

OPLYSNINGER VEDRØRENDE DET EUROPÆISKE ØKONOMISKE
SAMARBEJDSOMRÅDE

EFTA-TILSYNSMYNDIGHEDEN

Opfordring til at fremsætte bemærkninger efter artikel 1, stk. 2, i del I i protokol 3 til aftalen mellem EFTA-staterne om oprettelse af en tilsynsmyndighed og en domstol vedrørende statsstøttespørgsmål

(2019/C 197/06)

Ved ovennævnte beslutning, der er gengivet på det autentiske sprog efter dette resumé, har EFTA-Tilsynsmyndigheden meddelt de norske myndigheder, at den har besluttet at indlede proceduren efter artikel 1, stk. 2, i del I i protokol 3 til aftalen mellem EFTA-staterne om oprettelse af en tilsynsmyndighed og en domstol vedrørende ovennævnte foranstaltning.

Interesserede parter kan senest én måned efter datoen for offentliggørelsen sende deres bemærkninger til den pågældende foranstaltning til:

EFTA Surveillance Authority
Registry
Rue Belliard 35
1040 Bruxelles/Brussel
BELGIEN

Disse bemærkninger vil blive videresendt til de norske myndigheder. Interesserede parter, der fremsætter bemærkninger til sagen, kan skriftligt anmode om at få deres navne hemmeligholdt. Anmodningen skal være begrundet.

RESUMÉ

Sagsforløb

1. Tilsynsmyndigheden modtog den 11. maj 2017 en klage fra handelsorganisationen »Nelfo«.
2. Efter anmodning modtog Tilsynsmyndigheden oplysninger fra de norske myndigheder ved brev af 27. juni 2017 og 5. juli 2017 og ved e-mail af 8. september 2017, 12. september 2017 og 28. februar 2018.

Beskrivelse af foranstaltningen/foranstaltningerne

3. Den påståede støttemodtager er BKK, der handler gennem forskellige helejede datterselskaber.
4. I 1996 blev ejerskabet af gadebelysningen i Bergen overført fra et selskab, der var 100 % ejet af kommunen Bergen, til BKK. To år senere blev BKK omdannet til et aktieselskab. I øjeblikket ejes BKK af kommunen Bergen (37,75 %), andre kommuner i området omkring Bergen (12,35 %) og det statsejede selskab Statkraft Industrial Holding AS (49,9 %).
5. BKK's datterselskaber, der i årenes løb har ejet gadebelysningen, er BKK Nett AS (1996-januar 2016), EnoTek AS (januar 2016-maj 2017) og Veilys AS (maj 2017-nu).
6. Afgørelsen vedrører tre foranstaltninger, som Bergen kommune gennemførte i forbindelse med gadebelysningen i kommunen, nemlig a) drifts- og vedligeholdelsesaftalen, b) finansieringen af 12 000 LED-lysarmaturer og c) kompensation for gadebelysningsinfrastrukturens kapitalomkostninger.
7. Ifølge klageren indebærer foranstaltning a) og b) en vedvarende overtrædelse af statsstøttereglerne, der går tilbage til den 1. januar 2016. I forbindelse med disse to foranstaltninger er den formelle undersøgelsesprocedure begrænset til denne periode.

