



EFTA SURVEILLANCE AUTHORITY DECISION No 135/23/COL
of 27 September 2023
concerning alleged aid to the Remiks Group in relation to waste handling in Tromsø (Norway)
[2024/826]

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(2) of Part II,

Having called on interested parties to submit their comments ⁽¹⁾ and having regard to their comments,

Whereas:

I. FACTS

1 Procedure

1.1 The complaint and subsequent information exchange

- (1) On 15 August 2016 ⁽²⁾, Norsk Industri, the Federation of Norwegian Industries ('the complainant'), lodged a complaint with ESA alleging that the municipality of Tromsø, Norway ('the Municipality') had granted alleged unlawful State aid to the waste management company Remiks Næring AS ('Remiks Næring'), by purchasing commercial waste collection services for an amount exceeding the 'market price'.
- (2) By letter of 5 September 2016 ⁽³⁾, ESA forwarded the complaint to the Norwegian authorities and invited them to comment on the allegations. By letter dated 4 October 2016, the Norwegian authorities submitted comments on the complaint ⁽⁴⁾.
- (3) On 26 October 2016 ⁽⁵⁾, ESA informed the complainant of the 'non-priority' status of the case, in accordance with paragraph 49 of ESA's Guidelines on best practices for the conduct of State aid procedures ('ESA's best practice guidelines') ⁽⁶⁾.
- (4) By letter dated 15 December 2016 ⁽⁷⁾, the complainant submitted remarks on the Norwegian authority's comments on the complaint.

⁽¹⁾ Decision No 085/19/COL of 4 December 2019 to open a formal investigation into potential State aid granted to the Remiks Group in relation to waste handling in Tromsø, OJ C 40, 6.2.2020, p. 2 and EEA Supplement No. 8, 6.2.2020, p. 1.

⁽²⁾ Document No 814858 with enclosures filed as Document Nos 814859, 814860, 814861, 818908 818909, 818911 and 818910.

⁽³⁾ Document No 816676.

⁽⁴⁾ Document No 821154 with enclosures filed as Document Nos 82155 and 821156.

⁽⁵⁾ Document No 823576.

⁽⁶⁾ EFTA Surveillance Authority Decision No 534/09/COL of 16 December 2009 amending, for the 78th time, the procedural and substantive rules in the field of State aid by introducing a new chapter on best practices for the conduct of State aid procedures, OJ L 82, 22.3.2012, p. 7, EEA Supplement No. 17, 22.3.2012, p. 1.

⁽⁷⁾ Document Nos 831575 with enclosures filed as Document Nos 831576, 831577, 831578, 831579 and 831580.

- (5) By email of 18 January 2017 ⁽⁸⁾, ESA requested further factual clarifications from the Norwegian authorities. The Norwegian authorities responded to the information request by letter dated 28 February 2017 ⁽⁹⁾ and by email of 20 March 2017 ⁽¹⁰⁾.
- (6) On 24 May 2017, ESA met with the complainant, enabling them to further present their concerns ⁽¹¹⁾. By letter dated 24 May 2017 ⁽¹²⁾, ESA provided the complainant with its preliminary view on the allegations in accordance with paragraph 48(b) of ESA's best practice guidelines. In the letter, ESA took the view that there was no breach of the EEA State aid rules, as the Municipality's purchase of commercial waste collection services appeared to be on market terms. Nevertheless, ESA invited the complainant to submit further information that could change ESA's view.
- (7) By letter of 22 June 2017 ⁽¹³⁾, the complainant submitted comments on ESA's preliminary assessment, which were sent to the Norwegian authorities on 26 June 2017 ⁽¹⁴⁾. The Norwegian authorities provided comments on 22 August 2017 ⁽¹⁵⁾.

