TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

APPLICATION

Submitted pursuant to Article 36 of the Surveillance and Court Agreement, Article 19 of the Statute of the EFTA Court, and Article 101 of the Rules of Procedure, by

Eviny AS
P.O. box 7050,
5020 Bergen, Norway

represented by advocate Svein Terje Tveit and advocate Paul Hagelund with an address for service, in accordance with Article 102 of the Rules of Procedure, at Ruseløkkveien 30, PO box 2734, Solli – 0204 Oslo, Norway

Against
The EFTA Surveillance Authority
Avenue des Arts 19H
1000 Brussels, Belgium

(i) Seeking the annulment of Decision No. 161/22/COL, of 6 July 2022, of the EFTA Surveillance Authority ("ESA"), and an order that ESA shall bear the costs of the proceedings.

(ii) The Applicant is a Norwegian renewable energy company incorporated under Norwegian law with its registered office in Solheimsgaten 5, PO 5058 Bergen, Norway, represented by its Acting Managing Director, Kristin Aadland.

(iii) The Applicant is represented by advocate Svein Terje Tveit and advocate Paul Hagelund, both at Arntzen de Besche law firm (Russeløkkveien 30, 0251 Oslo, Norway), 982 409 705. Documents and correspondence may be served on the Applicant via e-EFTACourt to the representatives. The Authority to lodge this application issued by the Applicant is attached in **Exhibit 1**. In **Exhibit 2** we attach the registration certificate of Eviny AS proving that the Applicant is a legal person

governed by Norwegian law and that Kristin Aadland who has signed the authorization is entitled to do so. Documents certifying the authorisation to practise as lawyers are submitted as **Exhibit 3** and **Exhibit 4**.

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1 INTRODUCTION

1. The present application seeks annulment of ESA Decision No 161/22/COL. The Decision, hereinafter referred to as the Contested Act, is attached as **Annex A.1**. The decision concerns alleged aid to BKK Nett AS, Veilys AS and Eviny Solutions AS

– all subsidiaries of Eviny AS (formerly "BKK Group", hereinafter collectively and individually referred to as "Eviny"). The contested measures relate to alleged overcompensation for payment of (1) operation and maintenance costs and (2) capital costs in relation to streetlight infrastructure in Bergen. The vast majority of the streetlights are owned by Eviny, whereas a minority is owned by Bergen municipality ("the Municipality" or "Bergen municipality"). The alleged aid concerns the period from 1 June 2007 and continuing (capital costs), and the period from 1 January 2016 and continuing (operation and maintenance costs). However, for the streetlights owned by Bergen municipality, EFTA Surveillance Authority (hereinafter "ESA" or "the Authority") concludes that no aid exists after 1 April 2020, after which the services were delivered by Eviny following a competitive tender procedure.

2. The Contested Act was adopted following a complaint from the Norwegian Business Federation organisation NELFO dated 11 May 2017 on State aid in relation to (1) and (2) as mentioned above, as well as a third complaint rejected by ESA (**Annex A.2**).

3. The Applicant is the renewable energy company Eviny, 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 (43,4%), Bergen municipality (37,8%) and local municipalities and two local energy networks in the greater Bergen area (18,8%). Statkraft acquired its ownership stake in Eviny in 1999. At the time of the transfer of the streetlights in 1996, Eviny (BKK) was owned by Bergen municipality (70%) and other municipalities in the greater Bergen area.

4. The streetlight operations in scope of the Contested Act concern streetlights located on municipal roads only. The streetlights are intrinsically linked to the local energy network. Hence, in the period from 1996 to 2016 been owned and operated by the network company, BKK Nett AS (hereinafter "BKK Nett") and prior to that Bergen Lysverker, the latter a unit in Bergen municipality. The Norwegian Energy Act of

1999 require(d) a legal and functional separation between network activities, production, and sales of electricity for all vertically integrated companies. The regulation governing financial and technical reporting, income caps for network operations and transmission tariffs of 11 March 1999 No 302 (Nrw.: "Kontrollforskriften") require (d) accounting separation to avoid cross-subsidisation between network operations and commercial activities. This functional separation and accounting separation is overseen by the Norwegian Water Resources and Energy Directorate ("NVE").

5. The Contested Act, when considering the alleged aid relating to capital costs to BKK Nett in the period from 2007 to 2016, ignores this separate cost accounting which is instrumental to how BKK Nett operates and work with the accounts. Consequently, the legal assessment of the notion of undertaking, economic advantage and distortion of competition is fundamentally flawed. As from 2017, the streetlights owned by Eviny were owned by the subsidiary, Veilys AS (hereinafter "Veilys"). Veilys is established with the single purpose of owning the streetlight infrastructure, thereby ensuring separation from the remaining business of Eviny. In this period, Veilys has purchased maintenance and operation services by the sister company, Eviny Solutions AS (formerly BKK Enotek AS). As will be shown below, Eviny Solutions AS (hereinafter "Eviny Solutions"), has continued to observe separate cost accounting for each of the business areas relevant to Eviny Solutions, including a strict observation of cost accounting and project cost accounting for all activities and costs sorting under each business area.

6. The background for the NELFO **complaint** was in short that one of the NELFO members, Nettpartner AS, in 2016 requested Bergen municipality to open up for competition for the operation and maintenance services performed by Eviny Solutions. Bergen Municipality responded to this request by correctly pointing out that the Municipality did not own the streetlight infrastructure, and consequently that they had legal right, and Eviny no legal obligation, to tender the services for the streetlight infrastructure. Subsequently, NELFO submitted the complaint to ESA requesting that ESA takes the necessary actions – in accordance with SCA Protocol 3 Part II Article 10 – in order to examine whether the annual compensation paid by

Bergen Municipality to Eviny Solutions for operating and maintaining the streetlights is in compliance with EEA Article 61 on state aid.

7. The Applicant submits six pleas in law. *Firstly*, ESA commits a manifest error by applying the notion of undertakings and concluding that streetlight ownership and operation is an economic activity. In doing so, ESA ignores the factual and regulatory context for streetlight infrastructures. There was and is no market for owning streetlight infrastructures, and the restructuring in 1996 of the municipal unit Bergen Lysverker into a municipality owned energy network company, BKK Nett, did not in and by itself create a market. The Contested Act ignores fundamental market failures (no willingness to invest and no incentive to duplicate streetlights). Equally important, the Contested Act does not consider the cost accounting and separation performed by the Eviny companies throughout the relevant period.

8. *Secondly*, ESA commits a manifest error of assessment by concluding that Eviny received an economic advantage through overcompensation. ESAs decision makes an artificial distinction between the 1996 pricing mechanism (which indisputably does not involve aid) and its practical implementation (which allegedly involves aid). ESA does not present any accurate and reliable evidence to support any overcompensation. Rather, ESA relies on unsupported assertions as to how the Municipality and Eviny behaves and perceives the other party, and presumes the likelihood of overprice and cross-subsidisation based on the documents they have not seen. In the absence of any suitable benchmarks, ESA relies on a selective and arbitrary extract of the KOSTRA-database devoid of any evidential value in this matter. The KOSTRA-database is a national information system providing public information about the local government. The aim of the database is to provide basic information for research, analysis, planning and governing purposes. The KOSTRA-database does not provide any cogent justification for overcompensation and state aid. Generally, the data is incomplete, inaccurate, and not fit for purpose to either evidence or calculate state aid, as will be explained in detail below.

9. *Thirdly and fourthly,* there is no distortion of competition or effect on trade, because there is no cross-subsidisation between Bergen municipality streetlights owned by Eviny or operated for the Municipality and commercial tenders or other activities.

10. *Fifthly*, any alleged aid must be existing aid not subject to recovery since the aid measure relates to a sales agreement entered into in 1996 and it is not possible to separate the agreement from its implementation. The 10-year limitation period for recovery has expired. The limitation period shall start "*on the day on which the unlawful aid is awarded*", cf. SCA Protocol 3, Article 15. The basic premise of ESAs reasoning is the enabling of aid "*by means of the sale of the streetlight infrastructure, in combination with the establishment of the compensation mechanism allowing for a regulated level of return*" (cf. Contested Act, para 127). The restructuring and the compensation mechanism were executed and established in 1996. It is not disputed that the capital costs have been fixed, not even adjusted for inflation, to NOK 303 per streetlight from 1996 to date. The operation and maintenance compensation has also been fixed throughout the period, only subject to inflation adjustment. The recovery decision must therefore in any event be set aside because it incorrectly seeks to distinguish between the 1996 mechanism (which indisputably does not involve aid) and its practical implementation (which allegedly involves aid). If there is any aid (quod non), such aid would result from the 1996 agreement and therefore qualify as existing aid.

11. *Sixthly*, and for all the reasons mentioned above, the Contested Act is based on an insufficient examination of the facts and fails to state a proper reasoning in violation of Article 16 SCA.

12. *From a principled point of view* this case concerns the local democratic right to organise municipal tasks. Pursuant to the Norwegian Road Act and the Planning and Building Act, organising the streetlight infrastructure falls within the competence of the municipalities. How to organise the streetlight infrastructure, depends on a complex appraisal of economic, legal, political and historical considerations. Therefore, this responsibility has been administered in different ways, through transfer of ownership and separate legal entities, public tenders or as in-house services. Owning public road streetlights and purchasing streetlight operation is in

essence a two-sided monopoly. There is no offering of services to a competitive market; and there is no alternative infrastructure. Duplication is economically meaningless. The streetlight infrastructure is to a large extent technically integrated with the net-infrastructure (same masts/towers etc.) and there are synergies and local knowledge benefits of having it integrated with the net operation (**Annex A.3 Letter from Bergen municipality to Nettpartner**). Difficult technical and economic unbundling issues must therefore be sorted prior to any potential reverse take-over by the municipality (**Annex A.3**). The fact that some municipalities decide to organise the purchase of services by way of competitive tenders does not, in the Applicants view, turn streetlight infrastructure as such into a market.

2 AT FACTS

2.1 Introductory remarks

13. In 1996 Bergen municipality reorganised the ownership to the electricity activities in the municipal unit Bergen Lysverker by way of transfer to a separate legal entity, Eviny. As part of this restructuring the Bergen municipal road streetlight infrastructure was transferred together with the energy network and production infrastructure. This agreement is described in further detail below (**Annex A.4**). After 1996 new streetlights have been constructed, additional municipal road streetlights have been transferred by developers to Bergen municipality. These streetlights have remained in Bergen municipality's ownership, and no separate transactions to transfer these streetlights have been entered into.