Vurdering af foranstaltningen/foranstaltningerne

8. Tilsynsmyndigheden tvivler på, at de tre foranstaltninger er i overensstemmelse med det markedsøkonomiske investeringsprincip. Finansieringen af de 12 000 LED-lysarmaturer og kompensationen for kapitalomkostningerne i forbindelse med gadebelysningsinfrastrukturen kan indebære en reduktion af omkostninger, som normalt burde bæres af BKK's budget som ejer af gadebelysningen. De norske myndigheder har ikke forelagt oplysninger, der tyder på, at BKK er pålagt en forpligtelse til offentlig tjeneste, og reglerne om tjenesteydelser af almindelig økonomisk interesse synes derfor ikke at finde anvendelse på de pågældende foranstaltninger.
9. Selv om Bergen kommune køber drifts- og vedligeholdelsestjenester til gavn for borgerne, tvivler Tilsynsmyndigheden på, at den aktivitet, der udføres af BKK, som er en privat enhed, der tilbyder tjenesteydelser mod betaling, kan karakteriseres som ikkeøkonomisk.
10. Endelig ser det ud til, at markedet for drift og vedligeholdelse samt de andre markeder, hvor de relevante BKK-datterselskaber har været involveret, er åbne for samhandel inden for EØS. På nuværende tidspunkt mangler Tilsynsmyndigheden imidlertid tilstrækkeligt detaljerede oplysninger til at kunne drage en konklusion i denne henseende.
11. Hvis foranstaltningerne udgør statsstøtte, er forpligtelsen i artikel 1, stk. 3, i del I i protokol 3 til aftalen mellem EFTA-staterne om oprettelse af en tilsynsmyndighed og en domstol til at anmelde støtten til Tilsynsmyndigheden, inden den iværksættes, ikke overholdt. En sådan statsstøtte vil være ulovlig.
12. De norske myndigheder har ikke fremført argumenter for, at foranstaltningerne, i det omfang de udgør statsstøtte, kan betragtes som forenelige med EØS-aftalen. Tilsynsmyndigheden nærer derfor tvivl med hensyn til foreneligheden af alle tre foranstaltninger.

Decision No 27/19/COL**of 16 April 2019****to open a formal investigation into potential state aid granted in relation to the streetlights in Bergen***(Case 83223)***1 Summary**

- (1) The EFTA Surveillance Authority ('the Authority') wishes to inform the Norwegian authorities that it has concerns that the measures covered by the complaint, and one additional measure, related to streetlight infrastructure in Bergen, might entail state aid, pursuant to Article 61(1) of the EEA Agreement, and has doubts as to the compatibility of the measures with the EEA Agreement. Therefore, the Authority is required to open a formal investigation procedure ⁽¹⁾.
- (2) The Authority has based its decision on the following considerations.

2 Procedure

- (3) By letter dated 11 May 2017 ⁽²⁾, Nelfo, a trade organisation for electro, IT, e-com, system integrators and lift companies in Norway, submitted a complaint, alleging that the Municipality of Bergen has been granting unlawful state aid to BKK acting through different wholly owned subsidiaries, by way of different measures in relation to the streetlight infrastructure in Bergen.
- (4) By letter dated 1 June 2017 ⁽³⁾, the Authority forwarded the complaint to the Norwegian authorities, and invited them to comment on it. By letters dated 27 June 2017 and 5 July 2017 ⁽⁴⁾, the Norwegian authorities responded.
- (5) By email of 7 September 2017, the Authority invited the Norwegian authorities to provide further information ⁽⁵⁾. The Norwegian authorities responded by two emails dated 8 September 2017 ⁽⁶⁾ and 12 September 2017 ⁽⁷⁾.

⁽¹⁾ Reference is made to Article 4(4) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

⁽²⁾ Document No 855990.

⁽³⁾ Document No 858239.

⁽⁴⁾ Documents Nos 863097, 863099, 864432, and 864434.

⁽⁵⁾ Document No 872926.

⁽⁶⁾ *Ibid.*

⁽⁷⁾ Document No 873252.

- (6) On 11 July 2018, the Authority asked for further information⁽⁸⁾. On 17 August 2018, a videoconference between the Authority and the Norwegian authorities was held⁽⁹⁾.
- (7) By email dated 28 February 2019, the Norwegian authorities submitted further information⁽¹⁰⁾.