1.2 Formal information requests and further communication

- (8) By letter dated 31 August 2017 ⁽¹⁶⁾, ESA sent a formal Request for Information ('RFI') to the Norwegian authorities. By letter dated 15 September 2017 ⁽¹⁷⁾, ESA received further observations from the complainant. By letter dated 31 October 2017 ⁽¹⁸⁾, the Norwegian authorities replied to the RFI.
- (9) By email dated 10 November 2017, the Norwegian authorities supplied additional information ⁽¹⁹⁾. By letter of 13 November 2017 ⁽²⁰⁾, the complainant provided additional information. By email of 28 November 2017, the Norwegian authorities also supplied further documentation to ESA ⁽²¹⁾.
- (10) By letter dated 15 January 2018 ⁽²²⁾, the complainant submitted comments on the Norwegian authorities' reply to the RFI. The complainant sent further comments by letter dated 31 January 2018 ⁽²³⁾, wherein they formulated additional allegations. Remiks Husholdning AS' ('Remiks Husholdning') purchase of waste processing services from Remiks Produksjon AS ('Remiks Produksjon') was allegedly not on market terms, and the complainant questioned whether the initial capitalisation of the Remiks Group had complied with the market economy investor principle (the 'MEIP').
- (11) By letter dated 16 January 2018 ⁽²⁴⁾, ESA submitted a second RFI to the Norwegian authorities. On 13 February 2018, ESA met with the Norwegian authorities to provide clarifications on the information request. By letter dated 6 March 2018 ⁽²⁵⁾, the Norwegian authorities replied to ESA's second RFI. On 22 May 2018 ⁽²⁶⁾, the complainant provided comments on the Norwegian authorities' reply.

⁽⁸⁾ Document No 840687.

⁽⁹⁾ Document Nos 844198 and 844196.

⁽¹⁰⁾ Document No 848555.

⁽¹¹⁾ Document No 874324.

⁽¹²⁾ Document No 854974.

⁽¹³⁾ Document No 862433.

⁽¹⁴⁾ Document No 862909.

⁽¹⁵⁾ Document Nos 870978 and 870980.

⁽¹⁶⁾ Document No 871383.

⁽¹⁷⁾ Document Nos 873958 and 873959.

⁽¹⁸⁾ Documents Nos 880600 and 880582 with enclosures filed as Document Nos 880602, 880596, 880594, 880604, 880598, 880590, 880592, 880588, 880586 and 880584.

⁽¹⁹⁾ Document No 882061

⁽²⁰⁾ Document No 882172 with enclosures Document Nos 882173 and 882174.

⁽²¹⁾ Document No 884931 with enclosures Document Nos 884932 and 884933.

⁽²²⁾ Document No 896066

⁽²³⁾ Document Nos 895953 and 895954 with enclosures filed as Document Nos 895955 and 895956.

⁽²⁴⁾ Document No 882703

⁽²⁵⁾ Document Nos 901151, 901149, 901155, 901145 and 901147 with enclosures filed as Document Nos 901217, 901215, 901211, 901219, 901213, 901203, 901205, 901209, 901207, 901201, 901193, 901199, 901191, 901197, 901195, 901185, 901187, 901183, 901189, 901181, 901177, 901179, 901175, 901173, 901171, 901167, 901169, 901165, 901163, 901161, 901157, 901159 and 901153.

⁽²⁶⁾ Document Nos 914527 and 914528.

1.3 The formal investigation procedure

- (12) By Decision No 085/19/COL of 4 December 2019 ('the Opening Decision'), ESA initiated a formal investigation. At this stage, ESA was of the preliminary view that:
- Remiks Næring could have received an advantage through the Municipality's purchase of commercial waste collection services ('**Measure 1**').
 - Remiks Produksjon could have received an advantage through Remiks Husholdning's purchase of waste treatment services ('**Measure 2**').
 - With regards to the transactions relating to the establishment of the Remiks Group ('**Measure 3**'), ESA did not form a preliminary view but invited the Norwegian authorities to provide information to enable further assessment.
- (13) On 6 February 2020, the Opening Decision was published in the Official Journal of the European Union ⁽²⁷⁾ and its EEA Supplement ⁽²⁸⁾, wherein ESA called on the Norwegian authorities and interested parties to submit comments on the measures that were mentioned in the Opening Decision.

