JUDGMENT OF THE COURT

21 March 2024

(*Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Admissibility – Time limit – Recovery – Market economy operator principle – Private acquirer test – Private debtor test – Manifest error of assessment – Reliability of evidence – Burden of proof – Standard of proof – Negative presumption – Information from undertakings*)

In Case E-10/22,

Eviny AS, established in Bergen, Norway, represented by Svein Terje Tveit and Paul Hagelund, advocates,

applicant,

v

EFTA Surveillance Authority, represented by Michael Sánchez Rydelski, Claire Simpson and Kyrre Isaksen, acting as Agents,

defendant,

APPLICATION seeking the annulment of EFTA Surveillance Authority Decision No 161/22/COL of 6 July 2022 on aid in relation to the streetlight infrastructure in Bergen (Norway),

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann, and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant and the defendant, and the written observations of the Norwegian Government, represented by Lotte Tvedt and Vilde Hauan, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments of the applicant, represented by Svein Terje Tveit, and the defendant, represented by Michael Sánchez Rydelski, at the hearing on 5 July 2023,

gives the following

Judgment

I Introduction

1 Eviny AS ("Eviny") (formerly BKK AS) is a renewable energy company, producing and distributing electrical power in western Norway. Eviny also provides associated services relating to broadband, digital services, electrification, e-security, digital and electrical infrastructure, entrepreneur services, district heating etc. Eviny is publicly owned by the state-owned renewable energy producer Statkraft, Bergen municipality, other local municipalities and two local energy networks in the greater Bergen area.

2 The case concerns Decision No 161/22/COL ("the contested decision") of the EFTA Surveillance Authority ("ESA") concerning alleged overcompensation for payments of (i) operation and maintenance costs, referred to as "measure (a)" in the contested decision and (ii) capital costs in relation to streetlight services in Bergen municipality, referred to as "measure (c)" in the contested decision.

3 ESA found that there was overcompensation for maintenance and operation of the streetlight infrastructure controlled by Eviny ("the first part of measure (a)") and for maintenance and operation of the streetlight infrastructure owned by Bergen municipality ("the second part of measure (a)").

4 ESA found, as regards the first part of measure (a), that overcompensation occurred from 1 January 2016 (still ongoing at the date of the contested decision), and, as regards the second part of measure (a), that overcompensation occurred from 1 January 2016 until 1 April 2020. In relation to measure (c), ESA found that overcompensation for capital costs occurred from 1 June 2007 (still ongoing at the date of the contested decision).

5 A third measure concerning the financing of 12 000 LED fixtures, identified in the contested decision as measure (b), was not found to have conferred an advantage on Eviny.

6 In its application, Eviny seeks the annulment of the contested decision. The application is based on six pleas. First, that ESA committed a manifest error by applying the notion of undertakings and concluding that streetlight ownership and operation in the circumstances of the present case is an economic activity. Second, that ESA committed a manifest error of assessment by concluding that Eviny received an economic advantage through overcompensation. Third, that ESA committed a manifest error of assessment by concluding that there was a distortion of competition. Fourth, that ESA committed a manifest error of assessment by concluding that the effect on trade criterion

was met. Fifth, that any alleged aid is existing aid and recovery would therefore be unlawful. Sixth, that the contested decision is based on an insufficient examination of the facts and fails to properly state the reasons on which it is based.

7 In its defence, ESA contests the pleas advanced by Eviny and requests the Court to dismiss the application as unfounded.

II Legal background

EEA law

8 Article 61(1) of the Agreement on the European Economic Area ("EEA Agreement" or "EEA") reads:

> *Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.*

9 Article 6 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

> *In accordance with the provisions of this Agreement and the EEA Agreement, the EFTA Surveillance Authority may, in carrying out the duties assigned to it, request all the necessary information from the Governments and competent authorities of the EFTA States and from undertakings and associations of undertakings.*

10 Article 16 SCA reads:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

11 Article 36 SCA reads:

> *The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.*
>
> *Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance*

Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

12 Article 1 of Part I of Protocol 3 to the SCA ("Protocol 3 SCA") reads, in extract:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

...

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. 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.

13 Article 14 of Part II of Protocol 3 SCA, entitled "Recovery of aid", reads:

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the EFTA Surveillance Authority. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the EFTA Court pursuant to Article 40 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority's decision. To this effect and in the event of a procedure before national courts, the EFTA States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EEA law.

14 Article 15 of Part II of Protocol 3 SCA reads:

1. The powers of the EFTA Surveillance Authority to recover aid shall be subject to a limitation period of ten years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the EFTA Surveillance Authority or by an EFTA State, acting at the request of the EFTA Surveillance Authority, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.

III Facts and pre-litigation procedure

Background

15 Until 1996, streetlight infrastructure along municipal roads in Bergen was owned by Bergen Lysverker, a municipal unit within Bergen municipality. In 1996, Bergen Lysverker was acquired by BKK DA, under a sales agreement ("the Sales Agreement"). A provision was included in section 7(c) of the Sales Agreement concerning compensation for the provision of streetlighting and related services.

16 BKK DA was later reorganised into BKK AS, which later changed its name to Eviny. Various subsidiaries of Eviny have since owned and operated the streetlight infrastructure along the municipal roads in Bergen municipality.

17 Throughout the period concerned, Bergen municipality has also owned a (lower) number of streetlights itself. Since 1996, Bergen municipality has acquired new streetlights by means of financing their construction and by property developers transferring newly constructed streetlights to Bergen municipality.

18 Eviny and Bergen municipality have concluded several contracts regulating the supply of streetlighting and related services along municipal roads in Bergen since 2012. The duration of those contracts has normally been for two years, with a one-year option for prolongation. A contract for 2012 to 2014 was entered into with BKK Nett AS. It originally comprised 18 228 lamp points, of which 16 082 were controlled by the BKK group and 2 146 were owned by Bergen municipality. A contract for the period 2015 to 2017 was also made with BKK Nett AS. For the period from 2018 onwards, the existing contract was prolonged. Initially, the contract was prolonged until 1 July 2018 and subsequently to 1 January 2019 and then until January 2020.

19 On 27 September 2016, the Municipality published a call for tender for the purchase of approximately 12 000 LED fittings. The LED fittings were used to replace quicksilver and sodium fittings in the streetlights owned by BKK EnoTek AS (a subsidiary of Eviny). The replacement was financed by Bergen municipality, which remained the owner of the new LED fittings.

