E-10/22-30

REPORT FOR THE HEARING

in Case E-10/22

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Eviny AS, established in Bergen, Norway,

and

EFTA Surveillance Authority,

seeking the annulment of the EFTA Surveillance Authority's Decision 161/22/COL of 6 July 2022 on aid in relation to the streetlight infrastructure in Bergen (Norway).

I Introduction

1. Eviny AS ("the Applicant" or "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, el-security, digital and electrical infrastructure, entrepreneur services, district heating etc. Eviny is publicly owned by the state-owned renewable energy producer Statkraft, the Municipality of Bergen ("the Municipality" or "Bergen Municipality") and 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" or "the Defendant") concerning alleged overcompensation for payments of (i) operation and maintenance costs and (ii) capital costs (jointly referred to as "the measures"), in relation to streetlight services in the Municipality. In the contested decision, ESA found that overcompensation occurred as regards streetlights owned by the Applicant, in relation to (i) operation and maintenance costs from 1 January 2016 (still ongoing at the date of the contested decision), and in relation to (ii) capital costs from 1 June 2007 (still ongoing at the date of the contested decision). In respect of maintenance

and operation services for streetlights owned by the Municipality, ESA found that overcompensation occurred within the period from 1 January 2016 until 1 April 2020.

3. In its application ("the Application"), the Applicant seeks 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 the Applicant 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.

II Legal background

EEA law

4. Article 6 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.*

5. Article 37 EEA reads, in extract:

> *Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*
>
> *'Services' shall in particular include:*
>
> *(a) activities of an industrial character;*
>
> *(b) activities of a commercial character;*
>
> *(c) activities of craftsmen;*

(d) activities of the professions.

...

6. Article 61 EEA reads, in extract:

1. 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.

...

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

7. Article 62 EEA reads:

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the

EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

8. Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

9. The second paragraph of Article 36 SCA reads:

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.

10. Article 14 of Part II of Protocol 3 to the SCA 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.

11. Article 15 of Part II of Protocol 3 to the 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

Background

12. According to the contested decision, Norwegian municipalities are legally responsible for operating and maintaining municipal roads. Until 1996, the streetlight infrastructure along municipal roads in Bergen was owned by Bergen Lysverker. Bergen Lysverker was a municipal unit within Bergen Municipality.

13. In 1996, Bergen Lysverker was acquired by and incorporated into BKK DA, under the 1996 sales agreement ("the Sales Agreement"). A mechanism regulating the compensation for the provision of streetlighting and related services was set out in section 7(c) of the Sales Agreement. According to this mechanism, BKK DA 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.

14. BKK DA was later reorganised into BKK AS (currently Eviny). Various subsidiaries of BKK AS have since owned and operated the streetlight infrastructure along the municipal roads in Bergen Municipality.

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

16. 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 fittings and sodium fittings on the streetlight infrastructure owned by BKK EnoTek AS. The replacement was financed by the Municipality, which remained the owner of the new LED fittings.

17. A transfer of the BKK-owned streetlights to Veilys AS (a subsidiary of the Applicant) occurred in May 2017. Veilys AS has neither operated nor maintained the streetlight infrastructure itself. These activities have been performed by another subsidiary of the Applicant, BKK EnoTek AS. The Applicant also owns streetlight infrastructure along state roads, county roads and private roads.

The contested decision

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

19. 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 BKK for the capital costs related to streetlight infrastructure. In the opening decision, ESA furthermore expressed doubts as to the compatibility of the measures with the EEA Agreement. Moreover, it 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 the Municipality, might entail State aid pursuant to Article 61(1) EEA.

20. ESA formed the preliminary view that the Applicant 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 the Applicant. ESA also took the preliminary view that the Applicant engages in an economic activity when selling maintenance and operation services for the streetlights to the 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.

21. 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.

22. To the extent that the transactions between the Municipality and the Applicant were not carried out in line with normal market conditions, ESA concluded on a preliminary basis that they conferred an advantage on the Applicant, 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.

23. On 6 July 2022, ESA adopted the contested decision. In the context of assessing whether the Applicant 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.

24. On the question of whether the Applicant received an advantage, 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.

25. In relation to compensation for capital costs, 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 the Applicant 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 that the NVE reference rate was to be applied to the committed capital to entail that the capital base was to be established in an appropriate manner, ensuring an adequate level of return.

26. ESA took note of the disagreement between the Municipality and the Applicant. It appeared that while the Municipality advocated for the use of the book value for establishing the capital base, the Applicant argued in favour of using the assets' replacement cost. Further, 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.

27. Lastly, according to the contested decision, figures from a database showed that throughout the period from 2016 to 2019, the 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 the Applicant was compensated in excess of an adequate level of return.

IV Procedure and forms of order sought

28. The Applicant lodged the present action by an application registered at the Court on 27 September 2022.

29. The Applicant 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.*

30. On 12 December 2022, ESA submitted its defence pursuant to Article 107 of the Rules of Procedure ("RoP") ("the Defence").

31. ESA requests the Court to:

1. *dismiss the Application as unfounded, and*

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

32. On 30 January 2023, the Applicant submitted its reply ("the Reply"). On 3 March 2023, ESA submitted its rejoinder ("the Rejoinder").

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

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

35. 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 expenditure figures presented in the contested decision.

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

V Written procedure before the Court

37. Pleadings have been received from:

- the Applicant, represented by Svein Terje Tveit and Paul Hagelund, advocates; and

- the Defendant, represented by Michael Sánchez Rydelski, Claire Simpson and Kyrre Isaksen, acting as Agents.

38. Pursuant to Article 20 of the Statute, written observations have been received from:

- the Norwegian Government, represented by Lotte Tvedt and Vilde Hauan, acting as Agents.

VI Summary of pleas in law and arguments submitted

Admissibility

Applicant

39. The Applicant submits that, although the contested decision is addressed to the Kingdom of Norway, the Applicant, as an alleged aid recipient and addressee of a recovery decision, is directly and individually concerned and has legal standing to challenge the contested decision.

40. The Applicant maintains that the Application was submitted within the relevant period. Pursuant to Article 36 SCA, an application must be submitted within two months of the publication of the measure. The contested decision has not yet been published. The

Applicant maintains that its understanding is in accordance with the case law of the Court of Justice of the European Union ("CJEU")[1] and in line with past applications to the Court.[2]

41. The Applicant claims that, in the interests of legal certainty, it decided to submit the Application nonetheless within two months of the notification of the non-confidential version of the contested decision, which was on 27 July 2022. The Applicant respectfully encourages the Court to state in its ruling that the period within which third parties directly and individually concerned by an ESA decision must submit an application starts to run on the publication of the measure.

ESA

42. ESA submits that, by virtue of the wording of the third paragraph of Article 36 SCA, the criterion of the day on which a measure came to the knowledge of an applicant/plaintiff is subsidiary to the criteria of publication or notification of the measure. In other words, it is only relevant where a contested act is neither published in the Official Journal nor notified to the applicant.

43. ESA's State aid decisions to close formal investigations are notified to the EFTA States concerned, but not to third parties (such as private parties), and, in accordance with Article 26(3) of Part II of Protocol 3 to the SCA, are published in the EEA Section of and the EEA Supplement to the Official Journal of the European Union. Consequently, this implies that for third parties, such as the Applicant, the moment from which the time-limit for an application starts to run is the day of publication in the EEA Section of and the EEA Supplement to the Official Journal of the European Union. According to ESA, this is also confirmed by case law of the CJEU.

Substance

First plea – Manifest errors by applying the notion of undertakings and concluding that streetlight ownership and operation in the present case is an economic activity provided by an undertaking

44. By the first plea, the Applicant argues that ESA committed a manifest error of assessment by applying the notion of undertakings and concluding that streetlight ownership and operation is an economic activity. The Applicant submits that the public funding of municipal streetlight infrastructure and operation and maintenance of the streetlight infrastructure is not an economic activity within the scope of Article 61 EEA.

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[1] Reference is made to the judgments in *ISD Polska and Others* v *Commission*, T-273/06 and T-297/06, EU:T:2009:233, paragraphs 58 to 60, and *Covestro Deutschland* v *Commission*, T-745/18, EU:T:2021:644, paragraph 42.

[2] Reference is made to Case E-9/19 *Abelia* v *ESA*, judgment of 17 November 2020.

45. The Applicant argues that the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.[3] An economic activity presupposes the assumption of risk for the purpose of remuneration.[4]

46. At the outset, the Applicant notes that, historically, the public funding of infrastructure was considered to fall outside the scope of the State aid rules. This remains true for infrastructure that is used to perform public tasks, if there is no provision of services to the market. Pursuant to the case law of the CJEU, the future use of an infrastructure determines whether its construction is an economic activity and accordingly whether its public funding constitutes State aid or not.[5]

47. According to the Applicant, it cannot matter whether the activity might be pursued by a private operator. Such a reasoning would bring any activity of the State not consisting in the exercise of public authority under the notion of economic activity. Next, if the entity carries out non-economic activity separable from the economic activity, this separable activity is non-economic for the purposes of State aid law. The Applicant contends that, according to the Court's case law, the furthering of objectives in legislation and fulfilling duties toward the population generally indicates that the activity is non-economic.