14. According to the Authority, the alleged overcompensation for maintenance and operation took place from 1 January 2016 until 1 April 2020 for infrastructure owned by Bergen municipality. For infrastructure owned by Eviny, The Authority found that the overcompensation started at the same time but is still ongoing. For the payment of capital costs, ESA held that the unlawful aid comprises all overcompensation awarded within the limitation period of 10 years, which was interrupted when ESA forwarded the complaint to the Norwegian authorities, and invited them to comment on it, by letter dated 1 June 2017 (**Annex A.5**).

15. The Applicant shall below, for the purposes of this Application, provide information relevant to the Contested Act as concerns the 1996-transfer of the streetlight infrastructure from Bergen municipality to the publicly owned Eviny (then BKK); the regulatory context for streetlight infrastructure; the EEA and Norwegian regulations on functional separation and accounting separation relevant to BKK Nett. This context is missing in the Contested Act, albeit fundamental for a correct appraisal of the capital cost and maintenance compensation from Bergen municipality to Eviny. Finally, the Applicant shall add key facts relating to the operation of the streetlights, the demerger of Enotek and transfer of ownership to Veilys in 2017, and describe the 2020-Bergen municipality tender for streetlight services (which Eviny Solutions won as the economically advantageous tenderer).

2.2 The 1996-restructuring of the ownership to the streetlight infrastructure

16. Historically, operation and maintenance of municipal streetlights have in Norway been a matter for the municipality and connected to the energy infrastructure. However, as part of the liberalisation of the energy markets in 1991, parts of the streetlight infrastructure, and with that also the tasks related to the streetlight infrastructure, were transferred to the energy companies, e.g., in Bergen the tasks have been transferred to Eviny, in Trondheim to ON Energy, and in Fredrikstad to Nettpartner – all publicly owned entities. Whereas the operation of energy networks was made subject to national monopoly regulations requiring infrastructure owners to operate their infrastructures, no monopoly regulation was established for streetlight infrastructures, meaning ownership-structure and conditions for operations were decided locally.

17. The electricity activities of Bergen Lysverker were until 1996 integrated in the legal body of Bergen municipality and operated as a separate municipal unit. In 1996, this municipal unit was transferred to BKK DA. The assets and operations transferred concerned electricity production and distribution, including streetlight infrastructure. The value of Bergen Lysverker was set to NOK 2.619 billion before the deduction of debts and pension liabilities (Enskilda Securities). A number of publicly owned companies were invited to bid (Contested Act, para 28). As part of the restructuring, Bergen municipality became an owner in BKK DA, later

shareholder in Eviny. The 1996-agreement formed part of the restructuring of Bergen municipality's ownership in line with the regulatory requirements following the market liberalisation. Thus, the restructuring did not affect the operations of the electricity activities, including the streetlight infrastructure.

18. In accordance with the Norwegian authorities' expressed aim to consolidate power plants, other municipalities in the region took part in this restructuring by transferring local electricity activities, including the power supply network and the streetlights, in exchange for shares in Eviny. The power supply networks, including streetlights, were organized in BKK Nett. The streetlights were so entangled with the ordinary low voltage/power supply network that it was considered too complex to separate the street light network from the ordinary power supply network. The operation and maintenance of streetlights is not a core business area of BKK Nett, and the value of the streetlight infrastructure was de minimis compared to the value of the overall power supply network.

19. In so doing, BKK Nett became the owner of all of the municipal road street lighting infrastructure in Bergen, as well as that belonging to other rural municipalities in the region. Eviny has subsequently been responsible for delivering lights on the streets to the public, and the municipalities have paid for the streetlighting-services to BKK Nett according to the same pricing principles. When ownership of the streetlighting assets lies with BKK Nett, the road owner is not in a position to call out a tender for operation and maintenance.

20. There is no market for streetlighting-services. The only buyer is the road owner who must purchase these services to comply with the requirements of the Norwegian Road Act and the regulations of the individual zoning plan under the Planning and Building Act. Consequently, the municipalities could not acquire these services from anyone other than the owner of the infrastructure already in place.

21. For BKK Nett-owned streetlights, the 1996-pricing mechanism includes two cost components. *Firstly*, the road owner pays a capital cost per road light per year. This cost element covers depreciation and reinvestment in the infrastructure. *Secondly*, the road owner pays a price for operation and maintenance per streetlight per year.

Power and network rental are not included in the costs of operation and maintenance, which is paid by the road owner to the power supplier and network owner similar to any other customers of the electricity and network companies.

22. The pricing mechanism for streetlights owned by Eviny is set out in section 7 (c) of the 1996-agreement requiring the operation of streetlights to be on market terms (**Annex A.4**). The section reads that Eviny "*is free to contract on market terms the operation of streetlights a compensation that shall cover costs + NVE rate of return for the committed capital.*" The agreed capital cost compensation (NOK 303 per streetlight) was calculated immediately following the restructuring and has remained unchanged (**Annex A.6 – invoice**).

23. To safeguard the proper implementation of the streetlight-element of the 1996-agreement, more detailing agreements have been entered into between Eviny and Bergen municipality after 1996. These agreements regulate the number of streetlights, i.e. when municipal roads are reclassified and/or streetlights should be added or deducted on existing facilities. The agreements *do not* change the pricing. The pricing mechanism from 1996 has remained unaltered, e.g. section 6 of the Agreement on building and operation of streetlights of 2006 (**Annex A.7**) and Appendix A to the Agreement on operation and maintenance of streetlights of 2015 (**Annex A.8**). Accordingly, the Authority was wrong to introduce an (artificial) distinction between the 1996 mechanism (which indisputably does not involve aid) and its practical implementation (which allegedly involves aid).

2.3 Streetlight infrastructure owned by Eviny

24. As of 2022, Eviny owns approximately 25 535 streetlights in Bergen and the Municipality owns 4 344 streetlights. The streetlights owned by Eviny may be divided into four categories: (1) street lighting systems on their own street light poles, (2) street lighting system on a pole jointly owned and managed with other actors, (3) street lighting system on a pole owned by the electricity network provider, and (4) street lighting system without the pole. Rental costs are paid when third parties are the owner of the pole. The streetlight poles owned by Eviny were established in the period 1960–1991. The lifespan of these poles varies, but based on experience, the lifespan is estimated to somewhere in the range of 40–70 years.

2.4 Regulatory context to streetlights: The Planning and Building Act, the Road Act, the Road Standard (Norw.: "Vegnormalen") and local regulations

25. The Contested Act is manifestly wrong and based on an incomplete and over-simplified analysis of the Norwegian legal framework, when concluding that the municipalities are not obliged "*to provide streetlighting, or to provide streetlighting at a certain level*" (section 121).

26. The legal basis for the municipalities obligation to facilitate safe roads by provision of adequate streetlighting is twofold. *Firstly*, section 20 of the Norwegian Road Act stipulates that the municipalities are responsible for operating and maintaining municipal roads. This Act does not specifically require municipalities to provide streetlighting, or to provide streetlighting at a certain level. However, the provision of streetlighting is consistent with the main purpose of the Act, which is to secure road safety. *Secondly*, and more importantly, is the role of the municipalities as local area planning authorities under the Planning and Building Act. Construction and development of an area requires that the future purpose of the area is regulated in a zoning plan. Zoning plans are legally binding and stipulate how the specific area can be used and what can be built.

27. Section 3-1 of the Planning and Building Act, stipulates that zoning plans must promote public safety by preventing risks of loss of life and damage to health, the environment and important infrastructure, material values etc. A zoning plan failing to meet these requirements is null and void. Provision of streetlighting is consistent with one of the main purposes of the Planning and Building Act and the Road Act, and municipalities are as area planning authorities obliged to facilitate the construction of streetlighting. The zoning plan itself and the provisions therein are designed to ensure these legally binding obligations. In respect of the roads in the zoning area, the zoning plans include provisions on road classification and standard, including detailed lighting requirements.

28. The Road Standard (Vegnormalen) of the Norwegian Public Roads Administration (Statens vegvesen) is a "best practice" description of general requirements for roads, depending on road classification and other specifics such as traffic load, density of population etc. This standard stipulates the technical requirements, including

requirements relating to streetlights such as required degree of lighting applicable to the specific road classification. Vegnormalen is supplemented by a detailed manual (see **Annex A.9 Road Standard / Vegnormalen and Annex A.10 Road Lighting Handbook/Guidelines**).

29. The Zoning plans commonly refer to the Road Standard. In addition, general local streetlighting regulations apply **(Annex A.11 Local regulations for Bergen municipality)**. These are regulations issued by the municipal/City council laying out detailed requirements for local streetlighting (number of lights, design and other specific local requirements). In effect, and contrary to what is held by ESA in the Contested Act, the Road Standard and the local regulations are made legally binding when the zoning plan is adopted, and these requirements must be complied with when roads are planned, built or upgraded.

30. Section 3-3 of the Planning and Building Act obliges the municipalities to ensure that the Planning and Building Act and all the requirements in zoning plans are complied with. Any derogation from these provisions requires dispensation under the Planning and Building Act (chapter 19). The threshold for dispensation is high.

31. Section 12-7 item 10 of the Planning and Building Act allows for provisions in a zoning plan, to the extent necessary: *"requirements for a special procedural order for implementation of measures in accordance with the plan, and that development of an area may not take place before technical facilities and societal services, such as power supply, transportation and roads, social services, health and welfare services, day-care institutions, recreation areas, schools etc., have been sufficiently established"* – so-called procedural order rules according to which development work must be carried out.

32. The establishment of required infrastructure before any other measures in the zoning area are constructed or taken into use, is a standard procedural order rule. Thus, any developer seeking to realise profits from developing the area must either wait for the municipality to establish and pay for the infrastructure; or enter into a development agreement with the municipality whereby the developer accepts the responsibility to

construct and pay for the infrastructure. Logically, municipalities will seek to place the costs of infrastructure on private developers to the extent possible.

