

## III

(Other acts)

## EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION No 161/22/COL

of 6 July 2022

on aid in relation to the streetlight infrastructure in Bergen (Norway) [2023/101]

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to:

the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 and 62,

Protocol 26 to the EEA Agreement,

the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 7(5) and Article 14 of Part II, and

having called on interested parties to submit their comments <sup>(1)</sup>, and having regard to their comments,

Whereas:

I. FACTS

1. PROCEDURE

1.1. THE COMPLAINT

- (1) By letter of 11 May 2017, Nelfo ('the complainant') complained about alleged State aid granted by the Municipality of Bergen ('the Municipality') in respect of streetlighting along municipal roads. Nelfo is a sectoral federation within the confederation of Norwegian Enterprise ('NHO'). It comprises electricians, IT, e-communication, system integrators and lift companies in Norway <sup>(2)</sup>.
- (2) The alleged aid beneficiary is BKK AS, acting through different subsidiaries <sup>(3)</sup>. In the following, BKK AS, and its subsidiaries, will jointly be referred to as the 'BKK-group'.

<sup>(1)</sup> 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 (OJ C 197, 13.6.2019, p. 25), and EEA Supplement No 46, 13.6.2019, p. 1.

<sup>(2)</sup> At the time of the adoption of this decision, information on Nelfo was available through the following link: <https://www.nho.no/en/english/nho-sectoral-federations/>.

<sup>(3)</sup> Document No 855990, with enclosures filed as Document Nos 855997, 855996, 855995, 858823, 858813, 858821, and 855991. According to publicly available information from the website [www.proff.no](http://www.proff.no), the name of BKK AS was recently changed to Eviny AS. In view of the concerned time period, and the need to ensure consistency with the opening decision, the name BKK AS is nevertheless used in this decision. The remaining company names referred to are those used in the complaint, and in the submissions made by the Norwegian authorities and interested parties.

## 1.2. ADDITIONAL INFORMATION

- (3) By letter dated 1 June 2017 <sup>(4)</sup>, ESA forwarded the complaint to the Norwegian authorities. By letters dated 27 June 2017 and 5 July 2017 <sup>(5)</sup>, the Norwegian authorities provided comments.
- (4) By email of 7 September 2017, ESA invited the Norwegian authorities to provide further information <sup>(6)</sup>. The Norwegian authorities responded by emails of 8 September 2017 <sup>(7)</sup> and 12 September 2017 <sup>(8)</sup>.
- (5) On 11 July 2018, ESA sent an additional information request <sup>(9)</sup>. A video conference was held on 17 August 2018. By email of 28 February 2019, the Norwegian authorities submitted further information <sup>(10)</sup>.

## 1.3. THE FORMAL INVESTIGATION PROCEDURE

- (6) By Decision No 027/19/COL ('the opening decision'), ESA initiated the formal investigation procedure <sup>(11)</sup>. At this stage, ESA had formed the preliminary view that three measures, identified in the opening decision as measures (a), (b) and (c), appeared to constitute State aid. ESA furthermore expressed doubts as to the compatibility of this potential State aid with the functioning of the EEA Agreement. The three measures are described in Section 2 below.
- (7) The Norwegian authorities were invited to comment on the opening decision by 20 May 2019. Upon request, ESA extended the deadline to 5 June 2019 <sup>(12)</sup>.
- (8) By letter dated 5 June 2019, ESA received joint comments from BKK AS and Veilys AS ('BKK Veilys') <sup>(13)</sup>. By letter of 6 August 2019, the Norwegian authorities were invited to present their observations on these comments by 6 September 2019 <sup>(14)</sup>.
- (9) The Norwegian authorities submitted their comments to the opening decision on 5 April 2020 <sup>(15)</sup>. The comments are set out in two letters from the Municipality, dated respectively 10 May 2019 <sup>(16)</sup> and 3 April 2020 <sup>(17)</sup>.
- (10) ESA sent an additional request for information to the Norwegian authorities on 5 February 2021 <sup>(18)</sup>. The Norwegian authorities submitted their reply to this request on 12 April 2021 <sup>(19)</sup>.

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<sup>(4)</sup> Document No 858239.

<sup>(5)</sup> Document Nos 863097, 863099, 864432, and 864434.

<sup>(6)</sup> Document No 872926.

<sup>(7)</sup> *Ibid.*

<sup>(8)</sup> Document No 873252.

<sup>(9)</sup> Document No 923689.

<sup>(10)</sup> Document No 1058456.

<sup>(11)</sup> The COVID-19 outbreak, and related extraordinary workload in terms of notification cases, has impacted the case handling of this complaint.

<sup>(12)</sup> Document No 1070238.

<sup>(13)</sup> Document No 1073541, including enclosures filed as Document Nos 1073542 and 1073543.

<sup>(14)</sup> Document No 1082647.

<sup>(15)</sup> Document No 1126799.

<sup>(16)</sup> Document No 1126803.

<sup>(17)</sup> Document No 1126801.

<sup>(18)</sup> Document No 1178400.

<sup>(19)</sup> The Norwegian authorities replied by email of 12 April 2021, filed as Document No 1202143. The cover letter with attachments are filed as Document Nos 1194243, 1194249, 1194179, 1194189, 1194181, 1194183, 1194199, 1194185, 1194187, 1194217, 1194191, 1194193, 1194197, 1194195, 1194255, 1194253, 1194205, 1194201, 1194203, 1194209, 1194207, 1194211, 1194213, 1194223, 1194215, 1194229, 1194219, 1194221, 1194225, 1194233, 1194227, 1194235, 1194231, 1194239, 1194251, 1194237, 1194245, 1194241, and 1194247.

## 2. DESCRIPTION OF THE MEASURES

### 2.1. THE INVOLVED INFRASTRUCTURE AND LEGAL ENTITIES

- (11) The streetlight infrastructure along municipal roads was historically owned by a municipal unit called Bergen Lysverker. In 1996, however, Bergen Lysverker, including its assets, was acquired by BKK DA. This company was at the time owned by several municipalities, with the Municipality as the majority shareholder.
- (12) BKK DA was later reorganised into BKK AS <sup>(20)</sup>. According to publicly available information, the Municipality owns 37,75 % of the shares. Other shareholders include Statkraft Industrial Holding AS and different municipalities <sup>(21)</sup>.
- (13) Various subsidiaries of BKK AS have since been owning and operating the streetlight infrastructure along the municipal roads in Bergen. The infrastructure controlled by the BKK-group is currently owned by Veilys AS. This company also owns streetlight infrastructure along state roads, county roads and private roads.
- (14) According to the Norwegian authorities, Veilys AS has neither operated nor maintained its streetlight infrastructure itself. These activities have instead been performed by a subsidiary with the name of BKK EnoTek AS <sup>(22)</sup>.
- (15) As will be described in further detail below, Veilys AS does not own the entire streetlight infrastructure along the municipal roads in Bergen. Parts of this infrastructure are owned by the Municipality.

### 2.2. THE MEASURES IDENTIFIED IN THE COMPLAINT

- (16) Two alleged State aid measures were identified in the complaint. First, the complainant submitted that the Municipality has overcompensated companies within the BKK-group for maintenance and operation of streetlights along municipal roads (measure (a)). Second, the complaint concerned the financing by the Municipality of 12 000 new LED fixtures installed onto infrastructure owned by Veilys AS (measure (b)) <sup>(23)</sup>.
- (17) According to the complainant, measures (a) and (b) entail an ongoing breach of the State aid rules dating back to 1 January 2016. As stipulated in paragraph 18 of the opening decision, ESA has consequently limited its assessment of measures (a) and (b) to this period.
- (18) The complainant considers that several suppliers would be willing to operate and maintain the streetlights for compensation. On that basis, it regards the activities comprising maintenance and operation as economic in nature <sup>(24)</sup>.

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<sup>(20)</sup> Document No 863099, p. 1. Further information is included under points 3 and 4 below on the comments from the Norwegian authorities and interested parties.

<sup>(21)</sup> The figures are from the website [www.proff.no](http://www.proff.no).

<sup>(22)</sup> Document Nos 1126803, p. 1, and 1126801, p. 1.

<sup>(23)</sup> See paragraphs 19 and 34 of the opening decision.

<sup>(24)</sup> Document No 855990, p. 6.

- (19) To the extent that the compensation concerns a service of general economic interest ('SGEI'), the complainant argues <sup>(25)</sup>: First, that the presence of State aid cannot be excluded on the basis of the *Altmark*-criteria <sup>(26)</sup>. Second, that the compensation involved exceeds the SGEI *de minimis* ceiling of EUR 500 000 <sup>(27)</sup>. Third, that the measures fail to meet the requirements in the SGEI Decision <sup>(28)</sup>.
- (20) The complainant estimates the overcompensation for maintenance and operation to EUR 1,12 million per year. Comparable service contracts have allegedly stipulated prices of about NOK [...] per light point per year <sup>(29)</sup>.

### 2.3. THE ADDITIONAL MEASURE IDENTIFIED IN THE OPENING DECISION

- (21) The payments from the Municipality include compensation for capital cost related to the streetlight infrastructure owned by Veilys AS. This element in the compensation mechanism was included in the formal investigation as measure (c). As stipulated in paragraph 18 of the opening decision, the assessment of measure (c) is not limited to the period from 1 January 2016.

## 3. COMMENTS FROM THE NORWEGIAN AUTHORITIES

### 3.1. BACKGROUND INFORMATION

#### 3.1.1. *The relationship between the streetlight infrastructure and the power network*

- (22) The Norwegian authorities underline the close functional relationship between power networks and infrastructures used to provide streetlighting. Streetlight fixtures and connecting cables are frequently affixed to utility posts also carrying power cables. As such, the infrastructure in Bergen serves a twofold objective <sup>(30)</sup>.
- (23) There was no distinction between operating and maintaining infrastructures for power and streetlighting purposes until 1991. Along municipal roads, the operation and maintenance of such infrastructures was either carried out by municipalities or local entities owned by municipalities <sup>(31)</sup>.
- (24) With effect from 1991, however, energy markets in Norway were partly liberalised. In conjunction with this, the operation of power networks was made subject to monopoly regulation <sup>(32)</sup>.

<sup>(25)</sup> Document No 855990, p. 7-10.

<sup>(26)</sup> Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 87-93.

<sup>(27)</sup> 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 of the EEA Agreement, see Joint Committee Decision No 225/2012, published in OJ L 81, 21.3.2013, p. 27 and EEA Supplement No 18, 21.3.2013, p. 32, as amended by Commission Regulation (EU) 2018/1923 of 7 December 2018 amending Regulation (EU) No 360/2012 as regards its period of application (OJ L 313, 10.12.2018, p. 2), see Joint Committee Decision No 266/2019 (not yet published), and Commission Regulation (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 1), see Joint Committee Decision No 68/2021 (not yet published).

<sup>(28)</sup> 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, see Joint Committee Decision No 66/2012 published in OJ L 207, 2.8.2012, p. 46 and EEA Supplement No 43, 2.8.2012, p. 56.

<sup>(29)</sup> Document No 855990, p. 8.

<sup>(30)</sup> Document No 1126801, p. 3.

<sup>(31)</sup> Document No 1126801, p. 3.

<sup>(32)</sup> Document No 1126801, p. 3.

- (25) Under this sector-specific regime, infrastructure owners are obliged to operate their infrastructures. Other entities are prohibited from duplicating them. The operation and maintenance costs are covered by tariffs (*nettleie*) that have to comply with the regulated return set by the Norwegian Energy Regulatory Authority (NVE) <sup>(33)</sup>.
- (26) By contrast, no monopoly regulation has been established at the national level for streetlight infrastructures. For such infrastructures, the structure of ownership and conditions for operations therefore depend on local conditions. Several entities offer services related to operation and maintenance on a commercial basis <sup>(34)</sup>.

