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ESA | EFTA Surveillance Authority

ORIGINAL

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

DEFENCE

submitted pursuant to Article 107 of the Rules of Procedure of the EFTA Court by

THE EFTA SURVEILLANCE AUTHORITY

represented by Michael Sánchez Rydelski, Claire Simpson and Kyrre Isaksen, Members of the Legal & Executive Affairs Department, acting as Agents in

CASE E-10/22

Eviny AS

v

EFTA Surveillance Authority

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

ESA | EFTA Surveillance Authority

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1 INTRODUCTION

1. By letter dated 3 October 2022, the Registrar of the EFTA Court notified the EFTA Surveillance Authority ("**ESA**") of an application ("**the Application**"), which was lodged with the Court on 27 September 2022 by Eviny AS ("**the Applicant**"). The Application is based on Article 36(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("**SCA**") and seeks the annulment of ESA's Decision No. 161/22/COL of 6 July 2022 on aid in relation to the streetlight infrastructure in Bergen ("**the Decision**"). The Court invited ESA to lodge a Defence by 5 December 2022. On 31 October 2022, ESA requested an extension of the deadline to submit its Defence, which the Court granted until 12 December 2022.

2. The Decision concerns the Applicant's overcompensation for payments of (i) operation and maintenance costs and (ii) capital costs (jointly referred to as "**the measures**"), in relation to streetlight services in the Municipality of Bergen ("**the Municipality**"). Concerning streetlights owned by the Applicant, overcompensation occurred in relation to (i) operation and maintenance costs from 1 January 2016 (still ongoing), and in relation to (ii) capital costs from 1 June 2007 (still ongoing). In respect of maintenance and operation services of streetlights owned by the Municipality, overcompensation occurred within the period from 1 January 2016 until 1 April 2020.

3. The Application is based on six pleas. However, the centre of gravity and focus of the Application is on the second plea, where the Applicant argues that it was not overcompensated for its streetlight services and that ESA allegedly made a manifest error of assessment when concluding that the Applicant received an economic advantage through overcompensation. In support of the second plea (and related arguments in other pleas), the Applicant submits information and documents, which ESA sees for the first time.[1]

4. ESA submits that, contrary to the claims made by the Applicant, the Decision is the result of a proper formal investigation, involving the careful and detailed consideration of all evidence collected. The Decision was adopted on basis of the information and

[1] See on this point Section 2.6 of the Defence.

evidence available at the time. Consequently, any newly submitted information in the Application could not form the basis of the Decision. ESA submits that, when it is clear from a decision to open a formal State aid investigation which information ESA is seeking, in order to be able to assess a case, and if an interested party, in this case the Applicant as aid recipient, does not submit this information, then this party may no longer rely on this information once the decision is taken. The lawfulness of a decision concerning State aid is to be assessed in the light of the information available to ESA at the time when the decision was adopted. Similarly, the Applicant cannot complain that ESA failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure, but which were not, as ESA is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it.[2]

5. In any event, based on the information and evidence available at the end of the formal investigation, there were sufficient indications that the Applicant enjoyed an economic advantage by way of overcompensation.[3] The finding of overcompensation was, *inter alia*, supported by statistical data on the cost levels incurred by large Norwegian municipalities in respect of the provision of streetlighting. The cost levels registered for the Municipality, which was procuring streetlighting services from the Applicant, were by far higher compared to all other municipalities.

6. Finally, and in any event, even the Applicant's newly submitted information does not demonstrate that there was and still is no overcompensation. On the contrary, the newly submitted information shows that the services provided by the Applicant in respect of streetlighting, including its large customer the Municipality, is one of the Applicant's most profitable business areas. If all the relevant cost and control data relating to the compensation were, as the Applicant submits, available and retrievable, ESA questions why, even now, the Applicant has failed to provide the necessary data to the Court (and by implication to ESA). Rather than producing such information to make good its claim, the Applicant instead seeks to call into question and undermines the Decision, largely on the basis that ESA did not adduce evidence, which the Applicant did not provide to it during the formal investigation procedure and which,

[2] See to that effect also Section 4.3.1 of the Defence.
[3] Articles 2 and 3 in the operative part of the Decision.

upon examination, still today is not sufficient to properly substantiate the Applicant's claims.

7. In the following, ESA will first under Section 2 give a brief account of the relevant facts in relation to the Decision and the Applicant's unsatisfactory cooperation during the formal investigation. Section 3 then deals with the admissibility of the Application. Section 4 addresses the Applicant's six pleas, explaining why each is unfounded and must therefore be rejected. Finally, the form of order sought by ESA is set out in Section 5.

2 FACTS

2.1 Background

8. Norwegian municipalities are legally responsible for operating and maintaining municipal roads.[4] Until 1996, the streetlight infrastructure along municipal roads in Bergen was owned by Bergen Lysverker. Bergen Lysverker was a municipal unit within the Municipality.[5]

9. In 1996, Bergen Lysverker was acquired by and incorporated into BKK DA, under a 1996 sales agreement ("**the Sales Agreement**").[6] A mechanism regulating the compensation for the provision of streetlighting and related services was set out in section 7(c) of the Sales Agreement. According to this mechanism, BKK DA would be free to operate the streetlights on market terms, which entailed cost coverage plus a capital cost for the committed capital equal to the rate-of-return fixed by the Norwegian Energy Regulatory Authority ("**NVE**") for the regulated power grid infrastructure.[7]

10. BKK DA was later reorganised into BKK AS.[8] Various subsidiaries of BKK AS have since owned and operated the streetlight infrastructure along the municipal roads in Bergen.[9]

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[4] *Lov om vegar* (Road Act), LOV-1963-06-21-23, Section 20.
[5] Decision, para. 11.
[6] Annex A.4 of the Application.
[7] Decision, para. 32.
[8] Decision, para. 12.
[9] Decision, paras. 13 and 14. As set out in footnote 3 to the Decision, a rebranding introducing the name *Eviny* has recently taken place.

11. Throughout the concerned period, the Municipality has also owned a (lower) number of streetlights itself. Since 1996, the Municipality has acquired new streetlights by means of financing their construction and by developers transferring newly constructed streetlights to the Municipality.[10]

12. On 27 September 2016, the Municipality published a call for tender for the purchase of approximately 12 000 LED fittings. The LED fittings were used to replace quicksilver fittings and sodium fittings on the streetlight infrastructure owned by BKK EnoTek AS. The replacement was financed by the Municipality, which remained the owner of the new LED fittings.

13. The transfer of the BKK-owned streetlights to Veilys AS occurred in May 2017. Veilys AS has neither operated nor maintained the streetlight infrastructure itself.[11] These activities were performed by another subsidiary of the Applicant[12] (BKK EnoTek AS).[13] The Applicant also owns streetlight infrastructure along State roads, county roads and private roads.[14]

2.2 The Complaint

14. By letter of 11 May 2017, Nelfo[15] complained to ESA about alleged unlawful State aid granted by the Municipality to the Applicant by way of different measures in relation to the streetlight infrastructure in the Municipality ("**the Complaint**").[16] Nelfo essentially argued that the Municipality granted an advantage to the Applicant by: (i) overcompensating it for the maintenance and operation of the 18 407 streetlights along

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[10] Application, para. 13.
[11] Decision, paras. 13 and 14.
[12] For the sake of simplicity, all entities which have owned, operated and/or maintained the streetlight infrastructure (since the transfer from Bergen Lysverker), will be collectively and individually referred to as "**the Applicant**" (which will also include other companies in its group). The Defence will refer to a specific group entity only where the context so requires.
[13] Decision, para. 14; and Application, para. 5.
[14] Decision, para. 13.
[15] Nelfo is a sectoral federation within the confederation of Norwegian Enterprise (NHO). It comprises electro, IT, ecom, system integrators and lift companies in Norway. Information concerning Nelfo is available through the following link: https://www.nho.no/en/english/nho-sectoral-federations/
[16] Nelfo's complaint is attached as Annex A.2 to the Application.

municipal roads,[17] for which the Municipality was responsible; and (ii) financing the 12 000 new LED fixtures on the streetlight infrastructure owned by the Applicant.[18]

15. The complainant argued, *inter alia*, that the Applicant was engaged in an economic activity, as there were several suppliers that were willing and able to operate and maintain the streetlights.[19] Nelfo estimated the overcompensation for the service of maintenance and operation of the streetlights at approximately NOK 12 million (around EUR 1.12 million) per year. According to the complainant, comparable service contracts allegedly stipulated prices of about NOK 100 per light point per year.[20]

2.3 Correspondence with Norway

16. By letter dated 1 June 2017, ESA forwarded the Complaint to the Norwegian authorities and invited them to comment on it.[21] Despite repeated requests, the Norwegian authorities did not provide any evidence at all showing that the decisions to carry out the transactions under assessment were taken on the basis of economic evaluations, comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have carried out, to determine the profitability or economic advantages of the transactions.

17. The Norwegian authorities explained that the Municipality was in a 'deadlock' situation in that they had no choice but to purchase the services from the Applicant. They seemed to acknowledge in this respect that owners of this type of infrastructure could exploit their position, potentially to raise prices, and indicated that they had not found any suitable methods for finding and agreeing with the Applicant on "the right price".

18. On 28 February 2019, the Norwegian authorities submitted information[22] that brought an additional measure to ESA's attention. According to this new information, the Municipality also compensated the Applicant for the *capital* costs of its owned streetlights. The compensation covered the renewal and upgrade of streetlights, luminaires, wires, ignition systems, etc.

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[17] 16 058 of these are owned by BKK EnoTek AS and the rest, 2 349 are owned by the Municipality.
[18] Decision, para. 16.
[19] Decision, para. 18.
[20] Decision, para. 20. This price was in sharp contrast to the price charged by the Applicant (see Section 2.4.2 of the Defence, para. 32).
[21] Decision, paras. 3 and 4.
[22] Decision, para. 5.