48. The Applicant submits that there is a strong public safety rationale for ensuring streetlighting, there is a regulatory context to streetlights establishing, inter alia, an obligation to ensure sufficient streetlights and that local authorities have discretion when organising the ownership and operation of the streetlight infrastructure.

49. The Applicant submits that the State aid rules do not apply where the State acts by exercising public power or where public entities act in their capacity as public authorities. An entity may be deemed to exercise public power where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject.

50. The Applicant maintains that ensuring streetlighting on public roads is, in essence, a public task. There are no legal instruments or precedents to impose on any natural or legal person the costs and work associated with owning, operating, and maintaining streetlights. On the contrary, Norwegian law makes it clear that it is a public task to ensure streetlighting on public roads. The Municipality has, at its own expense and risk, operated and maintained streetlights along municipal roads. The Applicant contends that the purpose, funding,

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[3] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 78, and Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA Ct. Rep. 114, paragraph 62.

[4] Reference is made to the judgment in *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 76.

[5] Reference is made to the judgment in *Freistaat Sachsen and Others* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraphs 92 to 100.

establishment, and future use of streetlights mean that, as a starting point, the ownership and operation and maintenance of streetlights constitute non-economic activities. Even if these activities were considered to be economic, they cannot be separated from the exercise of public power, i.e. a municipality's public tasks of ensuring streetlighting, meaning that the activities as a whole must be regarded as being connected with the exercise of public powers.[6]

51. According to the Applicant, there is no private demand for municipal streetlights, and there is no private willingness to pay for this service. These market failures strongly support the finding of a non-economic activity. The decisions on how to organise streetlighting on municipal roads and the means of doing so are non-economic, even if - by the use of municipal powers - the operation and maintenance of streetlighting can be purchased or tendered on a market. Even if municipalities may organise public tenders to acquire streetlight services and thereby purchase services in a market, this is not relevant to the Applicant. The Applicant, as the owner of the streetlights, is not bound by the procurement rules. In any event, according to the Applicant, it remains free to perform the services in-house without opening up a market for bidding on the servicing of its own infrastructure.

52. The Applicant contends that the transfer of the ownership and operation and maintenance tasks to it in 1996 did not result in a change in the nature of the tasks, the aim of performing such tasks, nor in the rules to which they are subject. The Applicant explains that the municipal streetlight infrastructure was transferred by the Municipality via BKK DA to BKK Nett as part of a restructuring of the Municipality's activity in the municipal unit Bergen Lysverker, in line with the regulatory requirements following the market liberalisation. The restructuring did not affect the operations of the streetlight infrastructure as the infrastructure was administered by the network monopoly functionally separate from the energy production and other parts of the Applicant. The Applicant refutes the suggestion that this restructuring created any market.

53. Moreover, the public funding of municipal streetlights and the operation and maintenance of the infrastructure was, in any case, not an economic activity in 1996 nor anytime soon thereafter. The Applicant maintains that ESA fails to consider the legal and factual contextual differences concerning the periods 1996-2016, 2016 and 2017-2022.

54. The Applicant contends that no fundamental change took place from 23 December 1996 when the streetlight ownership and operation was in the hands of Bergen Lysverker to 24 December 1996 when the streetlight ownership and operation was vested in the hands of the Applicant, in which Bergen Municipality had a majority stake due to the sale of Bergen Lysverker.

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[6] Reference is made to the judgments in *Compass-Datenbank*, C-138/11, EU:C:2012:449, and *Aanbestedingskalender and Others* v *Commission*, C-687/17 P, EU:C:2019:932.

55. Next, the Applicant submits that any non-economic activity within BKK Nett in the period from 1996 to 2016 was de minimis, purely ancillary and non-separable from the non-economic activities connected with the exercise of public powers. It contends that if an economic activity cannot be separated from the exercise of an entity's public powers, the activities exercised by that entity as a whole remain activities connected with exercise of those public powers.[7] Moreover, there is no threshold below which all of an entity's activities should be regarded as non-economic activities because its economic activities are in the minority.[8] The other activities in BKK Nett have been grouped into the business divisions industry (sale of engineering and assembly services to industrial customers), energy (sale of engineering and assembly services to other power companies), lighting (operation and maintenance and construction and sale of road lighting systems), fibre network (construction of broadband facilities) and residential alarms (safety services launched in 2004). These activities only developed gradually. Activities within BKK Nett other than the monopoly activities relating to the network amounted to at most around 10-16% of the total annual operating revenue in the relevant period (except in 2009 where it was above 16%, but below 20%).

56. Should, in the alternative, the other activities be deemed non-ancillary or separable, it is all the same possible, according to the Applicant, to separate the costs and income from the Municipality. The costs and income from the activities for Bergen Municipality is part of the non-economic public activity reported separately in the accounts of BKK Nett and which is clearly distinguishable from the other activities performed by BKK Nett. This means that the classification of the activities for the Municipality in relation to the streetlights on municipal roads should not be called into question and treated as an economic activity regardless of whether these activities are considered purely ancillary or not.

57. In the Reply, the Applicant maintains that owning streetlights is not a provision of services to any market and therefore not an economic activity. The Applicant argues that ESA, in the Defence, has failed to appreciate the two-dimensional nature of the agreement comprising both ownership and maintenance. In the Applicant's view, this leads to a logical fallacy. The existence of public tenders in relation to streetlight maintenance services provided to a contracting authority subject to public procurement rules does not entail that owning and maintaining owned streetlights in the case at hand amounts to an economic activity.

58. The Applicant maintains in the Reply that there has not been a liberalisation of the Bergen Municipality streetlights. They were transferred to a Bergen Municipality-controlled entity, and subsequent monopoly owner and provider of the streetlight infrastructure. No subsequent bidding process was planned. On the contrary, the Sales

[7] Reference is made to the judgment in *UPF* v *Commission*, T-747/17, EU:T:2019:271, paragraph 82.

[8] Ibid., paragraph 83.

Agreement reflected a reciprocal desire to establish the Applicant as the long-term owner and service provider of the streetlights.

59. The Applicant contends further that ESA makes a fundamental error of law and appraisal in the Defence when simply stating that Norwegian law does not require municipalities to provide streetlighting. The Applicant asserts in this regard that public authorities are obliged to ensure streetlighting on public roads before permission to use any other infrastructure in the zoning area is granted – the streetlights are not constructed by private entities at their own initiative. ESA fails to acknowledge the legal framework – albeit fragmented – for ensuring and maintaining streetlights as detailed in the Application, instead interpreting Norwegian law in favour of its own conclusion.

60. The Applicant contests ESA's reasoning in the Defence that the economic activity is proven by way of the existence of an operation and maintenance service market alone. In the Applicant's view, a market could only be created, either if the public company decides to procure operation services (no legal obligation to do so), or upon third party access rules (none exist for streetlights). Hence, whilst streetlight maintenance services may, on occasion, form a market by way of public tenders, this does not warrant the conclusion that all maintenance services relating to streetlights form a market.

61. In the Reply, the Applicant finally maintains the argument that any economic activity within BKK in the period 1996-2016 is purely ancillary and non-separable from the non-economic streetlight activities. In any event, the capital cost compensation received from Bergen Municipality by BKK Nett is separable from any economic activity income relating to tenders or other alleged economic streetlight activities.

62. In response to the first plea, ESA highlights the Applicant's statement that the transfer of the streetlight infrastructure, and the subsequent operation and maintenance of that infrastructure, was the consequence of and in line with the regulatory requirements following the market liberalisation of energy markets. In that context, ESA notes that the Applicant also explains that, as part of the liberalisation of the energy markets back in 1991, parts of the infrastructure, and with that also the tasks related to the streetlight infrastructure, were transferred to the energy companies and that no monopoly regulation was established for streetlight infrastructure.

63. ESA submits that market liberalisation is typically referred to as the removal of controls in an industry or market to encourage the entry of new suppliers with a view to increasing the intensity of competition. Consequently, market liberalisation must be seen as introducing market mechanisms and moving away from State monopolies. This liberalisation took place in many sectors in the EEA, which were originally within the monopoly of municipalities, such as the provision, for instance, of electricity, gas, water or waste collection services. But these sectors have in many EEA States been liberalised and the services are now provided by commercial companies. ESA submits that the market for

operation and maintenance services for streetlights is no different to services provided by other utility companies.

64. Further, whether there exists a market for a given activity may vary between EEA States depending on national conditions. The classification of a given activity can also change over time as a result of political decisions or economic developments. As regards the regulatory framework in place in Norway, the legislation and standards simply mean that municipalities are responsible for operating municipal road infrastructures and that requirements on the existence of streetlighting must be met, in order for roads to meet Norwegian standards. Norwegian law does not require municipalities to provide streetlighting, or to provide streetlighting at a certain level. Further, there is nothing to prevent municipalities from contracting with commercial entities for the provision of operation and maintenance services for streetlighting on municipal roads as an economic activity.