### 3.1.2. *The sale of Bergen Lysverker and regulation of future supplies*

- (27) The objective of the process in 1996 was for the Municipality to sell Bergen Lysverker, including all of its assets and operations <sup>(35)</sup>. Those assets and operations concerned, in particular, electricity production and distribution. The streetlight infrastructure was considered a minor element that could not practically be separated <sup>(36)</sup>.
- (28) In a written summary from the counsellor (*Rådmannen*) to the Bergen City Council in preparation for the decision on the sale, it was reiterated that a number of publicly owned companies had been invited to bid. The Municipality had also procured a valuation from Enskilda Securities <sup>(37)</sup>.
- (29) This valuation was accounted for in a proposal from a representative in the Bergen City Council. Taking net liabilities into account, it indicated a value between NOK 2,8 and 3,0 billion <sup>(38)</sup>.
- (30) The case before the Bergen City Council further included a memo concerning synergy effects. In this memo, it was stated that a sale would have a twofold purpose. First, the Municipality should contribute to a functional structure for the supply of electricity in the Bergen area. Second, a sale should free up capital for the Municipality based on market pricing <sup>(39)</sup>. A number of additional considerations were also identified <sup>(40)</sup>.
- (31) In Section 6 of the sales agreement between the Municipality and BKK DA, the price to be paid for Bergen Lysverker was set to NOK 2,619 billion. This price was based on a gross price of NOK 3,124 billion before the deduction of debts and pension liabilities <sup>(41)</sup>.
- (32) A mechanism regulating the compensation for the future provision of streetlighting and related services, was included in Section 7(c) of the 1996 sales agreement <sup>(42)</sup>. According to this mechanism, BKK DA would be free to operate the streetlights on market terms, which should entail cost coverage plus a capital cost for the committed capital equal to the rate-of-return fixed by the NVE for the regulated power grid infrastructure <sup>(43)</sup>.
- (33) The value of the streetlight network was not identified separately in the sales agreement. In accordance with its Section 6, however, BKK DA initiated a due diligence process. In the report from the accounting firm used for this purpose, the accounted value of the streetlights was set to NOK 55 million <sup>(44)</sup>.

<sup>(33)</sup> Document No 1126801, p. 3.

<sup>(34)</sup> Document No 1126801, p. 3.

<sup>(35)</sup> Document No 1194249, p. 2.

<sup>(36)</sup> Document No 1194249, p. 4.

<sup>(37)</sup> Document No 1194189, p. 2 (paginated 1372).

<sup>(38)</sup> Document No 1194189, p. 2-3 (paginated 1372 and 1373).

<sup>(39)</sup> Document No 1194189, p. 5 (paginated 1375).

<sup>(40)</sup> Document No 1194189, p. 5 and 7 (paginated 1375 and 1376).

<sup>(41)</sup> Document No 1194179.

<sup>(42)</sup> Document No 1194249.

<sup>(43)</sup> Document No 1194179. The section reads as follows in the original Norwegian wording: '[...] kjøperen står fritt til å avtale på markedsmessige betingelser drift av veilys som skal innebære kostnadsdekning + NVE rente for den kapital som er bundet.'

<sup>(44)</sup> Document Nos 1194249, p. 3-4, and 1194183.

### 3.1.3. *The subsequent contracts between the Municipality and companies in the BKK-group*

- (34) The Norwegian authorities have provided contracts regulating the supply of streetlighting and related services along municipal roads in Bergen since 2012. The duration of the contracts has normally been for 2 years, with a 1-year option for prolongation <sup>(45)</sup>.
- (35) The contract for 2012 to 2014 was entered into with the company BKK Nett AS. It originally comprised 18 228 lamp points. Of these, 16 082 were controlled by the BKK-group, while 2 146 were owned by the Municipality. However, the number of lamp points was foreseen to change during the course of the contract <sup>(46)</sup>.
- (36) The regulation of the compensation is set forth in Section 7 and appendix A of the contract. The price for maintenance and operation was set to NOK [...], excluding VAT, per lamp point per year. The total annual compensation for the maintenance and operation of the 18 228 existing lamp points would therefore amount to NOK [...] <sup>(47)</sup>.
- (37) The compensation for capital cost was stipulated to NOK [...], excluding VAT, per lamp point per year. As this element only covered the lamp points controlled by the BKK-group, it resulted in an annual compensation of NOK [...] in respect of these 16 082 existing lamp points <sup>(48)</sup>.
- (38) The contract for the period 2015 to 2017 was also made with BKK Nett AS. At its inception, it comprised 18 407 lamp points. Of these, 16 058 were controlled by the BKK-group while 2 349 were owned by the Municipality <sup>(49)</sup>.
- (39) Following the same structure as the previous contract, the compensation was set out in Section 7 and appendix A of the contract. The price for maintenance and operation was set to NOK [...], excluding VAT, per lamp point per year. Therefore, based on the number of existing lamp points being 18 407, the annual compensation for maintenance and operation amounted to NOK [...] <sup>(50)</sup>.
- (40) The compensation for capital cost was set to the same unit level, NOK [...] excluding VAT, as in the previous contract (see paragraph (37)). Based on the BKK-group owning 16 058 existing lamp points, the annual compensation for capital cost was consequently calculated to NOK [...] <sup>(51)</sup>.
- (41) For the period from 2018 onwards, the existing contract was prolonged. In accordance with the letter from the Municipality of 19 June 2017, the contract was initially prolonged until 1 July 2018. The Municipality noted in this connection that due to a change in the company structure, the prolonged contract would have to be entered into with BKK EnoTek AS <sup>(52)</sup>.
- (42) The contract was then prolonged until 1 January 2019. In this regard, the Municipality made reference to an ongoing process, whereby it was working towards acquiring the streetlights owned by the BKK-group <sup>(53)</sup>.
- (43) In a letter concerning the prolongation, the BKK-group explained that the streetlight infrastructure had been transferred to its subsidiary Veilys AS. On that basis, the Municipality would receive two confirmations on the prolongation. The first confirmation would be from Veilys AS and relate to the streetlights owned by this company. The second confirmation would be sent from BKK EnoTek AS for its services rendered with respect to those streetlights owned by the Municipality <sup>(54)</sup>.

<sup>(45)</sup> Document No 1194249, p. 6.

<sup>(46)</sup> Document No 1194253, p. 1-5.

<sup>(47)</sup> Document No 1194253.

<sup>(48)</sup> Document No 1194253.

<sup>(49)</sup> Document No 1194205, p. 1-5.

<sup>(50)</sup> A copy of the contract was submitted to ESA on 28 February 2019. It is filed as Document No 1058456.

<sup>(51)</sup> Document No 1058456.

<sup>(52)</sup> Document No 1194203.

<sup>(53)</sup> Document No 1194209.

<sup>(54)</sup> Document No 1194211.

- (44) On 20 December 2018, the contract was prolonged on the same terms until 1 January 2020. This was done in conjunction with the prolongation of an intention agreement relating to the possible acquisition by the Municipality of the streetlight infrastructure owned by Veilys AS <sup>(55)</sup>.
- (45) The Norwegian authorities have lastly submitted an unsigned second prolongation of the intention agreement. According to this document, the contract was prolonged once more on the same terms. Based on the submitted information, it is ESA's understanding that this contract is still effective <sup>(56)</sup>.
- (46) In addition to the contracts pertaining to streetlighting along municipal roads, there exist contracts concerning: (i) streetlighting along private roads <sup>(57)</sup>; and (ii) lighting in parks and along pedestrian roads <sup>(58)</sup>. In accordance with paragraphs 19 and 34 of the opening decision, these contracts fall outside the scope of this decision.

#### 3.1.4. *The tendering out of certain operation and maintenance activities*

- (47) The operation and maintenance of the streetlights and LED fixtures owned by the Municipality has been tendered out. The delivery of services under this contract commenced on 1 April 2020 <sup>(59)</sup>.
- (48) According to the invitation to tender, the contract covers approximately 3 100 streetlights owned by the Municipality. In addition, it comprises 12 000 LED fixtures installed onto infrastructure owned by Veilys AS. This included infrastructure was specified further as 3 133 light fixtures, 2 254 steel posts/arrangements for wires, 841 wooden posts, 12 000 LED fixtures, and an unknown quantity of cables <sup>(60)</sup>.
- (49) It further follows from the invitation to tender that the duration of the contract is 4 years, and its estimated value between NOK 4 and 6 million per year (excluding VAT). The contract was to be awarded on the basis of the open procedure to the tenderer with the lowest price <sup>(61)</sup>.
- (50) Six tenders were submitted in the competition <sup>(62)</sup>. The contract was awarded to BKK EnoTek AS 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 <sup>(63)</sup>.
- (51) The level of services under the tendered-out contract is generally similar to that under the contracts described in Section 3.1.3 above. However, under the latter contracts, the responsibilities of the supplier include replacing defective equipment. This obligation falls on the Municipality under the tendered-out contract <sup>(64)</sup>.

#### 3.1.5. *Developments in the number of streetlights*

- (52) The contracts between the Municipality and companies in the BKK-group, described in Section 3.1.3 above, foresee that the number of streetlights will change over time. Based on the latest available documentation, the Norwegian authorities explained in the letter of 12 April 2021 that the number of streetlights owned by the Municipality had increased to 4 219. The total number of streetlights owned by Veilys AS amounted to 27 748 at this time <sup>(65)</sup>. Further, the Municipality has as mentioned purchased 12 000 LED fixtures that have been installed onto infrastructure owned by Veilys AS <sup>(66)</sup>.

<sup>(55)</sup> Document No 1194213.

<sup>(56)</sup> Document No 1194223.

<sup>(57)</sup> Document No 1194201.

<sup>(58)</sup> This contract is mentioned in the letter filed as Document No 1194203.

<sup>(59)</sup> Document Nos 1126801, p. 4, and 1194249, p. 13.

<sup>(60)</sup> Document No 1194249, p. 13.

<sup>(61)</sup> Document No 1194251 under points 1.6, 2.2, and 8.

<sup>(62)</sup> Document No 1194249, p. 13.

<sup>(63)</sup> Document No 1194231.

<sup>(64)</sup> Document No 1194249, p. 14.

<sup>(65)</sup> At the time of the adoption of this decision, aggregated information on the services provided by the BKK-group was available at: <https://www.eviny.no/vare-tjenester>.

<sup>(66)</sup> Document No 1194249, p. 1.

### 3.1.6. *The activities within the BKK-group*

- (53) The Norwegian authorities have provided an overview of the payments from the Municipality to companies within the BKK-group. In addition to the payments under the concerned measures, the Municipality has also paid for other activities outside their scope. These latter payments relate to energy supply and related services. Several of the services remunerated outside the scope of the concerned measures entail operating in competition with other suppliers <sup>(67)</sup>.
- (54) In addition to those activities remunerated by the Municipality, it is evident from the web-pages of the BKK-group that the companies of that group are active on a number of other markets. The group is presented as the largest renewables group in Western Norway. The services offered include, amongst others, charging facilities for cars, boats and ships, services pertaining to the establishment and upgrade of infrastructures, including in the areas of data centres, telecoms, and marine farming, as well as internet-related services concerning fibre internet, data storage and the so-called internet of Things <sup>(68)</sup>.
- (55) The Norwegian authorities are not in possession of direct evidence that the compensation paid by the Municipality in respect of streetlighting along municipal roads is used to cross-subsidise other economic activities. The transfer of the streetlight infrastructure to Veilys AS was partly made to prevent cross-subsidisation. However, due to a lack of documentation, cross-subsidisation cannot be excluded <sup>(69)</sup>.
- (56) The Norwegian authorities have also pointed out that the streetlight-related activities within the BKK-group are not limited to the Municipality. In particular, Veilys AS is compensated by other public entities in respect of the streetlights it owns along their public roads <sup>(70)</sup>.

### 3.2. GENERAL COMMENTS ON THE OPENING DECISION

- (57) The Norwegian authorities consider that ESA has failed to provide sufficient reasons to open the formal investigation procedure. As a result, the Municipality has been placed in a situation of legal uncertainty <sup>(71)</sup>.
- (58) On the basis that the Municipality is purchasing streetlighting, the Norwegian authorities dispute the distinction between measures (a) and (c). It is however correct that the compensation reflects different elements <sup>(72)</sup>.
- (59) The Norwegian authorities submit that the legal classification must take account of the context in which the activity is performed. The sole purpose of providing streetlighting is to serve the public at large <sup>(73)</sup>, and the provision is organised in accordance with the Norwegian Road Act <sup>(74)</sup>.
- (60) Pursuant to Section 20 of this Act, municipalities are responsible for operating and maintaining municipal roads. While the Act does not require municipalities to provide streetlighting, or to provide streetlighting at a certain level, this activity is consistent with its objective of road safety <sup>(75)</sup>. The Municipality further follows the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*) when planning, building and upgrading roads. This standard contains specifications as to the existence of streetlights <sup>(76)</sup>.

<sup>(67)</sup> Document No 1194249, p. 15.

<sup>(68)</sup> Document No 1194249, p. 15.