33. Upon completion, the infrastructure is then transferred, free of charge, to the municipality. This clearly illustrates that operation and maintenance of municipal roads is considered a public good that the municipalities must provide the public at large. Thus, the streetlights in Bergen, which in 1996 was acquired by BKK DA, were comprising of infrastructure i) paid for and constructed by private developers and transferred free of charge to the municipality, ii) paid for and constructed by the municipality, and iii) existing streetlighting on private roads that had been reclassified to municipal roads whereby the municipality assumed the responsibility for future operation and maintenance. This is the practical and likely reason for why parts of the municipal streetlight infrastructure currently is owned by Bergen municipality, and not Eviny. Put differently, the Municipality currently owns streetlight infrastructure on municipal roads constructed *after* 1996.

2.5 Regulatory context 1996-2016: Separation requirements in the Energy Act

2.5.1 Regulations

34. In the period 1996-2016, the streetlights were owned by BKK Nett, the energy network company in the BKK Group. During this period, BKK Nett was subject to mandatory requirements concerning legal, functional, and accounting separation between monopoly activities and commercial activities. Compliance with these rules and regulations is further described below in section 2.5.2 (overview of BKK Nett's separation of accounts) and section 3.4.2.2 (separation of accounts – capital cost).

35. The Energy Act (section 1-3, as amended 2006-06-30-59) described vertically integrated companies as "*An undertaking or group of undertakings engaged in the production or transformation of electrical energy in addition to the transmission, transformation or distribution of electrical energy (net business). A group of undertakings is included if there is control between undertakings in the group.*"

36. For network companies with more than 10 000 network customers that are part of a vertically integrated company, the Energy Act sections 4-6 and 4-7 ordered

corporate and functional separation. Legal separation means that the net business and the production or sales business are separated into separate companies (independent legal entities). Functional separation excludes personnel from management of the net company from involvement in the management of companies within the group and vice versa. Later, the Energy Act also implemented the second EU electricity market directive of 2003. NVE, as responsible supervisory authority, has, through its practice, detailed the organisational requirements applicable to Eviny in order to prevent cross-subsidisation from network activities.

37. Kontrollforskriften, as cited above, sets out requirements for accounting separation. Section 2-8 explicitly sets out that: *"The network company shall not charge its network operations with costs related to activities subject to competition. The transfer of revenues derived from network operations to business segments subject to competition is not permitted."* The requirements in the regulation imply that the activities must be distinguished into independent business areas with separate budgets and accounts, cf. section 3-1 of the Control regulation. Direct and indirect internal transfers of funds between the monopoly (network) and the activities subject to competition, if any, must be shown in the accounts. Thus, up until 1 January 2016 when the streetlighting activities were separated from the network activities, the financial reporting was required for each business areas. The division was as a minimum to be done into the following categories: power transmission, power generation, central network, regional network, distribution network, telecommunications and other activities.

2.5.2 The accounting separation in BKK Nett

38. BKK Nett AS' expansion into economic activities was based on the premise of a clear separation between the monopoly activities and the commercial activities.

39. The streetlight operations were subject to the same accounting scrutiny as the network activity. This meant that BKK Nett calculated and documented a continuous and transparent calculation of all direct and indirect costs not only for the network activity, including the alarm-, fibre-, industry-, energy- and streetlighting activities. The cost allocation methodology and accounting principles applied by BKK Nett in relation to separating the monopoly (network) activities from the other activities was

defining also for the income- and cost transparency within the various other activities. BKK Nett has each year, through the accounting tool Agresso, produced a granular overview of all the direct and indirect costs for each of the external- (commercial customers), operation- (municipalities) and investment-projects in order to calculate appropriate cost-plus hourly rates for work performed in relation to streetlight operation and maintenance (and other business areas) (**Annex A.12 Calculation hourly rates 2007 and Annex A.13 Calculations hourly rates 2014).** In effect, BKK Nett has for the relevant alleged state aid period from 2007 to 2016 kept separate accounts, fully allocating costs and benchmarking prices and rates against internal cost calculations.

40. In 2005 the board of BKK AS requested a profitability analysis of the commercial activities in BKK Nett. (**Annex A.14** ***Board Matter 13/2005 of 13 May 2005)***. The streetlighting activities at this time included operation and maintenance of both Bergen municipality streetlights as well as streetlights owned by smaller municipalities in the region. The financial status was prepared on the basis of self-cost/full-cost calculation separating the income and direct and indirect variable and fixed costs for each of the business areas. These are the same principles and calculations as applied to the monopoly activities audited by NVE. These principles were also applied in the accounts for the other commercial activities going forward.

41. Throughout the period from 2007-2016 BKK Nett kept self-cost/full-cost calculations separating the income and direct and indirect variable and fixed costs for each of the business areas (**Annex A.15 Self-cost calculation for 2007 / Annex A.16 Self-cost calculation for 2014**). Lighting is clearly identified as a separate business area. The income and expenditures from the commercial activities are identifiable and separate from the monopoly business in the segment accounts for each year (**Annex A.17 Segment Account for 2007 / Annex A.18 Segment Account for 2014**).

42. In parallel, the number of segments subject to separate accounts were extended. As of 2011, BKK Nett also produced self-cost calculations clearly identifying municipality income and costs separate from i) streetlighting owned and/or operated

on private roads and ii) the construction of new streetlight infrastructure based on agreements with municipalities or private developers **(Annex A.16).**

43. The functional separation and accounting separation within BKK Nett is overseen by the NVE and verified by an external auditor. The Contested Act, when considering the alleged aid relating to capital costs to BKK Nett in the period from 2007 to 2016, ignores this separate cost accounting which is instrumental to how BKK Nett lays out the principles of cost allocation. Consequently, the legal assessment of the notion of undertaking, economic advantage and distortion of competition is fundamentally flawed.

2.6 The operation and maintenance of the infrastructure and the arbitration proceedings in 2004

44. The Municipality and the BKK-group disagree on the reading and legal implications of section 7 (c) of the 1996-agreement in respect of the calculation of capital costs. That disagreement led the Municipality to file an application for arbitration in 2004 **(Annex A.19)**. The contested elements concerned, in particular what cost base should be applied in the **calculations**, the legal significance of re-investments in the infrastructure and how to account for depreciation. While the Municipality argued in favour of the use of the book value, Eviny has argued in favour of using the assets' replacement cost. The Municipality's view would imply that the streetlights were depreciated in 2007, meaning they should no longer have any value regardless of, among other things, the technical condition and the significant reinvestments financed by BKK Nett. **(Annex A.20)**. The Municipality did not pursue the suit further. Instead, the Municipality requested a section included in the detailed agreements pertaining to the streetlighting operation stating that "*the size of the remuneration for capital costs is disputed and will be finally determined in relation to the ongoing arbitration*", cf. section 6 of the 2006 agreement between BKK Nett and the Municipality **(Annex A.7)** and Section 7.2 of the 2015 agreement **(Annex A.8)**. Irrespective thereof, the capital costs invoiced and paid have remained unchanged at NOK 303 per streetlight, cf. section 6 (3) in the 2006 Agreement: "*In addition comes capital costs for NOK 303 per streetlight*".

45. The detailed streetlight operation agreement entered into between BKK Nett and the Municipality for the period January 2015- December 2017 has been extended and is the prevailing regulation of these operations (**Annex A.8 and Annex A.21**).

2.7 The demerger of Enotek and transfer to Veilys

46. Until December 2015, the streetlight activities were an integrated part of the management of the overall network by BKK Nett. As of 1 January 2016 the streetlight infrastructure was transferred to a separate company, BKK Enotek/Eviny Solutions together with the other activities of BKK Nett subject to competition. The demerger was a response to the expected changes to the regulatory framework for network companies. A regulatory order for network companies to spin off activities other than the monopoly activities were expected.

47. On 1 May 2017, the ownership to the streetlight infrastructure was transferred to Veilys, a subsidiary of Eviny. The business rationale was to secure the interface between streetlighting activities and other activities. Veilys has no employees. Veilys has entered into an agreement with Eviny Solutions (formerly BKK Enotek) for the operation- and maintenance-services on the streetlight infrastructure until 31 December 2025. Eviny Solutions has continued to observe separate cost accounting for the services rendered to Veilys in the same manner as applied during the BKK Nett ownership period. The continuity was also foreseen by the fact that the financial controller responsible for the separate cost accounting at BKK Nett, Maren Kjetså, transferred to become financial controller of BKK Enotek/Eviny Solutions, where she continued until 2020. In essence, the cost allocation methodology and accounting principles applied by BKK Nett in relation to separating the (network) monopoly activities from the commercial activities have governed, and will continue to govern, how Eviny ensures income- and cost transparency within the various economic activities. (**Annex A.22 Calculation hourly rates 2016, Annex A.23 Segment Account for 2016, Annex A.24 Accounting total 2017, Annex A.25 Segment Account for 2019**). All direct and indirect costs have been transparently and completely calculated. In effect, Eviny has for the relevant alleged state aid period from 2007 up until today kept separate accounts, fully allocating costs and

benchmarking prices and rates against internal cost calculations. (**Annex A.23 / Annex A.25).**

48. For the sake of completeness, we note that as of 2020 accounts were presented on a more aggregated level based on regional profit centres. In practice, the accounts from 2020 is therefore not directly comparable to the previous accounts. Translated into the state aid issue relevant to this case, however, all the direct and indirect costs for each of the external- customers, operation- and investment-projects are accounted for. This in turn forms the basis for an appropriate cost-plus hourly rate for all work performed in relation to streetlight operation and maintenance (and other business areas) to be calculated.

2.8 Tender for streetlights owned by the Municipality

49. In 2020, Bergen municipality concluded a tender for the operation and maintenance contract for the streetlights owned by the Municipality (4 355 streetlights as of 2022). Eviny won the tender on the merits based on the lowest price (NOK 10 554 689). The price of the five other tenders ranged from NOK 11 930 826 to NOK 26 596 947,50. The agreement commenced 1 April 2020 and is a framework agreement with four-year duration. It includes the operation, maintenance, and renewal tasks for the streetlights owned by the Municipality, which amounted to approximately 3 100 at the time. The tendered-out contract also encompassed the 12 000 LED fixtures installed on the BKK-owned network. However, the latter LED fixtures are new and does in general not require any service under the agreement. Eviny has to date not registered any services renders for the LED fixtures under the agreement, save for maintenance following rare strikes of lightening.