2.4 The formal investigation

19. By Decision No. 027/19/COL of 16 April 2019, ESA opened the formal investigation into this case ("**the Opening Decision**").[23] It informed the Norwegian authorities that it had concerns that the measures covered by the Complaint, and the compensation for the capital costs related to streetlight infrastructure in the Municipality, might entail State aid pursuant to Article 61(1) EEA. In the Opening Decision, ESA also expressed doubts as to the compatibility of the measures with the EEA Agreement.[24]

20. In light of the absence of any evidence supporting that the prices under the contracts were in line with normal market conditions, ESA formed the preliminary view that the Applicant might have received an economic advantage, within the meaning of Article 61(1) EEA.[25] Based on the available information, ESA also could not exclude that the financing of the 12 000 LED fixtures had conferred an economic advantage on the Applicant.[26]

21. ESA also took the preliminary view that the Applicant was engaging in an economic activity when selling maintenance and operation services for the streetlights to the Municipality.[27] ESA stressed that the Norwegian authorities were purchasing such services from a commercial entity, which offered that service for remuneration. There was a market for the maintenance and operation of streetlights, and such services were sold to public authorities, as well as to companies and individuals that needed lighting along private roads. The complainant represented companies selling services in this market.[28] ESA further explained that the fact that there might be no private demand for some of these services, due to a market failure, and that a public authority had therefore decided to purchase those services in the interest of the public good, did not lead to the conclusion that the activity of the supplier was non-economic. If this were to be sufficient to exclude the measure from the realm of State aid law, the existence of the rules governing services of general economic interest, for example, would be superfluous. In accordance with established case-law, ESA stated that the

[23] The Opening Decision is attached to this Defence as **Annex D.1**.
[24] Opening Decision (Annex D.1), paras. 1, 81 and 82.
[25] Opening Decision (Annex D.1), paras. 37 to 43.
[26] Opening Decision (Annex D.1), paras. 44 to 49.
[27] Opening Decision (Annex D.1), paras. 52 to 65.
[28] Opening Decision (Annex D.1), para. 62.

presence of a market failure and the fact that a public authority reacted by imposing a public service obligation on an entity, did not preclude the possibility that the supplier of the service was pursuing an economic activity.[29]

22. Concerning the distortion of competition, ESA emphasised, *inter alia*, that in order to exclude a potential distortion of competition, the management and operation of the infrastructure must generally be subject to a legal monopoly and fulfil a number of other cumulative criteria.[30] In this context, the Opening Decision referred to paragraph 188 of ESA's Guidelines on the notion of State aid ("**NoA**"), which stresses that "[…] *if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires that separate accounts are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities*".[31] (emphasis added)

23. To the extent that the transactions between the Municipality and the Applicant were not carried out in line with normal market conditions, ESA concluded preliminarily that they conferred an advantage on the Applicant, which may have strengthened its position compared to other undertakings competing with it. The measures were therefore liable to distort competition.[32] With regard to the effect on trade, ESA stated that it lacked more detailed information about the market for the operation and maintenance of streetlights and the presence of cross-border investment in this sector. The complainant, however, submitted that there were EEA suppliers of operation and maintenance services with which the Applicant competed. Moreover, the Applicant appeared to have been involved in several other markets providing, for example, entrepreneur services, project leadership, operation and maintenance services, as well as security and preparedness. ESA's preliminary conclusion was therefore that the measures might have benefited also these activities, while ESA was not aware of anything to suggest that these markets were *not* open to intra-EEA trade.[33]

[29] Opening Decision (Annex D.1), para. 63.
[30] Opening Decision (Annex D.1), para. 71.
[31] NoA, para. 188(d). The Guidelines are available under this link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:E2017C0003&from=EN
Concerning the matter of separate accounting, see also para. 54 of the Opening Decision (Annex D.1).
[32] Opening Decision (Annex D.1), para. 72.
[33] Opening Decision (Annex D.1), para. 74.

24. In the Opening Decision, ESA informed the Norwegian authorities that it would forward a copy of the Opening Decision to the Applicant and inform interested parties by publishing a meaningful summary of it in the Official Journal of the European Union. All interested parties were invited to submit their comments within one month of the date of publication in the Official Journal of the European Union.[34]

2.4.1 Comments submitted by the Applicant

25. Despite ESA's preliminary assessment and the relevant issues identified in the Opening Decision, the Applicant made no efforts to address these issues and submitted very limited information and documentation. The entirety of the Applicant's comments was a four-page letter (and one Appendix)[35] dated 5 June 2019.[36] In that letter, the Applicant only stated briefly that: (i) the alleged State aid concerned funding of public infrastructure not intended for commercial exploitation; and (ii) no overcompensation took place, and that if one took the view that the provision of streetlights was a service of general economic interest, the *Altmark* criteria would be fulfilled.[37]

26. The Applicant acknowledged in its comments that the compensation mechanism in section 7(c) of the Sales Agreement regulated the compensation for the provision of streetlighting. The information presented, however, did not contain any specifics concerning the basis for the prices charged (this information was also not contained in the Appendix).

27. In particular, as regards the compensation for maintenance and operation, the information did not set out the direct and indirect costs associated with the operation and maintenance of the streetlights and how these costs were established. As far as the indirect costs were concerned, there was no information as to what cost allocation mechanism was in place and why this was deemed appropriate. In respect of the compensation for capital costs, the submitted information did not establish how the eligible capital costs were calculated.

[34] On 13 June 2019, the Opening Decision was published in the Official Journal of the EU (OJ C 197, 13.6.2019, page 25).
[35] The Appendix contained Veilys AS' 2018-accounts.
[36] The letter of 5 June 2019 is attached to this Defence as **Annex D.2**.
[37] Annex D.2 to this Defence, page 1.

28. Further, there was nothing in the submitted information capable of establishing that the Applicant operated separate accounts in the sense that the relevant income and costs of the activities compensated by the Municipality were separated from other income and costs, and that this was done on the basis of an appropriate allocation mechanism.

2.4.2 Comments submitted by the Norwegian authorities

29. In the same vein as the Applicant, the Norwegian authorities submitted that the compensation mechanism in section 7(c) of the Sales Agreement governed the level of compensation. The Norwegian authorities were however unable to provide a definitive answer as to how the level of compensation had actually been calculated and were consequently also unable to substantiate that section 7(c) had been adhered to in practice. To this end, the Norwegian authorities acknowledged that the compensation may have included an element of overcompensation and that account separation should have been established to facilitate control with this.[38]

30. With respect to the compensation for capital costs, the Norwegian authorities explained that there had been a long-standing disagreement between the Municipality and the Applicant as regards the correct calculation. While the Municipality had advocated the use of the assets' book value for establishing the capital base, the Applicant had argued in favour of utilising their replacement costs. To this day, the compensation level has remained much higher than if it had been calculated on the basis of the book value.[39]

31. In the course of the formal investigation, the Norwegian authorities also presented figures from the KOSTRA-database[40] on the costs incurred for streetlighting by large

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[38] Decision, paras. 32, 66, 69, 70, 85 and 86.
[39] Decision, paras. 81 to 84, and 209.
[40] The term KOSTRA is an abbreviation for KOmmune-STat-RApportering. The Norwegian municipalities' obligation to report to KOSTRA is set out in Section 16-1 of the Local Government Act. In the preparatory works to the Local Government Act (Prop 46 L (2017-2018)), the Government described the background for Section 16-1 as follows (translation provided by ESA): "*20.10.1.4* […] *that KOSTRA (KOmmune-STat-RApportering) is a national information system that provides valuable management information on municipal activities.* […] *The information contributes to transparency about municipal administration and provides the opportunity for analysis and improvement processes in central parts of individual municipalities' operations. The government also uses KOSTRA data in national statistics.* […] *According to the ministry's assessment, KOSTRA has great legitimacy and is a very useful information system for the municipalities, the State and others*." The municipalities' obligation to report

Norwegian municipalities.[41] The main purpose of the aggregation of data in the KOSTRA-database was to benchmark the cost-level of various public services. The statistics were managed by Statistics Norway ("**SSB**"). The figures presented showed the total yearly costs per light point, including the electricity cost, over the period 2016 to 2019.[42] The Norwegian authorities considered that the figures from the KOSTRA-database were indicative of overcompensation.[43]

32. The Norwegian authorities further provided contracts regulating the supply of streetlighting and related services along municipal roads in Bergen since 2012. The duration of the contracts was normally for two years, with a one-year option for prolongation, and the contracts comprised operation and maintenance service for lamp points owned by the Applicant and owned by the Municipality.[44] According to these contracts, the price for maintenance and operation was set at NOK 465, excluding VAT, per lamp point per year, for the period from 2012 to 2014. For the period from 2015 onwards, the price for maintenance and operation was set at NOK 495, excluding VAT, per lamp point per year. The compensation for capital cost, for the lamp points owned by the Applicant, was set at NOK 303, excluding VAT, per lamp point per year, which remained the same throughout the period covered by the submitted contracts.[45]

33. The Norwegian authorities also stated that they were not in possession of direct evidence that the compensation paid by the Municipality in respect of streetlighting along municipal roads was used to cross-subsidise other economic activities. According to the Norwegian authorities, the transfer of the streetlight infrastructure to Veilys AS was partly made to prevent cross-subsidisation.[46] However, according to the

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to KOSTRA is further specified in the KOSTRA-Regulation (*KOSTRA-forskriften, FOR-2019-10-18-1412*). Section 3 of the KOSTRA-Regulation concerns the quality of information in KOSTRA and sets out: "*Statistics Norway can reject information that is substantially incorrect. If the information is rejected, Statistics Norway must notify the sender as soon as possible and state the reason for the rejection.*" ESA notes that data from KOSTRA has been allowed as evidence both by the Norwegian Supreme Court (HR-2006-1182-U) and Appeals Courts (for example in LF-2014-105830 and LF-2004-17614).

[41] Decision, para. 69 (and Table 1 showing the costs for streetlighting incurred by large Norwegian municipalities in NOK).

[42] See Table 1 in the Decision.

[43] Decision, paras. 69, 70 and 86.

[44] Decision, paras. 34 to 46.

[45] Decision, paras. 36 to 40.

[46] Decision, para. 55.

Norwegian authorities, due to a lack of documentation, cross-subsidisation could not be excluded.[47]

2.5 The Decision

34. In the context of assessing whether the Applicant carried out an **economic activity**, ESA explained in the Decision, *inter alia*, that it had not been presented with arguments to the effect that sufficient safeguards, effectively and appropriately separating the income and costs under the concerned contracts from other economic activities, were in place. On the contrary, the Norwegian authorities stated that safeguards should have been put in place, and that cross-subsidisation could not be excluded.[48]

35. With regard to the question whether the Applicant received an **advantage**, ESA found that the totality of the information received indicated that the compensation for maintenance and operation services most likely exceeded the level commensurate with the mechanism in section 7(c) of the Sales Agreement. In that regard, the Decision stated in its paras. 169 to 172:

> "*(169) Section 7(c) of the 1996 sales agreement entails, as set forth in section 3.1.2, that the compensation should cover BKK's operational cost plus a regulated return on the committed capital. Therefore, as far as the element concerning maintenance and operation is concerned, this mechanism only allows for cost coverage. ESA has furthermore not received any information indicating that costs that are wrongly or arbitrarily fixed, for example as a result of an artificially low efficiency level or an inappropriate allocation of indirect cost, would be eligible for compensation. On this basis, ESA finds that the element in the compensation mechanism pertaining to maintenance and operation is in keeping with the stipulations in Chronopost.*
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> *(170) Regarding the second question of whether the compensation mechanism in the 1996 sales agreement has been adhered to, a rational private operator would, bearing in mind the sums involved, have invested sufficient resources to ensure compliance. This would involve controls of the basis for the prices*

[47] Decision, para. 55.
[48] Decision, para. 118.

presented by the BKK-group, including of how the direct and indirect costs were determined. ESA is furthermore convinced that a private purchaser would have initiated legal steps if faced with a supplier unwilling to document that its prices comply with the agreed compensation mechanism.

(171) As described in section 3.3, the Municipality has questioned what it considers high pricing on the part of the BKK-group. The Municipality has further admitted that it cannot rule out that the compensation levels amount to overcompensation and that the lack of documentation on the basis for the prices charged is problematic. Moreover, the Municipality has entertained these concerns throughout the period covered by the formal investigation procedure.

(172) As regards the information presented by BKK Veilys, as presented in section 4.1.3, this does not contain any specifics concerning the basis for the prices charged. In particular, the information does not set out the direct and indirect costs associated with the activities pertaining to operation and maintenance, and how these have been established. As far as the indirect cost are concerned, there is no information as to what allocation mechanism is in place, and why this is deemed appropriate. This lack of specificity is an indication that the compensation mechanism in the 1996 sales agreement has not been complied with."