<sup>(69)</sup> Document No 1194249, p. 16.

<sup>(70)</sup> Document No 1126801, p. 4.

<sup>(71)</sup> Document No 1126803, p. 2.

<sup>(72)</sup> Document No 1126801, p. 4, 6 and 7.

<sup>(73)</sup> Document No 1126801, p. 4.

<sup>(74)</sup> *Lov om vegar* (Road Act), LOV-1963-06-21-23.

<sup>(75)</sup> Document No 1126801, p. 4.

<sup>(76)</sup> Document Nos 1126801, p. 4, and 1194249, p. 5.



- (61) In view of these factors, the Norwegian authorities maintain that the compensation is granted in respect of non-economic activities. The Norwegian authorities consider that the judgment in *Selex* <sup>(77)</sup> supports their position <sup>(78)</sup>.
- (62) The Norwegian authorities further refer to the Guidelines on the notion of State aid <sup>(79)</sup>. They submit that paragraph 17, on public powers and public authorities, supports that the provision of streetlighting is non-economic in nature <sup>(80)</sup>. In any event, activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes <sup>(81)</sup>.
- (63) Should ESA consider that there exists a market for streetlighting, this market is characterised by two failures. First, the streetlight infrastructure amounts to a natural monopoly which must be located alongside the concerned roads. Second, streetlighting is a public good associated with free-rider problems <sup>(82)</sup>.
- (64) The ownership of the infrastructure confers market power upon the BKK-group *vis-à-vis* the Municipality. It is practically not feasible for the Municipality to refrain from providing its roads with streetlighting. The Municipality is also unable to instruct the infrastructure owner as to how, and on what terms, services related to the infrastructure are procured <sup>(83)</sup>.
- (65) While there are normally available alternative methods to tendering to establish market prices, ESA has, according to the Norwegian authorities, failed to take account of the specific circumstances of the case. An entity purchasing from a monopolist does not have a legal right to obtain services at the conditions it deems reasonable. This harmful effect of monopoly power can only be remedied through the enforcement of competition law, or through price regulation <sup>(84)</sup>.

### 3.3. SPECIFIC COMMENTS ON MEASURE (A) – OPERATION AND MAINTENANCE

- (66) Index regulations may have taken place to establish the compensation levels over the concerned period. The Norwegian authorities are however unable to provide a definitive answer <sup>(85)</sup>.
- (67) As regards the prospects for comparing the compensation level with that in other areas, the Norwegian authorities underline that an external provider of maintenance and operation services will not bear the capital cost associated with an infrastructure that it does not own. Accordingly, the compensation for capital cost (measure (c)) must be excluded when comparing the compensation level with that paid by public entities in respect of infrastructure they own themselves. In 2020, the Municipality paid NOK [...] per street light for operation and maintenance <sup>(86)</sup>.
- (68) As for the complainant's assertion that operation and maintenance services have been delivered for NOK [...] per lamp point per year, the Norwegian authorities consider this undocumented. The complainant has also used another geographical region as a reference <sup>(87)</sup>.

<sup>(77)</sup> The Norwegian authorities refer generally to the judgment in '*Selex*'. Based on previous correspondence, and the opening decision, ESA take it that the Norwegian authorities are referring to the judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07P, EU:C:2009:191, as well as to the judgment of the General Court of 12 December 2006, *Selex Sistemi Integrati v Commission*, T-155/04, EU:T:2006:387.

<sup>(78)</sup> Document Nos 1126803, p. 1, and 1126801, p. 4-9.

<sup>(79)</sup> EFTA Surveillance Authority Decision No 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413] (OJ L 342, 21.12.2017, p. 35) and EEA Supplement No 82, 21.12.2017, p. 1.

<sup>(80)</sup> Document No 1126801, p. 5-6.

<sup>(81)</sup> Document No 1126801, p. 6.

<sup>(82)</sup> Document No 1126801, p. 6.

<sup>(83)</sup> Document No 1126801, p. 6.

<sup>(84)</sup> Document No 1126803, p. 2.

<sup>(85)</sup> Document No 1194249, p. 7.

<sup>(86)</sup> Document No 1126801, p. 7.

<sup>(87)</sup> Document No 1126801, p. 7.

- (69) The Norwegian authorities have, however, presented figures from the KOSTRA-database on the costs incurred for streetlighting by large Norwegian municipalities <sup>(88)</sup>. These figures show the total yearly costs per light point, including electricity cost, over the period 2016 to 2019. As is evident from the below table, the costs incurred by the Municipality were the highest recorded <sup>(89)</sup>.

Table 1 – Costs for streetlighting incurred by large Norwegian municipalities (NOK)

Category	SFS Kostnader til gatebelysning per lyspunkt kommunale veier									
	Bergen	Bærum	Drammen	Fredrikstad	Kristiansand	Oslo	Sandnes	Stavanger	Tromsø	Trondheim
2015										
2016	1200,20	779,70	592,90	883,90	801,30	818,20	758,20	519,00	466,20	1056,90
2017	1216,70	673,70	622,00	633,90	912,80	945,50	733,30	519,00	831,10	1115,00
2018	1324,00	643,50	714,90	687,50	741,10	1000,00	730,20	733,10	724,90	1187,40
2019	1219,70	773,50	861,00	667,90	747,10	1000,00	750,00	666,70	607,10	779,10

- (70) The compensation may have included an element of overcompensation, and the Municipality has over time questioned what it considers as high prices. Further, the Norwegian authorities consider that account separation should have been established between the provision of streetlighting and other activities <sup>(90)</sup>.

#### 3.4. SPECIFIC COMMENTS ON MEASURE (B) – FINANCING OF 12 000 LED FIXTURES

- (71) The Bergen City Council decided in 2017 to procure 12 000 LED fixtures for installation onto the streetlight infrastructure along municipal roads. Due to its scale and nature, this upgrade fell outside the contracts with the BKK-group <sup>(91)</sup>.
- (72) The objectives of the investment were (i) environmental; and (ii) to reduce electricity cost <sup>(92)</sup>. Reduced electricity cost will benefit the Municipality directly as electricity is not included in the contracts with the BKK-group <sup>(93)</sup>.
- (73) The contract was awarded on the basis of an open tender procedure at the price of NOK 60 million. Installation took place until late 2019 <sup>(94)</sup>. The Municipality will retain the ownership of the LED fixtures <sup>(95)</sup>.
- (74) The cost per fixture was NOK 1 899 in 2018 and NOK 2 039 in 2019. Planning and installation cost amounted to NOK [...] per light point. On the basis that the savings in electricity cost are estimated to NOK [...] per light point per year, the Municipality therefore expects to recoup its investment cost in 7 to 10 years <sup>(96)</sup>.
- (75) As explained in Section 3.1.4, the maintenance of the LED fixtures has been tendered out together with that of the remaining infrastructure owned by the Municipality. Under this contract, the Municipality is experiencing cost savings reflecting the increased lifetime of LED fixtures <sup>(97)</sup>. The Municipality is also expecting to negotiate adjustments in the contract covering the infrastructure owned by Veilys AS <sup>(98)</sup>.

<sup>(88)</sup> According to the Norwegian authorities, the term KOSTRA is an abbreviation for KOfmune-Stat-RApportering. The main purpose of the aggregation of data in KOSTRA is to benchmark the cost-level of various public services. The statistics are managed by Statistics Norway (SSB). See Document No 1194249, p. 10.

<sup>(89)</sup> Document Nos 1126801, p. 7, and 1194249, p. 10. The table is set forth at page 10 of Document No 1194249.

<sup>(90)</sup> Document Nos 1126801, p. 7, and 1194249, p. 16.

<sup>(91)</sup> Document Nos 1126801, p. 7-8, and 1194249, p. 16.

<sup>(92)</sup> *Ibid.*

<sup>(93)</sup> Document No 1194249, p. 11.

<sup>(94)</sup> Document Nos 1126801, p. 8, and 1194249, p. 12.

<sup>(95)</sup> Document No 1126801, p. 8.

<sup>(96)</sup> Document No 1194249, p. 12.

<sup>(97)</sup> Document No 1194249, p. 11-12.

<sup>(98)</sup> Document No 1194249, p. 11.

## 3.5. SPECIFIC COMMENTS ON MEASURE (C) – CAPITAL COST

- (76) The Norwegian authorities consider it normal practise that an external owner of an infrastructure that is used to produce a public good, is entitled to compensation for capital cost. By comparison, where the public entity that is financing the provision of streetlighting owns the infrastructure itself, the capital cost associated with this infrastructure are borne by the public entity as infrastructure owner <sup>(99)</sup>.
- (77) The compensation for capital cost has been established on the basis of the terms in Section 7(c) of the 1996 sales agreement. This mechanism stipulates, as set forth in Section 3.1.2, that the BKK-group is entitled to capital cost for the committed capital equal to the rate-of-return fixed by the NVE for the regulated power grid infrastructure <sup>(100)</sup>.
- (78) This principle has been specified somewhat further <sup>(101)</sup>. In Section 6 of the contract from 1998, it was stipulated that the compensation should cover depreciation and interests relating to the capital invested in the streetlight infrastructure at the time when this contract was entered into. Depreciation and interests relating to future investments ordered by the Municipality, should also be covered. This approach has been maintained in subsequent contracts <sup>(102)</sup>.
- (79) The Municipality and the BKK-group have, however, disagreed on how the capital cost should be calculated. The contested elements concerned, in particular, what cost base should be applied in the calculations, and how depreciation should be taken into account.
- (80) In this respect, the Norwegian authorities refer to a report submitted by BKK Nett AS in 2002. According to the Norwegian authorities, this report reflected a depreciation profile in line with the 1996 sales agreement <sup>(103)</sup>.
- (81) In 2003, however, the Municipality questioned how BKK Nett AS had established the capital base, including in particular the depreciation charges. By letter of 18 February 2004, BKK Nett AS provided an explanation where it stated, inter alia, that the capital cost had been established on the basis of normal criteria <sup>(104)</sup>.
- (82) BKK Nett AS described the basis for its calculations further in a letter of 30 March 2004. According to BKK Nett AS, the value of the infrastructure assets should be set to NOK 81,6 million based on a technical valuation of the replacement value <sup>(105)</sup>.
- (83) The Municipality did not agree with this approach and considered that the asset value should be based on the book value. The Municipality demanded that the compensation be adjusted accordingly <sup>(106)</sup>.
- (84) By letter of 4 August 2004, BKK Nett AS rejected this claim. In doing so, BKK Nett AS emphasised that the mechanism established in the 1996 sales agreement entails that the NVE rate-of-return should be applied on the committed capital. BKK Nett AS further upheld their view that it is appropriate to establish the level of the committed capital on the basis of a technical valuation of the assets' replacement value <sup>(107)</sup>. This method resulted in an almost doubling of the capital base compared with what would follow from the book value. To this day, the compensation level has remained much higher than if it had been calculated on the basis of the book value <sup>(108)</sup>.

<sup>(99)</sup> Document Nos 1126801, p. 8, and 1194249, p. 7.

<sup>(100)</sup> Document No 1194179. As set forth in footnote 43, the item reads as follows in the original Norwegian wording: '[...] kjøperen står fritt til å avtale på markedsmessige betingelser drift av veilys som skal innebære kostnadsdekning + NVE rente for den kapital som er bundet.'

<sup>(101)</sup> Document No 1194249, p. 7-8.

<sup>(102)</sup> Document Nos 1194249, p. 8, and 1194229, p. 4.

<sup>(103)</sup> Document Nos 1194249, p. 8, and 1194221.

<sup>(104)</sup> Document Nos 1194249, p. 8-9, and 1194225.

<sup>(105)</sup> Document No 1194249, p. 9.

<sup>(106)</sup> Document Nos 1194249, p. 8, and 1194233.

<sup>(107)</sup> Document No 1194227.

<sup>(108)</sup> Document No 1194249, p. 9-10.

- (85) Similarly to what is the case for the compensation for operation and maintenance (measure (a)), the Norwegian authorities have not provided a definitive answer as to how the compensation level has been established. The lack of separate accounts makes control difficult <sup>(109)</sup>. In a due diligence report concerning Veilys AS <sup>(110)</sup>, the auditors mentioned that they had obtained limited insight into the costs associated with the contract with the Municipality <sup>(111)</sup>.
- (86) The Norwegian authorities thus consider that the concerned companies in the BKK-group may have been overcompensated. The figures from KOSTRA, as presented in paragraph (69) above, are indicative of such overcompensation <sup>(112)</sup>.