65. ESA notes, with respect to the specific circumstances in the Municipality, that the contested decision found that the effect of including the streetlight infrastructure when selling Bergen Lysverker was that the Applicant became the only available supplier along the municipal roads concerned. Moreover, section 7(c) of the Sales Agreement included a mechanism governing the future compensation. This mechanism allowed for a regulated level of return. In this context, ESA underlines its finding in the contested decision that, by means of the sale of the streetlight infrastructure, in combination with the establishment of the compensation mechanism, which allowed for a regulated level of return, the Municipality created a market for the supply of the services concerned to the Municipality as an economic activity. The fact that the infrastructure was of a unique nature, resulting in its purchaser becoming the only available supplier, did not in itself entail that the Applicant had not delivered services in a market. The contested decision also found that the Applicant obtained its exclusive position in competition with five other bidders.

66. In relation to the Applicant's claim that there was and is no market for owning streetlight infrastructures, ESA submits that it is not the market for streetlight ownership at stake here, but the market for operation and maintenance services for streetlights. As these services are tendered out, there is, in ESA's view, a market for these services. It considers it an undisputed fact that some municipalities decided to organise the purchase of these services by way of competitive tenders. ESA notes that the Applicant itself calls the maintenance and operation services of streetlights a business area and a commercial activity.

67. Further, ESA considers the Applicant's comparison with the judgment in *Freistaat Sachsen and Others* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, not to be appropriate, because the present case is not concerned with the funding for the construction of the infrastructure, but with the separate market for operation and maintenance services for streetlights. ESA also rejects the Applicant's claim that operation and maintenance

services for streetlights should qualify as an exercise of public powers. ESA submits that the exercise of public powers is limited to activities that intrinsically form part of the prerogatives of official authority and are performed by the State. In addition, as in the present case, where an EFTA State has decided to introduce market mechanisms, services provided by companies can no longer qualify as an exercise of public powers. In this context, ESA notes that the Applicant admits that the Municipality enjoyed discretion when organising the operation of streetlights. Consequently, liberalising the market for the operation and maintenance services for streetlights was a legitimate option, by relying on external providers, such as the Applicant, offering their services on an economic basis.

68. In ESA's view, there is a market for maintenance and operation services for streetlights and such services are sold to public authorities, as well as to companies and individuals that need lighting along private roads. The entity which originally submitted a complaint to ESA represents companies selling services in this market. The Applicant also provides services in relation to infrastructure which is still owned by the Municipality and also services in relation to streetlights owned by smaller municipalities in the region. Consequently, the Applicant's services in relation to streetlights constitute an economic activity.

69. ESA further disagrees with the Applicant's assumption that, in order to qualify a service as economic in nature, the demand for that service must be private. ESA rejects the view that the presence of private demand for a good or service is necessary for a market to exist. In principle, fierce competition on a market can exist even in markets where public authorities are the only or the main purchaser of the services in question. This is the case, for example, in the market for the construction of roads. The fact that there may be no private demand for some of these services, due to a market failure, and a public authority therefore decides to purchase those services in the interest of the public good does not lead to the conclusion that the activity of the supplier is non-economic. If this were sufficient to exclude a measure from the scope of State aid law, the existence, for example, of the rules governing services of general economic interest would be superfluous. ESA submits that the presence of a market failure and the fact that a public authority reacts by imposing a public service obligation on an entity does not preclude the possibility that the supplier of the service is pursuing an economic activity. In any event, the Applicant provides similar services also to private customers.

70. Finally, with regard to the Applicant's allegation that the contested decision did not consider the cost accounting and separation performed by the Applicant's companies throughout the relevant period, ESA submits that this is irrelevant to the question of whether the services compensated through the measures qualify as an economic activity. In any event, ESA argues that the Applicant never submitted, in the course of the formal investigation, any information showing that the Applicant performed separate cost accounting with respect to those activities compensated through the measures.

71. In the Rejoinder, ESA contends that the Applicant misrepresents ESA's position set out in the Defence, when it alleges that ESA admitted that there were fundamental market failures. ESA stresses that it never stated this, arguing that the Applicant's allegation is made out of context. ESA acknowledges that it stated in the Defence that the fact that there may be no private demand for some of the services, due to a market failure, and a public authority therefore decides to purchase those services in the interest of the public good does not lead to the conclusion that the activity of the supplier is non-economic. By this statement, ESA seeks to underline that in order to qualify a service as economic in nature, the demand for that service does not have to be private.

72. ESA reiterates that a monopoly situation does not per se eliminate the possibility that the monopoly company is engaged in an economic activity. It is important to distinguish between the ownership of an infrastructure and the provision of services by means of and in relation to that infrastructure. Ownership unbundling from the provision of services might in some cases even be legally required. Although unbundling might not be required in the present case, it demonstrates, however, that infrastructure ownership and the provision of services by means of and in relation to that infrastructure are severable legal concepts.

73. Further, ESA argues that, contrary to the Applicant's assertion that ESA incorrectly interpreted Norwegian law, the Defence correctly stated that, as regards the regulatory framework in place in Norway, the legislation and standards mean that municipalities are responsible for operating municipal road infrastructures and that requirements for the existence of streetlighting must be met, in order for roads to meet Norwegian standards. However, this obligation does not prevent municipalities from contracting with commercial entities for the provision of services or the operation and maintenance thereof on municipal roads as an economic activity. In other words, according to ESA, the Defence correctly stated that there is nothing in Norwegian law that requires the Municipality to provide this kind of service in-house.

74. In the Rejoinder, ESA reiterates that cost separation, as such, has no bearing on the assessment of the nature of a particular service, i.e. whether the service is economic or non-economic in nature, but it may play a role when separating economic from non-economic activities or as an element for excluding a potential distortion of competition. Consequently, ESA avers that it applied the requirement of cost separation correctly and consistently throughout the contested decision.

75. The Norwegian Government agrees with the Applicant's contention that the public funding of streetlight infrastructure and the operation and maintenance of streetlight infrastructure is not an economic activity within the meaning of Article 61 EEA, and thus that the costs do not accrue to an undertaking within the scope of that article.

76. According to the Norwegian Government, it follows from established case law that an activity carried out by a State exercising its public powers, or by public entities acting in their capacity as public authorities does not constitute an economic activity within the scope of Article 61 EEA.

77. The Norwegian Government emphasises at the outset that public roads in Norway and the authorities responsible for public roads are regulated by Norwegian law. It is an overarching objective under Norwegian law for those authorities to ensure the greatest possible safety and good flow of traffic, and to take account of properties located nearby as well as environmental and other societal interests. Under Norwegian law, the term "road" is intended to encompass more than the road carriageway itself. According to the preparatory works to the applicable Norwegian legislation, the term "road" is intended to cover both the roadway and the associated areas and facilities that are permanently needed for the road to be able to exist and to be maintained and used.

78. The purpose of the services in the present case is thus to provide streetlighting, and by extension, road safety. This is done in the community's interest and constitutes a fundamental societal concern. The purpose and nature of the services contested are, in the Norwegian Government's view, therefore not fundamentally different from air navigation safety and control and maritime traffic control and safety which are both considered non-economic activities by the European Commission.

79. The Norwegian Government maintains that the classification of the services in this regard should depend upon whether the purpose of the services safeguards a fundamental societal concern, such as road safety, which is indeed the case for the services at hand.

80. Furthermore, the municipal roads in the present case essentially constitute non-economic infrastructure. If the provision of streetlights connected to these roads is considered on a preliminary basis to constitute an economic activity, the streetlights must nevertheless be considered either (i) intrinsically linked to the main activity (i.e. the provision of roads), or (ii) subordinate to, but still necessary for the operation of, and directly related to, the main activity (the provision of roads).

Second plea – Manifest error of assessment by concluding that the Applicant received an economic advantage through overcompensation

81. The Applicant maintains that the application of the market economy operator principle ("MEOP") entails a complex economic assessment comparing the behaviour of the public authority/undertaking with that of a similar private economic operator under normal market conditions.

82. The Applicant claims that ESA has to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from such a private

operator and, in that context, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to implement the measure at issue was taken.[9]

83. The Applicant submits that ESA was wrong to focus its assessment on the question whether the compensation mechanism laid down in 1996 was complied with. First, the Applicant submits that the distinction between the 1996 mechanism, which indisputably does not involve aid, and its practical implementation, which allegedly involves aid, is artificial since both are intrinsically linked. Second, the Applicant submits that ESA was wrong to base its assessment exclusively on the question whether the compensation mechanism laid down in the 1996 was complied with. After ESA arrived at the conclusion that this mechanism was not applied/monitored correctly, the Applicant maintains that ESA should have assessed whether the compensation actually paid conformed to market conditions for other reasons.

84. The Applicant asserts that ESA arrived at that erroneous conclusion through an insufficient examination of the facts. The Applicant notes that there is no appropriate application of an adequate benchmark for calculating the market price other than highly questionable data obtained from a database.