20 In May 2017, Eviny's ownership of streetlight infrastructure was transferred to its subsidiary Veilys AS. Veilys AS has neither operated nor maintained the streetlight infrastructure itself. These activities have been performed by another subsidiary of Eviny, BKK EnoTek AS. Veilys AS also owns streetlight infrastructure along state roads, county roads and private roads.

21 By letter dated 11 May 2017, ESA received a complaint concerning alleged unlawful State aid granted by Bergen municipality to Eviny in relation to the streetlight infrastructure. Two alleged State aid measures were identified in the complaint. First, the complainant alleged that Bergen municipality had overcompensated companies within the Eviny group for the maintenance and operation of streetlights along municipal roads. Second, the complaint concerned the financing by Bergen municipality of 12 000 new LED fixtures on infrastructure owned by Veilys AS.

22 By Decision No 027/19/COL of 16 April 2019 ("the opening decision"), ESA initiated the formal investigation procedure. In the opening decision, ESA identified a third possible State aid measure, namely the compensation paid to Eviny for the capital costs related to streetlight infrastructure. In the opening decision, ESA expressed doubts as to the compatibility of the measures with the EEA Agreement. ESA informed the Norwegian authorities that it had formed the preliminary view that the measures identified in the complaint, and the compensation for the capital costs related to streetlight infrastructure owned by Veilys AS in Bergen municipality, might entail State aid pursuant to Article 61(1) EEA.

23 ESA formed the preliminary view that Eviny might have received an economic advantage, within the meaning of Article 61(1) EEA. Based on the available information, ESA also could not exclude the possibility that the financing of the 12 000 LED fixtures had conferred an economic advantage on Eviny. ESA also took the preliminary view that Eviny engages in an economic activity when selling maintenance and operation services for the streetlights to Bergen municipality. ESA stressed that the Norwegian authorities were purchasing such services from a commercial entity, which

offered that service for remuneration. There was a market for the maintenance and operation of streetlights, and such services were sold to public authorities, as well as to companies and individuals that needed lighting along private roads. ESA further explained that the fact that there might be no private demand for some of these services, due to a market failure, and that a public authority had therefore decided to purchase those services in the interest of the public good, did not lead to the conclusion that the activity of the supplier was non-economic.

24 ESA emphasised, further, that in order to exclude a potential distortion of competition, inter alia, the management and operation of the infrastructure must generally be subject to a legal monopoly and fulfil a number of other cumulative criteria.

25 To the extent that the transactions between Bergen municipality and Eviny were not carried out in line with normal market conditions, ESA concluded on a preliminary basis that they conferred an advantage on Eviny, which may have strengthened its position compared to other undertakings competing with it. ESA could therefore not exclude the possibility that the measures were liable to distort competition.

The contested decision

26 On 6 July 2022, ESA adopted the contested decision. In the context of assessing whether Eviny carried out an economic activity, ESA maintained, inter alia, that it had not been presented with arguments to the effect that sufficient safeguards, effectively and appropriately separating the income and costs under the contracts concerned from other economic activities, were in place.

27 ESA further considered that section 7(c) of the Sales Agreement entailed a compensation mechanism under which Eviny would be free to operate the streetlights on market terms, which entailed cost coverage plus a capital cost for the committed capital equal to the rate of return fixed by the Norwegian Energy Regulatory Authority ("NVE") for the regulated power grid infrastructure.

28 On the question whether Eviny received an advantage through measure (a), ESA found that the totality of the information received indicated that the compensation for maintenance and operation services likely exceeded the level commensurate with the mechanism in section 7(c) of the Sales Agreement.

29 In relation to compensation for capital costs, measure (c), ESA considered that the mechanism in section 7(c) of the Sales Agreement did not specify the methodology to be applied for establishing the committed capital that was the capital base. There was, however, nothing in its wording to indicate that Eviny was entitled to an excessive level of return in the form of monopoly rents. On the contrary, cost-plus mechanisms, such as that included in the Sales Agreement, were normally used in regulated sectors to ensure that the compensation level was adequate. On this basis, ESA interpreted the provision in the Sales Agreement to entail that the capital base was to be established in an appropriate manner, ensuring an adequate level of return.

30 In its assessment, ESA noted a disagreement between Bergen municipality and Eviny. It appeared that while Bergen municipality advocated for the use of the book value for establishing the capital base, Eviny argued in favour of using the assets' replacement cost. Further, ESA considered that it appeared that this disagreement prevailed throughout the period concerned, and that the capital base may as a result have been established in a manner which was not commensurate with the regulation of adequate return as set out in the compensation mechanism of the Sales Agreement.

31 Lastly, according to the contested decision, figures from a database managed by Statistics Norway (*Statistisk sentralbyrå*) ("the KOSTRA database") showed that throughout the period from 2016 to 2019, Bergen municipality had the highest recorded costs for streetlighting of the 10 larger municipalities represented. While the figures were not sufficiently detailed to conclude to what extent the recorded costs concerned maintenance and operation or capital costs, ESA took this as an indication that Eviny was compensated in excess of an adequate level of return.

32 The operative part of the contested decision read:

Article 1

The overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)), paid to companies in the BKK-group in respect of streetlights along municipal roads within the Municipality, amounts to unlawful state aid that is incompatible with the functioning of the EEA Agreement.

Article 2

The overcompensation for maintenance and operation (measure (a)) concerns, first, the streetlight infrastructure controlled by the BKK-group. In respect of this infrastructure, the overcompensation comprises those elements exceeding the costs eligible for compensation under the mechanism in section 7(c) of the 1996 sales agreement.

Second, the overcompensation for maintenance and operation (measure (a)) concerns services in respect of the streetlight infrastructure owned by the Municipality. For these services, the overcompensation equates to those sums exceeding the market price that could have been obtained on the open market.

Article 3

The overcompensation for capital cost (measure (c)) comprises the compensation in excess of the adequate level of return allowed by the mechanism in section 7(c) of the 1996 sales agreement.

Article 4

With respect to the compensation for maintenance and operation (measure (a)), the finding of unlawful and incompatible overcompensation is limited to the

period from 1 January 2016. As concerns the streetlight infrastructure controlled by the BKK-group, this overcompensation is ongoing. In respect of the streetlight infrastructure owned by the Municipality, the overcompensation comprises activities performed until 1 April 2020.

Article 5

As regards the compensation for capital cost (measure (c)), the aid found unlawful and incompatible comprises all overcompensation awarded within the limitation period of 10 years in Article 15 of Part II of Protocol 3. This limitation period was interrupted when ESA forwarded the complaint to the Norwegian authorities, and invited them to comment on it, by letter dated 1 June 2017.