#### 4. COMMENTS FROM INTERESTED PARTIES

##### 4.1. COMMENTS FROM BKK VEILYS

###### 4.1.1. *Background information*

- (87) The agreement from 1996 entailed that BKK DA purchased the assets and operations of Bergen Lysverker. In doing so, it undertook to ensure the continued supply of streetlighting and assumed responsibility for the operation and maintenance of the infrastructure <sup>(113)</sup>.
- (88) In the same way as the Norwegian authorities, BKK Veilys consider that Section 7(c) of the sales agreement regulates the future economic compensation for the provision of streetlighting. Section 7(c) reflects, first, that the BKK-group is entitled to compensation for the operation and maintenance of the infrastructure and, second, that it is entitled to compensation for the committed capital. This provision has served as basis for the subsequent contracts <sup>(114)</sup>.
- (89) All contracts and operations regarding the streetlight infrastructure controlled by the BKK-group is organized under the wholly-owned subsidiary Veilys AS. These activities encompass approximately 50 000 streetlights, including the concerned streetlights along municipal roads in the Municipality <sup>(115)</sup>.

###### 4.1.2. *General comments on the opening decision*

- (90) The compensation concerns a public infrastructure that is not used for offering goods or services on a market. The measures consequently fall outside the scope of Article 61(1) of the EEA Agreement <sup>(116)</sup>.
- (91) In that regard, the opening decision does not adequately reflect that the infrastructure is owned by Veilys AS. As Veilys AS is the only possible supplier and the Municipality the only possible buyer, the compensation does not accrue to an undertaking <sup>(117)</sup>.
- (92) In any event, no overcompensation has taken place. To the extent that the provision of streetlighting is a SGEL, the *Altmark* criteria are fulfilled <sup>(118)</sup>.

###### 4.1.3. *Specific comments on measure (a) – operation and maintenance*

- (93) According to BKK Veilys, the compensation reflects the underlying costs and the remuneration level in comparable contracts. There has been no overcompensation <sup>(119)</sup>.

<sup>(109)</sup> Document Nos 1126801, p. 8, and 1194249, p. 10.

<sup>(110)</sup> Document No 1194235.

<sup>(111)</sup> Document No 1194249, p. 10.

<sup>(112)</sup> Document No 1194249, p. 10.

<sup>(113)</sup> Document No 1073541, p. 2.

<sup>(114)</sup> Document No 1073541, p. 2.

<sup>(115)</sup> Document No 1073541, p. 2.

<sup>(116)</sup> Document No 1073541, p. 1-2.

<sup>(117)</sup> Document No 1073541, p. 2.

<sup>(118)</sup> Document No 1073541, p. 1.

<sup>(119)</sup> Document No 1073541, p. 3.

- (94) With respect to benchmarking, BKK Veilys considers the price level indicated in the complaint unsupported. It is furthermore necessary to have regard to the particularities of the case. The concerned contracts have the format fixed price per light point and include a full range service scope. This entails that BKK Veilys has the risk for adverse events, such as extreme weather conditions, and the responsibility for all operation and maintenance. It is also more expensive to operate in city areas with heavy traffic and other disturbances <sup>(120)</sup>.

#### 4.1.4. *Specific comments on measure (b) – financing of 12 000 LED fixtures*

- (95) BKK Veilys refutes that the financing of the 12 000 LED fixtures amounts to State aid.
- (96) As far as BKK Veilys is aware, the Municipality purchased the fixtures at a cost of NOK 2 000 per light point. The costs of planning, installation and documentation were NOK [...] per light point.
- (97) Based on these figures, the costs of the upgrade amounted to NOK [...] per light point. This equates to approximately [...] times the yearly capital cost compensated by the Municipality. Accordingly, the upgrade consisting in the 12 000 LED fixtures was far more costly than what could be undertaken on the basis of this compensation <sup>(121)</sup>.
- (98) The LED fixtures will further ensure significant savings in energy cost for the Municipality. According to the information available to BKK Veilys, the cost savings have been estimated to NOK 450 per light point per year. This implies that the Municipality will recoup its investment in less than 7 years <sup>(122)</sup>.

#### 4.1.5. *Specific comments on measure (c) – compensation for capital cost*

- (99) According to BKK Veilys, the compensation relates to non-economic activities. The element concerning capital cost should be perceived as an access fee to the infrastructure <sup>(123)</sup>.
- (100) In any event, the compensation for capital cost does not confer an economic advantage upon BKK Veilys. The cost of establishing a lamp point is approximately NOK 20 000, with the addition of another NOK 10 000-50 000 for groundwork. The minimum cost for establishing the 16 058 streetlights owned by BKK Veilys is therefore NOK 500 000 000 <sup>(124)</sup>.
- (101) It follows from this that the capital cost is not disproportionately compensated. The streetlight infrastructure is managed so as to maintain its technical standard <sup>(125)</sup>.

## II. ASSESSMENT

### 5. PRESENCE OF STATE AID

#### 5.1. BACKGROUND

- (102) Article 61(1) of the EEA Agreement reads as follows:

‘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.’

<sup>(120)</sup> Document No 1073541, p. 3.

<sup>(121)</sup> Document No 1073541, p. 3.

<sup>(122)</sup> Document No 1073541, p. 3.

<sup>(123)</sup> Document No 1073541, p. 2-3.

<sup>(124)</sup> Document No 1073541, p. 3.

<sup>(125)</sup> Document No 1073541, p. 3.

- (103) The qualification of a measure as State aid therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade. As touched upon above, ESA has issued Guidelines on the notion of State aid <sup>(126)</sup>.
- (104) Based on the comments received, ESA considers it appropriate to assess first whether the compensation under measures (a) and (c) has accrued to an undertaking. If that question is answered in the affirmative, and to the extent that the financing of the LED-fixtures (measure (b)) has conferred an advantage on the same entities, this advantage would then also have accrued to an undertaking.

## 5.2. THE NOTION OF UNDERTAKING

### 5.2.1. *The legal test*

- (105) The notion of undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed <sup>(127)</sup>. Any activity consisting in offering goods or services on a market is economic <sup>(128)</sup>.
- (106) Contrary to what is asserted by the complainant, it is not decisive whether an activity might in principle be pursued by a private operator. Rather, it is necessary to ascertain the specific circumstances under which the activity is performed <sup>(129)</sup>. In that regard, it must be verified whether, by its nature, aim and the rules to which it is subject, the concerned activity is connected with the exercise of public powers, or has an economic character justifying the application of the EEA competition rules <sup>(130)</sup>.
- (107) Whether there exists a market for a given activity may vary between EEA States depending on national conditions <sup>(131)</sup>. The classification of a given activity can also change over time as a result of political decisions or economic developments.
- (108) With respect to entities performing several activities, the legal classification must be carried out separately for each activity. The fact that an entity is vested with public powers, does therefore not prevent it from being classified as an undertaking as regards other activities <sup>(132)</sup>. However, if an economic activity cannot be separated from the exercise of public powers, the activities as a whole are classified as non-economic <sup>(133)</sup>.

<sup>(126)</sup> Decision No 3/17/COL of 18 January 2017, cited in footnote 79.

<sup>(127)</sup> Judgment of the EFTA Court of 17 November 2020 in Case E-9/19 *Abelia and WTW AS v EFTA Surveillance Authority*, paragraph 87; Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 78; Judgment of the EFTA Court of 22 March 2002 in Case E-8/00 *Landsorganisasjonen i Norge v Kommunenes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 62.

<sup>(128)</sup> Judgment of the EFTA Court of 10 May 2011 in Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein and others v EFTA Surveillance Authority* [2011] EFTA Ct. Rep p. 16, paragraph 54; Judgment of the Court of Justice of 16 June 1987, *Commission v Italy*, 118/85, EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission v Italy*, C-35/96, EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

<sup>(129)</sup> *Abelia and WTW AS v EFTA Surveillance Authority*, cited in footnote 127, paragraph 88; *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, cited in footnote 127, paragraph 80.

<sup>(130)</sup> *Abelia and WTW AS v EFTA Surveillance Authority*, cited in footnote 127, paragraph 89; Judgment of the Court of Justice of 7 November 2019, *Aanbestedingskalender and Others v Commission*, C-687/17 P, EU:C:2019:932, paragraphs 15-16.

<sup>(131)</sup> Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre v AGF and Cancava*, Joined Cases C-159/91 and C-160/91, EU:C:1993:63, paragraphs 16 to 20.

<sup>(132)</sup> Judgment of the Court of Justice of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraph 25.

<sup>(133)</sup> *Abelia and WTW AS v EFTA Surveillance Authority*, cited in footnote 127, paragraph 90; *Aanbestedingskalender and Others v Commission*, cited in footnote 130, paragraphs 17-19; Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH v Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 38.

- (109) It follows from the case-law of the EFTA Court that the notion of 'services' within the meaning of the fundamental freedoms is relevant for determining whether activities are economic in a State aid context. As follows from the first paragraph of Article 37 of the EEA Agreement, only services normally provided for remuneration are considered 'services' within the meaning of the Agreement <sup>(134)</sup>.
- (110) The essential characteristic of 'remuneration' is that it constitutes consideration for the service in question <sup>(135)</sup>. Moreover, the remuneration is normally agreed upon between the provider and the recipient of the service <sup>(136)</sup>.
- (111) The notion of 'services' should also be understood in light of the second paragraph of Article 37 of the EEA Agreement <sup>(137)</sup>. According to this provision, 'services' include, in particular, activities of an industrial or commercial character and those of craftsmen and the professions.
- (112) It follows from settled case-law that the nature of an activity must be ascertained in the light of the sector in which it takes place, and the way in which this sector is organized.
- (113) Within the educational field, as an example, the financing of education provided under a national system is not regarded as consideration for a service where two conditions are fulfilled. First, the State is not seeking to engage in gainful activity when establishing and maintaining the education system, but rather to fulfil its duties towards the population. Second, the education system is generally funded from the public purse and not through user payments <sup>(138)</sup>.
- (114) On the basis of a similar line of reasoning, the element of remuneration has been considered absent in respect of municipal kindergartens in Norway. Accordingly, municipal kindergartens were not considered undertakings in the context of State aid <sup>(139)</sup>.
- (115) As regards the health sector, the EFTA Court has held that the nature of the provision of support services in the areas of procurement, information and communication technologies, and archiving, must be determined according to the subsequent use of the services. Where the support services are not provided on the market, but within a national health system established on the basis of solidarity, their provision is non-economic in nature <sup>(140)</sup>.

#### 5.2.2. *Application of the legal test to the case at hand*

- (116) As set out in paragraphs (53) and (54) above, companies within the BKK-group perform economic activities on a number of markets.
- (117) According to the Court of Justice, it is possible that an establishment may carry out both economic and non-economic activities. This is however conditional upon it keeping separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities <sup>(141)</sup>. Thus, any risk of cross-subsidisation must be excluded in order for public funding to be regarded as accruing to non-economic activities.

<sup>(134)</sup> *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, cited in footnote 127, paragraphs 80-81.

<sup>(135)</sup> Judgment of the EFTA Court of 10 December 2020 in Case E-13/19, *Hraðbraut ehf. v mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf.*, paragraph 91; *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, cited in footnote 127, paragraph 81; Judgment of the Court of Justice of 27 September 1988, *Belgian State v Humbel and Edel*, 263/86, EU:C:1988:451, paragraph 17.

<sup>(136)</sup> *Belgian State v Humbel and Edel*, cited in footnote 135, paragraph 17.

<sup>(137)</sup> *Belgian State v Humbel and Edel*, cited in footnote 135, paragraph 16.

<sup>(138)</sup> *Hraðbraut ehf.*, cited in footnote 135, paragraph 92.

<sup>(139)</sup> *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, cited in footnote 127, paragraphs 82-84.

<sup>(140)</sup> *Abelia and WTW AS v EFTA Surveillance Authority*, cited in footnote 127, paragraphs 95-97.

<sup>(141)</sup> Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496, paragraph 51.