1.4 Information exchange after ESA's Opening Decision

- (14) By letter dated 24 February 2020 ⁽²⁹⁾, the Norwegian authorities responded to the Opening Decision. On 6 March 2020, ESA received comments from interested parties ⁽³⁰⁾. By letter of 13 March 2020 ⁽³¹⁾, ESA forwarded the comments from interested parties to the Norwegian authorities, who responded by letter of 7 April 2020 ⁽³²⁾. The complainant provided additional comments on 13 August 2020 ⁽³³⁾.
- (15) By letter of 31 January 2022 ⁽³⁴⁾, ESA sent a third RFI to the Norwegian authorities. By letter of 25 March 2022 ⁽³⁵⁾, the Norwegian authorities replied to the RFI. The complainant submitted observations on the reply by letter dated 1 July 2022 ⁽³⁶⁾.
- (16) On 7 September 2022, ESA met with the Norwegian authorities. On 10 November 2022, ESA again met with the Norwegian authorities. There have also been informal contacts between the Norwegian authorities and ESA since these meetings.

2 Background

2.1 Regulation on Norwegian municipal waste

2.1.1 The waste management value chain

- (17) The waste management value chain for municipal solid waste initiates with the collection of waste from various 'waste producers', such as private households, public and private enterprises and institutions in a specified area. This collected waste is then transported to a waste transfer station or processing facility, where it undergoes sorting into various 'waste fractions', such as paper, glass, plastic, metals etc., followed by pre-treatment processing (grinding, pressing, packaging), before being consolidated into larger loads and temporarily stored if necessary.

⁽²⁷⁾ OJ C 40, 6.2.2020, p. 2

⁽²⁸⁾ EEA Supplement No 8, 6.2.2020, p. 1.

⁽²⁹⁾ Document Nos 1114868 and 1114906 with enclosures filed as Document Nos 1114908, 1114904, 1114900, 1114892, 1114890, 1114894, 1114896, 1116638, 1114902, 1114886, 1114884 and 1114888.

⁽³⁰⁾ Document Nos 1118790 and 1118791 with enclosures filed as Document Nos 1118792, 1118793, 1118794 and 1118795.

⁽³¹⁾ Document No 1120255.

⁽³²⁾ Document No 1126337 with enclosures filed as Document Nos 1126333, 1126335 and 1126339.

⁽³³⁾ Document No 1147831 and 1147832 with enclosures filed as 1147833 and 1147834.

⁽³⁴⁾ Document No 1266843.

⁽³⁵⁾ Document Nos 1278146 and 1278148 with enclosures filed as Document Nos 1278150, 1278152 and 1278144.

⁽³⁶⁾ Document No 1300165.

- (18) Subsequently, the waste is sent to further downstream ‘waste treatment’ facilities that specialise in material recovery or energy generation. These facilities reprocess the waste, recycling it into secondary raw materials and products, or use it as input in waste-to-energy conversion, composting, biogas generation etc. Non-recoverable waste material is either disposed of to landfills or undergoes incineration. Some waste fractions may yield positive ‘sales’ value in these downstream markets, but the main rule is that there is a cost associated with final treatment and disposal.

2.1.2 The Pollution Control Act

- (19) Waste management in Norway is regulated by the Pollution Control Act (‘PCA’) ⁽³⁷⁾.
- (20) Until 2004, the PCA categorised waste as either ‘consumption waste’ or ‘production waste’. With effect from 1 July 2004, there was a change from defining waste by type to one based on origin, namely ‘household waste’ and ‘commercial waste’.
- (21) The PCA defines ‘household waste’ as waste from private households, including larger objects such as inventory ⁽³⁸⁾. Under the PCA, Norwegian municipalities are obliged to ensure the collection of household waste ⁽³⁹⁾. They are further required to have waste storage sites or waste treatment and disposal facilities for household waste and have a duty to receive such waste ⁽⁴⁰⁾. The costs of handling such waste are to be covered by a fee levied on the municipal inhabitants ⁽⁴¹⁾. This fee shall be calculated based on a ‘full-cost principle’, i.e. covering the total cost of managing household waste without generating profit for the municipalities.
- (22) The PCA defines ‘commercial waste’ as waste from public and private enterprises and institutions ⁽⁴²⁾. The PCA does not require Norwegian municipalities to organise commercial waste management. Any operator can therefore offer such services on the market. However, all commercial waste *producers* must ensure the proper handling of their own commercial waste ⁽⁴³⁾. As a result, Norwegian municipalities are obliged to ensure appropriate handling of their ‘own’ commercial waste, produced by the various municipal entities (kindergartens, hospitals, nursing homes, etc.).

