contemplating the construction of a new facility would have required a much higher rate from the municipality than Spektrum does and has done.

In order to support their previous submission that the prices Spektrum charges to third-parties are also in line with market practices, and bear no sign of potential cross-subsidisation, the Norwegian authorities refer to the following results of a market investigation by Spektrum, the purpose of which was to see if and how much room for manoeuvre there is to charge higher prices to third-party users.

The following table gives an overview of the results for broadly comparable arenas. It refers to the average price of renting one of the venues for one larger arrangement.

Venue	Size in m^2	Max. no visitors	Rent	Price per m^2
Trondheim Spektrum	4800	12 000	190 000	40
Oslo Spektrum	3 400	9 700	200 000	59
DNB Arena Stavanger	2 000	5 500	350 000	*175**
Norges Varemesse	4 800		120 000	25

*Note that the price for the DNB Arena also includes time to prepare the venue, security services, cleaning etc, which is presumably why the price is much higher than the price observed for the other venues.

It follows from the above table that these venues and their pricing policies differ considerably. Nonetheless, Spektrum's pricing appears to be within the range of rent levels observed in the market, and by no means artificially cheap, though perhaps on the lower end of the scale, which indicates that it may be possible to charge higher prices to third-parties going forward.

Taking all elements submitted so far together, the situations can be summarised as follows:

1. Spektrum overall breaks more or less even i.e. its total revenues incl. from the lease agreements cover its costs over time.
2. Its pricing vis-à-vis commercial third parties is line with that observed in the market, and on individual an aggregated level at least similar, respectively higher than vis-à-vis the municipality.
3. Approximately half of its income is derived from those commercial activities, the remainder from the municipal lease agreement.
4. Spektrum uses less than half of its capacity for commercial activities.

If one accepts that the pricing vis-à-vis third parties is market conform (and there is no evidence to suggest so – why would third parties pay more?), then generating proportionally less income on more capacity under the lease agreement could necessarily not entail that the lease agreement with the municipality is based on a rent *above* market price.

This finding is further corroborated by the fact that the lease the municipality pays is also in line with comparable market practices as regards the renting of sports facilities to third parties, and the municipalities own purchases of hall capacity in other venues.

In this context, the Norwegian authorities refer to ESA's letter dated 27 June 2019 containing comments from third parties on the opening decision. Those comments appear to allege that the municipality pays too high a price for the lease of Spektrum, because it had paid less per hour for the rental of Kolstad arena in 2018/2019.

Kolstad arena is part of a school building, and fully owned by the county of Trøndelag. The reason that the municipality purchased more hours there in 2018/19 was that parts of Spektrum were not accessible due to the ongoing construction works. That reduced the amount of lease the municipality paid to Spektrum and made it necessary (and financially possible) to find interim solutions to provide a sufficient amount of hall capacity to the MVSCs. As of autumn, 2019, when the construction works in Spektrum will be completed, there is neither a need, nor the financial possibility for the municipality to continue the arrangement with Kolstad arena.

The Norwegian authorities do not consider that the interim arrangement with Kolstad arena is comparable to the lease agreement. The county, as owner of the arena, was ready to offer some hall capacity below market prices, while the expansion of Spektrum takes place. This arrangement was not meant to be, and was not, market-conform.

In the Norwegian authorities' view, it cannot be considered as an indication that the municipality's lease agreement with Spektrum is not line with the MEO.

Overall, the Norwegian authorities consider that they have demonstrated that the lease agreements do not confer an advantage on Spektrum. In any event, in their view, the Authority cannot, based on the available information, demonstrate the contrary. The legal test for concluding that the lease agreements entail state aid pursuant to Article 61(1) of the EEA Agreement is therefore not met.

3.1.3.2 No aid has been granted to date under the notified lease agreement

In paragraph 206 of the opening decision, the Authority invited the Norwegian authorities to submit further information on whether its preliminary conclusion that they have, by notifying the new lease agreement, which will enter into force on 1 December 2019, but was concluded in October 2017, respected the standstill obligation. In that regard, the Authority's preliminary conclusion takes account of the fact that

the lease agreement explicitly enables adaptations to bring it in line with market conditions should the Authority so require.

The Norwegian authorities agree, in line with previous submissions, with the Authority, that no new aid has been granted, or will be granted, prior to the entry into force of the agreement on 1 December 2019. That being said, the Norwegian authorities are uncertain which additional information they could possibly submit.

However, it may be useful to recall that the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, which contains the standstill obligation:

> *"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. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."* [emphasis added]

In light of the background of the present case as briefly described in the following, the Norwegian authorities maintain that they have respected the stand-still obligation, and in fact have a chosen a meaningful and pragmatic means to do so, which was intended to enable both the compliance with said obligation as well as avoiding an unnecessary notification.

As indicated in previous submissions, the suspensory clause of the lease agreement referred to above was inserted at a time when the Authority had already begun to assess the complaint. While the municipality was and remains of the view that the lease agreements are market-conform, it wanted to cater, through this clause, for the event that the Authority would reach the opposite conclusion for the existing (and past) lease agreements, and in that case, be able to notify, *in sufficient time* (at that time, in October 2017, it seemed likely that this question would be resolved long before December 2019). It would have been unusual, and arguably counter-productive, to subject the agreement explicitly to ESA's approval when it was still possible that the Authority would come to share the municipality's assessment that a notification of the lease agreement was unnecessary.

When it became apparent in autumn 2018, and contrary to previous indications that a decision in this case would be taken by the Authority at the latest during that time, that the Authority was not able to reach a conclusion, the Norwegian authorities proceeded to notify the agreement, in full respect of the stand-still obligation, and in *sufficient* time, more than one year before the intended entry into force of the agreement. At no time did the Norwegian authorities contemplate not to notify the lease agreement in circumstances where it would still be plausible that ESA would come to the view that the agreement needed to be notified. Accordingly, the Norwegian authorities have respected the stand-still obligation.

3.2 Measure 6: Capital increase

3.2.1.1 The Authority's preliminary view

In paragraphs 159-160, the Authority (preliminarily) concludes that the capital increase constitutes an advantage corresponding to the full amount of the capital increase, because Spektrum could not have obtained the *financing* on the market.

Furthermore, the Authority expressed doubts as to the compliance of the measure with Article 6 (2) of the GBER. If the requirements of that provision were not met, the Authority would consider the aid as unlawful (cf. paragraph 207 of the opening decision).

3.2.2 Factual background and clarifications

As explained in the letter from the Norwegian authorities dated 21 September, works on Spektrum's renovation have indeed begun prior Spektrum's request for a capital increase. However, as mentioned, those works got underway before detailed plans for the execution of the project were finalised. The reason

for this apparent haste in launching the construction works was that it needed to be ascertained that the project would be finalised in time for Spektrum to host the handball European championships for women and men in 2020.

According to these provisional plans, it was estimated that the project's cost would amount to approximately NOK 536 million. Based on this cost estimate, and the expected income that Spektrum generates, the financing of the project was assured. However, it became evident in the course of 2018, including due to a modification of the project, that it will entail costs of approximately NOK 591 million[13].

As indicated, these additional costs of NOK 55 million can be attributed as follows to the following broad categories:

- **New costs**: Modifications to the project amounting to NOK 40.5 million of additional costs
- **Unexpected costs**: Budget overruns of NOK 14.5

Given that Spektrum was already highly leveraged, fresh capital rather than additional loans were preferred in order to cover these additional expenses. Thus, it is correct to say that it might have been difficult to obtain financing (in the sense of an additional loan) on the market. In light of this, Spektrum also explored other possibilities to cover those costs. As many companies in such a situation would do, Spektrum looked to its owners to attain the necessary financial strengthening. Accordingly, Spektrum's board requested additional capital from its owners on 6 July 2018.

The municipality was at that time the majority owner of Spektrum (ca. 78 %). Spektrum's other owners did not indicate an intention to participate in the capital increase[14]. The municipality was accordingly faced with a choice: Provide the additional funds, and see to the completion of the project, or accept that Spektrum would not be able to finalise the project in accordance with the modified, final plans that had been established after the works on the original project had been initiated.

A number of considerations made the capital injection advantageous for Spektrum's majority owner, the municipality.

Firstly, the modifications that the main part of the capital injection financed, significantly increase the commercial potential and value of Spektrum. 3200 additional seats will enable Spektrum to generate higher revenue from large arrangements, and elevators with bigger capacity, as well as more storage in the arena, will enable Spektrum to become a more attractive venue and make Spektrum able to host large, commercially significant events. In the following we will explain in more detail why these three investments, in particular, contain important potential for future profits for Spektrum:

- The extension of the tribune with 3200 seats is likely to generate significant income:
    - The extension of the hall with 3200 seats will make it possible for Spektrum to host larger events, which will make the venue more attractive for event managers. Spektrum assumes it will be able to arrange 4 to 6 such large events each calendar year. In addition to the rent, the large events generate increased income in the form of VIP-events, catering and cloakroom income. As such, the extension was likely to lead to a (significant) increase in income for Spektrum.
    - Spektrum receives a large part of its income not only from rent, but also from box-office takings. The extra seating of 3200 was therefore likely to generate an increase in box-office takings, particularly as the extension made it possible for Spektrum to host attractive events such as Disney on Ice.