- (118) In the case at hand, ESA has 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, have been in place. To the contrary, the Norwegian authorities have stated that safeguards should have been put in place, and that cross-subsidisation cannot be excluded <sup>(142)</sup>.
- (119) On this basis, and irrespective of whether the activities compensated are economic in nature, ESA is therefore bound to conclude that the compensation under measures (a) and (c) has accrued to an undertaking.
- (120) In light of the arguments presented, ESA will nevertheless also assess whether the activities compensated under the concerned measures are in themselves economic. ESA will assess first those activities concerning the streetlights that have been owned by companies in the BKK-group.
- (121) As reiterated in paragraphs (59)-(60) above, the Norwegian authorities refer to the responsibilities of municipalities under Section 20 of the Norwegian Road Act to operate and maintain municipal roads. While Section 20 does not oblige municipalities to provide streetlighting, or to provide streetlighting at a certain level, this activity contributes to the objective of road safety. Moreover, the Municipality follows the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*) when planning, building and upgrading roads. This standard contains specifications as to the existence of streetlights <sup>(143)</sup>.
- (122) Against this background, the Norwegian authorities assert, as identified in paragraph (61), that the judgment in *Selex* supports their position that the activities compensated are non-economic <sup>(144)</sup>. Further, as set forth in paragraph (62), the Norwegian authorities invoke paragraph 17 on public powers and public authorities in the Guidelines on the notion of State aid <sup>(145)</sup>. In any event, the Norwegian authorities purport that activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes.
- (123) As already established, it is necessary to ascertain the specific circumstances under which an activity is performed when determining whether the activity is economic in nature <sup>(146)</sup>. In the case at hand, the natural starting point for this assessment is the regulatory framework in place as regards the provision of streetlighting along municipal roads in Norway, as well as the specific circumstances in Bergen.
- (124) As regards the regulatory framework in place in Norway, the legislation and standards referred to by the Norwegian authorities simply entail that municipalities are responsible for operating municipal road infrastructures, and that requirements on the existence of streetlighting need be fulfilled, in order for roads to meet the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*). As set out above, however, 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 preclude municipalities from contracting with commercial entities (parts) of the operation and maintenance of municipal roads as an economic activity.
- (125) With respect to the specific circumstances in Bergen, ESA notes that the effect of including the streetlight infrastructure, when selling Bergen Lysverker, was that BKK DA became the only available supplier along the concerned municipal roads. BKK DA obtained this position in competition with five other bidders.
- (126) Moreover, as described in paragraph (32), Section 7(c) of the sales agreement included a mechanism governing the future economic compensation. This mechanism allows for a regulated level of return.

<sup>(142)</sup> Document No 1126801, p. 7.

<sup>(143)</sup> Document Nos 1126801, p. 4, and 1194249, p. 5.

<sup>(144)</sup> The judgments of the Court of Justice and the General Court, cited in footnote 77.

<sup>(145)</sup> Guidelines on the notion of State aid, cited in footnote 79.

<sup>(146)</sup> *Abelia and WTW AS v EFTA Surveillance Authority*, cited in footnote 127, paragraph 88; *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, cited in footnote 127, paragraph 80.



- (127) On this basis, ESA takes the view that by means of the sale of the streetlight infrastructure, in combination with the establishment of the compensation mechanism allowing for a regulated level of return, 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, does not in itself entail that the concerned companies in the BKK-group have not delivered services in a market. Also, BKK DA did obtain its exclusive position in competition with five other bidders.
- (128) This point of view is corroborated by the course of action undertaken by the BKK-group and the Municipality in relation to the subsequent contracts entered into at regular intervals. The BKK-group has sought to maximize its profits through its interpretation of the contract terms and underlined that it is operating commercially with a view to create values for its shareholders<sup>(147)</sup>. On the flip side, the Municipality has acted on the basis that it is facing a commercial vendor. The Norwegian authorities have indeed referred to the market power enjoyed by the BKK-group in the capacity of infrastructure owner.
- (129) As is evident from multiple complaints cases before the Norwegian complaints board for public procurement (KOFA), services pertaining to maintenance and operation of streetlights are furthermore offered by different vendors on a commercial basis<sup>(148)</sup>. In line with this, the Municipality did, as described in Section 3.1.4, receive tenders from several suppliers when it launched a competitive procedure for such services.
- (130) Accordingly, ESA observes that it was indeed normal practise in Norway and the Bergen area to provide maintenance and operation services for remuneration. This also indicates that these activities were of an economic nature.
- (131) As regards the compensation paid in respect of the maintenance and operation of those streetlights owned by the Municipality, there is nothing in the contract terms to indicate that these activities should be classified differently. With the exception that there are no capital costs to be compensated, the terms were, until 1 April 2020, the same as for those streetlights controlled by the BKK-group. Since 1 April 2020, the services have been provided under a commercial contract awarded on the basis of a competitive procedure<sup>(149)</sup>.
- (132) In respect of the reference made by the Norwegian authorities to the judgment in *Selex*<sup>(150)</sup>, it should be recalled that that case concerned activities undertaken by the European Organisation for the Safety of Air Navigation ('Eurocontrol'). Eurocontrol was established by various European States under the International Convention on Cooperation for the Safety of Air Navigation<sup>(151)</sup>.
- (133) On appeal, the Court of Justice repeated its finding from a previous case that, when taken as a whole, Eurocontrol's activities were by their nature, aim and the rules to which they were subject, connected with the exercise of public powers relating to the control and supervision of air space. This conclusion also applied with respect to the assistance provided by Eurocontrol to national administrations in connection with, in particular, tenders for the acquisition of equipment and systems in the field of air traffic management<sup>(152)</sup>.
- (134) In view of the assessment set out in paragraphs (123)-(131), ESA therefore maintains that the case at hand is materially different from the judgment in *Selex*. It should also be recalled that in *Selex*, the Court did indeed indicate that the fact that a body is profit-making is an indication that an activity is of an economic nature<sup>(153)</sup>.

<sup>(147)</sup> Document No 1194227, p. 2.

<sup>(148)</sup> Decision of 23 March 2022, *Otera Traftec AS v Lillehammer Municipality*, Case 2021/1439; Decision of 24 March 2021, *Nett-Tjenester AS v Fredrikstad Municipality*, Case 2021/367; Decision of 14 September 2015, *Nettpartner AS v Stavanger Municipality and Others*, Joined Cases 2015/47, 2015/48, 2015/49 and 2015/50; Decision of 2 September 2015, *Traftec AS v Vest-Agder County Municipality*, Case 2015/71. The decisions are available on: <https://www.klagenemndssekretariatet.no/klagenemnda-for-offentlige-anskaffelser-kofa/>.

<sup>(149)</sup> See Sections 3.1.3 and 3.1.4.

<sup>(150)</sup> The judgments of the Court of Justice and the General Court, cited in footnote 77.

<sup>(151)</sup> The judgment of the General Court, cited in footnote 77, paragraph 1.

<sup>(152)</sup> The judgment of the Court of Justice, cited in footnote 77, paragraphs 71-72.

<sup>(153)</sup> The judgment of the Court of Justice, cited in footnote 77, paragraphs 116-117.

- (135) ESA also cannot agree that the activities compensated under measures (a) and (c) concern public powers or public authority within the meaning of paragraph 17 of the Guidelines on the notion of State aid <sup>(154)</sup>. Rather, the situation is that the Municipality has compensated a supplier operating on a commercial and economic basis. As such, the situation is analogous to that where a municipality procures construction works relating to building or maintaining municipal roads from a commercial contractor.
- (136) In the same vein, ESA remains unconvinced by the assertion that activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes. There is no basis in case-law for concluding that activities are non-economic *per se* because they pursue a given objective. To that end, it is, as mentioned, necessary to ascertain the specific circumstances under which the activity is performed. By way of example, maintenance activities relating to public property may clearly be undertaken on an economic basis, even if necessary for the safety of users.

### 5.2.3. Conclusion

- (137) On the basis of the above, ESA concludes that the compensation under measures (a) and (c) has accrued to an undertaking. To the extent that the financing of the LED-fixtures ((measure (b)) has conferred an advantage on the same entities, this would therefore also accrue to an undertaking.

## 5.3. PRESENCE OF STATE RESOURCES

- (138) For a measure to constitute State aid, it must be granted by the State or through State resources. The concept of State resources includes the resources of regional intra-state entities <sup>(155)</sup>.
- (139) The measures are all financed by the budget of the Municipality. They therefore involve the consumption of State resources.

## 5.4. ADVANTAGE

### 5.4.1. Introduction

- (140) 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 <sup>(156)</sup>. Accordingly, not only positive benefits such as subsidies, loans or direct investments are capable of conferring an advantage, but also interventions which, without being subsidies in the strict sense, are of the same character and have the same effects <sup>(157)</sup>. In line with this, a measure cannot be considered to fall outside the scope of the State aid prohibition merely because it takes the form of an agreement comprising reciprocal commitments <sup>(158)</sup>.

<sup>(154)</sup> Guidelines on the notion of State aid, cited in footnote 79.

<sup>(155)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraph 48 and the case-law cited.

<sup>(156)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraph 66; Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.

<sup>(157)</sup> Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, 173/73, EU:C:1974:71, paragraph 13; Judgment of the EFTA Court of 17 August 2012 in Case E-12/11 *Asker Brygge v EFTA Surveillance Authority* [2012] EFTA Ct. Rep p. 536, paragraph 55; Judgment of the Court of Justice of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA*, C-126/01, EU:C:2003:622, paragraph 28.

<sup>(158)</sup> Judgment of the General Court of 28 January 1999, *BAI v Commission*, T-14/96, EU:T:1999:12, paragraph 71.

#### 5.4.2. *An advantage cannot be excluded on the basis of the Altmark-conditions*

##### 5.4.2.1. **The Altmark-conditions**

- (141) There is specific case-law applicable with respect to public service compensation granted to undertakings entrusted with a service of general economic interest ('SGEI'). It follows from the judgment of the Court of Justice in *Altmark* that, in such cases, the presence of an advantage within the meaning of Article 61(1) of the EEA Agreement, can be excluded where the following four cumulative conditions are fulfilled <sup>(159)</sup>:
- i. 'First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.
  - ii. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner [...].
  - iii. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
  - iv. Fourth, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided [...], would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'
- (142) ESA has published a set of guidelines on the application of the State aid rules to compensation granted for SGEIs <sup>(160)</sup>. The *Altmark*-conditions are addressed in Section 3 of those guidelines.

##### 5.4.2.2. **Application of the Altmark-conditions to the case at hand**

- (143) According to the first condition, the recipient undertaking must be required to discharge clearly defined public service obligations.
- (144) According to the Court of Justice, the purpose of this condition is to ensure transparency and legal certainty. It requires the determination of whether, first, the recipient undertaking actually has public service obligations to discharge and, second, whether those obligations are clearly defined in national law. Accordingly, minimum criteria must be met as regards the existence of one or more acts of public authority defining, in a sufficiently precise manner, the nature, duration and scope of the public service obligations imposed on the entrusted undertaking(s) <sup>(161)</sup>.
- (145) In keeping with this, the Court of Justice upheld a judgment from the General Court finding that, in the absence of a clear definition of the service at issue as a SGEI in national law, the first *Altmark* condition was not fulfilled. This finding could not be called into question by the existence of a market failure on the concerned market, and that the service could have been defined as a SGEI. Those circumstances were not relevant for determining whether the concerned undertakings were actually entrusted with public service obligations by a public act, and whether those obligations were clearly defined in that act <sup>(162)</sup>.

<sup>(159)</sup> *Altmark*, cited in footnote 26, paragraphs 87-93.

<sup>(160)</sup> OJ L 161, 13.6.2013, p. 12 (Annex I) and EEA Supplement No 34, 13.6.2013, p. 1 (Annex I).

<sup>(161)</sup> Judgment of the Court of Justice of 20 December 2017, *Comunidad Autónoma del País Vasco and Others v Commission*, C-66/16 P, EU:C:2017:654, paragraphs 72-73.

<sup>(162)</sup> *Ibid*, paragraphs 74-75.