2.2 The Remiks Group

2.2.1 Historical background to the waste organisation in the Municipality ⁽⁴⁴⁾

- (23) Before 2002, the Municipality organised its management of consumption waste within the municipal agency ‘Renovasjonsetaten’, an administrative branch of the Municipality. Collection, transport, sorting, temporary storage, and processing of consumption waste, as well as the arrangement for further waste treatment and disposal, was therefore done ‘in-house’ under the legal monopoly remit.
- (24) Anticipating the forthcoming changes to the classification of waste under the PCA, the Municipality reorganised its waste-handling activities. Starting from 2002, the Municipality’s portfolio of existing ‘customers’ was divided between two entities; those that would fall within the new ‘household waste’ category remained with Renovasjonsetaten, while those that would be included in the ‘commercial waste’ category were transferred to a new municipal enterprise, MiljøXpert Tromsø KF. The processing and treatment activities were further separated from Renovasjonsetaten and transferred to a new municipal enterprise ⁽⁴⁵⁾, Avfallsbehandling Tromsø KF.

⁽³⁷⁾ Lov om vern mot forurensninger og om avfall (forurensningsloven), LOV-1981-03-13-6.

⁽³⁸⁾ See Section 27a, first paragraph of the PCA.

⁽³⁹⁾ See Section 30, first paragraph of the PCA.

⁽⁴⁰⁾ See Section 29, third paragraph of the PCA.

⁽⁴¹⁾ See Section 34, first paragraph of the PCA.

⁽⁴²⁾ See Section 27a, second paragraph of the PCA.

⁽⁴³⁾ See Section 32, first paragraph of the PCA.

⁽⁴⁴⁾ See accounts of the historical background provided in Document No 880582 and Document No 901147.

⁽⁴⁵⁾ A municipal enterprise is an administrative part of the Municipality, not a separate legal entity. The activities of the former Renovasjonsetaten were divided between a municipal agency and two municipal enterprises. Still, all three entities belonged to the Municipality legal subject.

- (25) When the amendments to the PCA eventually entered into force in July 2004, the waste collection activities of MiljøXpert Tromsø KF no longer fell within the legal monopoly remit. MiljøXpert Tromsø KF's existing portfolio of municipal and other public and private customers was thus subject to competition, and it could compete for new customers in the widened 'commercial waste' market. Although in principle free to choose their providers, all the individual municipal entities remained with MiljøXpert Tromsø KF, as did many of its existing public and private customers.
- (26) Separately, in June 2004, the Municipality established Tromsø Miljøpark KF to manage the development of the area today known as Remiks Miljøpark. At the time, the waste management activities within the municipality were spread across several different locations, and there was therefore a need for a geographic consolidation.
- (27) The zoning plan for the area in question had been adopted by the Municipal Council already in 1999 ⁽⁴⁶⁾. Included in this development project was the construction of an administration building and a building for reception and processing of waste. The construction work started in spring 2005 and the facilities were formally opened in September 2006. The administrative building was finalised in August 2008 ⁽⁴⁷⁾.
- (28) A further restructure ensued in 2007, when the activities of MiljøXpert Tromsø KF, Avfallsbehandling Tromsø KF and Renovasjonsetaten were consolidated to form a single municipal enterprise, Remiks Tromsø KF. The new entity thus handled both household waste and market operations relating to commercial waste, as well as waste processing and the arrangement for final waste treatment. At the time, the processing building at the Miljøpark site was fully operational, but as stated above, the administrative building was still under construction. As a result, the Municipality kept Tromsø Miljøpark KF as a separate entity until the construction was finalised.
- (29) A final reorganisation took place during 2009 – 2010, when the Municipality dissolved Tromsø Miljøpark KF and Remiks Tromsø KF and established the limited liability company Remiks Miljøpark AS with the three subsidiaries: Remiks Husholdning AS, Remiks Næring AS and Remiks Produksjon AS, as further described below. Collectively these entities are referred to as 'the Remiks Group'.