[13] For the sake of completeness, the Authority should take note of the fact that Spektrum at this point estimated the total costs to be NOK 595.4 million. In its decision concerning the capital increase Spektrum applied for, the municipality based itself on the amount of NOK 591 million, thus did not "accept" in full the estimation of Spektrum.

[14] With the exception of the tennis club, who owns two shares. The tennis club eventually did not participate in the capital increase.

- The alternative to an extension was to install temporary seating for handball European Championship and other large events. The installation and dismounting of temporary seating are estimated to take approximately 11 days, during which Spektrum would have had to close the hall for all sports activities. The use of temporary seating would thus have resulted in a decrease of income for Spektrum.

- Increased elevator capacity and storage will result in lower costs and higher efficiency:
  - The increase in elevator capacity meant that transport of sports equipment (including handball nets and other equipment needed for the championships) could be transported safely and efficiently to the different areas of the facilities. The efficiency costs in themselves are likely to save costs for Spektrum in the daily operations. The alternative was to transport the equipment manually around the stadium by car, to the external entrances at each of the halls. This was considered a costly and inefficient solution, particularly in view of the upcoming championships.
  - The storage facilities were – in the same way as the elevator facilities – necessary to ensure good logistics and efficient operations of large events, including the handball championships. Moreover, the board considered that there was potential for lease of the storage facilities, for example between the large events, which again provided another secure possibility for income for Spektrum.

All in all, the abovementioned modifications were likely to have a significant impact on Spektrum's profitability, in particular if compared with the respective counterfactual, i.e. if individual modifications would not have been made. As explained above, all three measures would have resulted in an increase of income/lower costs, while the alternatives resulted in the opposite.

Secondly, the situation enabled the municipality to become the quasi (and eventually most likely) sole shareholder of Spektrum. As a result of the capital increase, the municipality's share increased to 99,68 %.[15] Furthermore, the stake of over 99 % of all shares enables the municipality to purchase the remaining shares even without the consent of today's minority shareholders. Being the sole shareholder will put the municipality in a favourable position under the Norwegian Public Limited Liability Companies Act (Aksjeloven), as it can decide unilaterally how Spektrum should be operated going forward. That implies also that the municipality could decide to change the by-laws so that Spektrum can distribute dividends,[16] or sell Spektrum, should it so wish, without having to take account of the interests and opinions of the minority shareholders. In short, the capital injection put the municipality in a position that enables it to obtain a decent return on its investment in the long-term, or alternatively be the sole shareholder (and thus indirectly) owner of a commercially attractive, modern multi-functional infrastructure.

The counterfactual to that scenario would have been to remain majority-shareholder in a company whose sole assets would be a commercially less attractive, inferior infrastructure, with an accordingly less positive outlook for the future.

In view of those scenarios, the municipality decided to provide the additional capital.

---

[15] This current shareholding is both the result of the capital injection and the ensuing dilution of the other shareholders, and the purchase of the shares of the other larger shareholders Danske Bank, Sparebank 1 SMN and Nordea, who accepted to transfer their shares to the municipality for NOK 1.

[16] For the avoidance of doubt, changing the by-laws would already have been possible based on the municipality's previous stake that exceeded 2/3 of shares. However, the procedure would have been more cumbersome.

3.2.3 Assessment

3.2.3.1 It cannot be demonstrated that the capital increase conferred an advantage on Spektrum

The Norwegian authorities highlight that the use of the GBER does not mean that state aid has been granted. Neither is there a presumption for measures granted under the GBER to be state aid. The Norwegian authorities merely availed themselves of the GBER for the sake of legal certainty.

Now that the measure is subject to the formal investigation, the Norwegian authorities recall that the burden of proof is on the Authority to demonstrate that the measure constitutes state aid within the meaning of Article 61(1) EEA, and all constitutive elements of state aid pursuant to that provision are met.

As regards this measure, the key issue according to the Norwegian authorities is if the capital increase of winter 2018 can be demonstrated to entail a selective advantage in favour of Spektrum. As indicated in the foregoing, the Authority cannot, in the Norwegian authorities' view, simply presume the presence of a (selective) advantage[17].

In the Norwegian authorities' view, the above description of the factors underpinning the municipality's choice to opt. for the capital increase, and the applicable counterfactual, indicate that there is no advantage for Spektrum.

Firstly, the value of the shares in Spektrum – which is intrinsically linked to the infrastructure Spektrum owns – will be higher if linked to a completed Spektrum, than it would have been had the renovation project been stopped. In that regard, reference is made to the above explanations illustrating that in particular the modifications the capital increase financed will contribute significantly to Spektrum's profitability going forward, by both saving costs and strengthening the infrastructure's revenue generating capacity.

Secondly, the municipality has significantly increased its stake in Spektrum. That entails first and foremost an increase in value of its stake. The municipality purchased, in essence, a 18 % stake in a company owning an infrastructure whose expansion alone costs almost NOK 600 million for NOK 55 million. Moreover, the position of being the (quasi) sole owner of Spektrum will allow the municipality to exert more direct and immediate influence over the operation and future of the company. That could conceivably entail a change in the by-laws so that dividends can be distributed, implementing a clearer profit-maximising strategy for its commercial activities, and even a sale of the company if that should be an option in the future. In the medium- to long term, it is by no means improbable that Spektrum could be sold for a price that would entail an acceptable return on investment for the capital injection. Even if Spektrum is not sold, the value of owning it will most probably increase significantly with the completion of the expansion, and the implementation of the business plan and strategy that will gradually see a greater part of its income stemming from commercial activities.

Most importantly perhaps, this situation and outlook based on the capital increase needs to be contrasted with the counterfactual: for the municipality to remain majority-shareholder in a company whose sole assets would have been a commercially less attractive, inferior infrastructure, with an accordingly less positive outlook for the future.

A market economy operator faced with a choice between these two situations would likely have acted as the municipality did. In any event, the Norwegian authorities consider there not to be sufficient indications to conclude that the market economy operator test is not met.

---

[17] See for example T-305/13 *SACE and Sace BT v Commission*, paragraph 95: "*In accordance with the principles on the burden of proof in the State aid sector, the Commission must provide proof of such aid. In this regard, the Commission is required to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting a final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible.*", as well as the jurisprudence referred to above in footnote 1.

3.2.3.2 In any event, any potential aid would comply with the GBER

In the event the Authority maintains that the capital increase entailed state aid, the granted aid would have had an incentive effect, including pursuant to Article 6 of GBER.

The incentive effect of the aid pertains to the modifications of the scope of the project that took place after the construction works on the project in its original scope had already started. Trondheim Spektrum would not be constructed, at least not according to the current plan and scope, without the capital increase.

The Norwegian authorities therefore consider, as elaborated on in more detail below, that the aid has an incentive effect.

According to Article 6 (1) of the GBER, aid needs to have an incentive effect on the recipient in order to benefit from the block-exemption. This means that aid must change the behaviour of the beneficiary in such a way that it engages in (additional) activity which it would not carry out in the absence of the aid (or would carry out in a restricted or different manner). The concept of the incentive effect is thus logically linked with that of the counterfactual, i.e. a hypothetical situation that would arise if no aid were granted. In other words, the requirement of the incentive effect ensures that only aid that is necessary to bring about a certain behaviour or result can be granted. The ultimate purpose of the incentive effect requirement is to avoid windfall profits.

The assessment of whether the incentive effect criterion is met is simplified under the GBER, which at least according to the letter of Article 6(2) is based on a (pure) chronological test: " *(aid) shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts."* Consequently, the chronological order of events – application predates grant – is sufficient evidence to prove the incentive effect. However, in the Norwegian authorities' view, it is less clear how Article 6 (2) should be applied to ongoing projects, which are modified, increased, or whose finalisation becomes uncertain.

To the Norwegian authorities', it would seem logical that "*work on the project*" according to Article 6 (2) of GBER does not necessarily need to be the start of the project as a whole, but could also refer to a later point in time, in particular situations in which "the project" or "the activity" in reality is a modification, increase or similar, and should in particular be interpreted as to also cover situations in which a new "decision point" arises: Can the project – in particular in a modified, desired form – be realised with aid, or does it, in the absence of aid, need to be stopped, or scaled down? The counterfactual in such situations would entail a different behaviour of the aid recipient. Only with the help of the aid can the desired activity or project be realised.

The foregoing is underpinned by the following considerations.