- (146) It furthermore follows from settled case-law that for an undertaking to be regarded as entrusted with a SGEI, it must have been so by an act of public authority <sup>(163)</sup>. Such entrustment acts may encompass contracts, provided that they emanate from public authority and are binding <sup>(164)</sup>. The fact that a service forms the subject matter of a public contract, however, does not suffice for it to assume the status of a SGEI without any specific explanation <sup>(165)</sup>.
- (147) The relevant question is therefore not whether the Municipality could have entrusted companies in the BKK-group with a SGEI encompassing the concerned services, but whether it has actually done so.
- (148) The natural starting point for assessing this, is that neither the Norwegian authorities nor BKK Veilys have submitted that the BKK-group has been entrusted with a SGEI.
- (149) As is evident from Sections 3 and 4 above, the Norwegian authorities have in their comments not referred to the law pertaining to SGEIs at all. BKK Veilys have merely asserted that if the provision of streetlighting is a SGEI, then the *Altmark* conditions are fulfilled. This suggests, in line with the preliminary finding in the opening decision, that the companies in the BKK-group have not had, and do not have, a public service obligation to discharge with respect to the measures <sup>(166)</sup>.
- (150) This point of view is further supported by the contracts provided by the Norwegian authorities.
- (151) As explained in Section 3 above, the 1996 sales agreement was characterised by the Municipality selling, and BKK DA acquiring, an enterprise. While the agreement included stipulations on the future supply of streetlighting and related services, the provided documentation contains no indication that the Municipality, within the meaning of case-law, entrusted public service obligations upon BKK DA.
- (152) The same is true for the subsequent contracts with companies in the BKK-group. As regards those activities concerning the streetlights controlled by the BKK-group, they reflect the Municipality purchasing from a seller controlling a necessary input, as opposed to entrusting public service obligations. As for the maintenance and operation of those streetlights owned by the Municipality, it has been procured as an input in the Municipality's provision of streetlighting through this infrastructure. Both sets of activities have been included in the contracts without any stipulation, explanation or indication that the companies in the BKK-group have been entrusted with a SGEI.

#### 5.4.2.3. Conclusion

- (153) On the basis of the above considerations, ESA upholds its preliminary finding from the opening decision. As far as the three measures are concerned, the companies in the BKK-group have not had, and do not have, a public service obligation to discharge. Consequently, an advantage cannot be excluded on the basis of the *Altmark*-conditions.

#### 5.4.3. The market economy operator principle

##### 5.4.3.1. Background

- (154) Economic transactions carried out by public entities are considered not to confer an advantage on the counterpart, and therefore not to constitute State aid, when they are in line with normal market conditions. This question of market conformity is assessed pursuant to the market economy operator principle ('MEOP').

<sup>(163)</sup> Judgment of the Court of Justice of 23 October 1997, *Commission v French Republic*, C-159/94, EU:C:1997:501, paragraph 65.

<sup>(164)</sup> Judgment of the General Court of 7 November 2012, *Coordination bruxelloise d'institutions sociales et de santé (CBI) v Commission*, T-137/10, EU:T:2012:584, paragraph 109.

<sup>(165)</sup> Judgment of the General Court of 26 November 2015, *Spain v Commission*, T-461/13, EU:T:2015:891, paragraph 71. The judgment was upheld on appeal in the judgment of the Court of Justice of 20 December 2017, *Spain v Commission*, C-81/16 P, EU:C:2017:1003. See in particular paragraph 49 of the judgment of the Court of Justice.

<sup>(166)</sup> Paragraph 33 of the opening decision.

- (155) When assessing a disposition against the MEOP, the decisive element is whether the public entity acted as a market operator would have done in a similar situation <sup>(167)</sup>. Consequently, only the benefits and obligations linked to the role as an economic operator, as opposed to that of public authority, are to be taken into account <sup>(168)</sup>.
- (156) The question of whether a transaction involves State aid must be resolved with regard to the situation existing at the time when the transaction was decided on <sup>(169)</sup>. What constitutes normal remuneration thus follows from the factors which an undertaking, acting under normal market conditions, would have taken into consideration when fixing the remuneration <sup>(170)</sup>.
- (157) ESA is required to undertake a complex economic assessment when applying the MEOP <sup>(171)</sup>. This assessment must be carried out by relying on the objective and verifiable evidence which is available <sup>(172)</sup>.
- (158) In line with what is purported in the complaint, ESA will in the following assess whether the BKK-group has been compensated above market rates for maintenance and operation (measure (a)). Thereafter, ESA will assess whether the financing of the 12 000 LED fixtures (measure (b)) has conferred an advantage on it.
- (159) Lastly, ESA will address the compensation for capital costs (measure (c)). In that assessment, ESA will consider, first, whether it was commensurate with normal market practice to compensate for capital costs. Second, ESA will assess whether the BKK-group has been compensated for such costs above market rates.

#### 5.4.4. *Measure (a) – operation and maintenance*

##### 5.4.4.1. **The compensation paid in respect of the BKK-owned infrastructure**

- (160) During the formal investigation procedure, ESA has received additional information on the Municipality's sale of Bergen Lysverker.
- (161) As set forth in Section 3.1.2, the Municipality sold the municipal unit Bergen Lysverker, including its assets and operations, to BKK DA in 1996. Although BKK DA acquired Bergen Lysverker through a bidding process, the sale was also an internal transfer of a subsidiary. BKK DA was at the time wholly controlled by the Municipality.
- (162) A mechanism governing the compensation for the future provision of streetlighting through the infrastructure that was purchased by BKK DA, was established in Section 7(c) of the 1996 sales agreement. As follows from the information presented in Sections 3.1.2 and 4.1.1, the Norwegian authorities and BKK Veilys agree that they have been, and still are, bound by this provision when fixing the compensation.
- (163) The question of whether a transaction involves State aid must, as already mentioned, be resolved with regard to the situation existing at the time when the transaction was decided on <sup>(173)</sup>. Consequently, if the compensation mechanism in the 1996 sales agreement was established in a manner which, at the time of its inception, limited the future compensation levels to market rates, compensation subsequently calculated in accordance with this mechanism does not amount to an advantage <sup>(174)</sup>.

<sup>(167)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraph 76; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission*, C-305/89, EU:C:1991:142, paragraph 19; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, EU:T:2003:57, paragraph 208.

<sup>(168)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraph 77; Judgment of the Court of Justice of 5 June 2012, *Commission v Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318, paragraphs 79, 80 and 81.

<sup>(169)</sup> *Westdeutsche Landesbank Girozentrale*, cited in footnote 167, paragraphs 245-246.

<sup>(170)</sup> *Syndicat français de l'Express international (SFEI)*, cited in footnote 156, paragraphs 60-61.

<sup>(171)</sup> Judgment of the Court of Justice of 2 September 2010, *Commission v Scott SA*, C-290/07 P, EU:C:2010:480, paragraph 68. See also the judgment of the General Court of 27 April 2022, *Petra Flašker v Commission*, T-392/20, EU:T:2022:245, in paragraph 42.

<sup>(172)</sup> *Électricité de France (EDF)*, cited in footnote 168, paragraph 102.

<sup>(173)</sup> *Westdeutsche Landesbank Girozentrale*, cited in footnote 167, paragraph 245 and 246.

<sup>(174)</sup> See as regards option agreements the judgment in *Asker Brygge*, cited in footnote 157, at paragraph 57 with further references to case-law.

- (164) It therefore needs to be assessed, first, whether the compensation mechanism was devised in a manner limiting the future remuneration to market rates. If that question is answered in the affirmative, it needs to be assessed, second, whether the mechanism has actually been adhered to.
- (165) In a case concerning the market conformity of the remuneration paid for assistance afforded by the French Post Office, *La Poste*, to its subsidiary *SFMI-Chronopost* ('Chronopost'), the Court of Justice underlined that the services provided to Chronopost were inseparably linked to the unique postal network managed by La Poste. As this network was not devised on the basis of commercial considerations, it would not have been established by a private undertaking in lack of state intervention <sup>(175)</sup>.
- (166) The Court of Justice found that, in this situation, the costs borne by La Poste in respect of the provision of the concerned services could constitute the objective and verifiable elements on the basis of which the market conformity of the remuneration would have to be assessed. The presence of an advantage could be excluded if, first, the price charged properly covered the additional variable costs incurred in providing the services, an appropriate contribution to the fixed costs and an adequate return on the capital investment, and, second, there was nothing to suggest that these elements had been wrongly estimated or fixed in an arbitrary fashion <sup>(176)</sup>.
- (167) The case at hand also concerns services inseparably linked to a unique network that was not constructed on the basis of a commercial approach, and which would not have been created by a private undertaking in lack of state intervention. Moreover, BKK DA was indeed wholly owned by the Municipality at the time of the conclusion of the sales agreement.
- (168) On this basis, ESA finds the situation prevailing at the time when the compensation mechanism in the 1996 sales agreement was established, comparable to that assessed by the Court of Justice in *Chronopost*. Accordingly, insofar as this compensation mechanism fulfils the stipulations in *Chronopost*, ESA considers it in line with market terms.
- (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*.
- (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 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.

<sup>(175)</sup> Judgment of the Court of Justice of 3 July 2003, *Chronopost v Ufex and Others*, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraphs 36-37.

<sup>(176)</sup> *Ibid*, paragraphs 38-40.

- (173) With respect to the figures from KOSTRA, as set forth in paragraph (69), these present each municipality's total costs per light point per year, including electricity. The figures show that throughout the period 2015-2019, the Municipality had the highest recorded costs of the 10 larger municipalities that are represented.
- (174) Cost differences between municipalities may result from several factors, as explained in paragraphs (67)-(68) and (94) above. Neither the Norwegian authorities nor BKK Veilys have, however, provided information substantiating that the cost levels in KOSTRA are justified. BKK Veilys has merely asserted that particular factors affect the costs in Bergen, without documenting this further.
- (175) ESA consequently finds that the figures from KOSTRA are an indication that the BKK-group has been overcompensated. However, the figures are not sufficiently detailed to conclude to what extent the overcompensation concerns maintenance and operation (measure (a)) or capital cost (measure (c)).
- (176) In view of the above, the totality of the submitted information indicates that the compensation has most likely exceeded the level commensurate with the mechanism in the 1996 sales agreement. This reflects 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 has not acted as a private purchaser.

#### 5.4.4.2. The compensation in respect of the Municipality-owned infrastructure

- (177) As described in Sections 3.1.3, 3.1.4 and 3.1.5, the Municipality has owned, and continues to own, a number of streetlights along its municipal roads. Further, as set out in Section 3.1.4, the maintenance and operation of this Municipality-owned infrastructure has, with effect from 1 April 2020, been performed under a contract which the Municipality had tendered out.
- (178) As evidenced by its invitation to tender for this contract, 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. ESA will therefore assess separately the compensation paid with respect to these activities.
- (179) The information presented in Section 3.1.4 indicates that the award of the tendered-out contract followed a competitive, transparent, non-discriminatory, and unconditional procedure in line with EEA procurement law. The award decision was based on the lowest price, and there is nothing to indicate that the prevailing market rate was in fact lower than that achieved. On this basis, ESA finds that the compensation paid for maintenance and operation under the tendered-out contract has not conferred an advantage on the BKK-group<sup>(177)</sup>.
- (180) As concerns the compensation for activities performed before 1 April 2020, ESA observes 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 BKK-group. Accordingly, ESA observes that the Municipality has not acted as a private purchaser would have done.
- (181) Regarding the level of compensation, this was as mentioned the same per streetlight as for those streetlights controlled by the BKK-group. As observed in paragraph (176), the totality of the submitted information indicates that the compensation level has exceeded that allowed by the cost-based mechanism in the 1996 sales agreement. This also suggests that the Municipality has paid more than it would have done if procuring the services on the open market.
- (182) There is nothing in the information submitted to indicate the contrary. As set forth in paragraphs (173) to (175), the figures from KOSTRA are indeed an indication that the BKK-group has been overcompensated. However, the figures are not sufficiently detailed to conclude to what extent the overcompensation concerns maintenance and operation (measure (a)) or capital cost (measure (c)).

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<sup>(177)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraphs 89-96.

- (183) ESA has further considered the outcome of the tender for the services performed from 1 April 2020. However, as set out in paragraph (48), the tendered-out contract also encompassed the 12 000 LED fixtures installed on the BKK-owned network. The terms achieved under the tendered-out contract therefore does not amount to a meaningful comparator as regards the prices previously charged with respect to the Municipality-owned streetlights.
- (184) ESA must consequently conclude on the basis of the remaining information available. As set out in paragraphs (180)-(182), the totality of this information indicates that the BKK-group has been overcompensated also with respect to those streetlights owned by the Municipality.

#### 5.4.4.3. Conclusion

- (185) On the basis of the above assessment, ESA concludes that the BKK-group has been overcompensated for maintenance and operation of streetlights along municipal roads in Bergen. As regards those streetlights owned by the BKK-group, this overcompensation is ongoing. With respect to the streetlights owned by the Municipality, the overcompensation is limited to activities performed until 1 April 2020.
- (186) While the information submitted establishes that an advantage has been granted, it does not put ESA in a position to determine its amount. This is reflected in the recovery order set out in Section 10 below.