2.2.2 The structure and activities of the Remiks Group

- (30) At the time of the Opening Decision, **Remiks Miljøpark AS** ('Remiks Miljøpark') was the parent entity of the Remiks Group, owned 99.99% by the Municipality and 0.01% by the municipality of Karlsøy ⁽⁴⁸⁾. Its purpose was to be a complete provider of waste management services in the region through its subsidiary holdings.
- (31) Remiks Miljøpark's primary function within the group was to provide shared administrative services to its subsidiaries and to manage the facilities at the Remiks Miljøpark, where the entities of the Remiks Group have their main operations ⁽⁴⁹⁾.
- (32) **Remiks Næring** was a wholly owned subsidiary of Remiks Miljøpark. It was a commercial entity active in the local market for commercial waste collection, where it provided its services to both private enterprises and public institutions ⁽⁵⁰⁾.
- (33) From early 2010 until 1 February 2017, Remiks Næring provided waste collection services to the municipal entities and institutions. Combined, the municipal sale represented around 15% of Remiks Næring's total annual turnover in this period.

⁽⁴⁶⁾ Zoning plan number 1446, dated 9 December 1998 and adopted 29 September 1999.

⁽⁴⁷⁾ See Document No 901219.

⁽⁴⁸⁾ The 0.01% ownership by Karlsøy municipality seems to be related to the intention that Tromsø and Karlsøy would cooperate on waste handling. This seems not to have materialised. See the letter from Tromsø municipality, dated 5.3.2018, Document No 901147.

⁽⁴⁹⁾ See letter from Tromsø Municipality, dated 31 October 2017, Document No 880582 and Articles of Association of 17 June 2009, Document No 880592.

⁽⁵⁰⁾ See the Articles of association of 8 December 2009, Document No 880592.

- (34) **Remiks Husholdning** was a wholly owned subsidiary of Remiks Miljøpark. Its main function was to manage household waste for its owner municipalities in accordance with the municipalities' obligations under the PCA ⁽⁵¹⁾. In 2013 ESA considered the municipal household waste services to be non-economic ⁽⁵²⁾. Remiks Husholdning was a 'statutory entity' – compensated based on the full-cost principles described in paragraph (21) above. From 1 February 2017, Remiks Husholdning also assumed the responsibility of handling the Municipality's own commercial waste.
- (35) **Remiks Produksjon** was a wholly owned subsidiary of Remiks Miljøpark. It was a commercial entity active in waste processing and treatment services. Remiks Produksjon directly handled reception, sorting, pre-processing, and intermediate storage of waste at the Miljøpark site but bought final waste treatment services from further 'downstream' providers located both within and outside Norway ⁽⁵³⁾.

3 The measures under investigation

3.1 Measure 1: commercial waste collection services

3.1.1 Background

- (36) As described in section 2.2.1, the Municipality historically organised its waste management activities within municipal enterprises. After the establishment of the Remiks Group, Remiks Næring assumed responsibility for the activities relating to commercial waste collection, including the task of collecting the commercial waste produced by the various municipal entities and institutions ⁽⁵⁴⁾.
- (37) During the relevant time, Remiks Næring offered three main categories of services:
- i) Fixed-price services: various subscription plans differentiated based on bin size (litres), waste fraction and collection frequency, where the customer paid a fixed price for the bin regardless of the actual weight of the waste.
 - ii) Weight-based services: services where the customer paid according to the actual weight of the waste collected – with the final payment thus being dependent on the kilos of the particular waste fraction collected.
 - iii) Self-delivery service: ad-hoc service where the customer deposited waste to a collection station and paid according to the weight of the fraction delivered.
- (38) With the transfer of the activity to Remiks Næring, the arrangement with the Municipality was not renegotiated or subjected to a tender procedure, as Remiks Næring merely continued providing the same services as the previous municipal enterprise to the various municipal units. As a result, the Municipality and Remiks Næring never entered into a formal contract for commercial waste collection. Rather, the Norwegian authorities have described the arrangement as an 'unwritten framework agreement', where each municipal unit (around 150 in total) ⁽⁵⁵⁾ decided on its own needs, made its own requests, and was billed separately ⁽⁵⁶⁾.
- (39) Figure 1 illustrates the development in Remiks Næring's total revenues during 2010 – 2016, and the breakdown by revenue source. Specifically, it shows the share of revenues derived from sales to external private and public customers ('external sale') and the share of revenues linked to the combined sales to the various municipal entities ('the municipal sale' or 'the total remuneration' paid by the Municipality).