3 PLEAS IN LAW

3.1 Admissibility

50. The action is admissible pursuant to SCA Article 36. The Court has jurisdiction in actions against a decision of the ESA on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the SCA and the EEA Agreement or of any rule of law relating to the application or misuse of powers. If the action is well founded the decision of ESA shall be declared void.

51. The Contested Act is addressed to the Norwegian Government. However, as alleged aid recipient and addressee of a recovery decision, the Applicant is directly and individually concerned and have legal standing to challenge the Contested Act.

52. The Application is submitted within the relevant deadline. Pursuant to the SCA Article 36, the Application must be submitted "*within two months of the publication of the measure*". The Contested Act has not yet been published. Our understanding is in accordance with the jurisprudence of the CJEU (e.g. Joined Cases T-273/06 and T-297/06, ECLI:EU:T:2009:233, paras 58-60 and T-745/18, ECLI:EU:T:2021:644, para 42) and in line with past applications to the EFTA Court (e.g. Case E-9/19 *Abelia v ESA*). For the sake of legal certainty, the Applicant has nevertheless decided to submit the Application within two months from notification of the non-confidential version of the Contested Act (27 July 2022). We would respectfully encourage the EFTA Court to state in its ruling that the application deadline for third parties directly and individually concerned by an ESA decision runs from the publication of the measure.

3.2 Introduction

53. As stated in the introduction, the Applicant bases its application for annulment on the following six pleas. *Firstly,* ESA commits a manifest error by applying the notion of undertakings and concluding that streetlight ownership and operation is an economic activity. *Secondly*, ESA commits a manifest error of assessment by concluding that Eviny received an economic advantage through overcompensation. *Thirdly,* there is no distortion of competition. *Fourthly,* there is no effect on trade. *Fifthly*, any alleged aid is established and granted in 1996, and would therefore be existing aid. *Sixthly*, the Contested Act is based on an insufficient examination of the facts and fails to state a proper reasoning in violation of SCA Article 16.

3.3 First plea in law: 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

54. The Applicant respectfully 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 the EEA Agreement Article 61.

55. 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 (Case E-5/07, para 78; Case E-8/00, para 62). An economic activity presupposes the assumption of risk for the purpose of remuneration (indicated in Case C-180/98 *Pavlov*, ECR I-06451, para 76).

56. At the outset it is recalled that traditionally, the public funding of infrastructure was considered to fall outside the scope of the State aid rules (see the Commission Notice on the Notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union 2016/C 262/01 (hereinafter "NOA"), para 201). 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 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 (Joined Cases T-443/08 and T-455/08 *Leipzig/Halle v Commission*, EU:T:2011:117, paras 92–100).

57. In order to assess whether the activity is economic or not, "*it must be verified whether those activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of public powers or whether they have an economic character which justifies the application of the EEA competition rules*" (see Case E-9/19 *Abelia*, para 89). Contrary to what was invoked by NELFO in the state aid complaint to ESA in 2017, 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 an exercise of public authority under the notion of economic activity (ibid, para 88). Next, if the entity carries out non-economic activity separable from the economic activity, this separable activity is non-economic for the purpose of state aid law (ibid, para 90). This Court has also observed that furthering objectives in legislation and fulfilling duties toward the population, generally indicates that the activity is non-economic (ibid, para 92).

58. The EFTA Court has previously held that municipal kindergartens are not undertakings within the meaning of the EEA Agreement. The underlying rationale for this position is that there exist 'cultural, educational and social aspects to the activities of municipal kindergartens' and that 'provision of kindergarten services is

a task of the municipalities acting as a public authority'. As authority to this finding, the Court and ESA referred in particular to the purpose and contents of kindergartens as laid down in Articles 1 and 2 of the Kindergarten Act and as developed by the implementing regulation of 1 March 2006. ESA on its part also referred to the non-enforceable duty of the municipalities to ensure sufficient kindergarten places (see Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637; Case 218/00 *Cisal* [2002] ECR I-691; Joined Cases C-264/01, C-306/01, C-354/01; C-355/01 *AOK Bundesverband* [2004] ECR I-2493). In addition, within the social and educational fields, the contracting parties do not only have a "*considerable degree of discretion in deciding on the objective of their tasks, but also in determining how to fulfil that objective*" (See ESA's decision, 172/21/COL, *University summer courses*, para 41). Translated into our case there is a strong public safety rationale for ensuring streetlighting, there is regulatory context to streetlights establishing among others an obligation to ensure sufficient streetlights and there is a discretion on the local authorities when organising the ownership to and operation of the streetlight infrastructure.

59. As stated in NOA, 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*" (para 17). 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 (ibid).

60. Securing 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, the Planning and Building Act, the Road Act and the Road Standard make it clear that it is a public task to secure the streetlighting on public roads, cf. section 2.4 above. The Municipality has for its own expense and risk over time operated and maintained streetlights along municipal roads. The Applicant contends that the purpose, funding, establishment and future use of streetlights mean that the ownership to and operation and maintenance of streetlights as a starting point is a non-economic activity. Even if these activities were considered to be economic, they

cannot be separated from the exercise of public power (i.e. municipality's public tasks of securing streetlighting), so the activities as a whole must be regarded as being connected with the exercise of public powers (see Case C 138/11 *Compass-Datenbank*; C 687/17 P *TenderNet*, and the Commission decision of 20 September 2019 in Case SA.34402 – 2015/C (ex 2015/NN) – *HIS Germany*, para. 123 et seq.).

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

62. Turning to the transfer of the ownership and operation and maintenance tasks to Eviny in 1996, the Applicant contends that neither the nature of the tasks, the aim of performing the tasks, nor the rules to which they are subject has changed. 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 Eviny. The Applicant contests that this restructuring created any market. Indeed, the purpose of the transfer, and the continued operation and maintenance, was to ensure a "*long term, stable standard on the streetlighting*" (2014-Agreement, Clause 2; Purpose).

63. Moreover, in any case the public funding of municipal streetlights and operation and maintenance of the infrastructure was not an economic activity in 1996 or anytime soon thereafter. ESA fails to consider the legal and factual contextual differences in the period 1996-2016, 2016 and 2017-2022. In cases relating to the concept of

undertaking in the aviation sector, the Commission has stipulated that the "*gradual development of market forces does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered as an economic activity*" (see Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, paras 28-29). CJEU has recognised the development in the nature of airport activities on the application of state aid rules (ibid). The General Court held that from 2000, the application of state aid rules to the financing of airport infrastructure could no longer be excluded (see Joined Cases T-443/08 and T-455/08 *Leipzig-Halle airport* ECR II-1311 paras 105-106). These transitional rules have been applied by the Commission in a couple of airport cases (Commission decisions SA.21121 (*Frankfurt-Hahn*) and SA.22030-2007/C, SA.29404, SA.32091 (*Flughafen Dortmund*)). The NOA not only explicitly confirmed the mentioned above aviation guidelines on the applicability of state aid law to airport infrastructure financing, but also generalises the principles in this notice and intends to apply them beyond the aviation sector, to the construction of other (commercially used) infrastructures that are inextricably linked to an economic activity and compete with other infrastructures (e.g., port, broadband and energy infrastructure).

64. The Applicant is not aware of any specific cases by the EFTA Court or CJEU where the public funding of municipal streetlight infrastructure and operation and maintenance of streetlight infrastructure was held to constitute an economic activity. The Contested Act did not consider the element of gradual development of a market, but simply concludes that there was aid as of 1996 when the Municipality, according to ESA, established a market. The Applicant contends that there is no fundamental change from 23 December 1996 when the streetlight ownership and operation was in Bergen Lysverker, and 24 December 1996 when the streetlight ownership and operation was in Eviny, in which Bergen municipality had a majority stake due to the sale of Bergen Lysverker.

65. *Next*, the Applicant submits that any non-economic activity within BKK Nett in the period from 1996 to 2016 were de-minimis, purely ancillary and non-separable to the non-economic activities connected with the exercise of public powers. It is recalled that if an economic activity "*cannot be separated from the exercise of its*

public powers, the activities exercised by that entity as a whole remain activities connected with exercise of those public powers" (see Case T-747/17 *UPF* ECLI:EU:T:2019:271 para 82). It is further recalled that there is "*no threshold below which all of an entity's activities should be regarded as non-economic activities because of its economic activities are in minority*" (ibid para 83). 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) (**Annex A.14**). These activities only developed gradually. Any other activity within BKK Nett 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%).

66. In the alternative that the other activities are non-ancillary or separable, it is all the same possible to separate the costs and income from Bergen municipality. The costs and income from the activities for Bergen municipality is part of the non-economic public activity in the separated accounts in BKK Nett, which is clearly distinguishable from the other activities performed by BKK Nett. This means that the classification of the activities for Bergen municipality in relation to the municipal road streetlights should not be called into question as constituting an economic activity regardless of whether these are considered purely ancillary.

67. Against this background, it is respectfully submitted that ESA has arrived at an erroneous conclusion by way of insufficient examination and understanding of the factual and legal framework in; that in any case, the matter is such that the Authority should have entertained doubts, leading it to investigate further; and that the findings are borne out of an insufficient examination that translates into an absence of appropriate reasoning.

3.4 Second plea in law: Eviny did not receive any economic advantage through overcompensation – manifest error of assessment

3.4.1 Introduction – legal starting point

68. 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.

69. In the Contested Act, ESA has relied on *Chronopost* (Joined Cases C-83/01 P, C-933/01 P, C-94/01 P *Chronopost SA v Ufex and Others* EU:C:2003:338). CJEU's application of the MEOP in that case contrasts with the traditional approach to the MEOP of determining normal market conditions due to the particular situation in that case. *Chronopost* operated in a reserved market as the services provided by it were inseparably linked to the unique postal network. No commercial undertaking would establish such as network in the absence of state intervention as it was not devised based on commercial considerations (see ibid, paras 36-37).

70. In *Chronopost*, the Court of Justice held that there was no possibility to compare the situation of *Chronopost* with that of a private group of undertakings not operating in a reserved sector. In that case, "*normal market conditions*", which are necessarily hypothetical, must be assessed by reference to the "*objective and verifiable elements*" which are available (ibid, para 38). "[I]*n the absence of any specific and objective references in the market, I fear that the assessment might appear to be excessively hypothetical and abstract and might produce highly controversial, not to say arbitrary, results*" (Opinion AG Tizzano in *Chronopost*, cited above, para 55).