85. According to the Applicant, ESA misread the purpose, scope and context of the Sales Agreement, and therefore also the basis for the capital cost compensation. The Applicant claims that the Sales Agreement was based on the Municipality selling the electricity activities of Bergen Lysverker in return for an ownership stake in the Applicant (then BKK). The assets were transferred to BKK Nett, and the parties pursued a long-term perspective. A valuation based on a historic cost perspective ignores this perspective and the ownership risks involved. The Applicant further maintains that ESA makes an artificial distinction between the 1996 mechanism (no aid) and its practical implementation (allegedly aid) and focuses on omissions by the parties instead of establishing (positive) aid.

86. The Applicant asserts that, in relation to the allegation of cross-subsidisation, ESA should have examined BKK Nett’s publicly available segment accounts. Namely, according to the Applicant, 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. In particular, if ESA has been made aware of potentially relevant pieces of information which call into question the information at its disposal. The omission to investigate BKK Nett's segment accounts calls into question the information ESA had at its disposal in relation to the issue of alleged cross-subsidisation.

[9] Reference is made to the judgment in *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 66.

87. The Applicant contends that the contested decision misrepresents the facts and the context of the Sales Agreement and the disagreement in 2004, and that ESA makes a manifest error of assessment by referring to the disagreement in support of its conclusion that there is overcompensation.

88. The Applicant submits that, in the contested decision, ESA asserts that the Municipality had higher costs per streetlight compared to nine other large Norwegian cities in a period from 2015-2019, as reported in a database, and concludes that this is an indication of overcompensation. The Applicant contends that ESA has made a manifest error in the application of the MEOP by extracting and applying data from a database in reaching its conclusion on the existence of State aid. Rather, according to the Applicant, ESA must properly establish the relevance and verifiability of the data used.[10]

89. In the Applicant's view, the database referred to in the contested decision does not provide any cogent justification or positive evidence for overcompensation and State aid. In general, the data is incomplete, inaccurate, and not fit for purpose to either evidence or calculate State aid.

90. First, the Applicant submits that ESA focuses only on the cost input from the ten largest cities, based on costs per light for a period of four years, ignoring the past and the present; ignoring any other city; ignoring the quality of the cost input and the cost per km/road and misreading what the database at issue is and is not.

91. Second, the Applicant submits that the database at issue relies on input from the municipalities, and that the input is inconsistent and inaccurate.

92. Third, the Applicant submits that the comparison between cities ignores a set of variables unrelated to State aid allegations, which may influence the reported costs.

93. Fourth, the Applicant submits that the actual invoiced amount in a number of instances differs from the figures reported for Bergen Municipality in the database at issue.

94. Fifth, the Applicant submits that the database at issue does not in any case evidence any State aid prior to 2015 and after 2019.

95. Sixth, the Applicant submits that the contested decision is contradictory, placing significant emphasis on a selection of data from the database at issue, whilst ignoring the most verifiable and objective data relevant to streetlight infrastructure cost in Bergen Municipality in recent years, namely the competitive tender prices submitted in 2020.

[10] Reference is made to the judgment in *Ryanair and Airport Marketing Services* v *Commission*, T-77/16, EU:T:2018:947.

96. Moreover, the Applicant maintains that in recital 176 of the contested decision, ESA concludes, on the basis of CJEU case law, that the Applicant has obtained an advantage because, on the basis of the submitted information, the compensation has most likely exceeded the level commensurate with the mechanism in the Sales Agreement. However, given the burden of proof on ESA, the mere likelihood should not be sufficient to establish aid. According to the Applicant, the contested decision fails to point to any objective and verifiable elements which give grounds for establishing any overcompensation.

97. In the Reply, the Applicant reiterates that ESA bears the burden of proof. The EEA State in question merely bears the burden of proof for the question of whether the MEOP is applicable, i.e. whether it acted at all as a private economic operator and not as a public authority. Only if this is doubtful and thus the applicability of the MEOP as such is disputed, must the EEA State clearly prove, on the basis of objective and verifiable evidence, that it acted as a private economic operator. Ownership of municipal streetlights is, however, in any event not an economic activity within the scope of the State aid rules. However, when answering the question of whether the MEOP is fulfilled in the specific case, ESA must, according to the case law of the CJEU, prove that the action is not MEOP compliant.[11] Secondly, when considering the burden of proof, a distinction must also be made between capital injections and a reciprocal agreement entered into between professional parties. A reciprocal agreement would, as a starting point, presumably be market based when negotiated and agreed on a commercial basis as part of a transaction.

98. In the Applicant's view, ESA's approach to the interpretation of the Sales Agreement, stating that street lighting maintenance and operation were agreed to be performed in return for compensation for costs only, contradicts how the parties consistently practised the agreement and is contrary to the understanding presented also by the Municipality in previous letters to ESA. The reading of the Sales Agreement adopted by ESA also ignores the purpose and historic context of that agreement and the perspectives of the Municipality, i.e. seeking a long term solution, and the Applicant, seeking an economically rational take-over, and subsequent events. Clearly, both parties have understood, or at least accepted for over two decades, that the Applicant makes a profit on the capital and services overall or – if split in two – on both capital and services. In any event, a normal acquirer of physical assets and service provider would require a reasonable mark-up.

99. The Applicant disagrees with ESA's statement in the Defence that the Sales Agreement is not correctly applied. The Applicant submits that ESA makes a fundamental error of assessment, in placing more weight on the single fact that the Municipality once, in 2003-2004, raised objections to the agreement, than on the surrounding facts, namely

[11] Reference is made to the Opinion of Advocate General Kokott in *Commune di Milano* v *Commission*, C-160/19 P, EU:C:2020:591, points 96 to 114, and the judgments in *Commune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 106, and *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 82.

that the Municipality withdrew the objections, and honoured the agreement throughout the relevant period.

100. The Applicant argues in the Reply that ESA, in the Defence, shifts the focus from the alleged lack of separation of accounts, said to indicate that it is not possible to ensure that there is no overcompensation, to the contention that the Applicant and the Municipality have not established the appropriate level of compensation. No evidence has been presented by ESA or the Norwegian Government to substantiate the allegation that the level of compensation for capital costs has been inaccurate. The Applicant refutes the implication that the absence of old documentation is tantamount to overcompensation. The Applicant emphasises that the outcome of the disagreement in 2004 supports its argument since the Municipality did not pursue its claim further.

101. In the Reply, the Applicant supports its claim that ESA has misapplied the MEOP to the capital costs, by arguing, lastly, that ESA's submission that the capital cost compensation of NOK 303 entails double payment for general inflation is irrelevant. ESA has not shown that the cost of NOK 303 equals, or nearly equals, the replacement costs, and therefore that the use of the NVE interest rate entails double inflation. The Applicant also asserts in this regard that capital costs have never been subject to adjustments for inflation.

102. The Applicant reiterates its claim that ESA has misapplied the MEOP to operation and maintenance costs.

103. First, the Applicant strongly disputes the finding that the Sales Agreement does not allow for any profit relating to operation and maintenance services performed.

104. Second, ESA has failed to identify any active intervention that can constitute aid in the light of alleged inactivity by the Municipality.

105. Third, when seeking to establish that the level of compensation is excessive compared to normal market conditions, ESA's methodology must be based on the available, objective, verifiable and reliable data, which should be sufficiently detailed and should reflect the economic situation at the time when the compensation mechanisms were decided, considering the level of risk and future expectations. The database figures restricted to 2016-2019 are not indicative of and do not provide empirical support for overcompensation under the Sales Agreement.

106. Fourth, contrary to ESA's assertion in the Defence, the Applicant avers that its statement that the Municipality requested and received comprehensive information regarding the costs and risks involved in operating and maintaining the streetlights is supported by evidence.

107. Fifth, even if the comparable tender contract was awarded on the basis of the total price of NOK 10 554 689, the Applicant in its bid calculated a cost per light point of NOK 606, which is significantly higher than the NOK 495 per streetlight compensated for the maintenance and operation at stake. Finally, the Applicant claims that throughout the investigation it has provided other benchmarks, not reflected, however, in the contested decision. It asserts that, in the contested decision, ESA made no attempt to make other useful and reliable comparisons between agreements of municipalities.

108. ESA submits that the contested decision was based on sufficient evidence to substantiate an advantage to the Applicant. Contrary to the Applicant's assertion that ESA has the burden of proving whether or not the conditions for the application of the MEOP have been satisfied, ESA contends that it follows from case law that a reasonable basis for presuming that a company has received an advantage is sufficient. Hence, where there is a reasonable evidential basis for such presumption, a presumption is permissible and, in the present case, ESA concluded on the basis of the totality of the available information that the Applicant had most likely been overcompensated.

109. In the light of case law,[12] ESA submits that an aid recipient is not permitted to gain an advantage by not fully cooperating during the formal investigation as a result of not submitting relevant information, thereby increasing the evidential burden on ESA. Further, ESA maintains that the Applicant's cooperation in the course of the formal investigation can be seen to have been unsatisfactory, since the Applicant claims to have relevant information but which it failed entirely to produce at the relevant time. Based on the information actually submitted by the Applicant during the formal investigation, ESA was in no position to exclude the possibility that overcompensation took place. On the contrary, the totality of the available evidence indicated that the Applicant was most likely overcompensated.