3 Description of the measures

3.1 Background

- (8) Norwegian municipalities are legally responsible for financing the operation and maintenance of streetlights along municipal roads in their respective jurisdictions⁽¹¹⁾.
- (9) Until 1996, the streetlights infrastructure along municipal roads in Bergen was owned by Bergen Lysverker. Bergen Lysverker was wholly owned by the Municipality of Bergen.
- (10) In 1996, Bergen Lysverker was acquired by and incorporated into BKK. At the time, BKK was wholly owned by several municipalities in the Bergen region, and the Municipality of Bergen had a majority share, owning approximately 70 %. During that process, the streetlight infrastructure was considered to be part of the distribution power grid, and it was integrated into BKK Nett AS, a wholly owned subsidiary of BKK. With this, BKK Nett AS became the owner of the streetlight infrastructure. Simultaneously, a contract was negotiated between the Municipality of Bergen and BKK Nett AS, regulating the maintenance and operation of the streetlights ('the maintenance and operation agreement'). The contract included an element of exclusivity. BKK Nett AS would not sell streetlight services to others, and the Municipality of Bergen would only purchase streetlight services from BKK Nett AS.
- (11) In 1998, BKK was converted into a limited liability company. Currently, it is owned by the Municipality of Bergen (37,75 %), other municipalities in the Bergen region (12,35 %), and the state-owned enterprise Statkraft Industrial Holding AS (49,9 %).
- (12) On 1 January 2016, the ownership of the streetlights together with the operation and maintenance agreement was transferred to EnoTek AS, a wholly owned subsidiary of BKK Nett AS.
- (13) The most recent information available to the Authority on the ownership of the streetlights in the area of Bergen is from 18 May 2016⁽¹²⁾, and is as follows:
- 16 058 streetlights on municipal roads are owned by EnoTek AS.
 - 2 349 streetlights on municipal roads are owned by the Municipality of Bergen.
 - 8 989 streetlights on private roads are owned by EnoTek AS.
- (14) On 27 September 2016, the Municipality of Bergen published a call for tender for the purchase of approximately 12 000 LED fittings. The LED fittings would be used to replace quicksilver fittings and sodium fittings on the streetlight infrastructure owned by EnoTek AS. The replacement was financed by the Municipality of Bergen, which owns the new LED fittings⁽¹³⁾.
- (15) In May 2017, with the objective of defining the interface between streetlight activities and other activities, the ownership of the streetlights together with the provision of the streetlight services was transferred to another wholly owned subsidiary of BKK, Veilys AS.
- (16) On 28 February 2019, the Norwegian authorities submitted information that brought an additional measure to the Authority's attention. According to this new information, the Municipality of Bergen also compensates BKK for the capital costs of the streetlights. The compensation covers renewal and upgrade of streetlights, luminaires, wires, ignition systems, etc. The Municipality of Bergen pays NOK [...] per light point per year. The Authority has no further information concerning this measure, and it is, strictly speaking, not covered by the complaint.
- (17) On this background, the Authority will assess the following measures implemented by the Municipality of Bergen in relation to the streetlight infrastructure in Bergen.
- (a) The operation and maintenance agreement with BKK.

⁽⁸⁾ Document No 923689.

⁽⁹⁾ Document No 827789.

⁽¹⁰⁾ Document No 1057006.

⁽¹¹⁾ *Lov om vegar* (Road Act), LOV-1963-06-21-23, Section 20.

⁽¹²⁾ See letter from the Municipality of Bergen to Nettpartner AS dated 18 May 2016 attached as annex 2 to the complaint.

⁽¹³⁾ See contract notice published on TED website attached as annex 7 to the complaint.

- (b) The financing of 12 000 LED fixtures on the infrastructure owned by BKK.
- (c) The compensation for the capital costs of the streetlight infrastructure owned by BKK.
- (18) According to the complainant, the measures complained about entail an on-going breach of the state aid rules, dating back to 1 January 2016. For measures (a) and (b), the Authority will therefore restrict its assessment to this time period.

3.2 *The complaint*

- (19) The complainant essentially argues that the Municipality of Bergen has granted an advantage to BKK by: (a) overcompensating it for the maintenance and operation of the 18 407 streetlights along municipal roads⁽¹⁴⁾, for which the Municipality is responsible; and (b) financing the 12 000 new LED fixtures on the streetlight infrastructure owned by BKK.
- (20) The complainant argues in particular that BKK engages in economic activity as there are several suppliers that are willing and able to operate and maintain the streetlights.
- (21) In the event that the maintenance and operation of the streetlights is considered a service of general economic interest (SGEI), the complainant argues first that the presence of state aid cannot be excluded on the basis of the four *Altmark* criteria⁽¹⁵⁾. Second, the amounts involved exceed the SGEI *de minimis*⁽¹⁶⁾ ceiling of EUR 500 000. Third, the measure fails to meet the requirements in the SGEI Decision⁽¹⁷⁾.
- (22) The complainant estimates the overcompensation for the service of maintenance and operation of the streetlights at approximately NOK 12 million (around EUR 1,25 million) per year.