Article 6

The Norwegian authorities shall take all necessary measures to recover the unlawful and incompatible aid referred to in Articles 1, 2, 3, 4 and 5.

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

Article 7

Recovery shall be effected without delay and in accordance with the procedures under the national law of Norway, provided that they allow for the immediate and effective execution of this decision.

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

Article 8

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

1. the total amount (principal and recovery interests) to be recovered;
2. the dates on which the sums to be recovered were put at the disposal of the concerned companies in BKK-group;
3. a report on the progress made and the measures taken to comply with this Decision.

Article 9

Should the Norwegian authorities encounter serious difficulties preventing them from respecting either one of the deadlines set out in Articles 7 and 8, they must inform ESA of these difficulties. Provided that the Norwegian authorities have

presented an appropriate justification, ESA may prolong the deadlines in accordance with the principle of loyal cooperation.

Article 10

This Decision is addressed to the Kingdom of Norway.

IV Procedure and forms of order sought

33 Eviny lodged the present action by an application registered at the Court on 27 September 2022. Eviny requests that the Court:

1. *annul Decision No 161/22/COL, of 6 July 2022, of the EFTA Surveillance Authority; and*

2. *order the EFTA Surveillance Authority to pay the costs of the proceedings.*

34 On 12 December 2022, ESA submitted its defence pursuant to Article 107 of the Rules of Procedure ("RoP"). ESA requests the Court to:

1. *dismiss the application as unfounded, and*

2. *order the applicant to pay the costs of the proceedings.*

35 On 30 January 2023, Eviny submitted its reply. On 3 March 2023, ESA submitted its rejoinder.

36 On 13 February 2023, the Norwegian Government submitted written observations pursuant to Article 20 of the Statute of the Court.

37 On 13 March 2023, ESA submitted a proposal for measures of organisation of procedure pursuant to Article 57(4) RoP. On 24 March 2023, Eviny submitted its comments on ESA's proposal.

38 On 28 March 2023, the Court adopted measures of organisation of procedure pursuant to Article 57(3)(a), (b) and (d) RoP, inviting those participating in the proceedings before the Court to respond to questions relating to certain figures presented in the contested decision.

39 On 13 April 2023, responses to the measures of organisation of procedure were received from Eviny, ESA and the Norwegian Government.

40 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and pleas and arguments of the parties, which are mentioned or discussed in the following only insofar as it is necessary for the reasoning of the Court.

V Findings of the Court

Introduction and summary

41 The Court finds the action admissible, and that the applicant's second plea is well founded. ESA's conclusion that Eviny received an economic advantage through overcompensation is vitiated by a manifest error of assessment. The contested decision must, therefore, be annulled. Considering this conclusion, the Court has found it unnecessary to consider the other pleas of the applicant.

Admissibility

Time limit

42 The period of time for commencing proceedings is a matter of public policy since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice. Accordingly, the Court must ascertain, even of its own motion, whether it has been observed (compare the order in *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, T-2/09, EU:T:2009:478, paragraph 12).

43 The third paragraph of Article 36 SCA provides that the proceedings provided for in Article 36 SCA shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. Notification within the meaning of that paragraph refers to notification to an addressee of a decision in accordance with Article 17 SCA.

44 With regard to measures which according to established practice are published in the EEA Section of and EEA Supplement to the Official Journal, it is the date of publication which initiates the period to institute proceedings. In such circumstances, the third party concerned may legitimately expect that the decision in question will be published. That applies a fortiori to measures the publication of which in the EEA Section of and EEA Supplement to the Official Journal is required by EEA law (compare the judgment in *Oltchim* v *Commission*, T-565/19, EU:T:2021:904, paragraphs 37, 38 and 39).

45 In the present case, Eviny is not the addressee of the contested decision. The contested decision is a decision which must be published in the EEA Section of and the EEA Supplement to the Official Journal of the European Union pursuant to Article 26(3) of Part II of Protocol 3 SCA. Accordingly, the relevant time limit is within two months of the publication of the contested decision in the EEA Section of and the EEA Supplement to the Official Journal of the European Union. In accordance with Article 40 RoP, the time limit allowed for initiating proceedings against a measure adopted by ESA shall run, where the measure is published, from the end of the fourteenth day after publication thereof in the EEA Section of and EEA Supplement to the Official Journal of the European Union.

46 The contested decision was published in the EEA Section of and the EEA Supplement to the Official Journal of the European Union on 12 January 2023.

47 Eviny's application, which was lodged on 27 September 2022, must therefore be considered as having been lodged in time.

48 Accordingly, the application is admissible.

Substance

49 By its second plea, Eviny submits that ESA committed a manifest error of assessment by concluding that Eviny received an economic advantage through overcompensation.

50 As regards both measures (a) and (c), Eviny, in essence, submits that the evidence that ESA has relied on, whether taken separately or in combination with other evidence, is neither indicative nor can be considered proof of any overcompensation for operation and maintenance services or capital costs. Furthermore, Eviny contends that ESA's conclusions, in reality, are made on the basis of a negative presumption based on a lack of information enabling the contrary to be found.

51 Eviny argues that ESA's overall assessment has not proven that compensation for operation and maintenance, as well as capital costs, is manifestly above the market price. Eviny also submits that the contested decision is selective in its reliance on certain evidence, which in any event is inconsistent and unreliable, and that such an approach is not consistent with the burden of proof on ESA and the complex economic assessment inherent in applying the market economy operator principle. Moreover, Eviny disputes the factual accuracy, consistency and reliability of the figures derived from the KOSTRA database. Eviny also submits that ESA's findings on overcompensation are wrong in substance and, in any event, during its assessment, ESA should have found it necessary to investigate further and that its findings are born from an insufficient examination which has translated, in the contested decision, into an absence of appropriate reasoning.

52 ESA disputes the arguments raised by Eviny in this regard. In particular, ESA asserts that nowhere in the contested decision is there a conclusion which was made solely on the basis of a negative presumption. In its view, the conclusions set out in the contested decision were reached on the basis of a concrete analysis of evidence, which positively substantiated that Eviny had received an economic advantage.