Firstly, it is by no means uncommon that projects are modified, after constructions have begun. Due to changed circumstances or modifications to the scope of projects, budget estimates turn out to be insufficient. In the case of infrastructure projects, this might rather be the rule than the exception.

If the scope or budget needs to be increased, this may trigger the need for (additional) state aid. The Norwegian authorities consider that the GBER can also be applicable in these situations. Otherwise, there would be an unintended discrimination between the upgrade of an existing infrastructure, which for example Article 55 block-exempts, and the upgrade of an infrastructure that is currently being built. If the GBER could not be used in these cases, projects could in many cases not be adapted to changed circumstances, or objectives. What is more, projects that may already have consumed a considerable amount of (public) resources may have to be stopped or significantly down-sized half-way. The Norwegian authorities find it doubtful that this was the intention underlying the drafting of Article 6 of the GBER, and more generally, the introduction of the incentive effect criterion in the compatibility assessment.

Secondly, the Authority's interpretation (i.e. that aid could not be lawfully granted in this situation) the correct interpretation, could have unintended and undesirable consequences: It would force aid applicants to apply for, and public authorities to accept, extremely cautious (i.e. high) budget estimates, necessarily leading to the granting of higher aid amounts.

An example of such behaviour can be found in Decision No 225/15/COL regarding the Vålerenga football stadium. According to paragraph 16, the budget included a post for unforeseen costs/miscellaneous amounting to NOK 48 million. It is important to note, that this project did not include a claw back mechanism for unused financial resources. The budget was just increased in order to cover unforeseen events or costs. It is unclear, if unforeseen costs ever did materialize or not. Importantly however, if the unforeseen costs would not have materialised, the aid recipient would have made a windfall profit of 48 million, precisely the situation that the incentive effect criterion is meant to avoid.

Thus, a literal interpretation of Article 6(2) would make it legally and economically prudent to inflate budgets (or budget estimates) in aid applications, as this would be the only possibility to cater for possible overruns of budgets or changes in the scope of projects.

Thirdly, the advocated interpretation is consistent with the Authority's practice, albeit with regard to the incentive effect criterion outside the GBER.

For example, the Authority assessed an application for (additional) aid due to increased project costs in 110/15/COL regarding additional aid to Finnfjord AS. Paragraphs 66 and 68 read:

> *"[...] in order to be compatible with the functioning of the EEA Agreement, aid needs to provide an incentive effect. Whether the notified aid is necessary to produce a real incentive to undertake investment which would not otherwise be made is a crucial element in the compatibility assessment. It has to be verified whether the aid is necessary to provide an incentive effect for the investment, i.e. whether the aid actually contributes to changing the behaviour of the recipient [...].*
>
> *[...] the Authority does not exclude the incentive effect of aid to a project that has started when the grant of aid unequivocally ensures the completion of projects that would otherwise not have been completed [...]. In assessing the incentive effect of the aid in this light, the counterfactual situation, i.e. what the company would do without the aid, needs to be closely examined".*

In that case, the Authority considered that the counterfactual was that the project would be completed without the aid, and that therefore the additional aid would not have an incentive effect: *"In other words, the counterfactual scenario is that Finnfjord would finalise the project without delays and without reducing its scope also without the aid"*[18].

In line with the same reasoning – that aid can only be considered to be compatible if the counterfactual without the aid differs from the situation in which aid is granted – the Authority has approved aid applied for after the launch of a project in a number of cases. For instance, in 344/09/COL the Authority held that *"the construction of the aluminium smelter at Helguvík would not have continued without state aid. State aid is therefore necessary for the continuation of the project and the incentive effect is fulfilled"*[19].

In its decision 013/18/COL on aid for the construction and operation of the sports facility Templarheimen, the Authority had to assess the compatibility of aid to cover additional cost that arose after an initial amount of investment aid had been approved. The Authority's second Templarheimen decision pertained to two types of costs, which were not covered by the Authority's original decision:

---

[18] Paragraph 71.

[19] See on page 26 of that decision.

- An unexpected increase of costs for the finalisation of the swimming and bathing part of the sports facility; (costs pertaining to the original scope of the project and in principle encompassed by the Authority's original decision)
- New costs to construct an integrated cafeteria and to construct a climbing hall as part of the sports facility. (costs pertaining to an increase/upgrade in the project's scope, not covered by the Authority's original decision)

The Authority considered covering these costs to have an incentive effect, because "*the construction of the sports facility would not have been completed without the aid*" (paragraph 59).

In light of the above, the Norwegian authorities consider that an incentive effect is present also where aid is applied for (and granted) after the launch of the projects original start, when that aid demonstrably leads to the completion of a project (including in a modified form). Furthermore, the Norwegian authorities consider that Article 6 of the GBER can be interpreted in a manner that allows for this situation to be covered as well.

As explained above, the construction works on Spektrum had to start in a haste, before the plans for the project had been fully finalized. During the constructions, the scope of the project was altered, and some unexpected costs arose. As a result, it became clear in summer 2018, that without a capital injection, it would be impossible to complete Spektrum in the form and scope that fully attains the objectives of the municipality. Summer 2018 thus brought a new decision point, for Spektrum (and later its owner(s)): Without the application for (and subsequent grant of) the capital injection, the project would have had to be stopped or down-sized. There is thus a clear, demonstrable (and undesirable) counterfactual, showing that the granting of aid, if the capital injection is to be considered as such, has an incentive effect.

In the Norwegian authority's view, this argument holds true for both the unexpected costs, as well as the new costs. Arguably, the presence of incentive effect is even more apparent with regard to the new costs, which financed modifications to the project unknown to Spektrum and the municipality alike when works on the expansion began in 2017.

3.3 Measure 7: "Financing" of infrastructure cost

3.3.1 The Authority's preliminary views

Regarding measure 7, the Authority took the preliminary view that the division and calculation of infrastructure costs may have granted Spektrum an advantage, that advantage (presumably) being a more favourable treatment of Spektrum by the municipality than it has applied or would have applied to other (comparable projects).

The Authority has based its preliminary view on that a relief from cost normally born by a comparable operator is an advantage. Moreover, the Authority indicated that the Norwegian authorities have not submitted information underlying the calculation of the division of costs between Spektrum and the municipality and have not shown that these calculations are based on objective criteria. Furthermore, the Authority indicated that the submitted benchmark projects are not fully comparable, given that they concern housing development, whereas Spektrum is a multifunctional infrastructure.

In terms of factual description, the Authority indicated in paragraph 63 that the upgrade of Klostergata is a **direct** consequence of Spektrum's expansion. The Authority also states, in paragraph 64, that the bearing the costs for the development of green areas and parks is Spektrum's responsibility.

3.3.2 Factual clarifications and additional information

3.3.2.1 The legal framework

Firstly, the Norwegian authorities consider it important to clarify that there appears to have been a misunderstanding regarding the starting point for the assessment at hand.

General infrastructure measures are *not* the responsibility of the developer, but those of the municipality (ies). Furthermore, there is also no obligation to enter into a development agreement for neither the municipality nor the developer.

Development agreements are a *tool* to assist the developer and municipalities to ensure that requirements under the zoning plan and use procedural orders ("rekkefølgekrav"), including for general infrastructure measures, are met. They can, but do not necessarily have to entail provisions that impose some of the economic burdens relating to general infrastructure measures on the developer. Importantly also, development agreements are the result of a negotiation between municipality and developer.

The Norwegian legal order does not contain detailed provisions on the content of development agreements. However, as indicated previously, the law entails some provisions *protecting the developer* from the municipality imposing disproportionality high costs on him: Any costs for general infrastructure has to be necessary for the project and proportionate, according to section 17-3 of the Planning and Building Act. In the proportionality assessment, particular account has to be taken of what a project is able to sustain economically as regards infrastructure costs. This means that a project's profitability is factored in into the proportionality assessment.

Conversely, there are no provisions in the law that would *require* municipalities to impose any such costs on the developer.

The rationale for this is that the there is an asymmetrical distribution of power regarding the negotiation and conclusion of development agreements, favouring the municipality. This has been highlighted in a recent judgement from Oslo District Court, where the Court considers that

> *"The rationale for Section 17-3 was inter alia the need to limit what municipalities could include in a development agreement, given that the municipality's authority to permit or prohibit projects puts it in a powerful position. The provision therefore entails a requirement for necessity, appropriateness and proportionality"*[20]

Further information on limits as the economic burdens that can be allocated to developers is also provided *inter alia* on the Norwegian government's webpages[21], and a recent report written by the law firm Hjort on developments agreements. The Norwegian authorities draw the Authority's attention in particular to Hjort's conclusion regarding the scope of the "necessity" requirement, where it considers that the contents of the development agreement have to be strictly necessary for the projects[22].