3.3 *Comments by the Norwegian authorities*

- (23) The Norwegian authorities argue that BKK is not acting as an undertaking when providing operation and maintenance services to the Municipality of Bergen. Hence, any advantage granted to it, falls outside the remit of state aid law. More specifically, the Norwegian authorities argue that no market can exist without private demand and private willingness to pay for the goods or services in question, i.e. where public authorities are the only purchasers⁽¹⁸⁾.
- (24) The Norwegian authorities argue that the streetlight network is characterised by at least two types of market failure. First, the provision of streetlights along municipal roads is a public good hampered by a free rider problem, which entails that a private party cannot provide it for profit. Second, streetlight networks are natural monopolies in that allowing for competition would entail a wasteful duplication of resources.
- (25) Neither national nor EEA law requires BKK to allow for third party access to the streetlight infrastructure it owns. BKK has consistently refused to grant access not only to its own infrastructure, but also to the 2 349 streetlights owned by the Municipality of Bergen. By doing so, it has precluded the Municipality of Bergen from operating the streetlights in-house or purchasing the services from other companies. It is the view of the Norwegian authorities that the situation at hand does not allow for price regulation, state aid or competition law control with the view of preventing overcompensation for the operation and maintenance of streetlights.

4 *Presence of state aid*

4.1 *Introduction*

- (26) Article 61(1) of the EEA Agreement stipulates that:

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

⁽¹⁴⁾ 16 058 of these are owned by EnoTek AS and the rest, 2 349 are owned by the Municipality of Bergen.

⁽¹⁵⁾ Judgment in *Altmark*, C-280/00, EU:C:2003:415 (*Altmark*), paragraphs 89–93.

⁽¹⁶⁾ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8, referred to at point 1ha of Annex XV to the EEA Agreement.

⁽¹⁷⁾ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3, referred to at point 1h of Annex XV to the EEA Agreement.

⁽¹⁸⁾ The Norwegian authorities refer to judgment of the General Court of 12 December 2006, *Selex v Commission*, T-155/04, EU:T:2006:387, paragraph 61 (judgment of the GC in *Selex*). The reasoning in the judgment of the General Court was overturned by the Court of Justice which considered the activity to be non-economic on other grounds. See judgment of the Court of Justice of 26 March 2009, *Selex v Commission*, C-113/07, EU:C:2009:191 (judgment of the CoJ in *Selex*), paragraphs 86–93, which considered the activity non-economic on other grounds.

- (27) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: the measure must (i) be granted by the State or through State resources; (ii) confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) be liable to distort competition and affect trade.

4.2 *Presence of State resources*

- (28) For the measure to constitute aid, it must be granted by the State or through State resources. State resources include all resources of the public sector, including resources of intra-State entities (decentralised, federated, regional or other), see the Authority's Guidelines on the notion of state aid ('NoA') ⁽¹⁹⁾.
- (29) The remuneration for the services on the streetlight infrastructure, as well as the financing of the new LED fixtures, and the compensation for the capital costs, all come from the budget of the Municipality of Bergen. It therefore constitutes State resources.

4.3 *Advantage*

4.3.1 *Introduction*

- (30) The qualification of a measure as state aid requires that it confers an advantage to the recipient. An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit that an undertaking could not have obtained under normal market conditions.
- (31) The measure confers an advantage not only if it confers positive economic benefits, but also in situations where it mitigates charges normally borne by the budget of the undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities ⁽²⁰⁾.
- (32) Economic transactions carried out by public bodies are considered not to confer an advantage on the counterpart of the agreement, and therefore not to constitute aid, if they are carried out in line with normal market conditions. This is assessed pursuant to the market economy operator principle ('MEOP'). When public authorities purchase a service, it is generally sufficient, to exclude the presence of an advantage, that they pay market price.
- (33) As regards costs incurred by undertakings entrusted with the operation of a service of general economic interest, compensation for the service will not be considered as granting an advantage to the undertaking in question if the four cumulative *Altmark* conditions are fulfilled ⁽²¹⁾. The Norwegian authorities have, however, not provided any information indicating that BKK has a public service obligation to discharge. The Authority is therefore, at this stage, not able to exclude that BKK has obtained an advantage on this basis.
- (34) The complainant calls upon the Authority to consider whether the Municipality of Bergen has granted an advantage to BKK by: (a) overcompensating it for the maintenance and operation of the 18 407 streetlights along municipal roads, for which the Municipality of Bergen is responsible; and (b) financing the 12 000 LED fixtures. On 28 February 2019, the Norwegian authorities brought an additional measure to the Authority's attention, namely (c) the compensation paid to BKK for the capital costs of the streetlights.