53 The Court underlines that where ESA initiates a procedure in relation to a State measure and adopts a decision at the end of that procedure in which it classifies that measure as State aid, it is for ESA to prove, in its decision, the existence of such aid and therefore, inter alia, that the measure confers an advantage on the recipient undertaking or undertakings. ESA is required, in the interests of sound administration of the rules of the EEA Agreement relating to State aid, to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose

(compare, inter alia, the judgments in *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 67 and case law cited; *Volotea* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 111 and case law cited; and *Commission* v *Valencia Club de Fútbol*, C-211/20 P, EU:C:2022:862, paragraph 78 and case law cited).

54 Observance of that obligation must be assessed in the light of the information available to ESA at the time it adopted its decision, to the extent that ESA has made use of the powers that enable it to obtain all the information that appears to be necessary and useful to it (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 112). The principle of good administration, which is a general principle of EEA law, includes, in particular, the duty on ESA to examine carefully and impartially all the relevant aspects of the individual case (see Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA and Norway* v *ESA* [2012] EFTA Ct. Rep. 758, paragraphs 301 and 302).

55 When the existence and legality of State aid is being examined, it may be necessary for ESA, where appropriate, to go beyond a mere examination of the matters of fact and law brought to its knowledge. It cannot be inferred from that obligation that it is for ESA, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain. However, where ESA is aware of potentially relevant pieces of information which call into question the information at its disposal, it may be obliged to go beyond a mere examination of the information brought to its notice (see Case E-4/21 *Sýn hf.* v *ESA*, judgment of 1 June 2022, paragraph 63, and compare the judgment in *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraphs 83 to 85 and case law cited).

56 The lawfulness of a decision concerning State aid falls to be assessed by the Court in the light of the information available to ESA on the date when the decision was adopted, which includes information that seemed relevant to the assessment to be carried out and which could have been obtained, upon request by ESA during the administrative procedure. If ESA has insufficient or incoherent evidence, it will be required to request additional information from the national authorities, if necessary by way of an information injunction in accordance with Article 10(3) of Part II of Protocol 3 SCA, and, if the circumstances so require, from undertakings in accordance with Article 6 SCA.

57 Even where ESA is faced with an EEA State which does not fulfil its duty to cooperate and has not provided ESA with the information requested, it must base its decision on reliable and coherent evidence which provides a sufficient basis for concluding that an undertaking has benefited from an advantage amounting to State aid and which, therefore, supports the conclusions which it arrives at (compare, inter alia, the judgments in *Larko* v *Commission*, C-244/18 P, cited above, paragraph 69, and *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraph 82).

58 The aim of the recovery of State aid from a beneficiary is to eliminate the distortion of competition brought about by a certain competitive advantage and, thus, to re-establish the status quo before the aid was granted. Thus, ESA 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 (compare, inter alia, the judgments in *Larko* v *Commission*, C-244/18 P, cited above, paragraph 70, and *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraph 79). ESA is obliged to prove the existence of an advantage. It is not for the undertakings concerned to show the absence of one (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 132). This must not be understood as a prohibition on ESA against using and applying negative presumptions in the assessment of whether the undertaking has benefited from an advantage. However, there must be other evidence capable of positively confirming the presumption and thus establishing the existence of an advantage. The amount and quality of the additional evidence required depends, inter alia, upon what could be expected of the relevant comparable private operator in the case at hand.

59 A finding that a certain measure constitutes State aid within the meaning of Article 61(1) EEA presupposes that four conditions are met. These are that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition (see Case E-1/16 *Synnøve Finden AS* [2016] EFTA Ct. Rep. 931, paragraph 39). Any State measure which, whatever its form or objectives, is likely to favour one or more undertakings directly or indirectly, or which confers an advantage on them which they would not have been able to obtain under normal market conditions, must be regarded as satisfying that condition (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraphs 102, 103 and 107).

60 The characterisation of such an advantage as existing is, in principle, carried out by applying the market economy operator principle, unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create or the State acted in its capacity as a public authority (see Case E-1/13 *Míla ehf.* v *ESA* [2014] EFTA Ct. Rep. 4, paragraph 95, and compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 108).

61 The application of the market economy operator principle itself involves the use, on a case by case basis, of various specific tests which each aim to compare, in the most appropriate and adequate manner possible, the State measure at issue in a given case, taking account in particular of its nature, with a measure that might have been adopted by a private operator in a situation that is as alike as possible and acting under normal market conditions (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 109).

62 It follows from the case law of the European Court of Justice that those tests, which give specific expression to the market economy operator principle, include, inter alia, that of the private investor, the private creditor test, the private debtor test, the private vendor test, and the private acquirer test, which is the counterpart of the private vendor test (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraphs 110 and 123).

63 When the market economy operator principle applies, it is ESA that has the burden of proving, taking into account, inter alia, the information provided by the EEA State concerned, that the conditions for the application of the market economy operator principle have not been satisfied, so that the State intervention at issue entails an advantage within the meaning of Article 61(1) EEA (compare the judgment in *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraph 75).

64 When applying the market economy operator principle in a specific case, ESA must show, following an overall assessment that takes into consideration all the relevant evidence in the case, that the undertaking or undertakings benefiting from the State measure at issue would manifestly not have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Within that overall assessment, ESA must have regard to all the options that such a comparable operator would reasonably have envisaged, all the information available and likely to have a significant influence on its decision, and the developments that were foreseeable at the time when the decision to confer an advantage was taken (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 113).

65 In particular, ESA must assess, whether, at that time, the transaction by which the advantage was conferred could be considered rational from an economic, commercial and financial perspective, taking account of its prospects for profitability over the short or longer term and of the other commercial or economic interests which it involved (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 114).

66 In the application of the market economy operator principle, ESA must assess and pay regard to the appropriate comparator and the requirements underlying the applicable test in the specific case. The private acquirer test, since it constitutes one of the various iterations of the market economy operator principle, must consequently be interpreted and applied in a manner that is consistent with that principle and the evidential requirements underlying its application (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 125). In respect of negotiating and entering into a sales agreement in the first place, that principle and the evidential requirements correspond to that of a private purchaser. On the other hand, in a situation where the public authority is under a continuous obligation, in the context of a contractual relationship, the application of the principle and the evidential requirements underlying its application, may be more akin to that of a private debtor. Unlike a private investor, where the nature of the investment alone can be sufficient to warrant due diligence and documentation, the interest of a private debtor is only to pay

nothing more than that which they are obliged under the contract (compare the judgment in *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraphs 123 to 125). Thus, the application of the test and of its evidential requirements depends on and is relative to that of the relevant comparable private operator.