110. In addition, ESA maintains that it had no legal means to insist upon or to request specific information or documents from the Applicant. ESA observes that Protocol 3 to the SCA provides no legal basis for ESA to request specific information or documents from third parties in the course of formal investigation procedures. Consequently, ESA is entirely dependent on the information submitted by the EFTA State concerned and by third parties. The information submitted by Norway and the Applicant did not demonstrate that the compensation was at market price, meaning that no overcompensation took place, or that separate accounts were operated by the Applicant.

111. According to ESA, it is required to undertake a complex economic assessment when applying the MEOP. This assessment must be carried out by relying on the objective and

[12] Reference is made to the judgments in *Spain* v *Commission*, C-278/92 to C-280/92, EU:C:1994:325; *Freistaat Thüringen* v *Commission*, T-318/00, EU:T:2005:363, paragraph 88; *Scott SA* v *Commission*, T-366/00, EU:T:2007:99, paragraph 145; *Fleuren Compost BV* v *Commission*, T-109/01, EU:T:2004:4, paragraphs 49 and 50; and *Iberpotash SA* v *Commission*, T-257/18, EU:T:2020:1, paragraph 93.

verifiable evidence which is available. ESA submits that there was a sufficient evidential basis to conclude that the Applicant received an advantage and that its conclusions in the contested decision on this point were well founded in law and fact.

112. On the question of whether the compensation mechanism in the Sales Agreement was adhered to, ESA avers that it was correct to find, in the contested decision, having regard to the sums involved, that a rational private operator would have invested sufficient resources to ensure compliance. This would involve controls of the basis for the prices presented by the Applicant, including the basis for determining the direct and indirect costs. ESA remains convinced that a private purchaser would have initiated legal steps if faced with a supplier unwilling to evidence that its prices comply with the agreed compensation mechanism.

113. ESA further submits that, on the basis of, inter alia, the evidential factors, it was correct to conclude in the contested decision that the Municipality did not act as a private purchaser. While, in ESA's submission, the compensation mechanism in section 7(c) of the Sales Agreement would ensure market level compensation if correctly applied, this would entail, however, that the inputs were updated on a regular basis. According to ESA, this has evidently not been done.

114. In response to the Applicant's claim that ESA made a manifest error of law and assessment when applying the MEOP to the capital costs and arrived at an erroneous conclusion through an insufficient examination of the facts, ESA advances the following arguments. On the separation of accounts, ESA contends that accounting separation is not in itself sufficient to ensure that the compensation does not confer an advantage on the Applicant. The question of whether the Applicant has received an advantage turns on the level of compensation, not on whether there has been accounting separation. According to ESA, it was correct to find in the contested decision that overcompensation would be present if the level of compensation exceeded that allowed by the compensation mechanism of the Sales Agreement. As for the level of compensation, ESA submits that, due to the inclusion of the NVE interest rate in the compensation mechanism in section 7(c) of the Sales Agreement, capital costs calculated in accordance with this mechanism will include a market level reasonable return on capital. Therefore, if the activities concerned have in fact generated earnings beyond the calculated capital costs, this income amounts to supra competitive profits exceeding the required level.

115. On the question of alleged double compensation for inflation, ESA stresses its finding in the contested decision that, given the fact that the NVE reference rate was a nominal interest rate already incorporating general inflation, to apply this interest rate on a capital base established following a replacement cost-approach would entail compensating twice for general inflation.

116. According to ESA, the Applicant contends in the Application that there has been no double compensation for inflation, as the compensation has never been equal to what would follow from an approach based on replacement costs. ESA submits that this is a mere assertion, which must be rejected. No information is presented to substantiate or quantify the alleged difference between the level compensated and a calculation based on replacement costs.

117. As regards the disagreement in 2004, ESA submits that neither the information presented by the Applicant in the Application, nor that contained in the Annexes to the Application, shows how the level of compensation for capital costs has actually been calculated. Accordingly, in ESA's view, the information submitted provides no support for the Applicant's claim that the level of compensation has never been equal to that which would follow from a replacement cost approach and that such an approach would have been in line with market practice.

118. As for the database at issue, ESA claims that, in the contested decision, it did not purport to suggest that the database amounted to a comprehensive or the only appropriate tool for establishing what the compensation for capital costs should have been in the Municipality. Rather, ESA wishes to observe that, according to the database figures for 2016-2019, the Municipality had the highest costs of the 10 largest municipalities represented in this period. In the absence of sufficient justification for the cost difference, this was indeed, in ESA's view, an indication that the Applicant has been compensated in excess of an adequate level of return.

119. Moreover, on the question of alleged differences between the amount invoiced by the Applicant and the input reflected in the database at issue, the Applicant fails to specify in the Application what these alleged differences are. In any event, according to ESA, the database figures not only reflect the costs relating to maintenance and operation and capital costs, but also the costs of electricity. For that reason, the figures registered in the database at issue will be different from the amounts invoiced by the Applicant with respect to its streetlighting services. Furthermore, as regards the period covered by the database figures presented in the contested decision, ESA submits that it was a conscious choice not to represent in the contested decision that the Applicant was overcompensated in each and every year covered by the recovery order.

120. As for the terms of the 2020 tender, ESA claims that the contract exclusively concerned services to be rendered in respect of infrastructure owned by the Municipality, which consists of a number of existing streetlights and its new LED fixtures installed on infrastructure owned by the Applicant. On that basis, the service provider under the contract awarded by tender would not incur any capital costs in respect of the infrastructure covered. Since there were therefore no comparable capital costs to be covered under the contract that was subject to tender, ESA emphasises that it was correct to find in the

contested decision that the terms of that contract were incapable of constituting a meaningful reference point in relation to the level of compensation for capital costs.

121. ESA submits that, except for the claim that the level of compensation has only been subject to inflation adjustment, the Applicant provides no concrete information in the Application as to how the level of compensation has been calculated. Accordingly, there is no information on how the level of compensation was established in 1996, and no information on the level that would result if the compensation had, as is a precondition for a meaningful application of the compensation mechanism in the Sales Agreement, been regularly updated on the basis of an appropriate means for establishing the eligible costs.

122. ESA further argues that the information provided by the Applicant in the Application is therefore incapable of substantiating the contention that the level of compensation for maintenance and operation complied with the compensation mechanism found in the contested decision to ensure market terms. Rather, ESA has the impression that the Applicant is unable and/or unwilling to justify or explain the level of compensation. It therefore asserts that none of the new information provided by the Applicant is capable of calling into question ESA's assessment in the contested decision, based on the totality of the available evidence at the time, that the level of compensation most likely exceeded that allowed by the Sales Agreement. This conclusion is not weakened, but rather strengthened, by the information which is now brought forward by the Applicant, including, in particular, the information indicating that the Applicant's streetlighting operations have been characterised by high profits, operating and contribution margins.

123. In the Rejoinder, ESA submits that the applicability of the MEOP was never doubted or disputed in the case at hand, and therefore the Applicant's assertion is unfounded that only where the applicability of the MEOP is doubtful, and thus as such is disputed, must the EEA State clearly prove, on the basis of objective and verifiable evidence, that it acted as a private economic operator.

124. ESA further rejects the Applicant's contention that a reciprocal agreement is based somehow automatically on market terms, because it can be presumed that the agreement is on commercial terms. Instead, ESA argues that the concept of advantage, which is intrinsic to the classification of a measure as State aid, is an objective one, irrespective of the motives of the persons responsible for the measure in question.

125. ESA rejects all claims that it has misinterpreted the Sales Agreement. ESA submits that section 7(c) of the Sales Agreement established a clear cost plus mechanism, as are frequently used in the regulation of natural monopolies to ensure that the level of compensation ensures an adequate, as opposed to an excessive, level of return. To this end, ESA considers it evident from the reference in section 7(c) to the NVE interest rate that this compensation mechanism was inspired by the monopoly regulation in the area of electricity networks.

126. Consequently, it is also, in ESA's view, incorrect to assert that it based the contested decision on an interpretation which ignores the purpose and context of the Sales Agreement, or the fact that undertakings normally charge mark-ups. Rather, in ESA's submission, section 7(c) of the Sales Agreement allows the Applicant to make an adequate return limited to the NVE interest rate for the tied capital. Aside from this return, the compensation is only to entail cost coverage.

127. ESA argues that the Applicant is wrong to claim that ESA failed to substantiate the assertion that the mechanism in section 7(c) of the Sales Agreement was incorrectly applied. ESA considers it evident from the information received during the formal investigation procedure, as well as the information provided by the Applicant in the Application and the Reply, that at no time during the period concerned has the compensation reflected updated calculations made under section 7(c) of the Sales Agreement.