71. ESA has the burden of proving whether or not the conditions for the application of the MEOP have been satisfied (see Case C-244/18 P *Larko v Commission* ECLI:EU:C:2020:238 para 65; Case C-300/16 P *Commission v Frucona Košic*, EU:C:2017:706, para. 24 et seq.; Case C-405/11 P, *Commission/Buczek Automotive*, EU:C:2013:186, para 33; Case C-579/16 P, *Commission v FIH,* EU:C:2018:159, para 47). It is certainly not up to the Member State to disprove the existence of these conditions – no reversal of the burden of proof (see Case T-565/19, *Oltchim v Commission*, ECLI:EU:T:2021:904, paras 156, 179, 189, 215 and 220).

72. 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*". (see Case C-244/18 P *Larko v Commission* ECLI:EU:C:2020:238, para 66). Although ESAs selection of the appropriate benchmarking tool as a starting point is a matter for ESA, the selection must be done within "*the framework of its obligation to conduct a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the recipient undertaking and of the relevant market, to determine whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions*" (see Case T-165/16 *Ryanair v Commission,* ECLI:EU:T:2018:952, para 108).

73. It is not sufficient to "*rely on economic evaluations*" made after the advantage was conferred on retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justification of the course of action actually chosen (see Case T-747/15, ECLI:EU:T:2018:6, para 85). The Courts must, inter alia, "*establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*" (see Case C-300/16 P *Commission v Frucona Košice* para 64).

74. Even where the Member state does not fulfil its duty to cooperate and has not provided the information ESA has requested, ESA must base its decisions on reliable and coherent evidence which provide a sufficient basis for concluding that an undertaking has benefited from an advantage and therefore support the conclusions which it arrives at (see *Larko*, cited above, para 69). The Applicant also submits that ESA "*cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no*

other evidence capable of positively establishing the actual existence of such an advantage" (ibid para 70).

75. The Applicant submits that ESA was wrong to focus its assessment on the question whether the (market conform) compensation mechanism laid down in the 1996 was complied with (see the Contested Act paras 164, 176, 211). *Firstly*, 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. *Secondly*, and in any event, ESA was wrong to exclusively base its assessment on the question whether the (market conform) compensation mechanism laid down in the 1996 was complied with (ibid). After ESA arrived at the (erroneous) conclusion that this (market conform) mechanism was not applied/monitored correctly, ESA should have assessed whether the compensation actually paid was market conform for other reasons.

76. Against this background, and as further argued below, the Applicant contends that the Contested Act rests on weak grounds and is wrongly decided at law and in fact.

3.4.2 Manifest error of the application of MEOP in relation to capital costs

3.4.2.1 Introduction

77. In the Contested Act, ESA considers it commensurate with normal practice to compensate the infrastructure owner for capital costs (para 193) and concludes that the use of the NVE reference rate is commensurate with an adequate level of return in line with *Chronopost (*para 205). The Authority continues to assess whether the compensation mechanism has been followed in practice, and ultimately concludes that "*the totality of the submitted information [..] indicates that the compensation has most likely exceeded the adequate level of return allowed by the 1996-sales agreement*".

78. The Applicant respectfully submits that the Authority has 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 of calculating the market price other than the *highly questionable* data from the KOSTRA-database (**Annex A.26 Oslo Economics Report of 23 September 2022**).

79. In the Contested Act, para 211, ESA concludes that there is an advantage because "*the totality of the submitted information indicates that the compensation has most likely exceeded the adequate level of return allowed by the 1996 sales agreement*". However, in light of ESA's burden of proof, the mere likelihood (even if high) should not be sufficient to establish aid.

80. ESAs conclusion is based on four strands of alleged evidence.

81. *Firstly,* ESA states that the submitted information by the State and the Municipality has not established how the eligible capital cost have been calculated. In particular, ESA observes that control has been made difficult by the lack of separate accounts. The opposite is true, and ESAs account of the facts are fundamentally flawed, as will be shown below.

82. *Secondly,* ESA refers to the fact that the NVE reference rate incorporates general inflation, so that a capital base compensation based on a replacement cost-approach will compensate inflation twice. In doing so, ESA misreads the 2004-disagreement and the 1996-agreement. The 1996 compensation mechanism and the actual funds paid do not equal the replacement cost, albeit a replacement cost approach has been argued by Eviny, as will be explained further.

83. *Thirdly,* ESA refers to the disagreement between the Municipality and Eviny concerning how to calculate the capital base as evidence for an overcompensation. Without an accurate appreciation of the facts surrounding the disagreement, a difference of opinion is not in itself evidence of overcompensation.

84. *Fourthly,* ESA refers to a split-image of the KOSTRA-database concerning the top ten municipalities, indicating that the capital base is overcompensated. Again, the KOSTRA-database is not intended, nor suited, for a detailed comparison and benchmarking to market price. SSB itself has stated that there are challenges in relation to the KOSTRA figures due to the reported data and the lacking accuracy of the statistics, where SSB acknowledged that the definitions may be difficult to understand and that one must be critical to the collected data represented by the statistics, as is evident in the minutes from a working group meeting on 25 May 2022, page 2 (**Annex A.26**).

85. ESA misreads the purpose, scope and context of the 1996-agreement, and therefore also the basis for the capital cost compensation. The 1996-agreement was based on the Municipality selling the electricity activities in Bergen Lysverker in return for an ownership stake in Eviny (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 would ignore this perspective and the ownership risks involved. As stated above (3.4.1), 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.

3.4.2.2 Documentation – separation of accounts

86. The Applicant, firstly, observes that ESA cannot simply assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage (see Case C-520/07 P, *Commission v MTU Friedrichshafen* EU:C:2009:557, paras 57-58). Secondly, the Contested Act fails to reproduce the legal starting points as concerns cross-subsidization and ignores the actual separation of accounts in Eviny (BKK Nett in the period 1996-2016 and subsequently in BKK Enotek/Eviny Solutions).

87. Cross-subsidization is not defined in the EEA Agreement, but was defined among others in the 1991 Guidelines for the Telecommunications Sector as follows: "*Cross subsidization means that an undertaking allocates all or part of the costs of its activity in one product or geographic market to another product or geographic market*". The means to avoid the risk of cross-subsidisation is accounting separation, cf. Commission Directive 80/723/EEA of 25. June 1980 (with amendments). How to separate accounts is not defined in the EEA Agreement itself, but several ESA decisions have concluded the principles in the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings («Transparency directive»), provide guidance even if the entity in

question is not covered by the Transparency directive (see 460/13/COL para 66 and 113/14/COL para 33).

88. The EU transparency directive requires that the *method used* to allocate revenues and costs to different activities must clearly emerge (Article 1 (2) and 4 of the Transparency directive. However, no specific cost-allocation method is prescribed in the Transparency Directive (See Fehling, in chapter 7, Problems of Cross-Subsidisation in Krajewski, Neergaard, van de Gronden, "*The Changing Legal Framework for Services of General Interest in Europe - Between Competition and Solidarity*", (The Hague: T.M.C. Asser Press, 2009), page 135). The cost allocation mechanisms should, pursuant to ESAs practice, be "*objective and transparent*" to ensure that the commercial activities cover all the costs related to these operations (including all variable costs and an appropriate share of the fixed costs) (see ESA's decision 460/13/COL para 68). The Applicant notes that the Article 8 of the Transparency directive is relevant for the interpretation of "*separate accounts*" as it is stipulated that: "*annual accounts and annual report include, inter alia, the balance sheet and profit/loss account (...)*". Thus, it is necessary that non-economic activities have a segment of a balance sheet and profit/loss account and that the economic activities have a segment that includes balance sheet and profit/loss account.

89. BKK Nett's expansion into economic activities was based on the premise of a clear separation between the monopoly activities and the commercial activities, and a transparent and complete calculation of all direct and indirect costs pertaining to the commercial areas of alarm, fibre, industry, energy and lighting (**Annex A.14 Board Matter 13/2005 of 13 May 2005**). *Firstly*, the cost allocation methodology and accounting principles applied by BKK Nett in relation to separating the (net) monopoly activities from the commercial activities influences and defines also how BKK Nett ensures income- and cost transparency within the various economic activities. As described above, throughout the period from 2007-2016 BKK Nett has kept self-cost/full-cost calculation separating the income and direct and indirect variable and fixed costs for each of the business areas (**Annex A.17 Self-cost calculation for 2007 / Annex A.18 Self-cost calculation for 2014**). *Secondly*,

lighting is clearly identified as a separate business area. The income and expenditures from the business area self-cost calculations are identifiable and separate from the monopoly business in the segment accounts for each year (**Annex A.17 Segment Account for 2007 / Annex A.18 Segment Account for 2014**). As of 2012, BKK Nett also produced self-cost calculations clearly identifying municipality income and costs separate from "*private and commercial*" lighting income and cost and "other lighting" income and costs **Annex A.16 Self-cost calculation for 2014)**. *Thirdly*, BKK Nett annually produced a granular overview of all the direct and indirect costs for each of the external- (commercial customers), operation- (municipalities) and investment-projects in order to calculate appropriate cost-plus hourly rates for work performed in relation to streetlight operation and maintenance (and other business areas) (**Annex A.12 Calculation hourly rates 2007 / Annex A.13 Calculation hourly rates 2014).** Reference is made to section 2.5.2.

90. Indeed, ESA has not shown that the price in competitive markets does not cover both directly attributable costs and an appropriate share of common costs (see Fehling, "*Problems of cross-subsidisation*", cited above, page 135) on the remaining considerable discretion left to, in the present context in-house entities, in the choice of cost-allocation methods).

91. Eviny submits that it is relevant evidence, in relation to exclude possible cross-subsidising, to consider whether an "*external auditor verifies annually that the company uses the funds granted to it for its non-economic services; and in order to do that, a correct cost allocation methodology has to be in place*" (see ESA's decision 84/15/COL para 63). ESA ignores the role of NVE in supervising the separation of accounts within BKK Nett, the owner and operator of the streetlights in the period 1996-2016. As noted by the Commission in its decision 2011/839 (TV2/Danmark, OJ L 340, 21.12.2011, p. 0001-0031), even a public audit having no power to prevent overcompensation is relevant to the analysis (para 232). Translated into the regulatory context of our case, NVE has both the authority and mandate to prevent cross-subsidisation within BKK Nett for the relevant period up

to 2016. Although NVEs focus is the net monopoly business, the reporting to BKK Nett also accounts for other business areas such as lighting.