Finally, it should be noted that courts will strike down development agreements that entail provisions that do not meet the necessity and proportionality tests established by section 17-3. In the aforementioned

---

[20] Judgement of the Oslo District Court, 18-132587TVI-OTIR/07, page 8, office translation. The Norwegian version reads: «*Bakgrunnen var blant annet et behov for å sette begrensninger for hva kommunene kunne inngå avtale om, da kommunen i kraft av sin myndighet til å gi eller ikke gi tillatelser har en sterk maktposisjon i forhandlingene. Bestemmelsen oppstiller derfor både et krav om nødvendighet, og krav om rimelighet og forholdsmessighet.*» The judgment has been appealed. See also two new judgments from Oslo District Court: 18-104016 (Mortensrud) and 18-132587 (Universitetet).

[21] https://www.regjeringen.no/no/dokumenter/sporsmal-om-grensene-for-bruk-av-utbyggi/id733670/

[22] «Tiltak må være strengt nødvendig. Nødvendigheten strekker seg så langt behovet rekker, men ikke lengre» - see page 151 at https://www.regjeringen.no/contentassets/fa31cb1519af4aa0a9080d5521e96bb6/rapport_finansiering_av_offentlig_infrastruktur_i_utbyggingsomraderpdf.pdf

judgement of the Oslo District Court, the Court concluded that imposing costs for *inter alia* a cycle path on the developer was unlawful.

3.3.2.2 The municipality of Trondheim's practice with regard to development agreements

The municipality of Trondheim's margin of manoeuvre is therefore limited by the legal framework and strict judicial practice as regards the necessity and proportionality tests. Even so, the municipality attempts to impose as many costs on the developers as the legal framework permits. As explained earlier, while the municipality has adopted a principle of full cost transfer, this principle is somewhat mitigated in practice by the limitations stemming from the national legal framework.

In terms of administrative practice, development agreements in Trondheim are often concluded at the initiative of the developer. Once a developer contacts the municipality with the intention to negotiate a development agreement, the municipality publicly announces the launch of negotiations. In practice, developers will then indicate if the economic costs that the implementation of all requirements under the zoning plan (and use procedural orders) entail are unnecessary or disproportionate. Often, the developer will suggest a certain allocation of cost.

Neither the developer nor the municipality use a formula or perform sophisticated calculations for the cost of allocation between municipality and developer under a development agreement. Neither would such calculation by required by law, nor be useful in practice. Projects, developers and the economic capacity of different projects are too heterogenous to employ mathematical models.

That being said, the municipality assesses the proposals by the developer. In doing so, as indicated previously, and in order to ensure the proportionality of the cost allocation, the total costs that the developer has to bear are benchmarked against other projects and practice (cost of the contribution to public infrastructure per m^2 BRA (i.e. area of use)). For a typical housing development, which tends to be a highly profitable development, experience shows that an acceptable expense per m^2 BRA is around NOK 2000 or lower. Commercial projects, or public service projects, tend to have a lower profitability, and can thus generally speaking sustain a lower cost per m^2.

The development agreement with Spektrum was entered into following the practice outline above. In Spektrum's case, there is a cost of **NOK 2226 per m^2 BRA.**[23]

The Norwegian authorities will revert below to the comparability and significance of this benchmark for the Authority's assessment. In the following table, the Norwegian authorities provide an overview of recent relatively large construction projects in Trondheim where a development agreement was concluded. As the Authority will see, none of these projects bear a (substantially) higher cost per m^2 BRA than Spektrum:

Development project / area	**Total infrastructure costs**	**Infrastructure costs per m^2 BRA - *housing***	**Infrastructure costs per m^2 BRA – commerce & public *services***	**Description of project**
Tiller Øst	145 000 000	1 084	1 084	Residential area/project

[23] The Norwegian authorities draw the Authority's attention to the fact that previously they had indicated that Spektrum's general infrastructure costs amount to NOK 2081 per m^2 BRA (see for example the Norwegian authorities' submission of 20 September 2017, paragraph 148. This number was based on a draft development agreement. The final version, submitted to the Authority on 18 March 2019 differs in some details from the draft described earlier (the main difference is that Spektrum has to assume the cost for the construction of a pumping station, whereas the municipality finances some additional works on Klostergata). Overall, the description of its content in the Norwegian authorities' submissions remains correct, but as indicated in the body of the text, the total economic burden for Spektrum is NOK 145 per m^2 higher than previously indicated.

Lilleby	233 000 000	1 371	1 371	Residential area/project
Leangen senter	165 000 000	1 037	1 037	Residential area/project, and commercial buildings
Holtermanns vei 1-13	52 000 000	0	1 050	Office building
Ranheim Vestre	134 750 000	1 115	454	Residential area/project, commercial buildings, and public services
Lund Østre	44 198 000	786	0	Residential area/project
Lade-Leangen	117 502 000	487	331	Predominately commercial, some residential buildings[24].
Granås Vestre	23 000 000	558	0	Residential area/project
Granås Østre	53 000 000	596	596	Residential area/project, school and kindergarten
Scandic Nidelven	1 643 200	0	913	Expansion of a hotel
Nardobakken, butikksenter	11 087 600	0	2 281	Shopping centre
Ilsvika, Butikksenter	2 791 800	0	1 117	Shopping centre
Trondheim Spektrum	**128 200 000**	**0**	**2 226**	Multifunctional infrastructure

Furthermore, the table distinguishes between costs per m^2 BRA for housing projects (residential housing projects) and commerce/public services projects. Some of the projects belong to only one of those categories, some are mixed. Generally speaking, housing developments can sustain higher infrastructure costs. Therefore, as the example of Ranheim Vestre highlighted in grey above indicates, the costs for its housing part are higher than for the commerce/public service part.

The key fact, illustrated by the above examples, is however that Spektrum's development agreement is by no means particularly advantageous for the developer. If anything, it imposes a comparatively high cost per m^2 BRA on Spektrum. Even *prima facie* highly profitable commercial projects such as the expansion of a hotel and the establishment of a shopping centre (see highlighted in green above) bear lower or respectively only marginally higher costs than Spektrum per m^2 BRA.

To the best of the Norwegian authorities' knowledge, there are no nation-wide or Trondheim-specific statistics on costs per m^2 BRA. However, there are publicly available documents that also indicate that the cost Spektrum has to bear is at the upper end of what other construction projects contribute. For example, a report by Norsk Eiendom from August 2018 found that the cost per m^2 BRA for a sample of large developments in Oslo lies between NOK 975 and 2167, with most projects contributing approximately NOK 1400-1500.[25]

[24] For the sake of completeness, this is a "fortettingsprosjekt". As such, it is possibly not a good comparator to Spektrum's development agreement, and different from the other projects in the table.

[25] https://www.norskeiendom.org/wp-content/uploads/2017/10/Statistikk-for-infrastrukturbidrag.pdf; see in particular table on page 10.

3.3.2.3 The development agreement with Trondheim Spektrum

It follows from the forgoing that the development agreement with Trondheim Spektrum is consistent with the municipality's practice as regards development agreements.

In principle, Spektrum will cover all costs, except for those regarding three specific infrastructure measures, as previously indicated:

- The municipality covers fully the construction costs of a bridge connecting the Nidarø peninsula to the mainland;
- Spektrum contributes NOK 26 million to costs relating to a green area and park on Nidarø;
- Spektrum contributes NOK 20 million to works on Klostergata, which in particular relate to the replacement of water and wastewater pipes.

As regards to the latter, the Norwegian authorities highlight that the replacement of water and wastewater pipes had already been decided by the municipality in 2014, with a final deadline for implementation by 2024. The occasion of Spektrum's expansion necessitated road works in Klostergata and meant that it was meaningful for the municipality to replace the pipes at the same time, saving costs (and the nuisance of major road works in the same areas twice in the course of a few years for the residents).

The Norwegian authorities consider that the development agreement is in line with the applicable legal framework and the municipal practice. However, the Norwegian authorities concede that by concluding the development agreement at hand with Spektrum which *inter alia* entails total costs of 2226 NOK per m^2 BRA for Spektrum, it has exploited its legal room for manoeuvre to a large degree if not fully.

3.3.3 Assessment

The Norwegian authorities recall that the burden of proof is on the Authority to demonstrate that a measure implemented by an EEA EFTA State constitutes state aid within the meaning of Article 61(1) EEA, and that all constitutive elements of state aid pursuant to that provision are met.

As regards measure 7, the key issue according to the Norwegian authorities is if the cost allocation in the concrete case can be demonstrated to entail a selective advantage in favour of Spektrum.

As the Authority has pointed out in its opening decision, an advantage can "also cover situations where some operators do not have to bear costs that other comparable operators normally do under a given legal order." (NoA, para 68, emphasis added).

That test implies that for there to be an advantage, the Authority would have to demonstrate that comparable operators would *normally* bear more costs than Spektrum does. In the Norwegian authorities' view, there are no indications available that would support this conclusion. Conversely, all available evidence indicates that the development agreement does not derogate from normal practice, i.e. other development agreements.