67 It is the task of ESA to carry out that assessment and prove the existence of an advantage for the purposes of Article 61(1) EEA. In the present case, that advantage, assuming it to be established, can correspond only to the difference between the remuneration which the beneficiary at issue could have expected to achieve under normal market conditions and that actually paid to them (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 129).

68 Therefore, when it appears that the market economy operator principle could be applicable, ESA is under a duty to ask the EEA State concerned to provide it with all the relevant information enabling it to determine whether the conditions governing the applicability and the application of that principle are met (compare the judgment in *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraph 80).

69 Since ESA does not have direct knowledge of the circumstances in which the decision on acquiring goods or services was taken, it must rely, for the purposes of applying that principle, to a large extent, on the objective and verifiable evidence produced by the EEA State at issue (compare the judgment in *Commission* v *Valencia Club de Fútbol*, C-211/20 P, cited above, paragraph 81). It is settled case law that the examination which it falls upon ESA to carry out, when applying the market economy operator principle, requires a complex economic assessment and that it is not for the Court to substitute its own economic assessment for that of ESA. However, that does not imply that the Court must refrain from reviewing ESA's interpretation of economic data (compare, for example, the judgment in *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, cited above, paragraphs 116 and 117 and case law cited).

70 In reviewing whether such complex economic assessments are vitiated by a manifest error of assessment, the Court must, inter alia, establish not only whether the evidence relied on was factually accurate, reliable and consistent, but also whether that evidence contained all the relevant information which must be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it (compare the judgment in *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and case law cited). With regard to the standard of proof required to demonstrate a manifest error in the application of the market economy operator principle, it is necessary to demonstrate that there was an error sufficiently serious as to undermine ESA's complex economic assessment. A manifest error may be established by evidence which renders implausible ESA's assessment of the facts in its decision (compare the judgment in *BTB Holding Investments and Duferco Participations Holding* v *Commission*, C-148/19 P, EU:C:2020:354, paragraphs 71 and 72).

71 In the contested decision, ESA carried out its assessment with regard to the market economy operator principle. As set out in recitals 158 and 159 of the contested decision, as regards measure (a), ESA sought to assess whether Eviny had been compensated above market rates for maintenance and operation. As regards measure (c), ESA considered, first, whether it was commensurate with normal market practice to compensate for capital costs and, second, whether Eviny had been compensated for such costs above market rates.

72 In the contested decision, ESA assessed measures (a) and (c) separately, but its assessment of those measures was based, in several respects, on similar considerations. Accordingly, the Court will, first, examine the second plea with regard to those aspects of ESA's assessment which were based on the same considerations regarding both measures (a) and (c), before examining those measures separately with regard to the different grounds relied on by ESA in the contested decision.

73 As regards both measures (a) and (c), in recitals 173–175, 182 and 210 of the contested decision, ESA relied on a table of figures from the KOSTRA database to support its findings that Eviny had been overcompensated. In those recitals, ESA, referring to the table of figures, noted that Bergen municipality had the highest recorded costs of the 10 larger municipalities represented in that table. ESA considered that the table of figures from the KOSTRA database was an indication that Eviny had been overcompensated. However, ESA took the view that those figures were not sufficiently detailed to conclude to what extent the overcompensation concerned maintenance and operation under measure (a) or capital costs under measure (c). The table of figures, set out in recital 69 of the contested decision, represents the only quantitative basis relied on by ESA in its decision and by which ESA drew a comparison with the costs of other municipalities in order to support its findings that an advantage had been conferred on Eviny.

74 First, it must be noted that although the contested decision represents those figures as being from the KOSTRA database, it clearly follows from the letter of 12 April 2021 from Bergen municipality, from which the table set out in recital 69 of the contested decision is reproduced, that the source indicated for those figures is not the KOSTRA database, but another database organised by certain Norwegian municipalities. The Norwegian Government pointed this out in its written observations. However, in its proposal for measures of organisation of procedure, ESA submitted that this statement of the Norwegian Government was "factually manifestly wrong".

75 In the measures of organisation of procedure adopted by the Court on 28 March 2023, the Court brought attention to this discrepancy between the contested decision and the letter of 12 April 2021, which recital 69 of the contested decision refers to as the source of the table of figures, which is reproduced exactly from that letter. In its response to the measures of organisation of procedure, ESA merely stated that the figures from the other database are, ultimately, derived from the KOSTRA database, without explaining further this discrepancy.

76 Eviny submits that the figures from the KOSTRA database are not factually accurate, reliable and consistent. Eviny submits that ESA was required to properly establish the relevance and verifiability of the data used. Furthermore, Eviny has argued that ESA has been selective in what evidence it has relied on in order to support its findings. For example, Eviny has pointed out that ESA only relied on cost-input from the 10 largest cities in Norway, whereas readily available evidence suggested that there are several municipalities with higher costs than Bergen municipality. ESA also based itself on costs per light point for a period of four years from 2016–2019, whilst ignoring other years, the quality of the cost input and other metrics, such as cost per kilometres of lighted road.

77 As to whether the figures from the KOSTRA database can be described as factually accurate and reliable, Eviny has submitted that the figures from the KOSTRA database for Bergen municipality are not comparable with other municipalities, as Bergen municipality includes capital costs, which other municipalities do not. This, according to Eviny, would explain why Bergen municipality has the highest cost per light point, as there is considerable discrepancy in the costs municipalities include when they submit information to the KOSTRA database. Eviny states that ESA did not enquire with the municipalities, with which it draws a comparison, what costs are actually included and reported to the KOSTRA database.

78 ESA considers that the figures from the KOSTRA database are reliable and refers, inter alia, to the fact that Statistics Norway, the manager of that database, "can reject information that is substantially incorrect". Furthermore, ESA has explained that, in accordance with guidance on what costs to include when submitting data for the KOSTRA database, the figures comprise "inter alia, cables, posts and light fixtures, rehabilitation and replacements, maintenance, network tariffs, and electricity".

79 The Court notes that, as the information submitted by ESA indicates, the list of costs to be included when municipalities submit information to the KOSTRA database is not exhaustive, but merely illustrative as indicated by its use of "inter alia" in the list of costs to be included. In response to a question from the bench at the hearing as to whether ESA had investigated whether other municipalities submitted the same costs as Bergen municipality to the KOSTRA database, ESA stated that it had not done so, but merely assumed that other municipalities did so.