128. In the Rejoinder, ESA rejects the Applicant's claims that the MEOP cannot be applied to the remuneration for capital costs, but only for the operation and maintenance services of streetlights. ESA submits that the Applicant confuses the distinction between the mere ownership of an asset and the generation of services through recourse to this asset. ESA does not dispute that the mere ownership of an asset, including streetlights, does not amount to an economic activity. Assets, including infrastructures, may however be used to generate services in return for remuneration. In ESA's submission, the fact that the infrastructure was of a unique nature and the Municipality the only purchaser does not mean that the services were not offered in a market. Rather, the market which was created amounted to a bilateral monopoly composed of one seller, the Applicant, and one purchaser, the Municipality.

129. ESA views as unfounded the Applicant's assertion that, in the Defence, ESA shifted the focus, to now emphasise that the Applicant and the Municipality have not established an appropriate level of compensation. ESA maintains that it has consistently held that the Applicant has been overcompensated for capital costs, because the level of compensation was not calculated in accordance with section 7(c) of the Sales Agreement.

130. In relation to the Applicant's contention that, in the absence of original documentation and appropriate benchmarks, ESA should have examined the typical costs of owning streetlight infrastructures and other factors, ESA maintains that the compensation mechanism in section 7(c) of the Sales Agreement takes account of all of these factors. In the Rejoinder, ESA emphasises that what it took issue with was not the compensation mechanism as such but the fact that the Municipality did not act as a private purchaser to ensure that the costs, capital base (tied capital) and NVE interest rate on which the calculation of the level of compensation is based were regularly and appropriately updated.

131. As regards the disagreement in 2004, and the Applicant's reference to the Municipality deciding not to pursue this further, ESA submits in the Rejoinder that the Applicant fails to address specifically the points made in recital 209 of the contested decision. As stated there, in ESA's assessment, the disagreement is indicative of the compensation mechanism not having been complied with, as the Municipality appears to have accepted that the Applicant charged a level of capital costs which did not reflect an updated and appropriate calculation of the capital base (tied capital).

132. In response to the Applicant's rejection as irrelevant of ESA's submission that the compensation for capital costs entails double payment for general inflation, ESA stresses that, in the contested decision, it emphasised that, in the assessment of whether the Applicant has been compensated in excess of an adequate level of return allowed by the compensation mechanism in section 7(c) of the Sales Agreement, regard should be had to the inclusion in this mechanism of the NVE reference rate. As this is a normal interest rate incorporating general inflation, in ESA's submission, applying it on a capital base established following a replacement cost approach, as suggested by the Applicant, would entail compensating for general inflation twice.

133. Furthermore, under the NVE regulation, which, in ESA's submission, the compensation mechanism evidently reflects, the NVE reference rate is applied to the book value of the power grid assets put into productive use. Contrary to what the Applicant suggests, this observation is highly relevant. There is no indication, according to ESA, that the cost plus mechanism in section 7(c) of the Sales Agreement was designed to allow for overcompensation for general inflation.

134. As regards ESA's alleged failure to identify any active intervention and the Applicant's submission that the possibility of renegotiating terms or taking legal steps cannot be classified as a State aid measure, ESA maintains that State interventions not only include positive actions but also the fact that the authorities do not take measures in certain circumstances.[13]

135. In response to the claims made by the Applicant to the effect that it provided other relevant benchmarks throughout the investigation and that ESA made no attempt to make comparisons with other municipalities, ESA observes that the majority of the streetlights concerned were owned by the Applicant and encompassed by the compensation mechanism in section 7(c) of the Sales Agreement. Therefore, as regards these streetlights, in ESA's submission, compensation in excess of the level allowed by that mechanism would amount to an advantage regardless of the compensation level in other municipalities. Furthermore, ESA avers that it made use of the leading official database for the purpose of making such comparisons.

[13] Reference is made to the judgment in *Spain* v *Commission*, C-480/98, EU:C:2000:559.

136. ESA maintains that the database at issue provided relevant information concerning a considerable period of time, indicating that the Applicant might have received an advantage. In addition, ESA observes that it did not quantify the aid element in the contested decision, but left it to the parties to the Sales Agreement to determine. ESA only concluded that the database at issue provided a further indication that the Applicant may have been overcompensated.

137. In its written observations, the Norwegian Government contends that the figures relied on by ESA in the contested decision did not originate from the database specified in the contested decision, but another database established through the collaboration of certain Norwegian municipalities ("the ASSS database").

138. In its proposal for measures of organisation pursuant to Article 57(4) RoP, ESA maintained that the Norwegian Government's assertion that the figures used in the contested decision were provided by the ASSS database was in factual terms manifestly wrong.

139. In the measures of organisation of procedure adopted by the Court on 28 March 2023, those participating in the proceedings were invited to respond to questions relating to the origination of the figures contained in the contested decision and whether those figures constituted a reliable source of information.

140. In its response to the measures of organisation of procedure, ESA avers that the figures it set out in the contested decision do indeed originate from the database specified in the contested decision, as the data at issue contained in the ASSS database actually originates from that other database. Furthermore, ESA submits that those figures are a reliable source of information, capable of substantiating the contested decision.

141. In its response to the measures of organisation of procedure, the Applicant maintains its submissions that the Court should ignore the figures from the database specified in the contested decision as evidence, as the database is unreliable and inaccurate in terms of data quality, variations, particularities, omissions and limitations. Therefore, it is not relevant as evidence to establish or benchmark the cost level of streetlight ownership and maintenance.

142. The Norwegian Government, in its response to the measures of organisation of procedure, submits that the figures provided via the database specified in the contested decision are not suitable to indicate whether any State aid has taken place.

Third and fourth pleas – No distortion of competition in any market and no effect on trade

143. In its third plea, the Applicant contests ESA's finding that the condition of distortion of competition is met in relation to the alleged aid to Eviny's activities of operation and maintenance of Veilys' own streetlights on public roads.

144. The Applicant submits that streetlight infrastructure is by its nature a natural monopoly for which there is no demand or willingness to pay. In the context of the present case, Veilys, as owner of the streetlights, is not a player in any open market. Veilys does not have any direct competition from other infrastructures of the same kind, and it would be nonsensical and uneconomic for an undertaking to replicate Veilys infrastructure, i.e. to own streetlights on public roads. At the same time, Veilys has no legal obligation to tender out or outsource the activities of maintenance and operation of Veilys' own streetlights. In the Applicant's submission, the logical corollary of this, namely, that there is no direct competition to be distorted, fails to be understood by ESA in the contested decision, when ESA finds that the capital cost compensation, due to lack of benchmarking or documentation of the capital cost base, could amount to State aid distortive of competition.

145. The Applicant submits that ESA's assessment of cross-subsidisation is flawed, and that ESA's examination is insufficient. First, ESA has not identified the relevant and potentially affected markets. Second, ESA's contention that the Norwegian authorities are unable to exclude the possibility that other economic activities have been cross-subsidised, ignores the accounting separation and transparency within Eviny throughout the period. The Applicant further submits that ESA has not provided any concrete evidence of cross-subsidisation from Bergen Municipality to other municipalities (tenders), other private streetlight services or other commercial businesses of Eviny.

146. In the Reply, the Applicant contends that ESA has not indicated the size of the aid involved nor specified which EEA-wide actors operate on the relevant market, namely, the market for owning public streetlights.

147. In its fourth plea, the Applicant submits that ESA is manifestly wrong to assume that the effect on trade criterion is met in relation to the alleged overcompensation of operation and maintenance of streetlights owned by Veilys on public roads.

148. The Applicant submits that ESA, in the contested decision, does not provide a sufficient examination of the condition of effect on trade. First, ESA does not explain in the contested decision how the advantages conferred on Eviny may allow it to maintain or extend its activities at the expense of competitors. Second, and in the absence of any quantification or indication of the amount, ESA fails to consider in the contested decision whether the aid is more than marginal and if it is possible to exclude the effects of the alleged measures foreseen to be more than marginal.[14] Third, ESA's reasoning in relation to the overcompensation is not based on sufficiently detailed data, with the fact that the allegation of cross-subsidisation is only stated as likely to be true reinforcing such a view. Lastly, an effect on cross-border trade is lacking where measures to support local infrastructure are concerned.

[14] Reference is made to the judgment in *Marinvest and Porting* v *Commission*, T-728/17, EU:T:2019:325, paragraphs 100 to 106.

149. In the Reply, the Applicant submits that, as regards the fourth plea, ESA, in the Defence, focuses on negative presumptions relating to cross-subsidies based on the alleged absence of relevant documents. However, in the Applicant's submission, the adverse effect on trade cannot be purely hypothetical or presumed – rather, it is necessary to determine why the measure concerned is liable, by reason of its foreseeable effects, to have an impact on trade between Member States.[15] ESA must explain how, and on what market, competition is likely to be affected by the aid based on the foreseeable effects of the measure.[16]

150. Relying on established case law, the Applicant submits, first, that ESA fails to show how the existence of tenders in general correlates to an effect on trade stemming from the Bergen streetlights in particular. Second, there is no market or effect on trade with regard to streetlight ownership, and there is a difference between competing for the provision of specific services and competing for the provision of streetlighting-as-a-service, bearing the full ownership and thereby related maintenance risk as the Applicant does. Third, ESA fails to assess whether there is any international attractiveness in relation to the measure concerning the alleged overcompensation for the capital costs. In the Applicant's view, there is no EEA-wide market. Fourth, the absence of any quantification or indication by ESA of the amount of aid further indicates that the alleged State aid measure for capital costs is not sufficiently likely to affect cross-border investments.