The Norwegian authorities maintain in particular that the submitted benchmarks on the costs per m^2 BRA for other development projects *are* comparable. According to the legal order, account has to be taken in the proportionality assessment in particular of the economic sustainability of the cost allocation. In the Norwegian authorities' view, in order to determine whether Spektrum's development agreement deviates from normal practice, housing developments can be used as a benchmark, even if they can as a rule bear more costs than projects such as Spektrum. In any event, also the development agreements for commerce/public services developments entered into by the municipalities, have a lower cost per m^2 than Spektrum.

In addition, there are clear indications that the municipality could not have imposed more costs on Spektrum without coming into conflict with the law. The works on Klostergata are not caused by the project to a substantial degree and had to a large extent been decided long before Spektrum's expansion project was launched. The bridge will connect central parts of the city and would have been a desirable addition to the inner part of Trondheim city anyhow. This is even more so as this bridge will connect the important recreational and park areas, which are also not to a substantial degree "caused" by (in the sense of being necessary for) the project, but rather something that will benefit all citizens and visitors of Trondheim. A parallel could be drawn here with the cycle path the cost of which the municipality of Oslo attempted to impose on a developer and was held to have breached the law.

Beyond the foregoing, the Norwegian authorities cannot conceive of a meaningful manner through which to demonstrate that the development agreement is compliant with the national legal framework and consistent with the municipality's practice. There is not a practical way, and in the Norwegian authorities' view, also no obligation (under EEA law) to ensure a fully uniform cost distribution for development agreements.

Finally, the Norwegian authorities emphasise that a conclusion by the Authority that state aid is present could have dramatic repercussions on the Norwegian construction sector. It would be quasi-impossible to demonstrate that any development agreement would be free of aid, and any discontent citizen or other third party could submit a complaint alleging the granting of unlawful state aid. Based on a precedent the Norwegian authorities hope ESA will not create, it would be difficult in almost any conceivable case for the Authority to conclude that an agreement was not unduly advantageous, given the absence of mathematical formulas or more detailed criteria for the allocation of costs under development agreement.

Overall, the Norwegian authorities consider that they have demonstrated that the development agreement does not confer an advantage on Spektrum. In any event, in their view, the Authority cannot, based on the available information, demonstrate the contrary. The legal test for concluding that the development agreement entails state aid pursuant to Article 61(1) of the EEA Agreement is therefore not met.

3.4 Measure 9: Alleged implicit guarantee inherent in a loan agreement between Nordea and TS

3.4.1 The Authority's preliminary views

Regarding measure 9, the Authority took the preliminary view that various clauses in the loan agreement *between Nordea and Spektrum* could have *in effect* resulted in the *municipality* granting an advantage to Spektrum through an implicit guarantee.

The Authority does not discuss in its opening decision whether the statements in the loan agreement could involve state resources in the meaning of Article 61(1) of the EEA Agreement.

3.4.2 Factual clarifications

It is the Norwegian authorities' understanding, that the Authority does not appear to question the Norwegian authorities' explanations that the municipality has not in any way assumed some form of legal obligation through these clauses.

As highlighted, the municipality is not a party to the loan agreement that features the described clauses. Furthermore, Spektrum's board cannot, in any way, bind the municipality, its majority owner.

In the Norwegian authorities' view, the loan agreement's wording and structure clearly reflects the fact that the agreement cannot bind the municipality. For example, the legal consequence of Spektrum's non-compliance with the clause according to which a change of Spektrum's ownership implying that the municipality would hold less than 77.93% of its shares require Nordea's consent, is deemed to be a *breach of contract by Spektrum* according to the loan agreement. If that clause were binding on the municipality

i.e. that it would oblige the municipality to maintain a shareholding over that threshold, it would not be necessary to include in the agreement that ownership below that threshold amounts to a breach of contract by Spektrum.

That the loan agreement, including the clauses the Authority referred to is exclusively the result of negations between Spektrum and Nordea, without any involvement of the municipality, as illustrated further by a letter from the municipality to the county governor (fylkesmannen), enclosed as Annex 2 to this letter.

The letter was submitted in the wake of the events described on page 5-6 of the response dated 21 February to the Authority's RFI dated 28 January 2019. In essence, a previous loan agreement between Nordea and Spektrum would (probably) have entailed a guarantee from the municipality. Following a legal assessment, Nordea (and Spektrum) were informed that the municipality could not be party to the loan agreement, and not issue a guarantee.

Against this background, the municipality informed the county governor that *"Spektrum and Nordea are working on other financial solutions without the municipality's involvement"*[26].

Furthermore, the fact that the municipality is not bound by any of the clauses referred to by the Authority in its opening decision is also illustrated by the events preceding the capital increase of winter 2018 (measure 6). Had the municipality been legally bound to intervene, Spektrum would not have had to apply for an increase of capital, and the municipality would not have had the possibility to decide against or in favour of that measure.

For the above reasons, the Norwegian authorities reiterate that the loan agreement does not entail a contractual obligation upon the municipality that entails a *firm and concrete commitment* to make state resources available. The Norwegian authorities will elaborate on the legal significance of the forgoing in the following section.

3.4.3 Assessment

The Norwegian authorities recall that the burden of proof is on the Authority to demonstrate that a measure implemented by an EEA EFTA State constitutes state aid within the meaning of Article 61(1) EEA, and that all the constitutive elements of state aid pursuant to that provision are met.

As regards the alleged (implicit) guarantee under assessment, the Norwegian authorities consider that it can under no circumstances be concluded that a measure financed through state resources could be present. As summarised in the NoA, paragraph 51, a transfer of state resources occurs either through a positive transfer of funds, through a foregoing of revenue, or through a *"firm and concrete commitment to make state resources available at a later time"*.[27]

In the present case, no such commitment has been made. Furthermore, the municipality has not done anything that creates a sufficiently concrete risk of imposing an economic burden on it.

As regards the notion of advantage, it is in the Norwegian authorities' view highly doubtful that any acts of the municipality – beyond arguably its ownership in Spektrum – could have actually led to a material advantage for Spektrum as regards the loan agreement that Spektrum eventually concluded with Nordea.

---

[26] See Annex 2, office translation of the last sentence.

[27] NoA, paragraph 51. See also C-200/97 *Ecotrade*, parapraph 41: *"State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the resources of the State"*

In the Norwegian authorities' view, this means that there is therefore no advantage inherent in measure 9, and unquestionably no commitment (i.e. transfer) of state resources.

4 IN ANY EVENT, ANY POTENTIAL ELEMENT OF STATE AID WOULD BE COMPATIBLE AID

4.1 The Authority's preliminary views

Regarding the compatibility of any potential element of state aid inherent in the measures under investigation, the Authority took the preliminary view that it was doubtful whether the measures could be deemed compatible under Article 61(3)(c) of the EEA Agreement.

The Norwegian authorities' understanding of the opening decision is such that the Authority does not question whether aid to sports- and multifunctional infrastructures is to be assessed directly under Article 61(3)(c) of the EEA Agreement, and the common assessment principles.

Furthermore, to Norwegian authorities' understanding, the Authority does not question that any potential aid would (or could) contribute to a well-defined objective of common interest.

As regards potential aid inherent in the lease agreements, the Authority's doubts appear to pertain in particular to the potential aid's proportionality (in view of the uncertain total aid amount, cf. paragraph 225 of the opening decision) and the potential existence of cross-subsidies (cf. paragraph 225 of the opening decision). The Authority has neither expressed any specific doubts as regards the need for state intervention, the appropriateness of state aid as policy instrument, the existence of an incentive effect and the avoidance of undue negative effects on competition and trade, nor has it invited the Norwegian authorities to submit additional information pertaining to these common assessment principles. Accordingly, the Norwegian authorities will only briefly, and for the sake of completeness, refer to those.

In that regard, the Norwegian authorities also refer to the recent judgement by the EU General Court in case T-388/11, *Deutsche Post v European Commission*, in which the General Court held that an opening decision must include an interim evaluation of whether the public measure in question is likely to be State aid and explain *why* there are doubts as to its compatibility with the internal market.[28]

As regards the capital increase, the Authority invited the Norwegian authorities to submit arguments underpinning the measure's compatibility under Article 61(3)(c) of the EEA Agreement in the event that the Authority should conclude that it was not compliant with Articles 6 and/or 55 of the GBER.

Finally, the Authority invited the Norwegian authorities to present arguments as to the compatibility of the (implicit) guarantee. While the Authority did not do so for measure 7, the "financing" of infrastructure costs, it appears logical for the Norwegian authorities to also address the compatibility of an potential aid element in that measure, given that they have not submitted any arguments in that regard to date, and the Authority could not exclude that measure 7 would entail aid.

4.2 Assessment

4.2.1 Introduction and background: The compatibility of aid to sport and multifunctional infrastructure

As indicated above, the Norwegian authorities consider that none of the measures under investigation entail state aid pursuant to Article 61(1) of the EEA agreement.