80 Further, there is no indication in the contested decision that ESA considered the reliability of the figures derived from the KOSTRA database. ESA's explanations of its views as to the reliability of the KOSTRA database have only been presented in its written submissions before the Court. In this respect, the Court recalls that a decision must be self-sufficient and that the reasons on which it is based may not be stated in explanations given subsequently when the decision in question is already the subject of proceedings brought before the Court (compare the judgment in *Valencia Club de Fútbol* v *Commission*, T-732/16, EU:T:2020:98, paragraph 194).

81 As to the absence of any consideration of figures regarding cost per kilometre of lighted road in the contested decision, ESA stated that, at the outset, it had only received figures

for cost per light point from Bergen municipality. Therefore, given, inter alia, the fact that it appears that ESA had not examined the source of the table of figures reproduced in the contested decision, it must be held that ESA did not assess the reliability of the figures it reproduced in the contested decision before relying on them in its assessment.

82 As to Eviny's contention that ESA selectively relied on evidence, it is common ground that Bergen municipality does not have the highest cost according to another metric available in the KOSTRA database, namely cost per kilometre of lighted road. As to why the contested decision did not take this into account, ESA stated, at the hearing, that ESA had only received information concerning yearly cost per light point from Bergen municipality. As ESA was not aware of those figures when it adopted the contested decision, which does not contain any discussion of those figures, it did not investigate this issue further.

83 Regarding Eviny's submission that ESA selectively relied only on those years from the KOSTRA database where Bergen municipality had the highest cost, but not later years, where Bergen municipality did not have the highest costs, ESA acknowledged, at the hearing, that, in 2020 and 2021, Bergen municipality did not have the highest costs under the metric relied on in the contested decision. Nevertheless, ESA did not provide an adequate explanation of why, given that the contested decision was adopted on 6 July 2022, it neglected to include figures from those years in its assessment.

84 Accordingly, it must be held that the table of figures from the KOSTRA database, on which the contested decision relies to support its findings, is unreliable as evidence to substantiate ESA's conclusion. ESA has neither sufficiently explained why certain data was not included in its assessment nor taken account of all of the relevant information.

85 Further, the Court observes that ESA, in its assessment in the contested decision as to whether measures (a) and (c) had conferred an advantage on Eviny, in several respects relied on the absence of information in order to support its findings.

86 In recital 172, referring to Eviny's comments on the opening decision, ESA stated that the information submitted by Eviny did not contain any specifics concerning the basis for the prices charged. ESA took the view that this lack of specificity was an indication that the compensation mechanism in the Sales Agreement had not been complied with. As was confirmed at the hearing, although ESA considered that it had incomplete information in this regard, which, potentially, could only be supplemented with information from Eviny, it did not, after having received Eviny's comments by letter of 5 June 2019, request any further information from Eviny. At the hearing, ESA also stated that if it had received complete and full information from Eviny, it would have been able to fix a definite amount in relation to the State aid to be recovered.

87 In support of its conclusion in the contested decision that Eviny had been overcompensated in respect of the first part of measure (a), ESA referred in recital 172 to the lack of information from Eviny concerning whether the prices charged complied with the compensation mechanism of the Sales Agreement. Furthermore, in recital 174, ESA stated that neither the Norwegian authorities nor Eviny had provided information

substantiating that the cost levels derived from the figures from the KOSTRA database were justified. As such, ESA considered that a lack of information contrary to the indications that there had been overcompensation supported its findings that an advantage had been conferred on Eviny.

88 In recitals 181 and 182 of the contested decision, as regards the second part of measure (a), in support of its view that Bergen municipality had paid more than it would have done if procuring the services on the open market, ESA stated that there was "nothing in the information submitted to indicate the contrary". In recital 184 of the contested decision, ESA considered that it "must conclude on the basis of the remaining information available".

89 As regards whether measure (c) conferred an advantage on Eviny, in recital 207 of the contested decision, ESA considered that the information submitted did not establish how the eligible capital cost had been calculated. In that recital, ESA merely notes that the Norwegian authorities had been unable to provide specifics and considered that control on their part had been made difficult by the lack of separate accounts. ESA then stated that Eviny "merely made general reference to the capital that could be involved in constructing a similar infrastructure". ESA considered that this "lack of precision" was "in itself indicative" that the Sales Agreement had not been adhered to.

90 It is common ground that after having received Eviny's comments on the opening decision by letter of 5 June 2019, ESA did not request any information from Eviny, even though it considered that it had incomplete information which, potentially, could only be supplemented by Eviny. At the hearing, ESA acknowledged that further information from Eviny would have been useful to its assessment. As to why it did not request further information from Eviny, ESA stated in its defence, that it had no legal means to request specific information or documents from Eviny, referring to the absence of a provision in Protocol 3 SCA, which would empower it to request information directly from undertakings.

91 However, the Court observes that Article 6 SCA provides that, in accordance with the SCA and the EEA Agreement, ESA may, in carrying out the duties assigned to it, request all the necessary information from undertakings and associations of undertakings. Accordingly, Article 6 SCA provides ESA with a legal basis under which it may request information from undertakings such as Eviny, although ESA may not require it as under, inter alia, Article 10(3) of Part II of Protocol 3 SCA. There are no indications in the case file that Eviny was uncooperative during the administrative procedure or that it refused to provide the information that ESA considered to be lacking. However, ESA did not request that information or provide Eviny with any indication that it considered this information to be lacking and that it was necessary to its assessment, prior to the adoption of the contested decision. Furthermore, there is no indication that the Norwegian authorities did not provide ESA with all of the information that it requested, given that ESA did not make use of its power under Article 10(3) of Part II of Protocol 3 SCA by issuing an information injunction.

92 In its written submissions and at the hearing, ESA criticised Eviny for not having, of its own initiative, submitted the necessary information to ESA during the administrative procedure. However, the Court observes that an undertaking cannot be criticised for not providing information which it was never asked to provide. In the absence of a clear request from ESA, Eviny could not have known what information ESA considered to be relevant, lacking, and necessary for its assessment.

93 In that regard, the Court recalls that ESA has the burden of proof when applying the market economy operator principle and that ESA must ask for all relevant information during the administrative procedure. In the case at hand, this implies that ESA cannot rely on the fragmentary nature of the information it received during the administrative procedure to justify its decision since ESA has not exercised all the powers at its disposal to obtain the necessary information. That applies all the more strongly where the contested decision is based not on a failure to produce evidence which had been requested by ESA from the EEA State concerned, but on the finding that a private operator would not have behaved in the same way as the authorities of that EEA State, a finding which presupposes that ESA had all the relevant information necessary to draw up its decision (compare the judgment in *Valencia Club de Fútbol* v *Commission*, T-732/16, cited above, paragraph 136 and case law cited).