36. ESA concluded that the above reflected a failure on the part of the Municipality to take the necessary steps to ensure that this mechanism was complied with. As such, the Municipality had not acted as a private purchaser.[49]

37. As concerns the compensation for services performed in respect of the Municipality's owned infrastructure before 1 April 2020, ESA observed that while the Municipality perceived the price level as high, it did not check whether the services could be procured at lower costs from another supplier. Instead, it accepted that the same price per streetlight was applied as for the infrastructure controlled by the Applicant.

[49] Decision, para. 176.

Accordingly, ESA observed that the Municipality was not acting like a private purchaser.[50]

38. The figures from the KOSTRA-database were another indication that the Applicant had been overcompensated. However, the figures were not sufficiently detailed to conclude to what extent the overcompensation concerned maintenance and operation services or capital costs.[51]

39. Concerning the compensation for capital costs, the mechanism in section 7(c) of the Sales Agreement did not specify the methodology to be applied for establishing the committed capital that was the capital base. There was, however, nothing in its wording to indicate that the Applicant was entitled to an excessive level of return in the form of monopoly rents. On the contrary, cost-plus mechanisms, such as that included in the Sales Agreement, were normally used in regulated sectors to ensure that the compensation level was adequate. On this basis, ESA took it that the stipulation that the "NVE reference rate shall be applied on the committed capital", entailed that the capital base was to be established in an appropriate manner, ensuring an adequate level of return.[52]

40. With respect to the question of how the mechanism was applied in *practice*, however, the information received by ESA did not establish how the eligible capital costs were calculated. The Norwegian authorities were unable to provide specifics and considered that control on their part was difficult due to the lack of separate accounts. In the same way as for the compensation for operation and maintenance costs, this lack of precision was in itself indicative that the compensation mechanism in section 7(c) of the Sales Agreement was not adhered to.[53]

41. The Decision also referred to the use of the NVE reference rate and stated that, as the NVE reference rate was a nominal interest rate already incorporating adjustments for general inflation, applying it on a capital base established following a replacement cost-approach would entail compensating for general inflation twice.[54] The Decision found

[50] Decision, para. 180.
[51] Decision, para. 182.
[52] Decision, para. 206.
[53] Decision, para. 207.
[54] Decision, para. 208.

that under the rate-of-return fixed by NVE, which the compensation mechanism was evidently reflecting, the NVE reference rate was applied to the book value of the power grid assets put into productive use, i.e. to their historical value less depreciation.[55]

42. In this respect, ESA took note of the disagreement between the Municipality and the Applicant. It appeared that while the Municipality advocated the use of the book value for establishing the capital base, the Applicant argued in favour of using the assets' replacement cost. Further, it appeared that this disagreement prevailed throughout the period concerned, and that the capital base may as a result have been established in a manner which was not commensurate with the regulation of adequate return in the compensation mechanism of the Sales Agreement.[56]

43. Lastly, the figures from the KOSTRA-database showed that throughout the period from 2016 to 2019, the Municipality had the highest recorded costs for streetlighting of the 10 larger municipalities represented. While the figures were not sufficiently detailed to conclude to what extent the recorded costs concerned maintenance and operation or capital costs, this was an *indication* that the Applicant was compensated in excess of an adequate level of return.[57]

44. The totality of the submitted information therefore indicated that the compensation for capital cost most likely exceeded the adequate level of return allowed by the Sales Agreement. In the same way as with respect to the compensation for maintenance and operation, this reflected a failure on the part of the Municipality to take the necessary steps to ensure that the compensation mechanism was complied with. As such, the Municipality did not act as a private purchaser.[58]

45. Neither the Norwegian authorities nor the Applicant submitted that the compensated activities took place within the remit of a lawfully established legal monopoly. Accordingly, a distortion of competition could not be excluded on the basis of the cumulative conditions in the NoA.[59] The Decision also concluded that companies in the Applicant's group were additionally active on a number of other markets and that the

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[55] Decision, para. 208.
[56] Decision, para. 209.
[57] Decision, para. 210.
[58] Decision, para. 211.
[59] Decision, para. 220.

Norwegian authorities were unable to exclude that the other economic activities were cross-subsidised.[60]

2.6 About the Applicant and newly submitted information

46. The Applicant is a renewable energy company, producing and distributing electrical power in Western Norway. The Applicant also provides associated services relating to broadband, digital services, electrification, el-security, digital and electrical infrastructure, entrepreneur services, district heating, etc.[61]

47. In 2020, the Municipality concluded a tender for the operation and maintenance contract for the streetlights owned by the Municipality.[62] The contract also encompassed the 12 000 LED fittings installed on the Applicant's network. The contract was awarded to the Applicant at a price of NOK 10 554 689. The price of the five other tenders ranged from NOK 11 930 826 to NOK 26 596 947.50.[63]

48. The Application claims that the Applicant is operating separate cost accounting.[64] This is the first time the Applicant has made such a claim: no such statements or information were submitted by the Applicant in the course of the formal investigation. In addition, many of the Annexes to the Application contain completely new information, which was not submitted during the formal investigation. ESA has identified in total 17 Annexes,[65] which contain completely new information, in particular, in relation to information on revenue streams and accounting practices.

49. Despite all the new documentation that has now been submitted (and the related claims which have been made), no concrete calculations or information underpinning the levels that have been charged to the Municipality have been presented. In addition, the newly submitted information still does not demonstrate that the Applicant operates separate accounting as concerns the activities compensated under the measures assessed in the Decision. In the face of such omissions, ESA can only conclude that the Applicant is incapable or unwilling to present the basis for the prices charged.

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[60] Decision, para. 222.
[61] Application, para. 3. See also para. 54 of the Contested Decision.
[62] Decision, paras. 47 and 177.
[63] Decision, para. 50.
[64] Application, for example in paras. 4, 5, 39, 43 and 47.
[65] Namely Annexes A.6 and A.7, Annexes A.11 to A.18, Annex A.20, and Annexes A.22 to A.27.

3 ADMISSIBILITY

50. The Applicant seeks clarification from the EFTA Court on the moment from which the two months' deadline in Article 36(3) SCA starts to run, for purposes of the present Application.[66]

51. Pursuant to Article 36(3) SCA, the proceedings provided for in Article 36 SCA shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

52. ESA submits that, by virtue of the wording of Article 36(3) SCA ("[…] ***or, in the absence thereof****, of the day on which* [the measure] *came to the knowledge of the* [plaintiff] […]," emphasis added), the criterion of the day on which a measure came to the knowledge of an applicant/plaintiff is subsidiary to the criteria of publication or notification of the measure.[67] In other words, it is only relevant where a contested act is neither published in the Official Journal nor notified to the applicant/plaintiff.[68]

53. ESA's State aid decisions to close formal investigations are notified to the EFTA States concerned (as addressees), but not to third parties (such as private parties), and are, according to Article 26(3) in Part II of Protocol 3 SCA, published in the EEA Section of and the EEA Supplement to the Official Journal of the European Union. Consequently, this implies for third parties, such as the Applicant, that the moment from which the deadline starts to run is the day of publication in the EEA Section of and the EEA Supplement to the Official Journal of the European Union.[69] This is also confirmed by case-law of the CJEU.[70]

[66] Application, para. 52.
[67] Judgment of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, para. 39; Judgment of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, para. 35.
[68] Similar with regard to Article 263(6) TFEU, see: Lenaerts. K., Maselis. I. and Gutman. K., EU Procedural Law, 2015, Oxford University Press, page 407.
[69] To the best knowledge of ESA, on the date of the submission of the Defence, the Decision was not yet published in the Official Journal of the European Union.
[70] Judgment of 15 December 2021, *Oltchim SA* v *Commission*, T-565/19, EU:T:2021:904, paras. 42 to 66; Judgment of 6 October 2021, *Covestro Deutschland AG* v *Commission*, T-745/18, EU:T:2021:644, para. 42; Judgment of 1 July 2009, *ISD Polska and others* v *Commission*, T-273/06 und T-297/06, EU:T:2009:233, para. 57; Judgment of 15 September 1998, *BP Chemicals* v *Commission*, T-11/95, EU:T:1998:199, paras. 48 to 51.

4 ALLEGED ERRORS IN LAW AND PROCEDURE

4.1 Introduction

54. The Applicant raises six pleas: First, ESA allegedly made a manifest error of law and assessment when applying the notion of undertaking and concluding that streetlight ownership and operation is an economic activity. Second, ESA allegedly made a manifest error of assessment when concluding that the Applicant received an economic advantage through overcompensation. Third and fourth, the Applicant contends that there was no distortion of competition or effect on trade, because, *inter alia*, there was no cross-subsidisation between the streetlights owned by the Applicant or operated for the Municipality and its other commercial activities. Fifth, the Applicant claims that any alleged aid must be existing aid not subject to recovery, since the aid measure related to the Sales Agreement, which entered into force in 1996 and it is not possible to separate the agreement from its implementation. Sixth, the Applicant contends that the Decision was based on an insufficient examination of the facts and failed to state proper reasoning in violation of Article 16 SCA.

55. All six pleas are unfounded, as is set out below.

4.2 First Plea: The compensation under the measures was provided in respect of economic activities

56. By its first plea, the Applicant alleges that ESA made a manifest error of law and assessment when applying the notion of undertaking and concluding that streetlight ownership and operation is an economic activity.[71] The Applicant claims that 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 did not in and by itself create a market. The Applicant contends that the Decision ignored fundamental market failures (no willingness to invest and no incentive to duplicate streetlights) and that the Decision did not consider the cost accounting and separation performed by the Applicant's companies throughout the relevant period.

[71] Application, paras. 7, 54 to 67.

57. At the outset, ESA would like to highlight that the Applicant states that the transfer of the streetlight infrastructure, and the subsequent operation and maintenance of that infrastructure, was the consequence of and "*in line with the regulatory requirements following the market liberalisation*" of energy markets.[72] In that context, the Applicant also explains that, as part of the liberalisation of the energy markets back in 1991, parts of the infrastructure, and with that also the tasks related to the streetlight infrastructure, were transferred to the energy companies and that no monopoly regulation was established for streetlight infrastructure.[73]

58. ESA submits that "*market liberalisation*" is typically referred to as the removal of controls in an industry or market to encourage the entry of new suppliers with a view to increasing the intensity of competition. Consequently, market liberalisation must be seen as introducing market mechanisms and moving away from State monopolies. This liberalisation took place in many sectors in the EEA, which were originally within the monopoly of municipalities, such as providing, for instance, electricity, gas, water or waste collection. But these sectors were in many EEA States liberalised and are now provided by commercial companies. ESA submits that the market for operation and maintenance services of streetlights is no different to services provided by other utility companies.

59. Further, whether there exists a market for a given activity may vary between EEA States depending on national conditions. The classification of a given activity can also change over time as a result of political decisions or economic developments.[74] As regards the regulatory framework in place in Norway, the legislation and standards simply mean that municipalities are responsible for operating municipal road infrastructures and that requirements on the existence of streetlighting must be met, in order for roads to meet the standards of the Norwegian Public Roads Administration. Section 20 of the Norwegian Road Act does not *require* municipalities to provide streetlighting, or to provide streetlighting at a certain level. Further, there is nothing to prevent municipalities from contracting with commercial entities for the provision of operation and maintenance services on municipal roads as an economic activity.

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[72] Application, para. 62, second sentence.
[73] Application, para. 16.
[74] Decision, para. 107.