⁽⁵¹⁾ Ibid.

⁽⁵²⁾ EFTA Surveillance Authority Decision of 27 February 2013 on the financing of municipal waste collectors, Decision No. 91/13/COL.

⁽⁵³⁾ See the Articles of Association of 8 December 2009, Document No 880592 and letter from Norwegian authorities dated 25 March 2022, Document No 1278148.

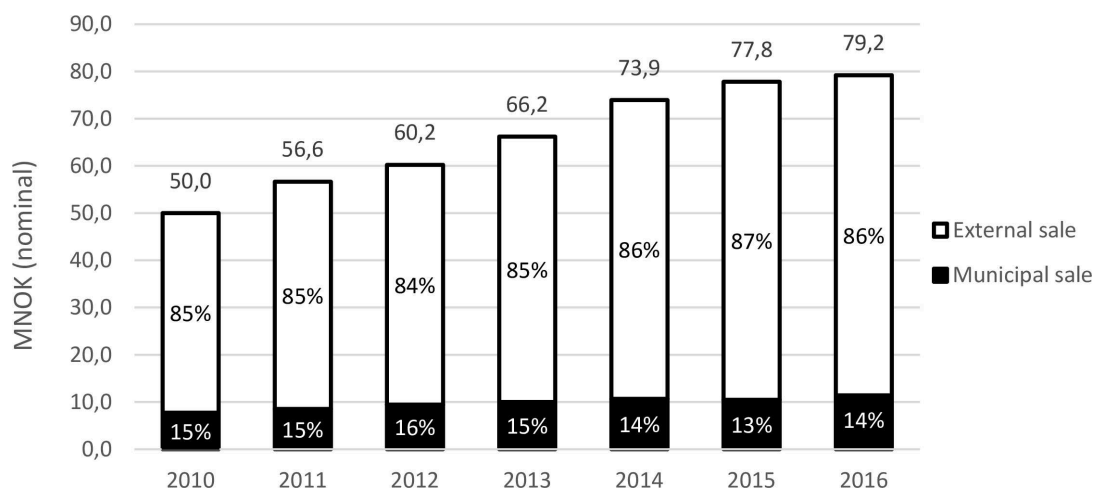
⁽⁵⁴⁾ See letter from Tromsø Municipality dated 31 October 2017, Document No 880582 and letter from Tromsø Municipality dated 5 March 2018, Document No 90114.

⁽⁵⁵⁾ See email dated 10 November 2017, Document No 882061.

⁽⁵⁶⁾ See letter from Tromsø Municipality dated 31 October 2017, Document No 880582 and letter from Tromsø Municipality dated 5 March 2018, Document No 901147.

- (40) According to Figure 1, Remiks Næring experienced a 58% nominal increase in total revenues during the specified period (~MNOK 30). Revenues from the municipal sales rose by around 47% (~MNOK 3.7). On average, the municipal sales accounted for approximately 15% of Remiks Næring's total revenues during these years (fluctuating within the range of 13–16%), declining by around 1% from 2010.