4.3.2 *The operation and maintenance of streetlights in the Bergen area*

- (35) In relation to the presence of an advantage, the Norwegian authorities have mainly pointed to the fact that BKK, as the owner of the streetlight infrastructure, has refused to give access to the Municipality of Bergen and other third party operators. This has prevented the public authorities from providing the services themselves or purchasing them from a different provider than BKK. The Municipality has therefore not had the option of acquiring the service by way of an open tender ⁽²²⁾.
- (36) The purchase of the services through a competitive, transparent, non-discriminatory and unconditional tender is only one of several methods for ensuring that a transaction does not confer an advantage within the meaning of Article 61(1) of the EEA Agreement. The Municipality of Bergen could have ensured that the transactions were carried out in line with normal market conditions by benchmarking ⁽²³⁾ or through a qualified financial assessment ⁽²⁴⁾.

⁽¹⁹⁾ OJ L 342, 21.12.2017, p. 35 and EEA Supplement No 82, 21.12.2017, p. 1, paragraph 48.

⁽²⁰⁾ NoA, paragraph 68.

⁽²¹⁾ *Altmark*, paragraphs 89–93.

⁽²²⁾ Email from the Norwegian authorities to the Authority of 8 September 2017, Document No 873252.

⁽²³⁾ NoA, paragraphs 98–100.

⁽²⁴⁾ NoA, paragraphs 101–105.

- (37) Despite repeated requests ⁽²⁵⁾, the Norwegian authorities have not provided evidence 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 ⁽²⁶⁾.
- (38) The Municipality of Bergen is paying NOK [...] per lamp point per year for maintenance and operation ⁽²⁷⁾. The available information does not provide any documentation on the question how the remuneration has been determined.
- (39) The complainant argues that comparable services have been delivered for around NOK [...] per lamp point per year in other regions. The complainant has not documented this allegation.
- (40) The Norwegian authorities argue that the services delivered under the contracts referred to by the complainant might not be comparable to the services delivered by BKK to the Municipality of Bergen. BKK has entered into contracts similar to the contracts covered by the complaint (contracts for operation, maintenance and call-out and emergency services ('OM&E contracts')) with other municipalities in the Bergen region for an average price of NOK [...] per light point per year. They explain that price variations between individual contracts can be due to differentiated services on the contractual response times for light repairs, monitoring consumption for metered installations, and the extent to which critical zones, such as hospitals, are covered by the contract ⁽²⁸⁾.
- (41) The Norwegian authorities have not provided any information concerning the OM&E contracts that BKK has entered into with other municipalities. The price in the contract under assessment in the case at hand (NOK [...]) is in any event higher than the average price for what the Norwegian authorities argue are similar contracts (NOK [...]). Even if the explanation provided by the Norwegian authorities could suggest that certain price variations might naturally occur under normal market conditions, the Norwegian authorities have, in any event, not substantiated that the price paid by the Municipality of Bergen was in line with the price charged for similar obligations in comparable contracts.
- (42) The Norwegian authorities have explained that they are in a deadlock situation in that they have no choice but to purchase the services from BKK. They seem to acknowledge in this respect that owners of this type of infrastructure can exploit their position, potentially to raise prices ⁽²⁹⁾, and indicate that they have not found any suitable methods for finding and agreeing with BKK on 'the right price' ⁽³⁰⁾.
- (43) In light of the above, and in particular in light of the absence of any evidence supporting that the prices under the contracts have been set in line with normal market conditions, the Authority has formed the preliminary view that BKK might have received an advantage under the maintenance and operation agreement, within the meaning of Article 61(1) of the EEA Agreement.