#### 5.4.5. Measure (b) – the financing of 12 000 LED fixtures

- (187) As follows from the information presented in Sections 3.4 and 4.1.4 above, the LED fixtures were procured by the Municipality from an external supplier. Their ownership has not been, and will not be, transferred to the BKK-group. Accordingly, no advantage has been conferred by means of the Municipality not retaining its ownership to the LED fixtures.
- (188) The Norwegian authorities and BKK Veilys have further clarified that the purchase of the LED fixtures amounted to an extraordinary upgrade that BKK Veilys was not obliged to undertake. On this basis, it can be concluded that no advantage has been conferred by means of the Municipality having relieved BKK Veilys from charges that it should have borne according to the terms of the contract(s).
- (189) As regards the operation and maintenance of the LED fixtures, these tasks were included in the separate service contract that was tendered-out. The compensation under this contract has, for the reasons set out in paragraph (179), not conferred an advantage on the BKK-group.
- (190) Based on the above, ESA finds that the financing of the 12 000 LED fixtures (measure (b)) has in itself not conferred an advantage on companies within the BKK-group. For the reasons set out in paragraphs (191) and (192) below, however, ESA underlines that it is necessary to take account of the installation of the LED fixtures when establishing the level of overcompensation under measures (a) and (c).
- (191) To the extent that this installation has reduced the cost of operation and maintenance, without this leading to reduced compensation in line with the cost-based mechanism in the 1996 sales agreement, this would amount to overcompensation under measure (a). ESA notes in this respect that while the tendered-out contract encompasses the operation and maintenance of the LED-fixtures, it appears that the BKK-group is still compensated, under the contract described in paragraph (45), for the maintenance and operation of the infrastructure onto which these fixtures are installed. Moreover, it appears that the compensation level has remained the same as when the contract also encompassed those fixtures that were replaced with the LED-fixtures <sup>(178)</sup>.

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<sup>(178)</sup> In the letter of 12 April 2021, filed as Document No 1194249, the Norwegian authorities stated on page 11 that '(t)he conditions and terms in the operating and maintenance agreement between the Municipality of Bergen and Veilys AS has not (...) changed due to the installation o(f) the LED fixtures.'



- (192) As regards measure (c), it is necessary to take account of the LED-fixtures being owned by the Municipality when establishing the correct level of compensation under the return-regulation in the 1996 sales agreement. Given that the LED-fixtures are owned by the Municipality, they cannot be included in the capital base that is subject to compensation. Further, any remaining value of the fixtures that were replaced with the LED fixtures, should have been removed from this capital base.

#### 5.4.6. *Measure (c) – the compensation for capital cost*

##### 5.4.6.1. **Introduction**

- (193) As explained in Section 3.1.2, the compensation for capital cost is the second element in the mechanism established in the 1996 sales agreement. As further set out in Section 3.5, the capital cost related to the infrastructure is one of several cost components imbedded in the provision of streetlighting. Thus, if the Municipality had owned the infrastructure itself, it would have borne such capital costs first hand. Conversely, when the streetlighting is produced by recourse to an infrastructure owned by another legal entity, the capital cost vests with this entity. Based on this new information, ESA considers it commensurate with normal practise to compensate the infrastructure owner for capital cost.
- (194) Pursuant to the mechanism in the 1996 sales agreement, the BKK-group is entitled to capital cost for the committed capital equal to the rate of return fixed by the NVE for the regulated power grid infrastructure. In the same way as for the compensation for maintenance and operation of the BKK-owned streetlights, ESA finds that if this element in the compensation mechanism was designed in a manner which, at the time of the conclusion of the sales agreement, limited the future remuneration to market rates, compensation subsequently calculated in accordance with it does not amount to an advantage <sup>(179)</sup>.
- (195) According to the judgment in *Chronopost*, as set out in paragraph (166), the assessment criterion for the cost of capital is whether the return exceeds an adequate return on the capital invested. The questions to be assessed is thus, first, whether the regulation in the 1996 sales agreement allows for an adequate, as opposed to an excessive, return. If that question is answered in the affirmative, it needs to be considered, second, if the compensation levels have adhered to this limitation.
- (196) The regulation of return on capital in the 1996 sales agreement is composed of two elements: (i) an interest rate; and (ii) a capital base on which to apply the rate. The resulting amount represents the opportunity cost of capital and covers both the cost of equity financing and of debt.
- (197) By way of introduction, ESA notes that the concept of opportunity cost of capital is commonly accepted and in line with the criterion of an adequate return on the capital invested. ESA will therefore proceed to assess the two elements of the regulation (the interest rate and the capital base).

##### 5.4.6.2. **The interest rate**

- (198) As touched upon in Section 3.1.1, power networks are natural monopolies and subject to sector-specific regulation in Norway. In accordance with this regime, the NVE fixes its reference rate so as to allow infrastructure owners a reasonable return on investments <sup>(180)</sup>.

<sup>(179)</sup> See paragraph(163) above with references to case-law.

<sup>(180)</sup> NVE fact sheet No 3/2021, last updated on 14 December 2021. At the time of the adoption of this decision, the fact sheet was available on the following link: <https://webfileservice.nve.no/API/PublishedFiles/Download/968a7fea-1dde-4094-836a-6ad8ef9aef7c/202119109/3425690>.

- (199) The NVE estimates the rate on an annual basis using the Weighted Average Cost of Capital ('WACC') methodology. The input parameters to the NVE's WACC estimate comprise several market related factors specific to the power network industry. These include, in particular, the equity-beta, industry credit premiums and optimal capital structure. The reference rate has been between 5-7 % in the past decade <sup>(181)</sup>.
- (200) According to the NVE, power grid operations are characterised by stable and predictable revenues and generally considered low risk. The equity beta parameter in the WACC is therefore estimated using listed companies with regulated income streams, such as various utility network providers <sup>(182)</sup>.
- (201) The concept of opportunity cost of capital is, as noted above, in line with the criterion that the price charged should allow for an adequate return on the capital invested. The WACC concept is furthermore a standard method for estimating such costs.
- (202) The appropriate WACC for the services assessed in the case at hand should, however, reflect the opportunity cost of investing in streetlight infrastructure. The appropriate WACC should therefore reflect the risk involved in this activity.
- (203) Similar to power networks, the concerned streetlight infrastructure amounts to a natural monopoly of substantial longevity. In view of the consistent demand for streetlighting on the part of the Municipality, the risk for income fluctuations is low. Moreover, considering that the Municipality is paying for electricity, the costs can also be expected to be stable.
- (204) These factors indicate that the use of the NVE reference rate represented an appropriate proxy for the required market return for streetlight infrastructure operations. ESA has not received any information indicating the contrary.
- (205) On this basis, ESA finds that the stipulation on the use of the NVE reference rate was commensurate with an adequate level of return, and therefore in line with *Chronopost*. However, as will be evident from the assessment below relating to the capital base, the submitted information does not establish how the compensation has been calculated in practise.

#### 5.4.6.3. The capital base

- (206) The 1996 sales agreement does not specify the methodology to be applied for establishing the committed capital that is the capital base. There is, however, nothing in its wording to indicate that the BKK-group is entitled to an excessive level of return in the form of monopoly rents. To the contrary, cost plus mechanisms, such as that included in the sales agreement, are normally used in regulated sectors to ensure that the compensation level is adequate. On this basis, ESA takes it that the stipulation that the NVE reference rate shall be applied on the committed capital, entails that the capital base shall be established in an appropriate manner ensuring an adequate level of return. Accordingly, this element is also commensurate with *Chronopost*.
- (207) With respect to the question of how the mechanism has been practised, however, the submitted information does not establish how the eligible capital cost have been calculated. The Norwegian authorities have been unable to provide specifics and consider that control on their part has been made difficult by the lack of separate accounts. BKK Veilys has merely made general reference to the capital that could be involved in constructing a similar infrastructure. In the same way as for the compensation for operation and maintenance, this lack of precision is in itself indicative of the 1996 sales agreement not having been adhered to.
- (208) Regard should further be had to the use of the NVE reference rate. As the NVE reference rate is a nominal interest rate already incorporating general inflation, applying it on a capital base established following a replacement cost-approach would entail compensating for general inflation twice <sup>(183)</sup>. Under the NVE regulation, which the compensation mechanism is evidently reflecting, the NVE reference rate is accordingly applied to the book value of the power grid assets put into productive use, i.e. to their historical value less depreciation <sup>(184)</sup>.

<sup>(181)</sup> NVE fact sheet No 8/2021, last updated on 14 December 2021. At the time of the adoption of this decision, the fact sheet was available on the following link: <https://webfileservice.nve.no/API/PublishedFiles/Download/6c8f4e29-3c0e-418c-a1b4-3d366df1bd71/202119109/3425693>.

<sup>(182)</sup> *Ibid.*

<sup>(183)</sup> NVE fact sheet No 8/2021, cited in footnote 181 above.

<sup>(184)</sup> NVE fact sheet No 3/2021, cited in footnote 180 above.

- (209) In this respect, ESA has taken note of the disagreement between the Municipality and the BKK-group. As set out in Section 3.5, it appears that while the Municipality has advocated the use of the book value for establishing the capital base, the BKK-group has argued in favour of using the assets' replacement cost. Further, 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.
- (210) Lastly, the figures from KOSTRA, as presented in paragraph (69), show that throughout the period 2015-2019, the Municipality had the highest recorded costs for streetlighting of the 10 larger municipalities represented. While the figures are not sufficiently detailed to conclude to what extent the recorded costs concern maintenance and operation (measure (a)) or capital cost (measure (c)), this is an indication that the BKK-group has been compensated in excess of an adequate level of return.
- (211) The totality of the submitted information therefore indicates that the compensation has most likely exceeded the adequate level of return allowed by the 1996 sales agreement. In the same way as with respect to the compensation for maintenance and operation (measure (a)), this reflects 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 has not acted as a private purchaser.

#### 5.4.6.4. Conclusion

- (212) On the basis of the above assessment, ESA concludes that the BKK-group has been overcompensated for capital cost in respect of its streetlights along municipal roads in Bergen.
- (213) While the information submitted establishes that an advantage has been granted, it does not put ESA in a position to determine its amount. This is reflected in the recovery order set out in Section 10 below.

### 5.5. SELECTIVITY

- (214) In order to amount to State aid under Article 61(1) of the EEA Agreement, measures must be selective by favouring 'certain undertakings or the production of certain goods'.
- (215) The measures concern companies in the BKK-group. Accordingly, they are selective in nature.

### 5.6. EFFECT ON TRADE AND COMPETITION

#### 5.6.1. *The legal test*

- (216) An advantage granted to an undertaking only constitutes State aid under Article 61(1) of the EEA Agreement if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods', and only insofar as it 'affects trade' between EEA States. In order for these criteria to be fulfilled, it is not necessary to establish that competition is actually being distorted and that the aid has a real effect on trade between EEA States. It suffices to examine whether the aid is liable to distort competition and affect trade <sup>(185)</sup>.
- (217) As regards the condition pertaining to distortion of competition, it is noted in the Guidelines on the notion of State aid that such distortion can be excluded only where certain cumulative conditions are met. These conditions are: (a) that the service is subject to a legal monopoly established in compliance with EEA law; (b) that the legal monopoly not only excludes competition on the market, but also for the market; (c) that the service is not in competition with other services; and (d) that if the service provider is active in another market open to competition, cross-subsidisation can be excluded <sup>(186)</sup>.

<sup>(185)</sup> Judgment of the Court of Justice of 29 July 2019, *Istituto nazionale della previdenza sociale (INPS) v Azienda Napoletana Mobilità SpA*, C-659/17, EU:C:2019:633, paragraph 29 and the case-law cited.

<sup>(186)</sup> Guidelines on the notion of State aid, cited in footnote 79, paragraph 188.

- (218) In recent case-law, the Court of Justice has referred to the equivalent paragraph in the corresponding European Commission Notice on the notion of State aid <sup>(187)</sup>. With respect to condition (b), that Court underlined that it does not suffice that the service is subject to a lawful legal monopoly. The legal monopoly must in addition exclude any possible competition to become the exclusive service provider <sup>(188)</sup>.
- (219) As for the condition concerning an effect on trade, such an effect is present where aid strengthens the position of an undertaking competing in trade between EEA States. However, it is not necessary that the beneficiary is involved in such trade. Where an EEA State grants aid to an undertaking, its internal activity may be maintained or increased so that the opportunities for undertakings established in other EEA States to penetrate the market are reduced. Accordingly, the local or regional character of services is not sufficient to exclude that the aid is liable to affect trade between EEA States <sup>(189)</sup>.