92. Next, ESA should have examined BKK Nett's publicly available segment accounts in relation to the allegation of cross-subsidisation. 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 (see Case E-4/21 *SÝN hf v ESA* para 63). 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 the question the information the Authority had at its disposal on the alleged cross-subsidisation.

93. Consequently, the Authority has made a manifest error of assessment of not sufficiently examine the fact that BKK Nett was the owner of the streetlights.

3.4.2.3 No double inflation compensation of capital costs

94. In the Contested Act, ESA held that the application of the NVE reference rate on a capital base established following a replacement cost-approach would in effect compensate for general inflation twice (see the Contested Act, para 208). Further, ESA assesses that under the NVE regulation, the NVE reference rate is applied to the book value of the power grid assets put into productive use, which the compensation mechanism in the 1996 sales agreement should reflect. However, ESA does not submit that this in itself has led to overcompensation, but only argues that the capital base may have been established in a manner which is not commensurate with the regulation of adequate return considering the evident disagreement in 2004.

95. Regardless of whether the NVE reference rate incorporates general inflation, the Applicant disagrees that there has been an actual compensation for general inflation twice. The actual payments following the 1996-agreement were never equal to the replacement cost-approach, meaning that Eviny never were compensated for general inflation twice.

3.4.2.4 The disagreement in 2004 – no evidence for overcompensation of capital costs

96. The Applicant contends that the Contested Act, para 209, misrepresents the facts and the context of the 1996-Agreement and the disagreement in 2004, and that ESA

makes a manifest error of assessment by referring to the disagreement in support of the conclusion that there is overcompensation.

97. *Firstly*, it is premature to draw conclusions from the disagreement without considering the arguments presented by BKK Nett AS in 2004. BKK Nett argued that it is necessary to acknowledge the actual wording of the 1996-Agreement, Clause 7 c, when it states that the "*Buyer shall be free to agree on market terms the operation of streetlights, which shall entail cost-coverage + NVE interest rate for the tied-capital*". There is no reference to book value in the 1996-Agreement, but merely a reference to market terms and NVE-interest rate. Streetlight infrastructure has a long lifecycle, and the capital compensation must account for depreciation and investments needed (**Annex A.20 Reply to application to the Arbitral Tribunal**). *Secondly*, the actual payments under the 1996-agreement were never equal to the replacement cost-approach. Even if, therefore, BKK Nett's position in the dispute should be capable of amounting to overcompensation and unlawful state aid, this is not relevant for the appraisal of the actual payments made. *Thirdly,* and importantly, compensating capital costs based on replacement value and not historic cost/book value, would have been in line with the market practice as concerns long life infrastructure such as network infrastructure. *Fourthly*, the Contested Act makes an inaccurate and insufficient application MEOP when simply assuming that the existence of the dispute is an indication of aid. It cannot be excluded that the Municipality's decision not to pursue the case was motivated by a legal and procedural assessment of the strength of the claim, thereby amounting to conduct which would be normal and diligent for a market actor of a contractual disagreement (see in comparison Case T-46/97 *SIC* para 99).

3.4.2.5 The KOSTRA-database – no evidence for overcompensation of capital costs

98. The Contested Act observes that the Municipality had higher costs per streetlight compared to nine other large Norwegian cities in a period from 2015-2019, as reported in the KOSTRA-database, and concludes that this is an indication of overcompensation.

99. The Applicant contends that ESA has made a manifest error in the application of MEOP by extracting and applying data from the KOSTRA-database when

concluding on the existence of state aid. It should be recalled that ESA must properly establish the relevance and verifiability of the data used (see Case T-77/16, *Ryanair*, ECLI:EU:T:2018:947, where the General Court upheld the applicants plea that 1) the Commission has failed to properly establish the estimate passengers in their MEOP analysis and 2) the Commission failed to adduce evidence justifying taking into account expected additional costs.

100. The KOSTRA-database does not provide any cogent justification or positive evidence for overcompensation and state aid. Generally, the data is incomplete, inaccurate, and not fit for purpose to either evidence or calculate state aid.

101. *Firstly,* and more specifically, ESA only focuses 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 KOSTRA-database is (and is not). It is argued that ESA has not establish whether the KOSTRA-database relied on is factually accurate, reliable and consistent with the other information and ESA has not proven or concluded that the KOSTRA evidence contains all the relevant information which must be taken into account in order to assess a "*complex*" situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-300/16 P *Commission v Frucona Košice* para 64).

102. *Secondly*, the KOSTRA-database relies on input from the municipalities, and the input is inconsistent and inaccurate (**Annex A.26 Oslo Economics Report of 23. September 2022**). By way of example, Bergen municipality included capital costs when reporting streetlight costs. It is not clear whether the other municipalities include capital costs.

103. *Thirdly,* the comparison between cities ignores a set of variables unrelated to state aid allegations, which may influence the reported costs. By way of example, the difference to Stavanger relates to a difference in energy prices, cf. Streetlight cost Bergen KOSTRA from Bergen municipality. Regardless of the reasons for differences in energy prices, this means that the KOSTRA-data from Stavanger and Bergen municipality are not comparable. As illustrated by Oslo Economics, the data

from Trondheim municipality illustrates the complexity. Trondheim is one of the municipalities in the sample of ESA's benchmarking. The examination of individual products and services in Trondheim's agreement with ON Energi AS clearly show that it reflects municipal-specific characteristics and scope, whereas services and products can be significantly different in Bergen compared to Trondheim. Trondheim's total cost is affected by the municipality's choice of product/service combination since the supplier has separate unit costs depending on product characteristics (**Annex A.26 Oslo Economics Report of 23. September 2022**). The costs for the same quality and quantity of services/products are not comparable and does not make for relevant comparisons. The variability in the agreements means that the data is not a meaningful proxy for market price. The streetlight contracts vary significantly. Whereas some contracts are based on streetlight as-a-service other contracts are call-off contracts according to specific needs at specific points in time.

104. *Fourthly,* the actual invoiced amount in a number of instances is different than the reported KOSTRA-database figures for Bergen*:* 1) Capital cost of NOK 4,59 mill per year (NOK 303 per streetlight) and 2) operation and maintenance of NOK 9,6 million (2018) (ca. NOK 495) inflation adjusted (see the contractual commitments and amount of streetlights in the Contested Act paras 37-40 as the basis for our calculations). ESA should have noted the significant difference in the data, in particular the agreements of Eviny's contractual commitments, and requested additional explanations or information from the Norwegian authorities (see in comparison Case T-77/16, *Ryanair,* ECLI:EU:T:2018:947, para 59).

105. *Fifthly*, the KOSTA-database does not in any case evidence any state aid prior to 2015 and after 2019 (see in comparison ibid para 61). As a result, the Authority has in any case failed to establish the costs and alleged overcompensation of the capital costs before 2015 and after 2019.

106. *Sixthly*, the Contested Act is contradictory when it puts significant emphasis on a selection of KOSTRA-data, whilst ignoring the most verifiable and objective data relevant to streetlight infrastructure cost in Bergen in recent times, namely the

competitive tender prices submitted in 2020. If anything, this is a much closer (yet not sufficient) benchmark for what would be a relevant price for the services.

107. Against this background, we respectfully plea that the Court disregard the KOSTRA-database and conclude that ESA committed a manifest error of assessment when emphasising the KOSTRA-database as an indication of state aid.

3.4.2.6 Concluding remarks

108. The Applicant submits that the alleged evidence upon which the Contested Act relies, whether assessed separately or together, does not prove any overcompensation of capital costs to Eviny. ESA cannot simply assume that the Eviny has benefitted on a negative presumption based on the lack of information enabling the contrary to be found. ESA's overall assessment has not proven that the compensation for the capital costs to the Eviny is manifestly above the market price. The selective approach to factual circumstances upon which the Contested Act relies is inconsistent, unreliable and not consistent with the burden of proof and the complex economic assessment inherent in applying the MEOP.

109. In any case, it is submitted that ESA should have entertained serious doubts, leading it to investigate further; and that the findings stem from an insufficient examination translating into an absence of appropriate reasoning.

3.4.3 Manifest error of the application of MEOP in relation to operation and maintenance

3.4.3.1 Introduction

110. in the Contested Act, para 176, ESA concludes, again from the basis of *Chronopost.* that there is an advantage because «*the submitted information indicates that the compensation has most likely exceeded the level commensurate with the mechanism in the 1996 sales agreement*». However, in light of the Authority's burden of proof, the mere likelihood should, again, not be sufficient to establish aid. The Contested Act fails to point to any "objective and verifiable elements" which give grounds for establishing any overcompensation (Joined Cases C-83/01, P, C-93-01 P and C-94/01 P *Chronopost and Others v UFEX and Others,* ECR I-6993, para 38).

111. ESAs conclusion is based on four strands of alleged evidence. *Firstly*, ESA alleges that a rational private operator would ensure control of the prices presented by the

operator (Eviny), initiate legal steps if necessary and generally invest more resources in ensuring compliance with the 1996-agreement (see section 3.4.2.1 above). *Secondly*, ESA concludes that the Municipality has entertained concerns of overprice throughout the period. *Thirdly*, ESA finds that Veilys does not have sufficient information on direct and indirect costs associated with the operation and maintenance activities. *Fourthly*, ESA refers to the KOSTRA-database and compares Bergen with nine other large municipalities in the period 2015-2019.

3.4.3.2 Alleged inactivity from Bergen municipality

112. As to the first strand of alleged evidence, it should be noted that the Municipality is not a normal private operator in regard to streetlights. Bergen municipality previously owned and operated the streetlights as a monopoly service and reorganised the ownership of the entire streetlight infrastructure to ensure a long-term operation and maintenance basis for a public infrastructure. The assumption, however, that the Municipality, did not invest in compliance – and the legal conclusions drawn from it – are erroneous at fact and in law. The Municipality has requested, and received, comprehensive information from Eviny (then BKK Nett) regarding the costs and risks involved in operating and maintaining the streetlight infrastructure. The actual price paid is based on commercial negotiations and a meeting of wills in 1996, and the subsequent honouring of that agreement is based on the very same price as initially agreed (inflation adjusted). Also, see section 3.4.2.4 above in relation to the 2004-dispute and the relevance of legal uncertainty of a claim in a legal dispute. The Municipality, as a normal and diligent market operator, chose actively to not further litigate the 2004-dispute.