[28] T-388/11, *Deutsche Post v European Commission,* paragraph 72.

In the event that the Authority concludes otherwise, and to facilitate the Authority's approval of one or several of these measures, the Norwegian authorities will in the following demonstrate that any potential aid element inherent in these measures would be compatible with the EEA Agreement. The below assessment applies in principle to all measures *mutatis mutandis*, unless explicitly stated otherwise.

By means of introduction, it seems clear that none of the Authority's compatibility guidelines apply to the measures under investigation. Nonetheless, it is in accordance with consistent case practice from the Commission and the Authority to assess the public financing of such infrastructure under Article 61 (3) (c) directly. To date, both bodies have only taken numerous, and to the best of the Norwegian authorities' knowledge, exclusively positive decisions, including for multifunctional infrastructure that appear to be more expensive, more commercially orientated and geographically located in a manner that makes possible competitive frictions across EEA borders more likely. The Norwegian authorities refer in this regard in particular to the Commission's analytical grid for sport and multifunctional infrastructure, and the indicative (i.e. by no means exhaustive) list of Commission decisions taken concerning sport infrastructure on pages 7-8 thereof.[29]

An illustrative example from the Commission's case practice that appears to be of particular relevance for the assessment of the case is case SA.33618 on aid for the Uppsala arena[30]. The case concerned a large, overwhelmingly commercially used multifunctional infrastructure, whose construction and operation was financed by a number of different aid measures, including investment and operating aid.

The Commission's decision is notable in a number of respects, of which the Norwegian authorities' will highlight two in the following:

- Firstly, as in the case at hand, the municipality in which the infrastructure is located had entered into a lease agreement to purchase hall capacity from it, which was then intended to be used for various, mainly amateur sports, purposes. In the case of Uppsala arena, the municipality leased 20%, of which 95 % was to be used for school and student sport, non-profit associations and leisure sport for the general public (see paragraphs 21-22 of the decision). In fact, the Swedish authorities' *committed* that this share of the arena's capacity would be used for this amateur sport purposes. That use, and that commitment, appears to have been considered by the Commission as an argument in favour of the aid's compatibility (cf. paragraphs 57-58). It would hence be logical to assume that the higher the share of non-profit/amateur users in such an infrastructure, the more "compatible" the aid for its construction and operation.

- Secondly, the Commission did not attempt to conclude on the existence of an aid element in the lease agreement, nor did it quantify any potential aid element in this measure. That did not lead the Commission to question the aid's compatibility, including its proportionality.

Finally, and concluding the introductory part of this section, the Norwegian authorities could not find any trace in the Commission's and the Authority's decision-making practice indicating that state aid could be incompatible because it would benefit or finance the "commercial" parts, aspects or uses of multifunctional infrastructure.

Indeed, the very nature of multifunctional infrastructure implies that it can be used for commercial events, including large concerts and sports events. In that regard, the Norwegian authorities refer, by means of example, to case SA.33728 on the financing of a new multi arena in Copenhagen. A glance at the arena's website[31] will quickly reveal that its main, if not sole, purpose is the arrangement of large commercial events. That did not appear to have put into question the aid's compatibility. Furthermore, and with specific reference to paragraph 48 of the opening decision, there are no indications in this decision, or in any other

[29] http://ec.europa.eu/competition/state_aid/modernisation/grid_sports_en.pdf
[30] See also the arena's website, o http://uppsalaarena.se/.
[31] https://www.royalarena.dk/

cases the Norwegian authorities are aware of, that aid for multifunctional infrastructures has to be limited to the costs that are necessary to the meet the demands of the infrastructure's non-commercial users. Illustratively, in the aforementioned case of the Copenhagen arena, the Commission did not appear to have questioned the fact that the aid would (co-)finance the costs arising from "*high architectural and aesthetic aspirations*"[32] the Danish authorities had for the arena.

Against the background of the above, the Norwegian authorities will now turn to the issue of the alleged cross-subsidisation of Spektrum's commercial activities/usage/users.

4.2.2 The implausibility of cross-subsidisation in the case of Trondheim Spektrum

A central issue in the complaint, and in the investigation to date, has been the allegation that the lease agreement, and possible also other (aid) measures, should have led to the cross-subsidisation of Spektrum's "commercial" activities. In the Norwegian authorities' view, the concept of cross-subsidisation in state aid law would seem to pre-suppose flow of (public) funds from a non-economic activity (or an SGEI, or possibly an activity , project or investment performed in the common European interest) to an economic activity (or, respectively, an activity, project, or investment) that cannot receive compatible aid.

In the Norwegian authorities' view, it cannot be demonstrated that cross-subsidisation has occurred in the case of Spektrum in an economic sense. What is more, at this point of the investigation, and based on the Authority's preliminary conclusions, the Norwegian authorities consider that cross-subsidisation cannot, in a legal sense, have happened or happen. The Norwegian authorities will elaborate on those points in the following.

In the opening decision, ESA considers that Spektrum is to be considered an undertaking when hosting concerts, fairs etc., i.e. when it engages "commercial" activities, but also when renting its premises to the municipality. Provided that this preliminary conclusion holds, both "parts" of Spektrum are economic, which would imply that the notion of cross-subsidisation – in the sense of a potential flow of funds from a non-economic to an economic part, is moot. Even if cross-subsidisation was understood as the flow of funds from between to economic activities, that could only be considered as an obstacle to the aid's compatibility provided that one of those economic activities could not lawfully (i.e. under Article 61(3)(c)) receive aid. However, as the brief overview of case practice in the foregoing sub-section indicates, that is demonstrably not the case – state aid can be granted also to the commercial aspects or activities taking place in multifunctional infrastructures such as Spektrum. Thus, to the extent that public funds benefit Spektrum's commercial activities or aspects, the below compatibility assessment applies.

In view of the forgoing, the Norwegian authorities consider that there are no grounds to contemplate if cross-subsidisation may have occurred in the present case.

Even if the Authority were to disagree, Norway has submitted a wealth of information that demonstrate that there is no "cross-subsidisation". In that regard, reference is made to the above comments on the "internal benchmarks"(see under point 3.1.3.1 showing that Spektrum's other (commercial) activities create approximately the same level of income while consuming less capacity and bearing an appropriate share of common costs. Even if the Authority is unable to rely on those internal benchmarks to exclude that the lease agreement entails aid, they should, in the Norwegian authorities' view, suffice to exclude the presence of cross-subsidies. At the very least, it would not appear possible to demonstrate that cross-subsidisation has taken place, even more so as the Norwegian authorities' have already demonstrated that commercial *users* pay a market price for the use of Spektrum.

Finally, the Norwegian authorities' note that the Authority expressed doubts, in particular in paragraph 187 of the opening decision, on whether the BDO cost allocation model ensures the absence of cross-subsidies

[32] See paragraph 72.

and that revenue from each activity covers their own set of costs. The Authority did not specify what it is, in the BDO report, that leads the Authority to consider having "insufficient information".

The Norwegian authorities recall that they have discussed the draft BDO model with the Authority on several occasions, following a request by the Authority to introduce separate accounting for the different types of activities in September 2017. In these discussions, the Authority did not raise any doubts as to the suitability of the model, which was subsequently implemented. In the period spanning early 2018 to spring 2019, the Authority did not give any indications that the methodology BDO had developed should be adjusted or was insufficient. Consequently, that model has been implemented, and Spektrum separates its accounts today in accordance with the BDO model.

The opening decision also does not entail concrete doubts or questions. A number of specific questions concerning the BDO report and model were asked by the Authority in the aftermath of the decision, and are addressed above (see in particular under point 3.1.2). In the absence of further concrete doubts or questions, the Norwegian authorities finds it difficult to provide additional information on the BDO methodology/model that may be useful to the Authority.

4.2.3 Any state aid inherent in measures 4, 5, 7 or 9 would be (proportionate) compatible aid

As stated above, the Norwegian authorities consider that any potential aid in favour of Spektrum could be deemed compatible under Article 61(3)(c), and the common assessment principles.

In principle, unless explicitly stated otherwise, the same considerations apply to all measures – to the extent that there is aid, it complies with all common assessment principles, and the Norwegian authorities' considerations set forth in the notification apply (mutatis mutandis).

There is one important caveat to be made with regard to the former. Aid inherent in the capital increase, the "financing of infrastructure costs", and the "implicit" guarantee, would be directly and exclusively linked to the ongoing expansion and renovation of Spektrum, and hence to be qualified as investment aid.

As regards the lease agreement, the potential aid stems from income generated under a lease agreement, which cannot be "allocated" to a specific set of costs in Spektrum. It can only be allocated to a profit centre, in line with the BDO report. Given the fungibility of money, this means that it cannot be said with finality that any aid would exclusively be operating aid, because the income from the lease agreement can also cover costs relating to the financing of Spektrum's upgrade (depreciation, interest and down payment of loans), and hence be investment aid.