151. In response, ESA submits that the Applicant fails to distinguish the funding of the infrastructure as such from the compensation for the operation and maintenance services for the streetlights as well as the capital costs. In ESA's submission, operators who make use of the infrastructure to provide services receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions.

152. ESA further submits that the Applicant is dependent on selling its services to the Municipality. In doing that, it is in competition with other service providers. ESA considers it undisputed that municipalities have chosen to organise the purchase of services by way of competitive tenders. In that regard, the Applicant is in competition with companies which offer their services for the operation and maintenance of, for example, streetlights that are still owned by the Municipality or other municipalities. The advantage of overcompensation will enable the Applicant to cross-subsidise offers made when tendering for the provision of other streetlight services.

153. In addition, ESA observes that the Applicant now argues in the Application that, as of 1 January 2016, the streetlight infrastructure was transferred to a separate company

[15] Reference is made to the judgment in *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 30.

[16] Reference is made to the judgments in *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 57, and *Le Levant 001 and Others* v *Commission*, T-34/02, EU:T:2006:59, paragraph 123.

together with other activities subject to competition. In this context, the Applicant claims that ESA ignored the Applicant's accounting separation. In response to this claim, ESA asserts that the Applicant never submitted any information to ESA in the course of the formal investigation explaining that it operated separate accounts, even though this issue was raised in the opening decision and the Applicant knowing that only it could provide the information on this point. ESA argues that the information submitted by the Applicant at the time of the formal investigation did not evidence that the costs and income relevant to the compensation under the measures were separated from costs and income concerning other contracts, and that an appropriate allocation mechanism had been put in place for this purpose.

154. Additionally, ESA avers that in the contested decision it properly focused on the question of whether a risk of cross-subsidisation could be excluded. ESA maintains that cross-subsidisation could also occur through the allocation of the profits from the overcompensation to other commercial activities within the Applicant's group, including through the disbursement of dividends and intra-group purchases of services. There were no mechanisms in place to prevent this.

155. ESA further submits that it is too late for the Applicant to raise this issue of separate accounts and that ESA adopted the contested decision based on the information available at the time, which suggested that the Applicant did not operate separate accounts and that cross-subsidisation could not be excluded. Further, since there is no legal monopoly and companies offering similar services, the issue is obsolete.

156. In the Rejoinder, ESA submits that providing streetlight services is not a legal monopoly and that, for the purposes of Article 61(1) EEA, it suffices to demonstrate a threat of distortion of competition. It is therefore not necessary, in ESA's submission, to establish that the aid has a real effect on trade between EEA States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and competition.

157. Furthermore, ESA rejects the Applicant's contention that ESA has not sufficiently explained how EEA trade could be affected. In that regard, ESA stresses that, in the contested decision, it found that the activities compensated included the operation and maintenance of streetlights. When the Municipality held a competition for the provision of such services, it received tenders from many different undertakings. There have also been multiple cases before the public procurement complaints board in Norway concerning contracts relating to this subject matter that were, or should have been, subject to EEA-wide tenders. Accordingly, ESA reiterates that it was correct to find in the contested decision that there were established markets in Norway for services pertaining to the operation and maintenance of streetlights.

Fifth plea – Any alleged aid would be existing aid and recovery is contrary to Article 62 EEA and Article 14 of Part II of Protocol 3 to the SCA and ESA Decision No 195/04/COL

158. According to the Applicant, Article 5 of the contested decision concludes that the compensation for capital cost and operation and maintenance services aid is unlawful insofar as the compensation and remuneration is granted within the limitation period of 10 years. Alleged overcompensation for capital costs from 1 June 2007 is held to be subject to recovery. For operation and maintenance services, only aid as of 1 January 2016 is held to be subject to recovery. The apparent reason for this distinction is that the State aid complaint relates to aid as of 2016.

159. The Applicant contends that this conclusion is based on a wrongful application of the rules of recovery, and that any alleged aid must be classified as existing aid. According to the Applicant, ESA, in the contested decision, ignores the fact that any alleged aid must be based on the mechanisms and understanding established by the Sales Agreement. The Applicant considers ESA's reasoning to be contradictory in that it states, on the one hand, that the Sales Agreement established a market and a compensation mechanism, whilst, on the other hand, it fully ignores the legal implications of the Sales Agreement for the purposes of the recovery period.

160. The Applicant further submits that, according to Article 15(1) of Part II of Protocol 3 SCA, recovery of aid shall be subject to a limitation period of ten years. According to Article 15(3) of Part II of Protocol 3 SCA, any aid for which the limitation period has expired, shall be deemed to be existing aid. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme.

161. According to the Applicant, the starting point for the recovery limitation period should be the Sales Agreement, as it is the agreement which enables the Applicant to receive remuneration and obliges the Municipality to pay remuneration for the capital costs and the operation and maintenance. As authority for this position, the Applicant relies on the case law of the CJEU which states that for the purpose of determining the date on which the limitation period starts to run, [the relevant] provision refers to the grant of the aid to the beneficiary.[17] As a further authority for this position, the Applicant relies on Section I of Part II of ESA Decision No 167/09/COL, where ESA in a case concerning alleged aid in the form of a beneficial lease agreement concluded that the ten-year limitation period had expired as the lease contract was entered into more than 10 years before ESA began its investigation.

162. According to the Applicant, this position is not changed by the fact that ESA seems to consider that the mechanism laid down in the Sales Agreement does not involve State

[17] Reference is made to the judgment in *France Telecom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 81.

aid, and that the alleged aid stems from the fact that the agreed mechanism was subsequently not correctly applied or complied with. Rather, according to the Applicant, without the Sales Agreement there would be no compensation at all and, in this regard, ESA was wrong to distinguish between the compensation mechanism and its practical implementation, as both are intrinsically linked. In fact, the capital costs have been paid on the basis of a legally binding agreement entered into in 1996 between the Municipality and the Applicant (then BKK DA).

163. The Applicant submits that its interpretation is strongly supported by the fact that the capital cost has not been subject to any adjustments or modifications of any other sort to the terms. There has not even been an inflation adjustment, and the cost has remained exactly NOK 303/streetlight throughout the 26-year period. In State aid terms this means, according to the Applicant, that there has been no change which could have altered existing aid in 1996 into new aid at a later date. An alteration into new aid would only apply in the case of changes that go beyond a purely formal or administrative nature, i.e. the change must affect the essential character of the aid. This is the case if the aid is granted on a legal basis which differs in substance from the original measure.[18] A substantial change in this sense only occurs if the nature, the source, the objective, the group of beneficiaries or the scope of the beneficiaries' activities is altered.[19]

164. The Applicant contends that its view is also supported by the circumstances and business rationale of the Sales Agreement. As was found by ESA in the contested decision, the objective of the process in 1996 was for the Municipality to sell Bergen Lysverker, including all its assets and operations. The streetlight infrastructure was a minor element in that transaction, but nevertheless an integrated part of the object of the transaction. This means, according to the Applicant, that the valuation of the streetlight infrastructure and the future cash flow generated from it was an important assumption for the assessment of the net present value of the future cash flow generated by the infrastructure.

165. The Applicant argues that the disagreement between the Municipality and the Applicant does not change the nature of any alleged aid as existing aid. The Municipality has until the present paid capital costs according to calculations made by the Applicant in accordance with section 7(c) of the Sales Agreement. In the Applicant's submission, the only rightful reason for the Municipality to continue to pay the capital costs as calculated by the Applicant, after having exchanged an application and reply to the arbitration proceedings, must be that the Municipality views section 7(c) of the Sales Agreement as valid and binding, with a high probability of losing a legal battle over the calculation method embedded in the clause.

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[18] Reference is made to the judgments in *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 175, and *P*, C-6/12, EU:C:2013:525, paragraph 47.

[19] Reference is made to the judgments in *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, EU:T:2002:111, paragraph 111, and *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraphs 54 and 66.

166. The Applicant argues further that the operation and maintenance compensation are no less based on and awarded in accordance with the Sales Agreement. Nor is this claim called into question by the fact that the contested decision concerns overcompensation for operation and maintenance services from 1 January 2016. Likewise, nor do the subsequent agreements concerning operation and maintenance alter this claim. According to the Applicant, the operation and maintenance element of the future cash flow is variable in nature, which is the reason why the parties subsequently entered into several more detailed agreements. These later agreements did not in any way change the remuneration agreed. The capital cost has remained stable at NOK 303 for each streetlight throughout the entire period.

167. With respect to the compensation relating to the infrastructure owned by the Applicant, ESA emphasises that a key premise of the contested decision was that the aid subject to recovery was the compensation which exceeded the compensation levels allowed by the compensation mechanism in the Sales Agreement. Hence, the aid was not awarded by means of the Sales Agreement, but rather in breach of the conditions in the Sales Agreement.