113. Next, it should be recalled that only an active intervention can constitute aid. However, The Authority seems to assume that merely a failure to renegotiate or to terminate a contract may amount to aid (see Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113, para 45; NOA para 5; Article 1 of Regulation 2015/1589). This is not consistent with the case law. According to the MEOP, the relevance of a "*specific transaction*", a "*measure actually carried out*" has to be assessed under state aid law (see Case C-124/10 P, *EDF v Commission* ECLI:EU:C:2012:318, para 83) or an "*intervention by the* state" (see NOA para 77).

3.4.3.3 The 2004-dispute and disagreement between the municipality and Eviny

114. As to the second strand of alleged evidence (see Contested Act paras 170-171), the Municipality's disagreement – and doubts as regards whether the price was high or too high - cannot in and by itself call into question the compliance with the MEOP-test. As shown above, and in the analysis of the KOSTRA-database, there is no coherent and plausible proof that the price is beyond and above the "market price" for streetlights (cf. **Annex A.26 Oslo Economics report**). After 2004, the Municipality has not initiated any legal action to require adjustments of the 1996-agreement, and the unsubstantiated statements by the Municipality in the period 2017-2022 to ESA in regard to the state aid complaint process, must be seen in the context of the allegations made and does not in and by itself constitute any coherent evidence for overcompensation.

3.4.3.4 Accounting separation – direct and indirect costs

115. As to the third strand of alleged evidence, the contention that Veilys does not have a proper account of direct and indirect costs related to the operation and maintenance is simply wrong. As a starting point, the CJEU in *Chronopost I (*cited above) para 40 held that "*there is no question of State aid to SFMI-Chronopost if, first, it is established that the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion*".

116. Turning to the facts, *firstly,* it must be stressed that BKK Nett, the owner and operator of the streetlights in the period 1996-2016, has a detailed account of every cost, whether related to manpower, equipment or other direct and indirect costs, related to the service (see Section 2.5.2 above). *Secondly*, these cost data were, as documented above, instrumental to the transfer of the streetlight infrastructure, and internal pricing thereof, to BKK Enotek (2016) and later Veilys (2017), and instructive also to costs of operating and maintaining the streetlights (see Section 2.7). *Thirdly*, Veilys as owner and purchaser of operation and maintenance services

in regard to the streetlights, and Eviny Solutions, as operator of the streetlights, can show to detailed cost calculations correlating to the actual prices agreed in the 1996-agreement (Section 2.7 above).

117. An analysis of the actual direct and indirect costs involved in delivering the streetlight operation and maintenance services to Bergen municipality clearly would have revealed that there is no overcompensation. Pursuant to calculations made by Eviny Solutions on the basis of 2021-figures, the direct and indirect costs for the tasks pertaining to operation and maintenance performed for Veilys for the streetlights on municipal roads in Bergen municipality amount to NOK 697 (**Annex A.27 Calculations for operation and maintenance performed for Veilys).** This finding does not support an overprice for the NOK 490 paid by Bergen municipality for these services.

3.4.3.5 The evidentiary value of the KOSTRA-database

118. The Applicant submits that in relation to The Authority use of the KOSTRA-database, the KOSTRA-data that ESA relied on, does not show any information of the costs between 1 January 2020 and 2020 April (or anytime soon thereafter). Reference is made to the facts and arguments set out above and in the annexed report from Oslo Economics (**Annex A.26**).

3.4.3.6 The 2020-tender

119. The Applicant submits that ESA commits a manifest error of assessment by ignoring the data from the 2020-Bergen municipality streetlight tender. The tender concerns the very same streetlights as those previously operated and maintained by Eviny Solutions and obviously relates to the same municipality and the same roads. The significantly higher, yet successful, tender bid price in 2020 (NOK 606/streetlight) than the agreed compensation for streetlights under 2015-agreement (NOK 495/streetlight) clearly demonstrates that there is no overcompensation.

120. Whereas Bergen municipality's contract with BKK Nett, and later Eviny Solutions and Veilys, is a streetlight-as-a-service contract with a number of additional services included, the tendered contract in 2020 is a call-off contract where the municipality orders and pay for the various cost elements included. This means that the actual

tender bid price likely will be higher. This again clearly demonstrates that there is no overcompensation in the previous operation and maintenance contract.

121. The Contested Act barely mentions the 2020-tender, and ultimately disregards the evidentiary value of the 2020-tender by referring to the fact that it includes LED fixtures, and therefore is not directly comparable to the 2016-2020 contract between Bergen municipality and Eviny. This is misunderstood. The LED fixtures are new and do in general not require any service under the agreement. In short, the inclusion of these has no significant effect on the pricing of the contract. The market tested bid price of NOK 600 (and effective price of NOK 1200) is a relevant benchmark and is even higher above the NOK 490 compensation paid under the alleged overcompensating 1996-agreement for the period 2016-2020.

3.4.3.7 Concluding remarks

122. Again, the Applicant submits that the evidence the Authority has considered, as outlined above, assessed separately or combination with other evidence, is not indicative or proof of any overcompensation for operation and maintenance services to Eviny. Again, the Authority cannot simply assume that Eviny has benefitted on a negative presumption based on the lack of information enabling the contrary to be found. The Authority's overall assessment has neither stipulated nor proved whether the compensation for operation and maintenance services to Eviny is obtained manifestly beyond and above the market price. Reference is made to the comments above concerning factual accuracy, consistency and reliability, in particular relating to the KOSTRA-database.

123. Against this background, it is respectfully submitted that the Authority's findings on overcompensation are wrong in substance; that in any case, the matter is such that the Authority should have entertained doubts, leading it to investigate further; and that the findings are borne out of an insufficient examination that translates into an absence of appropriate reasoning.

3.5 Third plea in law: There is not distortion of competition in any market – manifest error of assessment

124. The Applicant respectfully disagrees with ESA 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 at public roads.

125. ESA must prove the alleged state aid is liable to distort competition. In relation to infrastructures "*there are circumstances in which certain infrastructures do not face direct competition from other infrastructures of the same kind or other infrastructure of a different kind offering services with a significant degree of substitutability, or with such services directly*" (see NOA paras 210-212; Joined Cases C-174/19 P and C-175/19 P *Scandlines* EU:C:2021:801 paras. 94, 130, 172). As noted in *Altmark*, and repeated in the NOA, the distortion must not be merely hypothetical (see Case C-280/00, *Altmark* ECLI:EU:C:2003:415, para 79).

126. The Applicant submits that streetlights infrastructure is by its nature a natural monopoly for which there is no demand or willingness to pay (see NOA, para 211). Translated into the facts of the case at hand, 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 (see NOA paras 210-212), and it would be nonsensical and uneconomic for an undertaking to replicate Veilys' infrastructure, i.e., owning streetlights at 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. The logical corollary of this, that there is no direct competition to be distorted, is not appreciated in the Contested Act, when ESA indicates 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.

127. Next, the Applicant respectfully submits that ESA's assessment of cross-subsidisation is flawed, and that the Authority's examination is insufficient (cf. the Contested Act para 222: "*the Norwegian Authorities are unable to exclude that the other economic activities have been cross-subsidised*"). *Firstly*, ESA has not identified the relevant and potentially affected markets. *Secondly*, ESAs contention

that the Norwegian authorities are *"unable to exclude that the other economic activities have been cross-subsidised"*, ignores the accounting separation and transparency within Eviny throughout the period. The Authority has not provided any concrete evidence of cross-subsidisation from Bergen municipalities to other municipalities (tenders), other private streetlight services or other commercial businesses of Eviny.

128. On this basis, the Applicant finds that the alleged illegal aid to Eviny's activities of operation and maintenance of Veilys' own streetlights at public roads is not liable to distort competition. In addition, the Contested Act has examined the condition of distortion of competition in an insufficient manner in relation to the different markets and the implications of Veilys' ownership of streetlights at public roads.

3.6 Fourth plea in law: There is no cross-border effect - manifest error of assessment

129. The Applicant respectfully submits that ESA is manifestly wrong in assuming that the effect on trade criteria is met in relation to the alleged overcompensation of operation and maintenance of streetlights owned by Veilys at public roads.

130. The Applicant is referring to section 3.5 above in relation to distortion of competition. If there is no distortion of competition, nor is there any effect on (see Case *Scandlines* cited above, para 173). Next, the Contested Act does not provide sufficient examination of the condition on effect on trade. *Firstly*, the Contested Act, para 224, does not explain how the advantages conferred on Eviny may allow it to maintain or extend its activities at the expense of these competitors. *Secondly*, and in the absence of any quantification or indication of the amount, the Contested Act fails to consider whether the aid is more than marginal and if it is possible to exclude the foreseen effects of the alleged measures to be more than marginal (see Case T-728/17 *Marininvest v Commission*, EU:T:2019:325, paras 100-106). *Thirdly*, ESAs reasoning in relation the overcompensation is not based on sufficiently detailed data and the allegation of cross-subsidisation is only stated as "*likely true*" reinforce such a view (Contested Act, para 224). Lastly, an effect on cross-border trade lacks when measures to support local infrastructure are concerned (Commission, OJ 2006 L 32/82, para 59 – *Gas filling stations in Piemont*; Commission, N 860/01 – *Cable*

cars in Austria; Commission N 486/2002 – Conference Center Visby; Commission, SA.37432 – *Hospitals in Hradec Krelove*; NOA, paras 192 and 196-197).

3.7 Fifth plea in law: Any alleged aid would be existing aid – recovery is contrary to EEA Article 62 and Protocol 3 SCA, Part II, Article 14 and the related decision 195/04/COL

131. Article 5 of the Contested Act concludes that compensation for capital cost and operation and maintenance services aid is unlawful insofar as the compensation and remuneration is awarded 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 (Contested Act, paras 17 and 242).