#### 5.6.2. *Application of the legal test to the case at hand*

- (220) Neither the Norwegian authorities nor BKK Veilys have submitted that the compensated activities have taken place within the remit of a lawfully established legal monopoly. Accordingly, a distortion of competition cannot be excluded on the basis of the cumulative conditions in the Guidelines on the notion of State aid, reiterated in paragraph (217) above.
- (221) The compensated activities further include the operation and maintenance of streetlights. When the Municipality held a competition for such services, it received tenders from many different undertakings. There have also been multiple cases before the KOFA concerning contracts of this subject matter that were, or should have been, subject to EEA-wide tenders advertised in the TED-database <sup>(190)</sup>. Accordingly, ESA observes that there are established markets in Norway for services pertaining to the operation and maintenance of streetlights. Moreover, these markets include contracts that may be of an EEA-wide interest.
- (222) As set forth in paragraph (54), companies in the BKK-group are additionally active on a number of other markets. In spite of this, the Norwegian authorities are unable to exclude that the other economic activities have been cross-subsidised.
- (223) In light of the above, ESA is convinced that the advantages conferred upon the BKK-group are liable to distort competition by allowing it to maintain or strengthen its markets presence.
- (224) Considering that local authorities in Norway regularly tender-out contracts for maintenance and operation of streetlights through EEA-wide tenders, it is furthermore realistic that undertakings established in other EEA States would consider increasing their market presence in Norway as regards such activities. The advantages conferred on the BKK-group may, however, allow it to maintain or extend its activities at the expense of these competitors. To the extent that cross-subsidisation has taken place, the same is likely true for economic activities in other markets open to competition.
- (225) On this basis, ESA finds that the overcompensation is also liable to affect trade.

<sup>(187)</sup> The European Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ C 262, 19.7.2016, p. 1).

<sup>(188)</sup> Judgment of the Court of Justice of 19 December 2019, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, C-385/18, EU:C:2019:1121, paragraphs 57-58.

<sup>(189)</sup> *INPS*, cited in footnote 185, paragraphs 30-31 and the case-law cited.

<sup>(190)</sup> Cases 2021/1439, 2021/367, and 2015/71, cited in footnote 148.

### 5.6.3. *Conclusion*

- (226) In view of the above considerations, ESA concludes that the overcompensation is liable to distort competition and affect trade.

## 5.7. CONCLUSION CONCERNING THE PRESENCE OF STATE AID

- (227) As follows from the above considerations, ESA concludes that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)) constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

## 6. INDIVIDUAL AID OR AID SCHEME

- (228) Article 1(d) of Part II of Protocol 3 defines an 'aid scheme' as '[...]any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.' The term 'individual aid' is defined in letter (e) of the same Article as '[...] aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme.'
- (229) As concerns that aid granted in respect of the infrastructure controlled by the BKK-group, it comprises, as set out in Sections 5.4.4.1 and 5.4.6, amounts exceeding the compensation allowed under the mechanism set out in Section 7(c) of the 1996 sales agreement. Neither the Norwegian authorities nor BKK Veilys have identified any pre-existing act allowing for such overcompensation.
- (230) Similarly, as regards the aid concerning the maintenance and operation of the Municipality-owned infrastructure, as identified in Section 5.4.4.2, the Norwegian authorities and BKK Veilys have not purported that this compensation was granted on the basis of an act as defined in Article 1(d) of Part II of Protocol 3. In line with this, the information submitted during the formal investigation procedure contains no indication that the aid was granted on the basis of such an act.
- (231) On this basis, ESA concludes that the aid concerned is individual aid, as defined in Article 1(e) of Part II of Protocol 3.

## 7. PROCEDURAL REQUIREMENTS

- (232) Pursuant to Article 1(3) of Part I of Protocol 3, '[t]he 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'.
- (233) ESA was first informed of the aid already granted by virtue of the complaint. The aid is therefore unlawful within the meaning of Article 1(f) of Part II of Protocol 3.

## 8. COMPATIBILITY

- (234) It follows from Article 61(1) of the EEA Agreement that, unless provided otherwise, State aid measures are incompatible with the functioning of the Agreement. The Norwegian authorities have not put forward any arguments to the effect that the concerned measures amount to compatible aid.
- (235) The derogation under Article 61(2) of the EEA Agreement is inapplicable as the aid is not furthering any of the aims listed in this provision. For the same reason, Article 61(3)(a) and (b) of the EEA Agreement do not apply to the case at hand.

- (236) In respect of its Article 61(3)(c), ESA notes that the aid measures involve overcompensation exceeding the level of compensation necessary to induce the concerned economic activities. It follows from settled case-law that aid which improves the financial situation of the beneficiary, without being necessary for the attainment of the objectives specified in Article 61(3), cannot be considered compatible with the EEA Agreement <sup>(191)</sup>. Therefore, as the overcompensation was not necessary to induce the economic activities in question, it is incompatible with Article 61(3)(c) of the EEA Agreement.
- (237) As for the derogation in Article 59(2) of the EEA Agreement, ESA observes, as established in Section 5.4.2.2, that the companies in the BKK-group have not had, and do not have, a public service obligation to discharge with respect to the concerned services. Since the compensation is not granted in respect of an undertaking entrusted with a SGEL, the derogation in Article 59(2) is not applicable.
- (238) On the basis of these considerations, ESA finds that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)) cannot be declared compatible with the functioning of the EEA Agreement.

## 9. CONCLUSION

- (239) For the reasons set out above, ESA concludes that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)), paid to companies in the BKK-group, in respect of streetlights along municipal roads within the Municipality, amounts to unlawful State aid that is incompatible with the functioning of the EEA Agreement.
- (240) The overcompensation for maintenance and operation (measure (a)), concerns, first, the streetlight infrastructure controlled by the BKK-group <sup>(192)</sup>. In respect of this infrastructure, the overcompensation comprises those elements exceeding the costs eligible for compensation under the mechanism in Section 7(c) of the 1996 sales agreement.
- (241) Second, the overcompensation for maintenance and operation (measure (a)) concerns services in respect of the streetlight infrastructure owned by the Municipality. For these services, the overcompensation equates to those sums exceeding the market price that could have been obtained on the open market.
- (242) The finding of unlawful and incompatible overcompensation for maintenance and operation (measure (a)), is limited to the period from 1 January 2016. In respect of the streetlight infrastructure controlled by the BKK-group, the overcompensation is ongoing. As concerns the streetlight infrastructure owned by the Municipality, it comprises activities performed until 1 April 2020.
- (243) With respect to the compensation for capital cost (measure (c)), the unlawful and incompatible State aid is that compensation exceeding the adequate level of return allowed by the mechanism in Section 7(c) of the 1996 sales agreement. As this finding is not limited to the period from 1 January 2016, it comprises all overcompensation awarded within the limitation period of 10 years <sup>(193)</sup>. The limitation period was interrupted when ESA forwarded the complaint to the Norwegian authorities, and invited them to comment on it, by letter dated 1 June 2017 <sup>(194)</sup>.

<sup>(191)</sup> See in that regard the Judgment of the Court of Justice of 15 April 2008, *Nuova Agricast Srl v Ministero delle Attività Produttive*, C-390/06, EU:C:2008:224, paragraph 68 and the case-law cited.

<sup>(192)</sup> Based on the submitted information, it is ESA's understanding that these streetlights are currently owned by Veilys AS.

<sup>(193)</sup> Article 15 of Part II of Protocol 3. See also the judgment of the Court of Justice of 6 October 2005, *Scott SA v Commission*, C-276/03, EU:C:2005:590.

<sup>(194)</sup> Document No 858239.

## 10. RECOVERY

- (244) The EFTA Court has held that the obligation to abolish incompatible aid is designed to re-establish the previously existing situation <sup>(195)</sup>. That objective is attained once the recipient has repaid the amounts granted by way of unlawful and incompatible aid, thereby forfeiting the advantage it enjoyed over its competitors <sup>(196)</sup>. It further follows from settled case-law that, when ordering the recovery of aid declared incompatible with the functioning of the EEA Agreement, ESA is not required to fix the exact amount of the aid to be recovered <sup>(197)</sup>.
- (245) Part II of Protocol 3 contains detailed rules on recovery. In keeping with case-law, its Article 14(1) establishes an obligation on ESA to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. It also provides that the State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible.
- (246) Pursuant to Article 14(2), the recoverable aid shall include interest calculated from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. As stipulated in Article 14(3), recovery shall further be effected without delay and in accordance with the applicable procedures under national law. Those national procedures must allow the immediate and effective execution of the recovery decision.
- (247) Additional implementing provisions concerning recovery are included in Decision No 195/04/COL of 14 July 2004 <sup>(198)</sup>. ESA has also issued Guidelines on the recovery of unlawful and incompatible aid <sup>(199)</sup>.
- (248) On the basis of the foregoing assessment, and in line with the above stipulations on the recovery of unlawful and incompatible aid, ESA has therefore adopted this decision,

HAS ADOPTED THIS DECISION:

Article 1

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

<sup>(195)</sup> *The Principality of Liechtenstein and Others*, cited in footnote 128, paragraph 142; Judgment of the EFTA Court of 8 October 2012 in Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA v EFTA Surveillance Authority* [2012] EFTA Court Report p. 758, paragraph 286.

<sup>(196)</sup> Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraphs 64-65; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 121 at paragraph 178; Judgment of the Court of Justice of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 98.

<sup>(197)</sup> See the Guidelines on recovery of unlawful and incompatible State aid, cited in footnote 199 below, at paragraph 36 with references to the Judgment of the Court of Justice of 12 October 2000, *Spain v Commission*, C-480/98, EU:C:2000:559, paragraph 25, and the Judgment of the Court of Justice of 2 February 1988, *Kwekerij Gebroeders van der Kooy BV and others v Commission*, Joined Cases C-67/85, C-68/85, and C-70/85, EU:C:1988:38. See also the Judgment of the Court of Justice of 13 February 2014, *Mediaset SpA v Ministero dello Sviluppo economico*, C-69/13, EU:C:2014:71, at paragraph 21 with references to case-law.

<sup>(198)</sup> EFTA Surveillance Authority Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (OJ L 139, 25.5.2006, p. 37), and EEA Supplement No 26/2006, 25.5.2006, p. 1, as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008 amending College Decision No 195/04/COL on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice as regards the standard forms for notification of aid (OJ L 340, 22.12.2010, p. 1), and EEA Supplement No 72/2010, 22.12.2010, p. 1.

<sup>(199)</sup> EFTA Surveillance Authority Decision No 788/08/COL of 17 December 2008 amending, for the sixty-seventh time, the procedural and substantive rules in the field of State aid by introducing a new chapter on recovery of unlawful and incompatible State aid (OJ L 105, 21.4.2011, p. 32), and EEA Supplement No 23/2011, 21.4.2011, p. 1. The Guidelines correspond to the Commission Notice Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

#### *Article 2*

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

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

#### *Article 3*

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

#### *Article 4*

With respect to the compensation for maintenance and operation (measure (a)), the finding of unlawful and incompatible overcompensation is limited to the period from 1 January 2016. As concerns the streetlight infrastructure controlled by the BKK-group, this overcompensation is ongoing. In respect of the streetlight infrastructure owned by the Municipality, the overcompensation comprises activities performed until 1 April 2020.

#### *Article 5*

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

#### *Article 6*

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

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

#### *Article 7*

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

The Norwegian authorities must ensure that the recovery of aid is implemented within 4 months from the date of notification of this Decision.

#### *Article 8*

The Norwegian authorities shall, within 2 months from the date of notification of this Decision, submit the following information to ESA:

1. the total amount (principal and recovery interests) to be recovered;



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

*Article 9*

Should the Norwegian authorities encounter serious difficulties preventing them from respecting either one of the deadlines set out in Articles 7 and 8, they must inform ESA of these difficulties. Provided that the Norwegian authorities have presented an appropriate justification, ESA may prolong the deadlines in accordance with the principle of loyal cooperation.

*Article 10*

This Decision is addressed to the Kingdom of Norway.

*For the EFTA Surveillance Authority,*

Arne RØKSUND  
*President*  
*Responsible College Member*

Stefan BARRIGA  
*College Member*

Árni Páll ÁRNASON  
*College Member*

Melpo-Menie JOSÉPHIDÈS  
*Countersigning as Director,*  
*Legal and Executive Affairs*

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