The Norwegian authorities will therefore show that the granting of operating aid to Spektrum, in particular for the provision of hall capacity to MVSCs (and ultimately, to citizens), but more generally for the operation of a sports- or multifunctional infrastructure, is compatible under Article 61(3)(c) EEA. In that regard, the Norwegian authorities refer to the recent judgement of the EU General Court in T-135/17, *Scor v European Commission*, which illustrates that also operating aid can be declared compatible with the EEA Agreement, including under Article 61(3)(c), provided it being appropriate and necessary to achieve a public policy objective[33].

However, the municipality will also demonstrate that (investment) aid for the financing of the upgrade of Spektrum's physical infrastructure by means of the new lease agreement, the capital increase, the "implicit guarantee" and the "financing of infrastructure costs" entailing potential elements of state aid is compatible under this provision.

[33] T-135/17, *Scor v European Commission*, paragraph 115. See also the jurisprudence quoted in that paragraph.

4.2.3.1 Contribution to a well-defined objective of common interest

The Norwegian authorities refer to section 3.3.1 of the notification letter. The considerations set forth there apply to all four measures under investigation. Reference is also made to paragraph 224 of the opening decision, where the Authority appears to accept that the measures contribute to an objective of common interest.

4.2.3.2 Need for state intervention

The Norwegian authorities refer to section 3.3.2 of the notification letter. The considerations set forth there apply to all four measures under investigation. Reference is also made to the fact that nothing in the opening decision suggests that the Authority would be in doubt about the need for state intervention in the case at hand.

4.2.3.3 Appropriateness of state aid as a policy instrument

The Norwegian authorities refer to section 3.3.3 of the notification letter. The considerations set forth there apply to all four measures under investigation. Reference is also made to the fact that nothing in the opening decision suggests that the Authority would be in doubt about the need for state intervention in the case at hand.

The Norwegian authorities also draw the Authority's attention to a recent judgement by the EU General Court, T-135/17, *Scor v European Commission*, where the Court indicates that Member States are not required to demonstrate that no other imaginable measure could achieve the same objective under the same conditions[34]. In the light of this judgement, it would appear questionable if there is room for a strict appropriateness test in the compatibility assessment. In any event, even a strict test would be met in the present case, as explained in section 3.3.3 of the notification letter.

4.2.3.4 Existence of an incentive effect

Aid has an incentive effect when the aid induces the beneficiary to change its behaviour to further the identified objective of common interest, a change in behaviour which it would not undertake without the aid.

In this regard, a distinction has to be made between investment and operating aid.

For operating aid, the Authority normally considers an incentive effect to be present if in the absence of the aid the beneficiary would not have, or not to the desired extent, engaged in the activity that the aid is intended to induce[35]. In the present case, only a potential aid element inherent in the lease agreement could be qualified as operating aid. In this regard, the Norwegian authorities refer to section 3.3.4 of the notification letter.

For investment aid, the incentive effect is present if the project the investment pertains to could not be realised (including in the desired scope or form) in the absence of the aid (see in more detail above under point 3.2.3.2). As for any potential aid inherent in either the "implicit guarantee" or the "financing of infrastructure costs", the Norwegian authorities consider that both would clearly have an incentive effect.

In that regard, it should be recalled that Spektrum has little if any financial margin – it will just about manage to finance the upgrade, and break-even over time. Any reduction in income, for example from the municipal lease agreement, or increase in costs – including due to a greater share of infrastructure costs or (theoretically) higher interest rates in the absence of "the implicit guarantee" (the Norwegian authorities

[34] T-135/17, *Scor v European Commission*, paragraph 94.
[35] Cf. recitals 75-76 in the Regional aid guidelines.

recall that this measure does not entail state aid), would have left a hole in Spektrum's balance sheet that other - commercial – activities would probably not have been able to fill.

It should also be recalled that the development agreement, to which measure 7 relates, as well as the construction loan, to which measure 9 relates, were obvious prerequisites for the project, creating the regulatory and financial basis for the upgrade.

Accordingly, the upgrade of Spektrum could not have been realised in the absence of these measures.

As for the capital increase, the Norwegian authorities submit that Article 6 of the GBER plausibly lays down such a strict, formalistic approach to the notion of incentive effect that the Authority may conclude that this measure does not comply with the GBER. In this event, the arguments put forward above regarding Article 6 of the GBER under point 3.2.3.2 apply to the incentive effect criterion under the common assessment principles and Article 61(3)(c), which demonstrably leaves room for a less formalistic, substance-oriented assessment as ESAs decision in Templarheimen II and the Helguvík Aluminum Smelter referred to above illustrate. As long as aid ensures the completion of a project, which absent the aid would not have occurred, it has an incentive effect.

To recall, in the absence of the capital injection covering new and unexpected costs, Spektrum would have had to stop the upgrade, or complete the project in suboptimal, undesirable form that would not have met, or would meet to a lesser degree, the objective of common interest, including for example the needs of various kinds of amateur sports, or the municipality's objective to host the European handball championships. In the Norwegian authorities view, this is sufficient to prove that the measure had an incentive effect.

4.2.3.5 Proportionality of the aid amount (aid limited to minimum necessary)

State aid is proportionate if the aid amount is limited to the minimum needed to achieve the identified objective of common interest.

As indicated above, the Authority appears to suggest, in paragraph 225 of the opening decision, that without knowing the total possible amount of state aid, it cannot conclude on the aid measure(s)' proportionality.

The Norwegian authorities do not share the Authority's view in this regard. To their understanding, it is possible to assess and conclude on proportionality also without quantifying the aid element. As mentioned above, the Commission did not attempt to quantify the aid element in the Uppsala case. In a similar vein, the in the recent case of T-135/17, *Scor v European Commission*, the General Court did not take issue with aid in the form of an unlimited guarantee (per se "unquantifiable"), and upheld the Commission's positive decision because it demonstrated that the aid was appropriate and necessary to achieve a public policy objective without affecting the conditions of trade to an extent that would be contrary to the common interest.

Given that the Authority has approved aid intensities of 100 % for multifunctional infrastructure, for example in the *Templarheimen* cases, it would furthermore seem that for aid in situations such as the present one, there are no maximum aid intensities that need to be respected.

Thus, the Norwegian understanding of relevant case practice entails that the key aim of the proportionality assessment for aid to multifunctional infrastructure is that aid should not lead to undue profit or overly high profitability. Generally speaking, investment aid should only cover the funding gap. It would seem logical then to consider that operating aid can cover the operating losses (cf. also the GBER's Article 55 on operating aid to sports infrastructure). Other factors, such as the share in the infrastructure's use by amateurs and citizens, are used as proportionality safeguards or indicators.

In the present case, the measures at stake *cumulatively* cover the funding gap, respectively the company's operating losses. Only thanks to the measures is Spektrum able to break even and conclude the expansion of the Spektrum. On that basis alone, the aid, in the Norwegian authorities' view, is necessary (and proportionate). This conclusion is corroborated by the fact that approximately half of Spektrum's capacity is used by amateurs, and professional users demonstrably pay market prices for its use.

Furthermore, even if the Authority refuses to exclude the presence of aid in the lease agreement based on the benchmarks submitted by the Norwegian authorities, these benchmarks prove that the lease agreement's pricing falls within the range of what is customary in this market in Norway. In that regard, the municipality notes that the Authority has previously accepted such benchmarks in an infrastructure case as a means to ensure the proportionality of the aid.[36]

If the Authority would not be able to share the Norwegian authorities' view about the foregoing, the Norwegian authorities submit in the following two additional methods or approaches that could assist in demonstrating the measures' proportionality: (i) an attempt to approximate the aid element, and (ii) a GBER-inspired proportionality benchmark.

(i) Approximation of the aid element

As regards the **lease agreement**, the Norwegian authorities' recall that the only way to quantify any element of aid inherent in it would be to benchmark it against market prices. As discussed above, this exercise leads, in the Norwegian authorities' view, to the conclusion that the agreement is market conform. Should the Authority come to a different conclusion, it could rely on one of the following scenarios to approximate the aid element. The Norwegian authorities note however that this is neither necessary, nor in their view correct, because both scenarios would appear to lead to too high a potential aid amount.

Firstly, it should be recalled that that the rent under the new lease agreement is based on a fixed amount of capacity (16 848 hours), and an hourly rate of approx. NOK 1700 (cf. point 5.3 of the lease agreement. The previous lease agreement had an hourly rate of approx. NOK 1200, covering approximately 12 000 hours[37].

The starting point for the calculation of the aid amount has to be the nominal, annual amount of lease paid by the municipality to Spektrum (approx. NOK 30 million at the end of 2019/beginning of 2020). The hypothetical maximum aid amount that could be conferred upon Spektrum would accordingly be approx. NOK 30 million per annum. However, that would assume that it would be market-conform if the municipality would not have to pay any lease to Spektrum for the lease of the capacity covered by the lease agreement. In the Norwegian authorities' view, that cannot be reasonably assumed. Instead, the (annual) aid element, if any, would be equivalent to the difference between NOK 30 million and the market price. The Norwegian authorities reiterate that in their view, the annual lease is not below the market price, and hence does not entail an element of state aid.