4.3.3 Financing of the 12 000 LED fixtures

- (44) Next, the Authority must consider whether the financing by the Municipality of Bergen of 12 000 LED fixtures on the infrastructure owned by BKK entailed a mitigation of charges that normally should have been borne by the budget of BKK.
- (45) In a letter from the Municipality of Bergen to Nettpartner AS dated 8 November 2016, the Municipality explained that the reason for changing the LED fixtures is partly environmental considerations, partly the desire to reduce electricity costs, which the Municipality covers on top of the price for the maintenance and operation of the streetlight infrastructure ⁽³¹⁾. The Norwegian authorities have not commented on the state aid nature of this measure.
- (46) The objective of the measure, i.e. environmental protection, does not exclude it from the scope of state aid law ⁽³²⁾.
- (47) For the purpose of the MEOP test, only benefits and obligations linked to the role of the state as an economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account ⁽³³⁾. Therefore, the relevant question is whether the Municipality of Bergen acted as a market economy operator when taking the decision to finance the LED fixtures on the infrastructure owned by BKK. In that regard, the municipality's obligation to pay for electricity, and the corresponding savings ensured by the investment are undoubtedly relevant when assessing whether the transaction is in line with normal market conditions.

⁽²⁵⁾ Emails of 7 September 2017 and 11 July 2018 (Documents Nos 872926 and 923689).

⁽²⁶⁾ NoA, paragraph 79.

⁽²⁷⁾ Email of 28 February 2019 and the attached maintenance and operation agreement, Document No 1057006.

⁽²⁸⁾ Document No 863099.

⁽²⁹⁾ Document No 864434.

⁽³⁰⁾ Document No 873252.

⁽³¹⁾ Annex 6 to the complaint.

⁽³²⁾ NoA, paragraph 69.

⁽³³⁾ NoA, paragraph 77. Judgment in *FIH v Commission*, C-579/16, EU:C:2018:159, paragraph 55.

(48) However, the Authority lacks the necessary information to assess whether a private operator, in a situation as close as possible to that of the Municipality of Bergen, only taking into account the benefits and obligations linked to its situation as a private operator, would have been prompted to take the decision to finance the new LED fixtures. The Authority asks that the Norwegian authorities provide it with all the relevant information to enable it to determine whether the transaction complies with the MEOP test ⁽³⁴⁾.

(49) Based on the available information, the Authority cannot exclude that the financing of the 12 000 LED fixtures has conferred an advantage on BKK.

4.3.4 Compensation for the capital costs of the streetlights

(50) Based on the available information, the compensation for the capital costs of the streetlights appears to be a mitigation of charges that should normally be borne by the budget of BKK as the owner of the streetlights. The Authority has no information suggesting that it is normal market practice for a private purchaser of maintenance and operation services to compensate the company providing such services and owning the streetlights for its capital costs. To the extent that this would be common practice, the Authority has no information allowing it to assess whether NOK [...] per lamp point per year is market price for such service.

(51) Therefore, the Authority cannot exclude that the compensation for the capital costs of the streetlights has conferred an advantage on BKK.

4.4 The notion of undertaking

(52) Only advantages granted to 'undertakings' are subject to state aid law. The concept of an undertaking covers any entity that engages in an economic activity regardless of its status and the way it is financed. Hence, the public or private status of an entity, or the fact a company is partly or wholly publicly owned has no bearing on whether or not the entity is an 'undertaking' ⁽³⁵⁾.

(53) An activity is economic in nature where it consists in offering goods and services on a market ⁽³⁶⁾. In order to determine whether an entity is an 'undertaking', it is necessary for the Authority to carry out an individual examination of all its different activities.

(54) A single entity may carry out a number of activities, both economic and non-economic. An entity that engages in both kinds of activities should keep separate accounts to exclude cross-subsidies ⁽³⁷⁾.

(55) The Municipality of Bergen is legally responsible for the streetlights along municipal roads in Bergen. All three measures appear to be in support of BKK's activity related to the operation and maintenance of the streetlight infrastructure. The main question in relation to all three measures is therefore whether BKK is engaging in economic activity when selling operation and maintenance services to the Municipality of Bergen.

(56) The Norwegian authorities argue that the activities of BKK in providing maintenance and operation services on those streetlights are non-economic in nature. The Norwegian authorities state that no market can exist without a private demand and a private willingness to pay for the good or service in question. This is the case for streetlights along the municipal roads. The Norwegian authorities refer to the judgment of the General Court in *Selex v Commission* ⁽³⁸⁾.

(57) That case concerned the activities of Eurocontrol, an international organisation established by various European States with the aim of strengthening cooperation in the field of air navigation and developing joint activities for better harmonisation and integration of practices. One of the questions considered was whether Eurocontrol offered services on a market when it prepared technical standards which were to be adopted by the Council of Eurocontrol, an act that would make them binding on all contracting States.