94 In the light of the foregoing, it must be held that ESA was not justified in relying on the absence of certain information in order to support its findings that measures (a) and (c) conferred an advantage on Eviny, given that it failed to request that information, which it could have done during the administrative procedure. As ESA considered this information to be relevant and necessary to its assessment, it was required to go beyond a mere examination of the matters of fact brought to its notice. In those circumstances, ESA failed to conduct a diligent investigation so that it had at its disposal the most complete and reliable information possible.

95 As to ESA's more specific assessment of measure (a), the decision was divided into two parts. The first part concerned compensation for operation and maintenance in respect of streetlight infrastructure controlled by Eviny, whereas the second part concerned compensation for operation and maintenance in respect of streetlight infrastructure owned by Bergen municipality.

96 In its assessment of the first part of measure (a), ESA set out its interpretation of section 7(c) of the Sales Agreement. In recital 169 of the contested decision, ESA took the view that section 7(c) entailed that the compensation should cover Eviny's operational costs plus a regulated return on the committed capital. In ESA's view, as far as the element concerning maintenance and operation is concerned, section 7(c) only allows for cost coverage. In essence, the advantage characterised by ESA in respect of the first part of measure (a) was any compensation in excess of the costs eligible for compensation under section 7(c) as interpreted by ESA, as is also borne out by the first subparagraph of Article 2 of the operative part of the contested decision.

97 Eviny contests ESA's interpretation of section 7(c) of the Sales Agreement and argues that, properly interpreted, section 7(c) does not only provide for cost-based

compensation for operation and maintenance, but that such compensation is to be on market terms. Eviny criticises ESA for having based the contested decision on its own interpretation of the Sales Agreement and the compensation agreed, without having enquired about the understanding of the parties to that agreement and the assumptions made by the parties upon entering into it. In this respect, Eviny referred, at the hearing, to the importance of such considerations under Norwegian contract law, given that the law applicable to the Sales Agreement is Norwegian law. In Eviny's view, ESA has further ignored the wording of section 7(c), such as its reference to "market based" compensation. Moreover, Eviny argues that, in the contested decision, ESA failed to take account of the subsequent practice and agreements between Eviny and Bergen municipality, which supports the interpretation, advocated by Eviny, that section 7(c) is not limited to cost-based compensation.

98 Eviny submits that the pricing mechanism for streetlights owned by Eviny set out in section 7(c) of the Sales Agreement requires the operation of streetlights to be on "market terms". Eviny further points out that more detailed agreements have been entered into between Eviny and Bergen municipality after 1996, such as the 2006 agreement on building and operation of streetlights and the 2015 agreement on operation and maintenance of streetlights. In this respect, the Court notes that point 2.2 of Appendix A to the latter agreement explicitly provides that "[t]he Traffic Administration shall pay [Eviny] an annual amount of NOK 495 excluding VAT for the operation and maintenance of each lamp point in municipal roads".

99 In its defence, ESA stated that the contested decision is based on the premise that section 7(c) of the Sales Agreement provided for a compensation mechanism that only allowed for cost coverage and that the relevant costs must be regularly and appropriately established in order to comply with that compensation mechanism. Accordingly, ESA is of the view that a cost coverage method is mandatory.

100 The Court observes that the wording of section 7(c) of the Sales Agreement is open to several interpretations. It may thus be understood both as advocated by ESA and as advocated by Eviny. However, in its interpretation of section 7(c), ESA did not take any account of the law applicable to the Sales Agreement. In those circumstances, ESA was not entitled to take the view that section 7(c) of the Sales Agreement was limited to compensation for operational costs. Accordingly, ESA's assessment in that regard did not take account of all the relevant considerations it was required to take account of in order for it to be entitled to rely on its interpretation of section 7(c) of the Sales Agreement.

101 Given that ESA's application of the private acquirer test, set out in recital 170 of the contested decision, in relation to the first part of measure (a) rested on its interpretation of section 7(c) of the Sales Agreement, it must be held that it similarly did not take account of all the relevant considerations.

102 ESA found, in recital 176, that "the totality of the submitted information indicates that the compensation has most likely exceeded the level commensurate with" the compensation mechanism in the Sales Agreement. In ESA's view, this reflected a

failure on the part of Bergen municipality to take the necessary steps to ensure that the compensation mechanism was complied with and that, as such, Bergen municipality had not acted as a private purchaser.

103 In the light of the Court's findings regarding ESA's reliance on the table of figures from the KOSTRA database and the absence of information above, the Court must hold that the evidence relied on by ESA was unreliable and insufficient to substantiate its findings.

104 Accordingly, it must be held that ESA's assessment in relation to the first part of measure (a) was vitiated by manifest errors of assessment.

105 As regards the second part of measure (a), ESA found that Bergen municipality was free to purchase maintenance and operation of its streetlight infrastructure from any willing provider and was not bound by any predefined compensation mechanism.

106 In relation to the compensation for activities performed by Eviny in respect of the streetlight infrastructure owned by Bergen municipality, ESA observed, in recital 180 of the contested decision, that Bergen municipality had "perceived the price level as high" but "did not check whether the services could be procured at lower costs from another supplier". Instead, ESA noted, Bergen municipality had accepted the same price per streetlight as was charged for the streetlight infrastructure controlled by Eviny. On this basis, ESA concluded that Bergen municipality had not acted as a private purchaser would have done.

107 Regarding the level of compensation, ESA referred to its findings as regards the first part of measure (a), i.e. that the "totality of the submitted information indicates that the compensation level has exceeded that allowed by the cost-based mechanism" in the Sales Agreement. ESA took the view that this also suggested that Bergen municipality had paid more than it would have done if procuring the services on the open market.

108 Given the Court's findings above that ESA's assessment as regards the first part of measure (a) was vitiated by manifest errors of assessment, in so far as ESA's assessment regarding the second part of measure (a) relies on that assessment, it is vitiated by the same manifest errors of assessment.

109 The application of the market economy operator principle in the present case required ESA to examine whether Bergen municipality, as a party to the contracts concluded with Eviny, could be regarded as having acted like a private acquirer of services in a comparable situation (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 152).