168. As regards the compensation concerning the infrastructure owned by the Municipality, ESA submits that this was not regulated by the Sales Agreement, as emphasised in recital 178 of the contested decision. Consequently, this compensation was therefore evidently not awarded by virtue of the Sales Agreement.

169. In addition, ESA submits, according to Article 15(2) of Part II of Protocol 3 to the SCA, the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary. Consequently, the decisive factor in determining the starting point of the limitation period, referred to in Article 15, is when the aid was in fact granted. This implies that each time the beneficiary receives overcompensation under the Sales Agreement, aid is awarded to the Applicant. The aid is granted on a recurring basis. Contrary to the Applicant's claims, this does not mean that the award is backdated to 1996, which would effectively make any future payments immune from recovery.

170. According to ESA, the Applicant's attempt to extrapolate from case law on the classification of existing aid and to apply it to the limitation period in Article 15 of Part II of Protocol 3 SCA is misguided for the following two reasons. First, ESA avers that in the contested decision it treated any aid granted within the 10-year limitation period as existing aid. Second, according to ESA, aid granted after the 10-year limitation period is for the reasons and case law mentioned above to be classified as new aid.

Sixth plea – the contested decision is based on an insufficient examination of the facts and fails to properly state the reasoning on which it is based in violation of Article 16 SCA

171. Under the first part of the sixth plea, the Applicant submits that ESA does not provide proper reasoning in the contested decision for its conclusion on the notion of

undertaking. Under the second part of the sixth plea, the Applicant submits that the contested decision does not provide proper reasoning for the finding of overcompensation.

172. First, the Applicant submits that ESA was wrong to exclusively base its assessment on the question of compliance with the compensation mechanism laid down in the Sales Agreement. After coming to the conclusion that this mechanism was not applied/monitored correctly, ESA should have assessed whether the compensation actually paid conformed to market conditions for other reasons. Further, instead of identifying potential omissions on the part of the Municipality when considering the criterion of economic advantage, in the Applicant's submission, ESA should have positively established that there is positive aid, i.e. that the compensation payments are too high, and why.

173. Second, the Applicant submits that ESA overlooked material facts which should have led it to a different conclusion, including the circumstances surrounding the Sales Agreement and transfer of assets and the accounting separation of BKK Nett and the Applicant.

174. Third, the Applicant submits that there is a lack of quality in the evidence relied upon. This is particularly true as regards the database at issue. It argues that, in the contested decision, ESA does not critically review the quality of the data from the database at issue and bases its conclusions on a narrow selection of data in time and scope. According to the Applicant, ESA fails to investigate whether the differences in costs between the municipalities may be a result of factors other than the presence of overcompensation. The awkwardness of applying the database at issue is evidenced, amongst other things, by ESA's outright rejection of the cost data (bid price) in the Bergen Municipality 2020 tender. According to the Applicant, ESA has not in fact pointed to any circumstance that demonstrates the existence of overcompensation or the occurrence of unlawful aid.

175. Fourth, the Applicant submits that the contested decision is ambiguous and inadequate when considering the amount of overcompensation. The Applicant maintains that, whilst ESA is not required to fix an exact amount to be recovered, a recovery decision must include information enabling the recipient to work out himself, without overmuch difficulty, that amount of overcompensation.[20] At the very least, the decision must set out the method according to which the overcompensation should be calculated.[21]

176. Under the third part of the sixth plea, the Applicant submits that, in the contested decision, ESA provides an insufficient examination of the issues of existing aid and

[20] Reference is made to the judgment in *Mediaset*, C-69/13, EU:C:2014:71, paragraph 21.

[21] Reference is made to the judgment in *Commission* v *France*, C-441/06, EU:C:2007:616, paragraph 41.

limitation and fails to properly state its reasoning in this respect. The Applicant submits that, in the contested decision, ESA fails to consider the issue of existing aid.[22]

177. In the Reply, the Applicant argues that the burden of proof also includes a duty on ESA to assess the work when it relies on material produced for statistical purposes.[23] The Applicant asserts that ESA admits in the Defence that the figures were not sufficiently detailed to conclude to what extent the recorded costs concerned maintenance and operation or capital costs. Yet, at the same time, in the Applicant's view, ESA still fails in the Defence to address the weakness of the data, the random selection of data and the conclusions that can logically be deduced from the data.

178. With regard to ESA's argument that the Court's assessment is limited only to the information available to ESA at the time it adopted its decision, the Applicant submits that the Court's assessment is only limited to the extent that the institution has made use of the powers that enable it to obtain all the information that appears to be necessary and useful to it.[24] According to the Applicant, it follows from the case law of the CJEU that ESA can only ignore information that was not submitted to it during the investigations where it may legitimately consider that is has more reliable information or that the information is not relevant.[25] The Court can verify whether the evidence relied upon by ESA contains all the information that must be taken into account to assess a complex situation, whether the facts relied on are accurate, reliable and consistent, and whether the evidence relied upon is capable of substantiating the conclusion drawn from it.[26]

179. ESA rejects the claim that it failed to give reasons in the contested decision and submits that it has, in line with relevant case law, in a concise and clear manner, set out all the principal issues of law and fact upon which the reasoning was based and which led to the adoption of the contested decision. According to ESA, the Application is a testament to ESA's discharge of its duty, because the Applicant has perfectly understood on which basis ESA took the contested decision and was able to advance detailed counterarguments.

180. ESA submits that the duty to give reasons relates solely to the matters on which the decision is based. This is to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow it to ascertain whether the decision is well-founded or whether it is vitiated by a defect which will allow its legality

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[22] Reference is made to the judgment in *Tirrenia*, T-265/04, T-292/04 and T-504/04, EU:T:2009:48, paragraphs 97 to 134.

[23] Reference is made to the judgments in *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 172, and *Valmont* v *Commission*, T-274/01, EU:T:2004:266, paragraph 71.

[24] Reference is made to the judgment in *Volotea* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 112.

[25] Reference is made to the judgment in *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 143.

[26] Reference is made to the judgment in *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraphs 87 and 91.

to be contested. Accordingly, that requirement is satisfied where the decision refers to the matters of fact and law on which the legal justification for the decision is based and to the considerations which led to its adoption.[27]

181. ESA submits that the contested decision is the result of a proper formal investigation, involving the careful and detailed consideration of all the evidence collected. The contested decision was adopted on basis of the information and evidence available at the time. Consequently, any newly submitted information in the Application could not form the basis of the contested decision.

182. Finally, ESA argues that the contested decision also provides sufficient guidance for the Norwegian authorities and the Applicant to estimate the possible overcompensation involved, as the compensation should reflect market value and be in line with section 7(c) of the Sales Agreement. ESA submits that it cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for ESA's decision to include information enabling the EFTA State concerned to determine the amount, without too much difficulty.

183. In the Rejoinder, ESA argues that the obligation to state reasons, which is an essential procedural requirement, must be distinguished from the merits of the reasoning which goes to the substantive legality of the measure at issue.[28] ESA submits that the Applicant's argument relating to ESA's alleged failure to establish an advantage concerns the merits of the reasoning which goes to the substantive legality of the measures at issue and is a repetition of its second plea.

184. In relation to the Applicant's contention that ESA should have requested relevant documents for the assessment directly from the Applicant, ESA submits that these arguments do not relate to an alleged lack of reasoning but raise procedural questions.

185. ESA maintains, notwithstanding the above arguments, that it properly used the procedural means available to it and that the contested decision was the result of a proper formal investigation, involving the careful and detailed consideration of all evidence collected. In detail, it argues, first, in relation to Article 10(3) of Part II of Protocol 3 SCA, that an information injunction can only be addressed to an EFTA State concerned, but not to a company. Second, in relation to Article 6 SCA, ESA draws attention to the specific provisions concerning State aid cases in Protocol 3 SCA. In relation to formal State aid

[27] Reference is made to the judgments in *IAZ* v *Commission*, 96-102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 37; *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 26; *SP SpA* v *Commission*, T-472/09 and T-55/10, EU:T:2014:1040, paragraph 79; and *Printeos SA and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44.

[28] Reference is made to the judgment in *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 79.

investigations, it asserts that there is no provision in Protocol 3 SCA that would empower ESA to request information directly from companies.

186. ESA maintains that the information available provided it with a sound basis for concluding its investigations. It was evident, in ESA's view, that the level of compensation did not reflect updated calculations in line with the compensation mechanism in section 7(c) of the Sales Agreement. In this regard, ESA considers it telling that the Applicant has not submitted any documentation to undermine ESA's reasoning or findings in its submission before the Court. It contends that although the Applicant remains unable or unwilling to share information establishing the costs actually involved in the production of the services concerned, or the capital base (tied capital) employed, the information which the Applicant has brought forward nevertheless confirms that its streetlighting operations have been characterised by particularly high profit, operating and contribution margins. In ESA's view, this supports, rather than contradicts, the conclusions it reached in the contested decision.

Páll Hreinsson
Judge-Rapporteur