132. The Applicant contends that this conclusion is based on a wrongful application of the rules of recovery, and that any aid would be existing aid. The Contested Act ignores the fact that any alleged aid must be based on the mechanisms and understanding established by the 1996-sales agreement. ESAs reasoning is contradictory when stating on the one hand that the 1996-agreement established a market and a compensation mechanism (para 127), whilst on the other hand fully ignoring the legal implication for the recovery period of the 1996-agreement (para 244 et seq.).

133. 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 (see also Article 1 (b)(iv) of Part II of Protocol 3 SCA, according to which "existing aid" is *"aid which is deemed to be existing aid pursuant to Article 15 of this Chapter")*. 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 (see Article 15 (2) of Part II of protocol 3 SCA).

134. The starting point for the recovery limitation period should be the 1996-agreement, as it is the agreement which enables Eviny to receive remuneration and obliges the Municipality to pay remuneration for the capital costs and the operation and

maintenance. As authority to this position, the Applicant refers to CJEU case-law: *"for the purpose of determining the date on which the limitation period starts to run, that provision refers to the grant of the aid to the beneficiary"* (see Case C-81/10 P *France Telecom v Commission*, ECLI.EU:C:2011:811, para 81). A second authority to this position is ESA's decision in 167/09/COL part II, section I, where ESA in a case concerning alleged aid in the form of an (beneficial) lease agreement concluded that the ten-year limitation period had expired as the lease contract binding was entered into more than 10 years before ESA.

135. This position is not changed by the fact that ESA seems to consider that the *mechanism* laid down in the 1996 sales agreement does not involve state aid (paras 163, 169, 194), and that the alleged aid would stem from the fact that the agreed mechanism was subsequently not *correctly applied* or complied with (paras 170, 205, 207, 211). Without the 1996-agreement there would not exist any compensation at all, and the Applicant contends that ESA was wrong to distinguish between the mechanism and its practical implementation, as both are intrinsically linked (see section 3.3 above). Indeed, the capital costs have been paid on the basis of a legally binding agreement entered into in 1996 between the municipality and Eviny (BKK DA). As ESA lays out under para 125 of the contested Act: *"...section 7(c) of the sales agreement included a mechanism governing the future economic compensation. This mechanism allows for a regulated level of return."*

136. This is strongly supported by the fact that the capital cost has not been subject to any adjustments or otherwise modifications of 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 that there is no change which could have altered existing aid in 1996 into new aid any later. This would only apply in case of changes that go beyond a "*purely formal or administrative nature*", i.e., the change must affect its "*essential character*". This is the case if it is "*granted on a legal basis which differs in substance*" from the original measure (see Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 *Sardegna,* ECLI:EU:T:2011:493, para 175) or if the "*scope*" changes (see Case C-6/12 P *Oy,* ECLI:EU:C:2013:525, para 47). 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 (see Joined Cases T-195/01 and T-207/01 ECLI:EU:T:2002:111 para 111; Case C-492/17, *Südwestrundfunk* ECLI:EU:C:2018:1019, paras 54, 66).

137. The Applicant's view is also supported by the circumstances and business rationale of the 1996-agreement. As stated in the Contested Act para 27, 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 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.

138. The disagreement between the municipality and Eviny does not change the nature of any alleged aid as being existing aid. The municipality has until this day paid capital cost according to calculations made by Eviny in accordance with section 7c in the 1996 sales agreement. The only rightful reason for the municipality to continue to pay the capital costs as calculated by Eviny, after having exchanged application and reply to the arbitration proceedings, must be that the municipality views section 7c of the 1996 sale agreement valid and binding with a high probability of losing a legal battle over the calculation method embedded in the clause.

139. The operation and maintenance compensation is no less based and awarded by the 1996-agreement. This is not called into question by the fact that the Contested Act concerns overcompensation for operation and maintenance services from 1 January 2016 (Contested Act, paras 17, 242). This also applies irrespective of the subsequent agreements concerning operation and maintenance. 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.

140. Against this background it is respectfully submitted that the alleged aid in relation to capital costs and operation and maintenance is existing aid from 1996, and therefore not subject to recovery pursuant to EEA Article 62 and Protocol 3 SCA, Part II, Article 14 and the related ESA decision 195/04/COL.

3.8 Sixth plea in law: The Contested Act is based on insufficient examination and fails to state a proper reasoning in violation of Article 16 SCA

141. In accordance with Article 16 SCA, ESA is obliged to state the reasons on which the decision is based. In doing so ESA must *"set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Authority to its decision may be understood"* (see Case E-2/94, *Scottish Salmon Growers Association Ltd v ESA*, para 26; Case 24/62 Germany v Commission [1963] ECR 63, page 69; Case C-41/93 *France v Commission* [1994] ECR I1829, para 34). The statement of reason must enable the persons concerned to ascertain the reasons and be able to defend their rights, whilst at the same time enabling the Court to exercise its powers of judicial review (see e.g. Joined Cases E-4/10, E-6/10 and E-7/10, *the Principality of Liechtenstein v ESA*, para 171. The obligation to state reasons is a separate question from that of the merits of those reasons (see Case T-265/04, ECLI:EU:T:2009:48, paras 99-100).

142. *In the first part of the sixth plea*, the Contested Act does not provide a proper reasoning for concluding on the notion of undertaking. Reference is made to the arguments presented under section 3.3, in particular the omission in the Contested Act to consider the regulatory context, relevance of BKK Nett as owner and operator of the streetlights in the period 1996-2007, the notion of purely ancillary and non-separable as well as the market failures and factual and historical context of streetlight infrastructure.

143. *In the second part of the sixth plea*, the Contested Act does not provide proper reasoning for finding overcompensation. *Firstly*, ESA was wrong to exclusively base its assessment on the question whether the (market conform) compensation mechanism laid down in the 1996 was complied with (see the Contested Act paras 164, 176, 211). After it came to the (incorrect) conclusion that this (market conform)

mechanism was not applied/monitored correctly, if should have assessed whether the compensation actually paid was market conform for other reasons. Instead of identifying potential omissions of the municipality when considering the criterion of economic advantage (para. 180: "*did not check whether the services could be procured at lower costs*"; para. 170:" *a rational private operator would have invested sufficient resources to ensure compliance. This would involve controls of the basis for the prices* (...)"), ESA should have positively established that there is (positive) aid, i.e. that the compensation payments are too high, and why.

144. *Secondly*, in its concrete assessment of the alleged overcompensation ESA overlooks material facts which should have led ESA to a different conclusion, including the circumstances surrounding the 1996-agreement and transfer of assets and the accounting separation of BKK Nett and Eviny Solutions (compare e.g. Commission decision 2010/607/EU in the Belgium Ostend fish auction restructuring case, OJ L 274, 19.10.2010, p. 0103-0138 cf. paras 191 and 290).

145. *Thirdly*, there is a lack of quality in the evidence relied upon. This is particularly true as regards the KOSTRA-database. The Contested Act does not critically review the quality of the KOSTRA-data and bases its conclusions on a narrow selection of data in time and scope, cf. section 3.4.2.5. ESA fails to investigate whether the differences in costs between the municipalities may be a result of other factors other than the presence of overcompensation. The awkwardness of applying the KOSTRA-database is evidenced among others when the cost-data (bid-price) in the Bergen municipality tender in 2020 is outright rejected. ESA has not in fact pointed to any circumstance that demonstrates the existence of overcompensation or the occurrence of unlawful aid.

146. *Fourthly*, and consequently, the decision is ambiguous and inadequate when considering the amount of overcompensation (see the Contested Act, para 186 and 213). 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] (see Case C-69/13, *Mediaset*, EU:C:2014:71, para 21). At the very least, the decision must set out the

method according to which the overcompensation should be calculated (Case C-441/06 Commission v France EU:C:2007:6616, para 41).

147. *In the third part of the sixth plea*, the Contested Act has insufficient examination and fails to state a proper reasoning of existing aid and limitation. Indeed, the Contested Act fails to consider the issue of existing aid (see e.g. Joined Cases T-265, 292 and 504/04 *Tirrenia* EU:T:2009:48, paras 97-134). Reference is made to the arguments presented under section 3.7 above.

148. Consequently, it must be concluded that ESA has failed to state the reasons that led it to adopt the contested decision in accordance with Article 16 SCA.

4 FORM OF ORDER SOUGHT

149. For the reasons set out above, the Applicant respectfully submits that the EFTA Court shall

- Annul Decision No.161/22/COL, of 6 July 2022, of the EFTA Surveillance Authority; and

- Order the EFTA Surveillance Authority to pay the costs of the proceedings

In order to enable the Court to have a full view of the matter, the Applicant shall enclose to the present application, as **Annexes**, the following documents:

SCHEDULE OF ANNEXES

Annex A.1	EFTA Surveillance Authority Decision of 6 July 2022
Annex A.2	Complaint from NELFO to ESA of 11 May 2017
Annex A.3	Letter from Bergen municipality to Simonsen Vogt Wiig of 15 October 2018
Annex A.4	Sales agreement of 1 November 1996
Annex A.5	Forwarding of complaint from the Authority to the Norwegian authorities by letter dated 1. June 2017
Annex A.6	Invoice for operation and maintenance of municipal roads in accordance with the contract for august 2022
Annex A.7	Agreement on building and operation of streetlights of 2006
Annex A.8	Agreement on building and operation of streetlights of 2015

Annex A.9	Road Standard/Vegnormalen
Annex A.10	Road Lighting Handbook/Guidelines V124 (extract)
Annex A.11	Local regulations for Bergen municipality
Annex A.12	Calculation hourly rates 2007
Annex A.13	Calculation hourly rates 2014
Annex A.14	Board Matter 13/2005 of 13 May 2005
Annex A.15	Self-cost calculation for 2007
Annex A.16	Self-cost calculation for 2014
Annex A.17	Segment Account for 2007
Annex A.18	Segment Account for 2014
Annex A.19	Subpoena for arbitration Bergen Municipality
Annex A.20	Reply to application to the Arbitral Tribunal
Annex A.21	Extension of 2015 agreement
Annex A.22	Calculation hourly rates 2016
Annex A.23	Monthly report 2016
Annex A.24	Accounting total 2017
Annex A.25	Accounting/prognosis 2019
Annex A.26	Oslo Economics Report of 23 September 2022
Annex A.27	Calculations for operation and maintenance performed for Veilys