60. With respect to the specific circumstances in the Municipality, the Decision found that the effect of including the streetlight infrastructure, when selling Bergen Lysverker, was that the Applicant became the only available supplier along the concerned municipal roads. Moreover, section 7(c) of the Sales Agreement included a mechanism governing the future compensation. This mechanism allowed for a regulated level of return.[75] On that basis, the Decision found that, by means of the sale of the streetlight infrastructure, in combination with the establishment of the compensation mechanism, which allowed for a regulated level of return, the Municipality created a market for the supply of the concerned services to the Municipality as an economic activity. The fact that the infrastructure was of a unique nature, resulting in its purchaser becoming the only available supplier, did not in itself entail that the Applicant had not delivered services in a market. The Decision also found that the Applicant obtained its exclusive position in competition with five other bidders.[76]

61. Concerning the Applicant's claim that there was and is no market for owning streetlight infrastructures, ESA submits that it is not the market of streetlight *ownership* at stake here, but the market for operation and maintenance services of streetlights. As these services are tendered-out, there is a market for these services. It is an undisputed fact that some municipalities decided to organise the purchase of these services by way of competitive tenders. The Applicant itself calls the maintenance and operation services of streetlights a business area and a commercial activity.[77]

62. Further, the Applicant's comparison[78] with Joined Cases T-443/08 and T-455/08 *Leipzip/Halle* v *Commission* is not on point, because the present case is not concerned with the funding for the *construction* of the infrastructure, but with the separate market for operation and maintenance services of streetlights. ESA also disagrees with the Applicant that the operation and maintenance services of streetlights should qualify as an "*exercise of public powers*".[79] ESA submits that the exercise of public powers is limited to activities that intrinsically form part of the prerogatives of official authority and are performed by the State.[80] In addition, like in the present case, where an EFTA State

[75] Decision, para. 126.
[76] Decision, para. 125.
[77] Application, para. 40.
[78] Application, para. 56.
[79] Application, paras. 57, 58, 59 and 60.
[80] NoA, para. 17. Link to NoA:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:E2017C0003&from=EN

has decided to introduce market mechanisms, services provided by companies can no longer qualify as an exercise of public powers.[81] In this context, the Applicant admits that the Municipality enjoyed discretion when organising the operation of streetlights.[82] Consequently, liberalising the market for the operation and maintenance services of streetlights was a legitimate option, by relying on external providers, such as the Applicant, offering their services on an economic basis.

63. The Applicant works on the assumption that if there is no competitive market, there can be no economic activity.[83] However, a competitive market is no requirement for there to be an economic activity. Even a monopoly situation would be sufficient, as long as there is an offer and demand for a certain service. In the present case, the Norwegian authorities are purchasing services from a commercial entity, which is offering that service for remuneration.

64. There is a market for maintenance and operation services of streetlights and such services are sold to public authorities, as well as to companies and individuals that need lighting along private roads. The complainant Nelfo represents companies selling services in this market. The Applicant also provides services to infrastructure which is still owned by the Municipality and also services to streetlights owned by smaller municipalities in the region.[84] Consequently, the Applicant's services in relation to streetlights constitute an economic activity.

65. ESA further disagrees with the Applicant's assumption that, in order to qualify a service as economic in nature, the demand for that service must be "*private*".[85] ESA disagrees that the presence of private demand for a good or service is necessary for a market to exist. In principle, fierce competition on a market can exist even in markets where public authorities are the only or the main purchaser of the service in question. This is for example the case in the market for the construction of roads. The fact that there may be no private demand for some of these services, due to a market failure, and a public authority therefore decides to purchase those services in the interest of the

[81] NoA, para. 17.
[82] Application, para. 58, last sentence.
[83] Application, para. 12.
[84] Application, para. 40.
[85] Application, para. 61.

public good, does not lead to the conclusion that the activity of the supplier is non-economic. If this were sufficient to exclude the measure from the realm of State aid law, the existence of the rules governing services of general economic interest would for example be superfluous. ESA submits that the presence of a market failure and the fact that a public authority reacts by imposing a public service obligation on an entity, does not preclude that the supplier of the service is pursuing an economic activity. In any event, the Applicant provides similar services also to private customers.[86]

66. Finally, with regard to the Applicant's allegation that the Decision did not consider the cost accounting and separation performed by the Applicant's companies throughout the relevant period,[87] ESA submits that this is irrelevant to the question of whether the services compensated under the measures qualify as an economic activity. In any event, the Applicant never submitted, in the course of the formal investigation, any information showing that the Applicant performed separate cost accounting with respect to those activities compensated under the measures.

67. In light of the above, ESA respectfully submits that the Court should dismiss the first plea as unfounded.

4.3 Second Plea: The Applicant received an economic advantage

68. By its second plea, the Applicant claims that ESA committed a manifest error of assessment by concluding that the Applicant received an economic advantage through overcompensation.[88] According to the Applicant, ESA's decision made an artificial distinction between the 1996 pricing mechanism and its practical implementation. The Applicant further claims that ESA did not present any accurate and reliable evidence to support any overcompensation. Rather, ESA allegedly relied on unsupported assertions as to how the Municipality and the Applicant behaved and perceived the other party and presumed the likelihood of overprice and cross-subsidisation based on documents ESA did not see. The Applicant asserts that, in the absence of any suitable benchmarks, ESA relied on a selective and arbitrary extract of the KOSTRA-database devoid of any evidential value. According to the Applicant, the KOSTRA-database did

[86] Application, paras. 33 and 42.
[87] Application, paras. 7, last sentence, and 66.
[88] Application, paras. 8, 68 to 123.

not provide any cogent justification for overcompensation and State aid. Generally, the Applicant alleges that the data was incomplete, inaccurate, and not fit for purpose to either evidence or calculate State aid.

4.3.1 The Decision was based on sufficient evidence to substantiate an advantage

69. The Applicant states that ESA has the burden of proving whether or not the conditions for the application of the market economy operator principle ("**MEOP**") have been satisfied, by reference, *inter alia*, to Case C-244/18 P *Larko* v *Commission*.[89] However, what the Applicant fails to explain is the follow-up to the "Larko Saga", when the GCEU finally clarified that:

> "*It is true that, according to well-established case-law, in the interests of proper application of the fundamental provisions of the TFEU in the field of State aid, the Commission must conduct the administrative procedure carefully and impartially so that it has the most complete and reliable information possible when it takes the final decision. Therefore, the Commission has to ask the Member State concerned for all relevant information in order to be able to verify whether the conditions for the application of the private economic operator principle are met. Even where the Commission is faced with a Member State which, in breach of its duty to cooperate, fails to provide the information requested, it must base its decisions on reasonably robust and coherent evidence* <u>*which provides a reasonable basis for presuming that a companies have received an advantage*</u> *which constitutes State aid and which is therefore capable of supporting the conclusions which it has reached. In doing so, the Commission cannot simply proceed on the assumption that an advantage constituting State aid has accrued to an undertaking, because it does not have information to conclude otherwise, in the absence of other evidence to conclude positively that such an advantage is based on a negative presumption (see, to that effect, judgments of 26 March 2020, Larko v Commission, C-244/18 P, EU:C:2020:238, paragraphs 67 to 70 and the case-law cited, and of 7 May 2020, BTB Holding Investments and Duferco Participations Holding v Commission, C-148/19 P, EU:C:2020:354, paragraphs 48 to 51 and the case-law cited).*

[89] Application, para. 71.

Furthermore, the EU judicature must assess the lawfulness of a decision in the field of State aid <u>on the basis of the information available to the Commission when adopting the decision and which could have been submitted to it during the administrative procedure</u> at its request (see, to that effect, judgment of 20 September 2017, Commission v Frucona Košice, C-300/16 P, EU:C:2017:706, paragraphs 70 and 71 and the case-law cited there)."[90] (emphasis added)

70. It follows from this case-law that a reasonable basis for presuming that a company has received an advantage is sufficient. Hence, a presumption can be made when there is a reasonable evidential basis for that presumption, and in this case, ESA concluded on the basis of the totality of the available information that the Applicant had most likely been overcompensated.[91] What also follows from this case-law is that ESA adopts a decision on the basis of information available to it at the end of a formal investigation. Concerning the facts available at the time when a decision is adopted, it is settled case-law that if no or insufficient information is submitted in the course of the formal investigation, ESA is empowered to terminate the procedure and make its decision on the basis of the information available to it when the decision was adopted.[92]

71. Further, if an interested party fails to submit crucial information in the course of a formal investigation, it cannot rely on this information in the subsequent litigation phase. In that regard, the CJEU held:

"[*…*]*, according to Article 6(1) of Regulation No 659/1999, 'the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'. That decision and the publication thereof in the Official Journal of the European Communities inform the Member State and other interested parties of the facts on which the Commission intends to base its decision. It follows that, if those parties believe that some of the facts*

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[90] Judgment of 4 May 2022, *Larko* v *Commission*, T-423/14 RENV, EU:T:2022:268, para. 57 (translation provided by ESA).

[91] Decision, in particular, paras. 170 to 176 and 180 to 184, as regards the compensation for maintenance and operation, and paras. 206 to 211, as regards the compensation for capital costs.

[92] Judgment of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, para. 47; Judgment of 14 February 1990, *French Republic* v *Commission*, C-301/87, EU:C:1990:67; para. 22; Judgment of 10 July 1986, *Belgium* v *Commission*, C-234/84, EU:C:1986:302, para. 16.

contained in the decision to initiate the formal investigation procedure are incorrect, they must inform the Commission thereof during the administrative procedure or risk not being able to challenge those facts at the litigation stage."[93] (emphasis added)

72. In the same vein, the CJEU clarified:

> "[*…*] *it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see to that effect Commission v Sytraval and Brink's France, cited in paragraph 43 above, paragraph 60).*
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> *To the extent that the applicant relies, in support of its application, on information which was not available at the time when the Decision was adopted or was not brought to the Commission's attention during the prelitigation procedure, it must be recalled that in an action for annulment based on Article 230 EC, the lawfulness of the Community measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted (Joined Cases 15/76 and 16/76 France v Commission [1979] ECR 321, paragraph 7, and Joined Cases T-371/94 and T-394/94 British Airways and Others v Commission [1998] ECR II-2405, paragraph 81).*"[94] (emphasis added)

73. Consequently, the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to ESA at the time when the decision was adopted. Similarly, it cannot be complained that ESA failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure, but

[93] Judgment of 14 September 1994, *Spain* v *Commission*, C-278/92 to C-280/92, EU:C:1994:325; Judgment of 19 October 2005, *Freistaat Thüringen* v *Commission*, T-318/00, EU:T:2005:363, para. 88; Judgment of 29 March 2007, *Scott SA* v *Commission*, T-366/00, EU:T:2007:99, para.145.

[94] Judgment of 14 January 2004, *Fleuren Compost BV* v *Commission*, T-109/01, EU:T:2004:4, paras. 49 and 50.

which were not, as ESA is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it.[95]

74. In light of this case-law, ESA submits that an aid recipient cannot gain an advantage by not fully cooperating during the formal investigation by not submitting relevant information, and thereby increasing the evidential burden on ESA. As mentioned above,[96] the Applicant's cooperation in the course of the formal investigation can be seen to have been unsatisfactory (it claims to have relevant information but which it entirely failed to produce at the relevant time). Based on the information *actually submitted* by the Applicant during the formal investigation, ESA was in no position to exclude that overcompensation took place. On the contrary, the totality of the available evidence indicated that the Applicant was most likely overcompensated.[97]

75. In addition, ESA had no legal means to insist upon or to request specific information or documents from the Applicant. It is important to recall that the procedural State aid framework in Protocol 3 SCA is still based on the old Council Regulation No 659/1999,[98] which provides no legal basis for ESA to request specific information or documents from third parties in the course of formal investigation procedures. Although this possibility is foreseen in Council Regulation (EU) 2015/1589,[99] this Regulation has still not been made part of the EEA legal order. Consequently, ESA is solely dependent on the information which is submitted by the EFTA State concerned and by third parties. The information submitted by Norway and the Applicant did not demonstrate that the compensation was at market price, so that no overcompensation took place, or that separate accounts were operated by the Applicant.