However, the Authority could also take into consideration the lease agreements the municipality has entered into with other facilities than Spektrum regarding hall capacity for the MVSCs (cf. section 3.8.2 of the Norwegian authorities' comments to the complaint in case 80451 submitted on 1 June 2017, and exhibits E and F thereto). The hourly rates the municipality pays under a large number of these individual contracts are certainly below market prices (and hence not be fully comparable, including, as explained, because a number of these venues have been financed (partly) by the State and are contractually bound to

[36] See the Authority's decision in 225/15/COL, and in particular paragraphs 25 and 75.

[37] The amount of rented hours has varied over the years. The figure of 12 000 would seem to be a sufficient basis to approximate the potential aid amount.

provide (some) capacity at fixed rates, and the agreements may relate to day/week-times of differing value).[38]

The average hourly rate for the 11 agreements with which the municipality purchases hall capacity is approximately NOK 688. This number could be misleading, as it attributes the same weight to a contract with which the municipality purchases 6 hours annually (Autronicahallen), as to a contract with which it purchases 1344 hours (Heimdalshallen). The weighted average of hourly rates for the 11 contracts, resulting in a rate of ca. NOK 908, would appear to be more appropriate (albeit still subject to the same disclaimer as provided in the foregoing paragraph).

In any event, those two hypothetical rates could be used as "worst case scenarios" for the calculation of a hypothetical aid element in the lease agreements.

For the new lease agreement, that would entail that the "hourly aid element" equals NOK 1700 minus NOK 908, or respectively NOK 688, leading to a result of NOK 792 or NOK 1012, respectively. The annual aid amount would then be approximately NOK 13.5 million, or NOK 17 million respectively (16 848 times hourly aid element).

For the old/previous, lease agreements, the "hourly aid element" equals NOK 1200 minus NOK 908, or respectively NOK 688, leading to a result of NOK 292 or NOK 512, respectively. The annual aid amount would then be approximately NOK 3.6 million, or NOK 6 million respectively (12 000 times hourly aid element).

As regards the **capital injection**, should the Authority conclude that it constitutes state aid, then the aid amount will depend on Authority's conclusions as to whether the entire measures is aid, or, a distinction should be drawn between new and unexpected costs that the capital increase covered, or even between individual cost items. As indicated above, the Norwegian authorities consider that the modifications contribute significantly to Spektrum's profitability, and hence it would appear to be incorrect to assume that the potential aid element could be the nominal amount of the capital injection. That being said, the Norwegian authorities concede that it may be, in particular in the context of an approval as investment aid, for practical purposes most straightforward to approximate the aid element to the total, i.e. NOK 55 million.

The quantification for any aid possibly inherent in the "**financing of infrastructure**" costs would depend on which costs would be considered to be "normally born by a comparable operator". Absent more concrete doubts by the Authority which and how many additional costs Spektrum should have born, or a mathematical formula or method to calculate these costs, the Norwegian authorities are unable to provide any attempts to approximate the potential aid element. The Norwegian authorities are of course ready to engage in discussion with the Authority on how the aid element could be approximated. One theoretical possibility would be to base a calculation on the highest cost per square meter BRA observed in somewhat comparable projects, which is Nardobakken, where the cost per m^2/BRA is NOK 55 as for Spektrum. That would result in an aid amount of approx. NOK 1 million.

Finally, as regards the "**implicit guarantee**", the potential aid element would likely be equivalent to the hypothetical increase in interest rates Nordea would have charged in the absence of that measure. In the absence of clear indication what precisely constitutes the guarantee, the Norwegian authorities consider this to be a rather speculative exercise. The Norwegian authorities are of course ready to engage in discussion with the Authority on how the aid element could be approximated.

[38] The Norwegian authorities also point out that Autronicahallen, and many of the other venues, only provide actual hall space, whilst Spektrum provides mingling areas and other communal areas in addtition to the actual hall. As such, one could argue that Spektrum's hourly rate would be much higher than these other venues on the market.

(ii) Proportionality benchmark of Article 55 of the GBER

The GBER, and Article 55, provide guidance on the proportionality of aid to sports infrastructures. The Norwegian authorities have understood that the Authority considers Spektrum to be a multifunctional infrastructure, which cannot receive operating aid under that Article. Nonetheless, the Norwegian authorities consider that the provisions of Article 55 can provide guidance also for an Article 61(3)(c) assessment. It is not immediately obvious why a large football stadium (a sport infrastructure), should be treated more favourably than a handball arena that can also host concerts (a multifunctional infrastructure).

First, the Norwegian authorities recalls that an annual EUR 2 million grant for a sports infrastructure would have been proportionate under the GBER. A similar amount for multifunctional infrastructure would appear "approvable" (and proportionate) under Article 61(3)(c).

Second, pursuant to paragraph 12 of Article, operating aid to sports infrastructures can cover 80% of the eligible costs. Further, under paragraph 11, operating aid can simply cover the operating losses. That means as long as a sports infrastructure does not create profits, operating aid is necessarily proportionate pursuant to paragraph 11. Again, similar considerations could apply, in the Norwegian authorities' view, to multifunctional infrastructures.

Third, it is possible to grant up EUR 30 million investment aid under Article 55 of the GBER for sports- and multifunctional infrastructure alike.

Application to the present case

It cannot be disputed, in the Norwegian authorities view, that Spektrum, being a multifunctional infrastructure can benefit, under Article 55 of the GBER, of up to EUR 30 million of investment aid. For the sake of simplicity, the Norwegian authorities use NOK 300 million as a starting point.

Spektrum has received NOK 27.5 million under the gaming funds scheme. If the Authority considers the capital injection to be state aid, this would add at most another NOK 55 million of investment aid, so that the total amount would be 82.5 million of investment aid.

That leaves almost NOK 220 million margin of manoeuvre in terms of *block-exempted* investment aid. It seems inconceivable that any aid element inherent in measures 7 and, which would be investment aid, could amount to a figure close to NOK 220 million. All those measures would thus clearly fall under the notification threshold of the GBER.

That leaves the lease agreement(s).

If its potential aid element is regarding exclusively as operating aid, it would equal an annual grant of NOK 17 million and NOK 6 million under the theoretical worst-case scenarios described above. Any such aid would
a) in effect simply cover Spektrum's operating losses (any reduction of "aid" would lead to Spektrum not breaking even, currently, as in the past);
b) remain firmly under the EUR 2 million threshold of Article 55;
c) cover significantly less than 80 % of the eligible costs under Article 55, because Spektrum's operating costs amount to approx. NOK 25 million.

Another possibility to "measure" the aid intensity would be to compare the "worst case" aid element under the lease agreement with Spektrum's total annual costs and expenses (approx. NOK 60 million

in 2020). That would lead to an operating aid intensity of approx. 28 % in the worst-case scenario (17/60).

In reality, however, it seems clear that the income from the lease agreement(s) finances at least in part Spektrum's construction and could thus be regarded as being partly investment aid. The Norwegian authorities cannot attribute a fixed portion to a specific category of aid or category expenses (money being fungible) but consider that one could assign the total "aid element" under the lease agreement for instance to Spektrum's financial expenses, which predominately relate to the construction loan from Nordea. Those are projected to be between NOK 19.8 and NOK 15.3. million in the period between 2020 – 2026, thus almost completely "absorbing" any potential aid element in the (new) lease agreement.

The Norwegian authorities assume that there are many other possibilities to approximate aid intensities. The above should however, in their view, provide sufficient comfort to the Authority to conclude that any potential aid is proportionate and limited to the minimum necessary.

4.2.3.6 Avoidance of undue negative effects on competition and trade

The Norwegian authorities refer to section 3.3.6 of the notification letter. The considerations set forth there apply to all four measures under investigation.

4.2.3.7 Transparency

The Authority has in recent years required all aid awards above EUR 500 000 to be published in a publicly accessible register.

If there is any aid involved in measures 4, 5, 7 or 9, the Norwegian authorities would be willing to publish the required information on the Norwegian state aid register following the Authority's approval of the measure as compatible state aid, even if the aid element, if any, is likely below the EUR 500 000 for all measures.

5 CONCLUSION

The Norwegian authorities have in the forgoing demonstrated that none of the measures subject to the opening decision entail aid, or are, in eventful, compatible with the EEA Agreement. The Norwegian authorities consider that the information and arguments provided should enable the Authority to close the formal investigation.

Kluge Advokatfirma AS

Bjørnar Alterskjær

Sgn. Amie Eliassen
on behalf of
Bjørnar Alterskjær

Amie Eliassen

Clemens Kerle

On behalf of
Clemens Kerle