110 As regards ESA's application of the private acquirer test, although ESA was entitled to consider that a private acquirer, if it considered the price level to be high, would have checked whether those services could be procured at a lower cost from another supplier, that conclusion, in and of itself, was not sufficient to prove that Eviny had received an advantage. ESA was obliged to examine whether Eviny had received an advantage that

it would manifestly not have obtained under normal market conditions and to substantiate that conclusion with sufficient evidence. It was not sufficient for ESA simply to state that a private acquirer would have ascertained whether those services could be procured at a lower cost from another supplier without further substantiating its conclusion that Eviny had received an advantage.

111 As set out in the second subparagraph of Article 2 of the operative part of the contested decision, ESA found that there had been overcompensation for maintenance and operation concerning services in respect of the streetlight infrastructure owned by Bergen municipality. For those services, the overcompensation equated to those sums exceeding the market price that could have been obtained on the open market.

112 In view of the grounds on which ESA relied in order to support its conclusion that Bergen municipality had paid more than it would have done if procuring the services on the open market, the Court observes that in the contested decision ESA did not analyse what could constitute an appropriate market price. In response to a question from the bench, as to whether ESA had made any attempt at establishing a market price for the services at issue in the contested decision, ESA stated that it had not done so because it would have needed reliable and verifiable data from Eviny or a competitor, which it had not obtained.

113 ESA is under the obligation to conduct a diligent investigation and obtain the necessary evidence in order to substantiate its conclusion as to the existence of an advantage that would manifestly not have been obtained under normal market conditions. In the present case, that advantage, assuming it to be established, can correspond only to the difference between the remuneration which Eviny could have expected to achieve under normal market conditions and that actually paid to it (compare the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, cited above, paragraph 129).

114 As such, it is evident that ESA did not discharge its burden of proof by obtaining sufficient evidence in order to establish that Eviny had received an advantage, which it would manifestly not have obtained under normal market conditions.

115 In the light of the Court's findings regarding ESA's reliance on the table of figures from the KOSTRA database and the absence of information above, as well as the foregoing findings, it must be held that the evidence relied on by ESA was unreliable and insufficient to substantiate its findings. Therefore, it must be held that ESA's assessment as regards the second part of measure (a) was vitiated by manifest errors of assessment.

116 Regarding measure (c), ESA based its reasoning, in accordance with its interpretation of section 7(c) of the Sales Agreement, on the premise that the NVE reference rate should be applied on the committed capital and that the capital base should be established in an appropriate manner ensuring an adequate level of return.

117 ESA considered it commensurate with normal market conditions to compensate an infrastructure owner for capital costs. ESA divided its assessment of measure (c) into two parts, first, as to the interest rate to be applied and, second, the capital base to which

the interest rate was to be applied. ESA found that the application, in principle, of the NVE reference rate was commensurate with an adequate level of return. However, as to the capital base to which the NVE reference rate was to be applied, it considered that the information submitted did not establish how the compensation had been calculated in practice.

118 In recitals 208 and 209, ESA states that, in general, as the NVE reference rate is a nominal interest rate already incorporating general inflation, applying it on a capital base established following a replacement cost-approach would entail compensating for general inflation twice. Noting a disagreement between Bergen municipality and Eviny in 2004, ESA considered that "this disagreement prevailed throughout the concerned period" without providing any further reasons for this conclusion. ESA went on to state that the capital base "may as a result" have been established in a manner which was not commensurate with the regulation of an adequate level of return in accordance with the compensation mechanism of the Sales Agreement.

119 Eviny submits that the actual payments that it received under the Sales Agreement were never equal to what would have been paid under a replacement cost approach, which means that Eviny was never compensated for general inflation twice. Furthermore, Eviny argues that ESA misrepresents the facts and context of the disagreement in 2004 and makes a manifest error of assessment by referring to the disagreement in support of its conclusion that there is overcompensation. In addition, ESA failed to examine why Bergen municipality abandoned its claim and never submitted the dispute to arbitration in accordance with the Sales Agreement.

120 In this respect, ESA submits that Eviny's contention that the level of compensation has never been equal to an approach based on replacement costs is "a mere assertion". ESA considers that Eviny has presented no information to substantiate or quantify the alleged difference between the level compensated and a calculation based on replacement costs.

121 At the hearing, in response to a question from the bench, ESA confirmed that the contested decision does not assert that the level of compensation was actually based on replacement costs.

122 It is undisputed that the capital costs paid to Eviny, i.e. NOK 303 per light point, have remained unchanged since the conclusion of the Sales Agreement in 1996.

123 As such, the Court observes that the contested decision does not allege that the level of compensation is based on replacement costs, but rather contends that, if that were the case, then there would be overcompensation.

124 However, mere speculation, without any regard to the facts at issue, reliance on the absence of information, without carrying out any further investigation and adducing any reliable positive evidence, does not satisfy the burden of proof on ESA to establish that an advantage has been conferred on an undertaking. On the contrary, ESA must base its decisions on reliable and coherent evidence which provides a sufficient basis for concluding that an undertaking has benefitted from an advantage amounting to State

aid. Having regard to the foregoing, as well as the Court's findings regarding ESA's reliance on the table of figures from the KOSTRA database and the absence of information, ESA's assessment in this respect as regards measure (c) cannot be said to have sufficiently substantiated its conclusions.

125 Therefore, it must be held that ESA's assessment as regards measure (c) was vitiated by manifest errors of assessment.

126 In the light of the foregoing, it must be held that the evidence relied on by ESA in its assessment of whether measures (a) and (c) conferred an advantage on Eviny was not reliable and its factual accuracy was uncertain. Furthermore, the evidence relied on by ESA did not contain all the relevant information, which it should have taken into account in its assessment, given that ESA failed to obtain the information necessary for its assessment. Finally, the evidence relied on by ESA was not capable of substantiating the conclusions that it drew from it.

127 Accordingly, the second plea submitted by Eviny is well founded.

128 Since, for the purposes of Article 61(1) EEA, proof of the existence of an advantage is one of the cumulative conditions that must be fulfilled for a particular measure to be classified as "State aid" within the meaning of that provision, and since Eviny's second plea must be upheld, the action brought by Eviny must be upheld. Consequently, the contested decision must be annulled in accordance with the form of order sought, without there being any need to examine the other pleas put forward in support of the action.

VI Costs

129 Pursuant to Article 121(1) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Eviny has requested that ESA be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by the Norwegian Government are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Annuls ESA Decision No 161/22/COL of 6 July 2022 on aid in relation to the streetlight infrastructure in Bergen (Norway).**

2. **Orders ESA to bear its own costs and to pay the costs incurred by the applicant.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 21 March 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President