76. By the newly submitted information in this Application, the Applicant now tries to establish that no overcompensation took place and that it operated separate accounting. However, this information has been submitted too late and the Applicant

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[95] Judgment of 16 January 2022, *Iberpotash SA* v *Commission*, T-257/18, EU:T:2020:1, para. 93.
[96] *Supra* paras. 25 to 28 of the Defence.
[97] Decision, in particular, paras. 170 to 176 and 180 to 184, as regards the compensation for maintenance and operation, and paras. 206 to 211, as regards the compensation for capital costs.
[98] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, page 1).
[99] Article 7 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 25.9.2015, page 9).

cannot therefore complain that ESA failed to take it into account in the Decision. In addition, despite all the new documentation that has now been submitted, as will be demonstrated below, no concrete calculations or information underpinning the levels which have been charged to the Municipality have been presented. The newly submitted information further still does not demonstrate that the Applicant operates separate cost accounting with respect to the activities compensated under the measures. This suggests that the Applicant is incapable or unwilling to present the basis for the prices charged.

4.3.2 Correct application of the MEOP

77. ESA is required to undertake a complex economic assessment when applying the MEOP. This assessment must be carried out by relying on the objective and verifiable evidence which is available.[100] ESA submits that there was a sufficient evidence basis to conclude that the Applicant received an advantage and that the Decision's conclusions on this were well-founded in law and fact.

78. The Applicant claims that ESA was wrong in its assessment to focus on the question of whether the compensation mechanism in the Sales Agreement was correctly applied.[101] ESA disagrees, because the Sales Agreement serves as the legal basis for the compensation and it was not only the deviation from the Sales Agreement which indicated the presence of an advantage, but also additional statistical data, i.e. the KOSTRA-database, which supported this conclusion.

79. Regarding the question of whether the compensation mechanism in the Sales Agreement was adhered to, the Decision correctly found that a rational private operator would, bearing in mind the sums involved, have invested sufficient resources to ensure compliance. This would involve controls of the basis for the prices presented by the Applicant, including of how the direct and indirect costs were determined. ESA was furthermore convinced that a private purchaser would have initiated legal steps if faced

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[100] Judgment of the CJEU of 5 June 2012, *Commission* v *Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318, paras. 102.
[101] Application, para. 75.

with a supplier unwilling to document that its prices comply with the agreed compensation mechanism.[102]

80. The Decision also correctly took into account the fact that the Municipality questioned what it considered high pricing on the part of the Applicant. The Municipality further admitted that it could not rule out that the compensation levels amounted to overcompensation and that the lack of documentation on the basis for the prices charged was problematic. Moreover, the Municipality entertained these concerns throughout the period covered by the formal investigation procedure.[103]

81. As regards the information presented by the Applicant, the Decision recorded that this did not contain any specifics concerning the basis for the prices charged. This lack of specificity was a relevant indication that the compensation mechanism in the Sales Agreement was not complied with.[104] This reflected a failure on the part of the Municipality to take the necessary steps to ensure that this mechanism was complied with.

82. On the basis of, *inter alia,* the evidential factors above, the Decision correctly concluded that the Municipality did not act as a private purchaser.[105] While the compensation mechanism in section 7(c) of the Sales Agreement would ensure market level compensation if correctly applied, a precondition for this would have been that the inputs were updated on a regular basis. This has evidently not been done.

4.3.3 Applying the MEOP to the capital costs

83. The Applicant argues that ESA made a manifest error of law and assessment when applying the MEOP to the capital costs and arrived at an erroneous conclusion through an insufficient examination of the facts. The Applicant states that ESA's conclusions were based on four strands of evidence, which the Applicant alleges were insufficient or which ESA misinterpreted in some way.[106] The allegations related to these four points are unfounded and are addressed in turn below.

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[102] Decision, paras. 170 and 207. See to that effect also: Judgment of 12 October 2000, *Spain* v *Commission*, C-480/98, EU:C:2000:559, para. 19; Judgment of 10 May 2000, *SIC* v *Commission*, T-46/97, EU:T:2000:123, paras. 98 and 99.
[103] Decision, paras. 171 and 209.
[104] Decision, paras. 172 and 207.
[105] Decision, paras. 176, 180, 184 and 211.
[106] Application, paras. 77 to 80.

4.3.3.1 Separation of accounts

84. The Applicant contends that ESA's account of the facts was fundamentally flawed with regard to the Decision's conclusions that (i) no information was submitted that demonstrated how the eligible capital costs were calculated and (ii) that control was made difficult by the Applicant's failure to operate separate accounts.[107]

85. Concerning the separation of accounts, the Applicant argues that there has been accounting separation between (i) the electricity distribution undertaken within the context of the regulated monopoly controlled by the NVE, and (ii) other commercial activities.[108] In this respect, the Applicant makes reference to Annex A.14 (Board Matters 13/2005 of 13 May 2005), Annexes A.17 and A.18 (Segment Account for 2007 and 2014), Annex A.16 (Self-cost calculation for 2014) and Annexes A.12 and A.13 (Calculation hourly rates 2007 and 2014).[109]

86. As a starting point, ESA would like to underline that accounting separation is not in itself sufficient to ensure that the compensation does not confer an advantage on the Applicant. The question of whether there is an advantage turns on the *level* of compensation, not on whether there has been accounting separation. The Decision correctly found that there would be overcompensation if the level of compensation exceeded that allowed by the compensation mechanism in the Sales Agreement.[110]

87. In any event, the Annexes referred to by the Applicant do not permit the conclusion that the revenues and costs relevant for the compensation under the measures were appropriately separated from other revenues and costs. The Annexes also do not demonstrate that compensation adhered to the level allowed by the compensation mechanism in the Sales Agreement.

88. With respect to Annex A.14, it is evident from its Section 4.2.6 that the commercial activities concerning streetlighting were not limited to those activities compensated by

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[107] Application, para. 81.
[108] Application, paras. 86 to 93.
[109] In respect of Annexes A.12, A.13, A.16, A.17 and A.18, ESA observes that no indication is given of when and by whom these documents were prepared and which cost allocation keys were used.
[110] Decision, paras. 194 to 212.

the Municipality. Further, it is noteworthy that the expressed internal strategy is to expand the commercial operations, including within the core competence of streetlighting.[111] In spite of this, no distinction is made in Annex A.14 between those activities that are eligible for compensation under the measures assessed in the Decision, and other activities related to streetlighting that are performed under different contracts. Annex A.14 consequently does not provide a basis for stating (as is indicated in the first sentence of para. 89 of the Application) that there has been separation between the activities assessed in the Decision and other commercial activities.

89. As regards Annexes A.17 and A.18, these only indicate that there has been separation between the activities falling within the monopoly regulated by the NVE and other activities. This is so because the Annexes distinguish only between "*monopoly activity and other activity*", but not between those activities falling within the "*other-category*" (which includes streetlighting). Given this, there is naturally also no distinction made between the commercial activities related to streetlighting that are performed and compensated under different contracts. As the metrics relevant for the compensation assessed in the Decision are not singled out, Annex A.16 similarly contains no information substantiating that there has been accounting separation between those activities assessed in the Decision and other economic activities, or that the level of compensation has been in line with the compensation mechanism established in section 7(c) of the Sales Agreement. Annex A.16 only contains aggregated figures in respect of lighting activities.

90. Concerning the *level* of compensation, it should further be recalled that, due to the inclusion of the NVE interest rate in the compensation mechanism in section 7(c) of the Sales Agreement, capital costs calculated in accordance with this mechanism will include a market level reasonable return on capital. Therefore, if the concerned activities have in fact generated earnings beyond the calculated capital costs, this income would amount to *supra* competitive profits exceeding the required level. While Annex A.16 fails to isolate the figures relevant to the compensation assessed in the Decision, it is of interest to note that the business category of activities which includes streetlighting has seemingly been very profitable. In the years from 2011-2014, this

[111] See Sections 2 and 4.1 of Annex A.14.

category consistently had the highest "*contribution margin*" and "*calculated earnings contribution*".[112]

91. With respect to Annexes A.12 and A.13, these concern operating costs, including in particular labour costs, which are not relevant for the calculation of the compensation for capital costs. Further, and similarly to the Annexes addressed above, Annexes A.12 and A.13 contain general calculations, which are not limited to the compensation assessed in the Decision. For these reasons, Annexes A.12 and A.13 are equally incapable of establishing that there has been accounting separation or of justifying the level of compensation for capital costs.

92. The Applicant further claims that "[…] *ESA has not shown that the price in competitive markets does not cover both directly attributable costs and an appropriate share of common costs* […]".[113] This misses the point and ESA submits that the Decision never intended to establish that there were costs uncovered by the sums the Applicant has charged the Municipality. Rather, the crux of the matter is that the compensation most likely exceeded that allowed by the compensation mechanism in the Sales Agreement. It is this overcompensation that has been identified as an economic advantage. ESA has not concluded in the Decision on the extent to which other commercial activities have been cross-subsidised.

93. Para. 91 of the Application alleges that the Decision ignores the role of the NVE in supervising the separation of accounts within BKK Nett AS (1996-2014). This also misses the point. Paras. 25 and 26 of the Decision duly present the monopoly regulation in the area of electricity distribution and refer to the role of NVE as regulator. However, the compensation and activities assessed in the Decision fall *outside* the scope of the monopoly regulation that the NVE oversees. The role of the NVE in overseeing accounting separation in another business area can therefore not be taken as an indication that the compensation mechanism in section 7(c) of the Sales Agreement has been adhered to.

94. Lastly, as regards the argument made in para. 92 of the Application that ESA should have analysed publicly available segment accounts, ESA submits that segment

[112] See Annex A.16 to the Application.
[113] Application, para. 90.

accounts are not detailed enough to distinguish between activities concerning different individual contracts. ESA has therefore not failed to investigate any available information that is relevant for the case at hand.

4.3.3.2 Double inflation compensation

95. Para. 208 of the Decision found that, bearing in mind that the NVE reference rate was a nominal interest rate already incorporating general inflation, applying this interest rate on a capital base established following a replacement cost-approach would entail compensating for general inflation twice.[114]

96. Para. 95 of the Application contends that there has been no double compensation for inflation, as the compensation has never been equal to what would follow from an approach based on replacement costs. ESA submits that this is a mere assertion, which must be rejected. No information is presented to substantiate or quantify the alleged difference between the level compensated and a calculation based on replacement costs.