(58) The General Court found that the activity of producing the technical standards was non-economic in nature, observing in paragraph 61 of its judgment that 'the only purchasers of such services can be States in their capacity as air traffic control authorities'. In the view of the Authority, that statement cannot be read in isolation.

(59) Private unwillingness to pay for a service only suggests the presence of a market failure. The services under assessment in *Selex v Commission* on the other hand, concerned not simply a service the provision of which is hampered by a market failure in that there is no willingness to pay for the good in question, but rather a service of which the States were the only possible purchasers due to their prerogative in adopting technical standards for air navigation.

⁽³⁴⁾ Judgment in *Commission v EDF*, C-124/10, EU:C:2012:318, paragraph 104.

⁽³⁵⁾ Judgment in *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496, paragraph 42.

⁽³⁶⁾ NoA, chapter 2.1.

⁽³⁷⁾ Judgment in *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496, paragraph 51.

⁽³⁸⁾ Judgment of the GC in *Selex*, paragraph 61.

- (60) Even for a service of this nature, the General Court also looked at the way the States had chosen to organise it, so as to assess whether it was economic in nature. It observed that the States had chosen not to introduce market mechanisms, but rather to produce those standards themselves through an international organisation, which rendered the conclusion that the service was non-economic. The Authority therefore disagrees that the judgment can be interpreted to mean that 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.
- (61) The Authority also notes that the reasoning of the General Court was overturned by the Court of Justice which found that the activity was non-economic on the basis of the public powers exemption⁽³⁹⁾. The Court of Justice pointed to the fact that, taken as whole, an international organisation such as Eurocontrol exercised activities which, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space, and are therefore not economic in nature. The Norwegian authorities have not argued that the public powers exemption applies to the activities of BKK.
- (62) In the present case, the Norwegian authorities are purchasing services from a private entity, which is offering that service for remuneration. There is a market for the maintenance and operation 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 represents companies selling services in this market.
- (63) The fact that there would be no private demand for some of these services, due to a market failure, and the decision by a public authority to purchase those services in the interest of the public good, does not lead to the conclusion that the activity of the *supplier* is non-economic. If this were sufficient to exclude 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, 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⁽⁴⁰⁾.
- (64) The question in the present case is different from the one considered by the Court of Justice in *FENIN*⁽⁴¹⁾. That case concerned the question whether Spanish hospitals abused their dominant position when purchasing medical goods and equipment on the market. The Court of Justice ruled only on the fact that an organisation which purchases goods not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking, simply because it is a purchaser in a given market⁽⁴²⁾. However, *FENIN* did not raise the separate legal question whether the activities of the supplier of the medical goods and equipment are economic in nature. In principle, even if the public authority purchasing the service in question is carrying out a non-economic activity, for example because it is fulfilling its responsibilities to provide for lighting along municipal roads, the companies supplying the authorities with the delivery of LED lights and maintenance and operation services, might well be exercising economic activities.
- (65) On that background, the Authority takes the preliminary view that BKK is engaging in an economic activity when selling maintenance and operation services for the streetlights to the Municipality of Bergen. As all three measures are linked to this activity, the Authority preliminarily concludes that the three measures confer an advantage to an undertaking within the meaning of Article 61(1) of the EEA Agreement.

4.5 **Selectivity**

- (66) To be characterised as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must also be selective in that it favours 'certain undertakings or the production of certain goods'. Not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings, categories of undertakings or to certain economic sectors.
- (67) Any advantage stemming from the maintenance and operation agreement, the financing of the new 12 000 LED fixtures and the compensation for the capital costs of the streetlights, favours one particular undertaking, namely BKK. Hence, the measures are selective in the sense of Article 61(1) of the EEA Agreement.

4.6 **Effect on trade and distortion of competition**

- (68) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the measures must be liable to distort competition and affect trade between EEA States.

⁽³⁹⁾ Judgment of the CoJ in *Selex*, paragraphs 86–93. See NoA, paragraphs 17–18 on the public powers exemption.

⁽⁴⁰⁾ *Altmark*; judgment of the CoJ in *Selex*, paragraph 119.

⁽⁴¹⁾ Judgment in *FENIN v Commission*, C-205/03, EU:C:2006:453.

⁽⁴²⁾ *Ibid.*, paragraph 37.