4.3.3.3 The disagreement in 2004

97. The Applicant first contends that para. 209 of the Decision misrepresents the facts and that ESA made a manifest error of assessment by referring to the disagreement with the Municipality, about the correct way of calculating the capital costs, in support of the conclusion that the compensation mechanism in the Sales Agreement had not been complied with.[115] The Applicant further contends, second, that the level of compensation has never been equal to that which would follow from a replacement cost approach, and that such an approach would in any event have been in line with market practice.[116] In terms of documentation, reference is made by the Applicant to a draft version of an application to a tribunal in conjunction with the disagreement in

[114] The NVE reference rate is applied to the book value of the power grid assets put into productive use, i.e. to their historical value less depreciation, whereas the Applicant has argued in favour of using the assets' replacement cost (Decision, paras. 208 and 209).
[115] Application, para. 96.
[116] Application, para. 97.

2004.[117] However, it is not clear if this application was ever sent, as the brackets for dating and undersigning have been left blank.

98. The first point (ability of ESA to rely on the disagreement in reaching the conclusions about whether overcompensation took place) has been addressed at paras. 77 to 82 above. In respect of the second point (levels of compensation), ESA submits that neither the information presented in the Application, nor that contained in Annex A.20, show how the level of compensation for capital costs has actually been calculated. This includes both the question of how the capital base has been established and of what interest rate has been applied on that capital base. From the description in Annex A.20, it appears that the level of compensation has in practice been decided through negotiations, which were not founded in calculations that were shared with the Municipality.

99. Accordingly, the information submitted provides no support for the Applicant's claim that the level of compensation has never been equal to that which would follow from a replacement cost approach and that such an approach would have been in line with market practice. As such, it is also incapable of refuting ESA's observation in para. 209 of the Decision that "[…] *it appears that this disagreement prevailed throughout the concerned period, and that the capital base may as a result have been established in a manner which is not commensurate with the regulation of adequate return in the compensation mechanism of the 1996 sales agreement*."

4.3.3.4 The KOSTRA-database

100. In para. 175 of the Decision, ESA concluded that the figures from the KOSTRA-database were an indication that the Applicant had been overcompensated for capital costs. The Decision however underlined that the figures were not sufficiently detailed to conclude to what extent the overcompensation concerned maintenance and operation or capital costs.

101. The Applicant argues, *first*, that ESA did not establish whether the KOSTRA-database was factually accurate, reliable and consistent with the other information, and did not

[117] Annex A.20 (Reply to application to the Arbitral Tribunal) to the Application.

prove or conclude that the KOSTRA evidence contained all the relevant information which must be taken into account in order to assess a complex (economic) situation.[118] *Second*, the Applicant contends that the input in the KOSTRA-database was inconsistent and inaccurate.[119] *Third*, it is alleged that the comparison in the KOSTRA-database ignores variables that may influence the costs reported by different municipalities. In this respect, reference is made to differences between municipalities in terms of electricity costs and to differences in the scope of services provided. As regards the latter, reference is made to Annex A.26 (Oslo Economics Report of 23 September 2022) to the Application. *Fourth*, the Applicant asserts that the amount actually invoiced by the Applicant deviated from the figures reported in the KOSTRA-database. It is purported that ESA should have noted these differences and requested additional explanations from the Norwegian authorities.[120] *Fifth*, the Applicant underlines that the figures from the KOSTRA-database presented in the Decision were not evidence that there has been State aid prior to 2015 and after 2019. On that basis, it is argued that the Decision failed to establish the alleged overcompensation for the remaining time period.[121] *Sixth*, it is argued that the Decision is contradictory insofar as it attached significant weight to the figures from KOSTRA, while ignoring the terms of the tenders submitted in 2020.[122]

102. Given the close relationship between the **first, second and third point**, ESA finds it appropriate to consider them in combination. In that regard, an important starting point is that the Applicant has not referred to any characteristics or limitations of the KOSTRA-database, which were not already identified in the Decision. On the contrary, it is acknowledged in para. 174 of the Decision that differences between the figures registered in KOSTRA for different municipalities may result from several factors. Para.

[118] Application, para. 101.

[119] Application, para. 102. This paragraph refers to Annex A.26 to the Application in support (Oslo Economics Report of 23 September 2022) but does not specify where in the eleven-page report the relevant supporting information or evidence can be found. ESA recalls the settled case-law according to which "*Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application*.": see e.g. Judgment of 17 September 2007, T-201/04, *Microsoft* v *Commission*, EU:T:2007:289, para. 94. Arguments found solely in annexes are therefore inadmissible: Judgment of 5 May 2022, E-12/20 *Telenor* v *ESA*, paras. 87 and 88.

[120] Application, para. 104.

[121] Application, para. 105.

[122] Application, para. 106.

174 of the Decision refers back to paras. 67, 68 and 94 of the Decision. In these latter paragraphs, it was highlighted that municipalities purchasing maintenance and operation services in respect of streetlights that they own themselves would not be charged capital costs from the service provider and that there were differences between the service scope of contracts. It was further identified in para. 69 of the Decision that the figures in KOSTRA included electricity costs.

103. At the same time, as set out in footnote 88 of the Decision, the main purpose of the aggregation of data in KOSTRA was to *benchmark* the cost-level of various public services. The KOSTRA-database therefore had evidential value for that purpose.[123] To state otherwise would be tantamount to arguing that the registration of the costs of streetlighting in the KOSTRA-database (managed by SSB), which is a long-standing practice, and to which the Norwegian authorities have consciously allocated resources, is meaningless.

104. In view of these considerations, the Decision did not purport to claim that the KOSTRA-database amounted to a comprehensive or the only appropriate tool for establishing what the compensation for capital costs should have been in Bergen. Rather, the observation made is that, according to the KOSTRA-figures for 2016-2019, the Municipality had the highest costs of the 10 largest municipalities represented in this period. In the absence of sufficient justification for the cost difference, this was indeed an indication that the Applicant has been compensated in excess of an adequate level of return.

105. As regards the **fourth point** on the alleged differences between the amount invoiced by the Applicant and the input reflected in the KOSTRA-database, the Application fails to specify what these alleged differences are. In any event, the KOSTRA-figures do, as mentioned above, not only reflect the costs relating to maintenance and operation and capital costs, but also the costs of electricity. The figures registered in KOSTRA will therefore be different from the amounts invoiced by the Applicant with respect to its streetlighting services. As identified in para. 72 of the Decision, electricity was not included in the concerned contracts with the Applicant.

[123] See in that regard also footnote 40 of the Defence (on the evidential value of the KOSTRA-database).

106. Concerning the **fifth point** and the period covered by the KOSTRA-figures presented in the Decision, it was consciously not stated in the Decision that the Applicant was overcompensated in each and every year covered by the recovery order. Rather, ESA substantiated that there had been overcompensation in the period covered by the Decision and provided guidance as to how to calculate this overcompensation.[124] Accordingly, considering how the Decision was framed, it was sufficient to rely in part on the KOSTRA-figures for the years 2016-2019, and to leave it for the Norwegian authorities to calculate the level of overcompensation, including to what extent there was overcompensation in the remaining years covered by the decision.

107. As regards the **sixth point** on the terms of the tender in 2020, that contract exclusively concerned services rendered in respect of infrastructure owned by the Municipality (a number of existing streetlights and its new LED-fixtures installed onto infrastructure owned by the Applicant). On that basis, the service provider under the tendered-out contract would not incur any capital costs in respect of the infrastructure covered. Since there were therefore no comparable capital costs to be covered under the contract that was subject to tender, the terms of that contract were, as the Decision correctly found,[125] incapable of constituting a meaningful reference insofar as the level of compensation for capital costs was concerned.

4.3.3.5 Conclusion

108. Barring the information that the level of compensation per streetlight is the same as in 1996, no concrete information is presented in the Application as to how the level of capital costs subject to compensation has been calculated. Accordingly, there is no information on (i) how the level of compensation for capital costs was established in 1996 or (ii) on the level that would follow if the capital base and NVE interest rate applied on it had, as is a precondition for a meaningful application of the compensation mechanism in the Sales Agreement, been appropriately and regularly updated.

109. The information provided in the Application is therefore incapable of substantiating that the level of compensation for capital costs complied with the compensation mechanism

[124] Articles 3 and 5 in the operative part of the Decision.
[125] Decision, para. 183.

that was found in the Decision to ensure market terms. Rather, the impression is still that the Applicant is unable and/or unwilling to justify or explain the level of compensation. None of the new information is therefore capable of calling into question the Decision's assessment, based on the totality of the available evidence at the time, that the level of compensation most likely exceeded that allowed by the Sales Agreement.[126] This conclusion is not weakened, but rather strengthened, by the information which is now brought forward by the Applicant, including, in particular, the information indicating that the Applicant's streetlighting operations have been highly profitable and generated contributed earnings in addition to covering capital costs.

4.3.4 Applying the MEOP to operation and maintenance costs

110. The Applicant alleges that ESA made a manifest error when applying the MEOP in relation to the operation and maintenance costs, and in particular by basing its conclusion on overcompensation on this point on four strands of evidence:[127] *First*, a rational private operator would ensure control of the prices presented by the Applicant, initiate legal steps if necessary and generally invest more resources in ensuring compliance with the Sales Agreement. *Second*, the Municipality entertained concerns of overpricing throughout the period. *Third*, the Applicant did not provide sufficient information on direct and indirect costs associated with the operation and maintenance activities. *Fourth*, the information contained in the KOSTRA-database and the comparison of Bergen with nine other large municipalities in the period 2016-2019.

111. Before addressing these four points in turn, ESA would like to observe that, from the wording of the Application, it appears that the Applicant has not understood that, with respect to the compensation for maintenance and operation services, ESA's Decision was based on the premise that the mechanism in the Sales Agreement only allowed for cost coverage and that the relevant costs must be regularly and appropriately established, in order to comply with the compensation mechanism.[128] In this respect, it is illustrative how para. 89 of the Application refers to calculations of appropriate cost-plus hourly rates for work performed in relation to streetlight operation and

[126] Decision, para. 211.
[127] Application, para. 111.
[128] Decision, para. 169.

maintenance. However, the compensation mechanism in the Sales Agreement did not allow for coverage of cost-plus rates for man hours, but merely coverage of the appropriately established costs of man hours.

4.3.4.1 Inactivity of the Municipality

112. The Applicant alleges that the Municipality did invest in compliance with the relevant contractual obligations and requested and received comprehensive information regarding the costs and risks involved in operating and maintaining the streetlights. The Applicant again submits that the price paid per streetlight reflects the price agreed in 1996, adjusted for inflation.[129] Cross-reference is made to the arguments in the Application under Section 3.4.2.4 concerning the disagreement in 2004 and it is submitted that failure to litigate the 2004-dispute cannot constitute State aid, because only active intervention can constitute State aid.[130]

113. The assertion that the Municipality requested and received comprehensive information regarding the costs and risks involved in operating and maintaining the streetlights is wholly unsupported by evidence: no examples of such information are given in (or annexed to) the Application. ESA recalls that the Norwegian authorities were unable to provide any detailed information on the costs during the formal investigation procedure, which would tend to suggest they had no such information in their possession.

114. As for the claim that the compensation level per streetlight has been arrived at simply by adjusting the price agreed in 1996 for inflation, this does not preclude that there has been overcompensation.

115. In respect of the disagreement with the Municipality in 2004, and the related assertion that only active intervention can constitute State aid, ESA submits, first, that the Applicant is wrong in law that only active interventions can constitute State aid.[131]

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[129] Application, para. 112.

[130] Application, para. 113.

[131] It is settled case-law that the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see for example Judgment of 17 June 1999, C-295/97, *Piaggio*, EU:C:1999:313, para. 34).

Second, the assertion is irrelevant: the 2004 disagreement was limited exclusively to the calculation of the compensation for capital costs and was therefore not referred to in the part of the Decision addressing the compensation for maintenance and operation costs.

4.3.4.2 The 2004 dispute and disagreement between the Municipality and the Applicant

116. The Applicant asserts that the 2004 disagreement, and subsequent doubts on the part of the Municipality about the correctness of the level of compensation, cannot call the compliance with the MEOP-test into question.[132]

117. ESA submits, first, that the 2004 disagreement concerned exclusively the compensation for capital costs. It was therefore not referred to in the part of the Decision on the compensation for maintenance and operation costs. Second, with respect to the doubts entertained by the Municipality about the correctness of the level of the compensation, ESA recalls how the analysis was actually conducted in the Decision. The starting point of the analysis, set out in para. 170 of the Decision, was that a private operator would enforce its contractual position. A failure to enforce an agreed contractual position can confer advantages on the private party that has obligations under the contract. In spite of its impression that the prices charged could be too high, the Municipality did, as underlined in para. 171 of the Decision, not do anything to ensure that the agreed compensation mechanism in the Sales Agreement was complied with. In the Decision, this complete lack of control was identified as one of several factors indicating that there had been overcompensation. The other factors were the lack of specificity in the information presented by the Applicant,[133] and the information from the KOSTRA-database for the years 2016-2019.[134] These different factors were all elements in the overall assessment that was carried out on the basis of the totality of the available evidence.[135]

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[132] Application, para. 114.
[133] Decision, para. 172.
[134] Decision, paras. 173 *et seq.*
[135] Bearing in mind that also the Complaint contained pricing information for similar services, which was considerably below the price level charged by the Applicant to the Municipality.

4.3.4.3 Accounting separation – direct and indirect costs

118. Section 3.4.3.4 of the Application disputes the Decision's finding (which it refers to as the third strand of evidence) that the Applicant did not have a proper account of direct and indirect costs related to operation and maintenance. The Applicant makes four arguments in this respect. The *first* argument concerns the owner and operator of the streetlights in the period 1996-2016, BBK Nett AS. Para. 116 of the Application refers back to Section 2.5.2 of the Application. It is submitted that the information presented there establishes that BBK Nett AS had detailed accounts of every cost, be it manpower, equipment or other direct and indirect costs, related to the service. The information presented in Section 2.5.2 comprises the following Annexes: Annex A.12 (Calculation hourly rates 2007), Annex A.13 (Calculations 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) and Annex A.18 (Segment Account for 2014).

119. *Second*, it is argued that these cost data were "*instrumental to the transfer of the streetlight infrastructure, and internal pricing thereof, to BKK Enotek (2016) and later Veilys (2017), and instructive also to (the) costs of operating and maintaining the streetlights"*. In this respect, reference is made in para. 116 of the Application to the information presented in Section 2.7 of the Application. The following Annexes were referred to in that Section: Annex A.22 (Calculation hourly rates 2016), Annex A.23 (Monthly report 2016), Annex A.24 (Accounting total 2017) and Annex A.25 (Accounting/prognosis 2019).

120. *Third*, it is purported, also in para. 116 of the Application, that Veilys (AS) and Eviny Solutions "[…] *can show* [sic] *detailed cost calculations correlating to the actual prices agreed in the 1996-agreement*." Reference is made again to the Annexes referred to in Section 2.7 of the Application.[136]

121. *Fourth*, para. 117 of the Application contends that an analysis of the actual direct and indirect costs involved in delivering the streetlight operation and maintenance services

[136] Again, the following Annexes were referred to in Section 2.7: Annex A.22 (Calculation hourly rates 2016), Annex A.23 (Monthly report 2016), Annex A.24 (Accounting total 2017) and Annex A.25 (Accounting/prognosis 2019).

to the Municipality would have revealed that there is no overcompensation. According to calculations made by Eviny Solutions, the direct and indirect costs for the tasks pertaining to operation and maintenance performed for Veilys for the streetlights on municipal roads within the Municipality amount to NOK 697 (Annex A.27 Calculations for operation and maintenance performed for Veilys).

122. ESA submits that it should be noted at the outset that it is not correct that ESA relied, as a third strand of evidence in the assessment of the presence of an advantage, primarily on the premise that the Applicant did not have a proper account of direct and indirect costs related to operation and maintenance. As explained above, the Decision's assessment of the compensation for maintenance and operation services involved an overall consideration of three different factors. ESA did not identify as any of those factors that the Applicant did not have a proper account of direct and indirect costs. Rather, para. 172 of the Decision found that the information presented by the Applicant in the context of the formal investigation procedure did not contain any information concerning the basis for the prices charged with respect to the compensation. This inability to bring forward specific information was regarded as an indication that the compensation mechanism in the Sales Agreement had not been complied with.

123. Further, it should be underlined that accounting separation (even if correctly carried out) would not in itself be sufficient to ensure that the compensation did not confer an advantage on the Applicant. The question of whether an advantage is present turns on the *level* of compensation.

124. In addition, as will be shown below, the newly submitted information neither indicates nor substantiates that there was accounting separation (and with it, a proper allocation of (in)direct costs) between the relevant activities and other commercial activities. On any view therefore, the newly submitted information is incapable of calling into question the Decision's findings on the lack of information on the basis of the prices charged and concerning the absence of accounting separation.

125. Turning to the **first group** of documents relied on, it should be noted that, except for the addition of Annex A.15, the Annexes referred to are the same as those addressed in the context of the compensation for capital costs in Section 4.3.3.1 above. As shown

in that Section, the concerned Annexes do not provide a basis for the assertion that there has been separation between the activities relating to the measures and other activities. Since the data concerning the activities performed in respect of the measures are not singled out, the Annexes are also incapable of substantiating that the level of compensation complied with the mechanism in the Sales Agreement.

126. As regards Annex A.15, the data provided in this Annex also do not distinguish between the lighting related activities which concern the compensation at stake, and those activities which concern other contracts or customers. This information is therefore equally incapable of evidencing that there was effective accounting separation or that the level of compensation complied with the mechanism in the Sales Agreement.

127. However, in the same way as was noted in Section 4.3.3.1 above with reference to Annex A.16, it is certainly of interest to note that the activities falling within the category of 'lighting' would seem to have been very profitable. The 'contribution margin', 'calculated profit contribution' and 'operating profit' are the highest recorded.

128. The **second group** of documents[137] submitted are equally incapable of demonstrating that the compensation mechanism in the Sales Agreement was complied with. This results from the same deficiencies as have been pointed out with respect to the first group of documents.

129. As regards Annex A.22, the data relating to the compensation at stake are not singled out. Instead, a broad category comprising lighting and traffic engineering is presented. The same is true for Annex A.23. However, as has already been observed with respect to other newly presented documents, it is of interest to note that those activities including streetlighting were characterised by high operating margins and profits compared with other areas.[138]

130. Equally, no data meaningfully limited to the activities at stake are presented in Annex A.24. The Annex furthermore only presents aggregate sums concerning various contracts. There is no explanation of the basis for the sums in question. The figures

[137] This concerns the documents cited in para. 131 *et seq*. of this Defence.
[138] Sheets on pages 3 and 8 of Annex A.23.

presented in Annex A.25 also do not separate the data which may be relevant from those which are not. Again, it is however noteworthy that the data in Annex A.25 indicates that the activities pertaining to streetlighting were very profitable. In this regard, it follows from the spreadsheet presented on page 5 of that annex that the estimated contribution margins from *Veilys AS* and *lighting and traffic engineering – local authorities* were respectively 23.1% and 27.4% for 2020. The estimated contribution margins for the same year from the categories of activities within the areas of *electrical power and industry*, *telecommunications and fiber*, *industry and distribution*, and *multivolt*, ranged from 5.1% to 13.6%.

131. Given that Annexes A.22 to A.25 are also relied on in the context of the **third** contention that Veilys (AS) and Eviny Solutions "*can show* [sic] *detailed cost calculations correlating to the actual prices agreed in the 1996-agreement*," it follows from the above analyses of these Annexes that this claim is also wholly unfounded. More generally, it is also unclear from the Application what is meant more precisely by the phrase "*correlating to the actual prices agreed in the 1996-agreement*."

132. In respect of, **fourth**, Annex A.27, the Authority first observes that the figures presented therein are unexplained and unverified. In particular, i the basis for the amounts and unit prices presented is unsubstantiated. Annex A.27 is not therefore a reliable basis for establishing that the relevant costs in the concerned period exceeded the compensation for maintenance and operation. Second and in any event, it should be observed that the figures contained therein would imply that the relevant costs have in fact been much higher than the level of compensation for operation and maintenance provided under the measure. This claim fundamentally undermines the claims previously made by the Applicant that it has had effective and appropriate systems for allocating costs and revenues pertaining to different activities, customers and contracts. It would furthermore imply that the Applicant has unknowingly refrained from enforcing the compensation mechanism in section 7(c) of the Sales Agreement, with the result that it has not even received cost coverage for its maintenance and operation services compensated under the measure.

133. In light of the information submitted in the case, it appears highly improbable that the Applicant has unknowingly undercharged the Municipality and engaged in "*loss-*

making" activity as it alleges. Rather, it follows from the internal strategy document submitted as Annex A.14 that the Applicant's activities pertaining to streetlighting were already in 2004 identified as a commercial part of its business. As explained above, several of the Annexes presented by the Applicant furthermore indicate that its activities pertaining to streetlighting have in fact been characterised by high operating and contribution margins compared with other business areas.[139]

4.3.4.4 The KOSTRA-database

134. Para. 118 of the Application states that the KOSTRA-data relied on "*do not show any information of the costs between 1 January 2020 and 2020 April (or any time thereafter).*" This is correct. However, as explained in Section **Error! Reference source not found.** above, as regards the compensation for capital costs, it is consciously not stated in the Decision that BKK Veilys has been overcompensated in each and every year covered by the recovery order. Rather, the Decision concluded that there has most likely been overcompensation and left it for the Norwegian authorities to determine the amount of the overcompensation, as well as the precise dates on which it occurred.

4.3.4.5 The 2020 tender

135. The Applicant submits that ESA committed a manifest error of assessment by ignoring the data from the 2020 Bergen municipality streetlight tender. In this respect, it is argued, first, that this tender concerned the very same streetlights as those previously operated and maintained by the Applicant. It is claimed that there was a tender price of NOK 606 per streetlight, and that this is significantly higher than the NOK 495 per streetlight compensated for the maintenance and operation at stake.[140] Second, it is asserted that, due to differences in the service level under the contracts, the pricing of the tendered-out contract will likely be higher. This is also taken as an indication that there has been no overcompensation.[141] Third, it is alleged that the conclusion in the Decision that the terms of the tendered-out contract are not comparable, since the tendered-out contract also encompassed the 12 000 LED fixtures, is unfounded. The

[139] See e.g. Annex A.23, pages 3 and 8, Annex A.25, page 5.
[140] Application, para. 119.
[141] Application, para. 120.

basis for this is that as the LED-fixtures are new, they generally do not require any service.[142]

136. Contrary to the Applicant's contentions, the Decision did not ignore the terms of the tendered-out contract. Rather ESA made sure to obtain information about the tender and presented this in Section 3.1.4 of the Decision. The assessment and conclusion in para. 183 of the Decision, that the terms of the tendered-out contract did not amount to a meaningful comparator, must be read against this background.