- (69) A measures granted by the State are considered liable to distort competition when they are liable to improve the competitive position of the recipient compared to other undertakings with which it competes. A distortion of competition within the meaning of Article 61(1) of the EEA Agreement is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ⁽⁴³⁾.
- (70) Public support is liable to distort competition even if it does not help the recipient undertaking to expand or gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided ⁽⁴⁴⁾.
- (71) The Norwegian authorities argue that streetlight networks are 'natural monopolies' in the sense that allowing for competition would entail a wasteful duplication of resources. The fact that the infrastructure itself is a natural monopoly, does not, however, exclude that the operation of the infrastructure can distort competition. To exclude 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 ⁽⁴⁵⁾. In the Authority's preliminary assessment, the measures do not seem to fulfil the necessary conditions.
- (72) To the extent that the transactions between the Municipality of Bergen and BKK have not been carried out in line with normal market conditions, they have conferred an advantage on BKK, which may have strengthened its position compared to other undertakings competing with it. The measures are therefore liable to distort competition.
- (73) The final question is whether the measures are liable to affect trade between EEA States. Where state aid strengthens the position of an undertaking as compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by the aid ⁽⁴⁶⁾.
- (74) The Authority lacks more detailed information about the market for operation and maintenance of streetlights and the presence of cross-border investment in this sector. The complainant has, however, submitted that there are EEA suppliers of operation and maintenance services with whom BKK competes. Moreover, EnoTek AS appears 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 ⁽⁴⁷⁾. The Authority's preliminary analysis is that the measures might have benefited also these activities and the Authority is not aware of anything to suggest that these markets are not open to intra-EEA trade.
- (75) On this basis, the Authority cannot exclude that the measures are liable to distort competition and have an effect on intra-EEA trade.

4.7 Conclusion

- (76) Based on the available information provided by the Norwegian authorities and the complainant, the Authority has formed the preliminary view that the measures fulfil all criteria in Article 61(1) of the EEA Agreement, and therefore constitute state aid.

5 Procedural requirements

- (77) Pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Protocol 3'): 'The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision.'
- (78) The Norwegian authorities did not notify the potential aid before putting it into effect. The Authority therefore concludes that, if the measures constitute state aid, the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

6 Compatibility of the aid measures

- (79) Having preliminarily concluded that the measures might constitute unlawful aid, the Authority must assess whether they would be compatible with the functioning of the EEA Agreement.
- (80) The Norwegian authorities have not provided any arguments substantiating why the measures should be considered compatible with the functioning of the EEA Agreement. In particular, no arguments supporting the conclusion that the aid is targeted at a well-defined objective of common interest have been presented. Furthermore, the Norwegian authorities have not presented evidence suggesting that BKK has been entrusted with a public service obligation. The Authority has also not identified any clear grounds for compatibility.

⁽⁴³⁾ NoA, paragraph 187.

⁽⁴⁴⁾ NoA, paragraph 189.

⁽⁴⁵⁾ NoA, paragraph 188.

⁽⁴⁶⁾ Judgment in *Eventech*, C-518/13, EU:C:2015:9, paragraph 66.

⁽⁴⁷⁾ <https://www.bkk.no/enotek>.

- (81) To the extent that the measures constitute state aid, the Authority therefore has doubts as to their compatibility with the functioning of the EEA Agreement.

7 **Conclusion**

- (82) As set out above, the Authority has formed the preliminary view that the measures fulfil all criteria in Article 61(1) of the EEA Agreement, and therefore constitute state aid. The Authority furthermore has doubts as to whether the measures are compatible with the functioning of the EEA Agreement.
- (83) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority hereby opens the formal investigation procedure. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures do not constitute state aid, or that they are compatible with the functioning of the EEA Agreement.
- (84) The Authority invites the Norwegian authorities to submit, by Monday 20 May 2019, their comments and to provide all documents, information and data needed for the assessment of the measures in light of the state aid rules.
- (85) The Authority informs the Norwegian authorities that it will forward a copy of this decision to BKK and inform interested parties by publishing a meaningful summary of it in the Official Journal of the European Union. All interested parties will be invited to submit their comments within one month of the date of such publication. The comments will be communicated to the Norwegian authorities.

Done in Brussels, 16 April 2019.

For the EFTA Surveillance Authority

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