137. In response to the first argument made, it is not correct that the tender price was NOK 606 per streetlight. The contract was awarded on the basis of the total price of NOK 10 554 689 set out in para. 50 of the Decision. This price related to the infrastructure described in para. 48 of the Decision, including 3 133 light fixtures and 12 000 LED fixtures.

138. In respect of the second argument made, in relation to the alleged differences in the service level, it is important to recall that, as recorded in para. 51 of the Decision, the Norwegian authorities described the level of services under the tendered-out contract as generally similar to that compensated under the measure. In any event, it is hard to see these factors indicating that the pricing of the tendered-out contract should be higher than the pricing of the services at stake, amount to a sufficient indication that there has been no overcompensation.

139. As regards, third, the argument made in relation to the alleged absence of services rendered with respect to the LED-fixtures, two points must be made. First, what matters is not what service need has actually materialised, but how the inclusion of the LED-fixtures affected the pricing at the time when the terms of the submitted tenders were decided. Second, the lifetime of the tendered-out contract is not finished, and actual service needs may still materialise. In relation to both these points, it can be observed that the fact that the Municipality consciously decided to include the LED-fixtures in the scope of the tendered-out contract is an indication that there was, and presumably still is, an expected need for services comprising these fixtures.

[142] Application, para. 121.

4.3.4.6 Conclusion

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

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

142. Based on the above, ESA respectfully requests the Court to dismiss the second plea as unfounded.

4.4 Third and Fourth Pleas: Distortion of competition and effect on trade

143. In the third and fourth pleas, the Applicant alleges, *inter alia*, that there was no distortion of competition or effect on trade, because there was no cross-subsidisation between streetlights owned by the Applicant or operated for the Municipality and commercial tenders or other activities.[143] The Applicant also refers again to the funding of the infrastructure as such, i.e. the funding to the owner/developer of the

[143] Application, paras. 127 and 130.

infrastructure, when arguing that the infrastructure does not compete with other infrastructure.[144]

144. ESA submits that the Applicant again fails to distinguish the funding of the infrastructure as such from the compensation for the operation and maintenance services of the streetlights (as well as the capital costs). Operators who make use of the infrastructure to provide services receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions.[145]

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

146. In addition, the Applicant argues now that, as of 1 January 2016, the streetlight infrastructure was transferred to a separate company together with other activities subject to competition. In this context, the Applicant claims that ESA ignored the Applicant's accounting separation.[146] ESA recalls that the Applicant never submitted any information to ESA in the course of the formal investigation explaining that it operated separate accounts, even though this issue was raised in the Opening Decision[147] and knowing that only the Applicant could provide the information on this point. The information submitted by the Applicant at the time of the formal investigation did not evidence that the costs and income relevant to the compensation under the measures were separated from costs and income concerning other contracts, and that an appropriate allocation mechanism was put in place for this purpose.

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[144] Application, para.125 and 126.
[145] NoA, para. 223.
[146] Application, paras. 4, 5, 39, 127 and 130.
[147] Para. 54 of the Opening Decision (see Annex D.1).

147. Additionally, it should be recalled that the Decision properly focused on the question whether a risk of cross-subsidisation *could be excluded*.[148] Cross-subsidisation could also occur through the allocation of the profits from the overcompensation to other commercial activities within the Applicant's Group, including through the disbursement of dividends and intra-group purchases of services. There were no mechanisms in place to prevent this.

148. ESA further submits that it is too late for the Applicant to make this point and that ESA has taken the Decision on the available information at the time, which suggested that the Applicant did not operate separate accounts and that cross-subsidisation could not be excluded. Further, since there is no legal monopoly and companies offering similar services, the issue is obsolete. To this end, it should be borne in mind that the Applicant owns a Group of undertakings active also in other sectors subject to EEA-wide competition.

149. Consequently, ESA respectfully requests the Court to dismiss the third and fourth pleas as unfounded.

4.5 Fifth Plea: The aid constitutes new aid

150. By its fifth plea, the Applicant claims that any aid must be existing aid not subject to recovery, since the aid measure related to the Sales Agreement, which entered into force in 1996, and it was not possible to separate the contractual terms of this agreement from their practical implementation.[149] According to the Applicant, the 10-year limitation period for recovery has expired.

151. ESA recalls that, with respect to the compensation relating to the infrastructure owned by the Applicant, a key premise of the Decision was that the aid subject to recovery was the compensation which exceeded the compensation levels allowed by the compensation mechanism in the Sales Agreement.[150] Hence, the aid was not awarded by means of the Sales Agreement, but rather in breach of the conditions in the Sales Agreement.[151]

[148] Decision, paras. 55, 117 and 118.
[149] Application, paras. 10, 131 to 140.
[150] See Articles 3 and 4 of the operative part of the Decision.
[151] Decision, para. 229.

152. As regards the compensation concerning the infrastructure owned by the Municipality, this was not regulated by the Sales Agreement. As emphasised in para. 178 of the Decision:

> "[…] *the Municipality was free to purchase the maintenance and operation of the Municipality-owned infrastructure from any willing provider and was not bound by any predefined compensation mechanism* […]".

153. Consequently, this compensation was therefore evidently not awarded by virtue of the Sales Agreement.

154. In addition, according to Article 15(2) in Part II of Protocol 3 SCA, the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary. Consequently, the decisive factor in determining the starting point of the limitation period, referred to in Article 15, is when the aid was in fact granted. This implies that each time the beneficiary receives overcompensation under the Sales Agreement aid is awarded to the Applicant. The aid is granted on a reoccurring basis. Contrary to the Applicant's claims,[152] it does not mean that the award is dated back until 1996, which would effectively make any future payments "immune" from recovery.

155. The Applicant's references to Case C-81/10 P *France Telecom* v *Commission* and ESA's Decision No 167/09/COL,[153] are actually to the advantage of ESA. In Case C-81/10 P *France Telecom* v *Commission*, the CJEU clarified that:

> "*The determination of the date on which aid was granted may vary depending on the nature of the aid in question. Thus, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to*

[152] Application, para. 134.
[153] Application, para. 134.

the beneficiary ***until the date on which it was in fact received by the beneficiary***.”[154] (emphasis added)

156. The CJEU thereby confirmed the General Court’s finding that the limitation period starts to run afresh each time an advantage is actually granted, which may be on an annual basis, so that the calculation of the limitation period may depend on how and when the advantage is identified.[155]

157. The Applicant refers to ESA’s Decision No 167/09/COL,[156] but this does not advance its case. In that decision ESA concluded that the first request for information that addressed the issue of the potential aid measure in the form of the lease agreement was sent on 28 March 2007. ESA considered that, on that date, the 10-year limitation period had expired as the contract binding the parties had been entered into on 27 June 1996. No recovery would therefore be possible. Moreover, the lease agreement itself had also already expired on that date, since the option to renew the agreement for a further ten years was not used. The lease agreement therefore ceased to exist on 30 June 2006 and no further effects were created as a result of that agreement. In other words, that case concerned completely different circumstances and the key fact was that the lease agreement itself had already expired within the 10-year limitation period.

158. The Applicant’s attempt to extrapolate from jurisprudence on the classification of existing aid and to apply it to the limitation period in Article 15 in Part II of Protocol 3 SCA,[157] is misguided for the following two reasons: First, any aid granted within the 10-year limitation period has been considered in the Decision as existing aid. Second, aid granted after the 10-year limitation period, is for the reasons and jurisprudence mentioned above, to be classified as new aid.

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[154] Judgment of 8 December 2011, *France Telecom* v *Commission*, C-81/10 P, EU:C:2011:811, para. 82.

[155] Judgment of 8 December 2011, *France Telecom* v *Commission*, C-81/10 P, EU:C:2011:811, paras. 84 and 86.

[156] ESA Decision No 167/09/COL of 27 March 2009 on the lease and sale of Lista air base. The decision is available under this link: https://www.eftasurv.int/cms/sites/default/files/documents/decision-167-09-COL.pdf

[157] Application, paras. 136 to 139.

159. In light of the above, ESA respectfully requests the Court to dismiss the fifth plea as unfounded.

4.6 Sixth Plea: ESA provided sufficient reasoning; proper examination of the facts

160. In the sixth plea the Applicant contends that the Decision was based on an insufficient examination of the facts and failed to state proper reasoning in breach of Article 16 SCA.[158] Before considering these claims, ESA recalls that the duty to give reasons relates solely *to the matters on which the decision is based*. This is to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow it to ascertain whether the decision is well-founded or whether it is vitiated by a defect which will allow its legality to be contested. Accordingly, that requirement is satisfied where the decision refers to the matters of fact and law on which the legal justification for the decision is based and to the considerations which led to its adoption.[159]

161. ESA rejects the claim that the Decision failed to give reasons and submits that it has, in line with relevant case-law, in a concise and clear manner, set out all the principal issues of law and fact upon which the reasoning was based and which led to the adoption of the Decision. The Application is a testament to that, because the Applicant has perfectly understood on which basis the Decision was taken and was able to advance detailed counter-arguments.

162. The Applicant also complains that the Decision has not assessed, for example, the fact that the Applicant operates accounting separation.[160] But again, ESA can only assess information which is submitted to it at the time of its Decision and, since the Applicant did not provide any information related to this during the formal investigation, ESA has no obligation to discuss in theory issues on which it has no information. ESA submits that the Decision is the result of a proper formal investigation, involving the careful and

[158] Application, paras. 11, 141 to 148.
[159] Judgment of 8 November 1983, 96-102, 104, 105, 108 and 110/82, *IAZ International Belgium and others* v *Commission*, EU:C:1983:310, para. 37; Judgment of 11 July 1985, 42/84, *Remia and others* v *Commission*, EU:C:1985:327, para. 26; Judgment of 9 December 2014, T-472/09 and T-55/10, *SP SpA* v *Commission*, EU:T:2014:1040, para. 79; Judgment of 13 December 2016, T-95/15, *Printeos SA and Others* v *Commission*, EU:T:2016:722, para. 44.
[160] Application, para. 144.

detailed consideration of all the evidence collected. The Decision was adopted on basis of the information and evidence available at the time. Consequently, any newly submitted information in the Application could not form the basis of the Decision.

163. Finally, and contrary to para. 146 of the Application, the Decision also provides sufficient guidance for the Norwegian authorities and the Applicant to estimate the possible overcompensation involved, as the compensation should reflect market value and be in line with section 7(c) of the Sales Agreement. ESA cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for ESA's decision to include information enabling the EFTA State concerned to determine the amount, without too much difficulty.[161]

164. Consequently, ESA respectfully requests the Court to dismiss the sixth plea as unfounded.

5 FORM OF ORDER SOUGHT BY ESA

Accordingly, ESA respectfully requests the Court to:

1. dismiss the Application as unfounded, and

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

Michael Sánchez Rydelski Claire Simpson

Kyrre Isaksen

Agents of the EFTA Surveillance Authority

[161] Judgment of 12 October 2000, C-480/98, *Spain* v *Commission*, EU:C:2000:559, para. 25; Judgment of 2 February 1988, C-67/85, C-68/85 and C-70/85, *Kwekerij van der Kooy BV and others* v *Commission*, EU:C:1988:38, paras. 66 and 72.

6 SCHEDULE OF ANNEXES

No	Description	Referred to in this defence at paragraph(s)	Number of pages
D.1	ESA's Decision No. 027/19/COL dated 16 April 2019	19 to 24	10
D.2	Applicant's letter of 5 June 2019 (with Appendix)	25	26