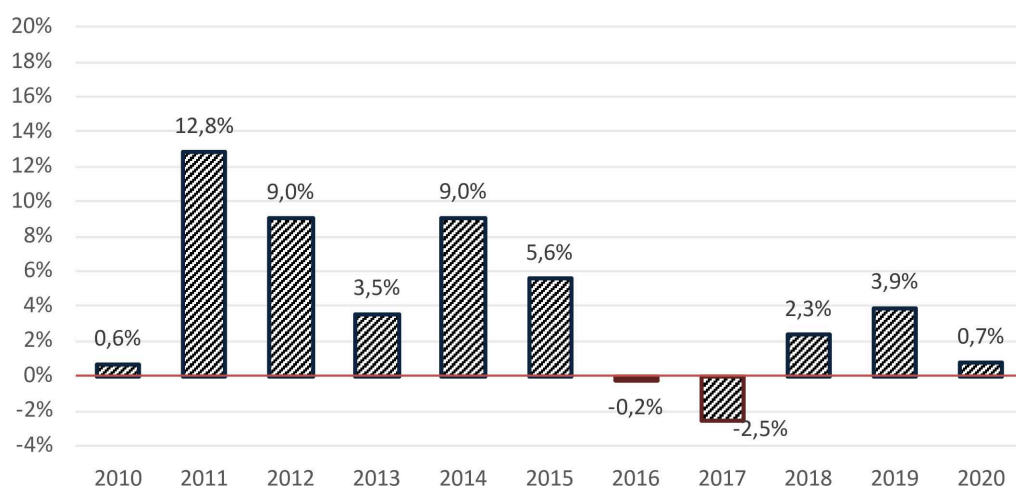
Figure 1: Remiks Næring's total revenues during 2010 – 2016 (MNOK)



Source: Remiks Næring AS annual report

- (41) Figure 2 below displays the development in Remiks Næring's operating margin during 2010 – 2017, when Remiks Næring carried out services for the Municipality, and the development in operating margin from 2018 – 2020, when Remiks Næring no longer carried out services for the Municipality. Remiks Næring had an average operating margin of 4.7% during 2010–2017 and 2.3% during 2018 – 2020.

Figure 2: Remiks Næring's gross operating margin from 2010 – 2020



Source: Remiks Næring AS annual report

3.1.2 Grounds for opening the formal investigation procedure

3.1.2.1 Introduction

- (42) Prior to the Opening Decision, the complainant argued that since the contract with Remiks Næring for the collection of waste from the municipal buildings had not been subjected to a public tender, it likely involved unlawful State aid through 'over price'.

- (43) In the communication with ESA, the complainant advanced four lines of argument in support of its allegation, namely that: (i) a comparison with the amount paid by Bodø municipality indicated overpayment; (ii) the Municipality had not negotiated better prices based on its position as the largest buyer in the region; (iii) there was a notable increase in the remuneration paid to Remiks Næring during 2010 – 2016; and (iv) a comparison with the cost incurred by Remiks Husholdning for carrying out the same service in 2017 indicated significant margins for the municipal sale.

3.1.2.2 Benchmarking with Bodø Municipality

- (44) Before the Opening Decision, the complainant noted that the remuneration paid to Remiks Næring in 2015 was substantially higher than the value of a contract for waste collection services concluded between Retura Iris AS and Bodø Municipality.
- (45) However, the Norwegian authorities argued that market conditions and therefore prices, varied greatly between different areas of Norway and that there was also a difference in the content and quality of the service. Benchmarking with municipalities in other areas was therefore inappropriate ⁽⁵⁷⁾. In the Opening Decision, the arguments put forward by the Norwegian authorities led ESA to the preliminary conclusion that Bodø Municipality was not a suitable benchmark for establishing market terms in Tromsø ⁽⁵⁸⁾.

3.1.2.3 Benchmarking with local private customers

- (46) Prior to the Opening Decision, the Norwegian authorities argued that the municipal sales could be benchmarked against similar sales made to external public and private customers within the same local market to rule out 'over price'. In this regard, the Norwegian authorities stressed that Remiks Næring offered the same services to private and public entities for the same prices. They further informed ESA that around 60% of the municipal sale concerned purchases of 'fixed price' subscriptions, which represented around 30% of Remiks Næring's total sale of such services.
- (47) The Norwegian authorities presented an overview of the highest turnover services, both fixed-price subscriptions and other services, purchased by the municipal entities in 2015. The overview, which represented 70% of the total municipal sale that year, showed that several 'matching' external customers could be found for all but four of the services included ⁽⁵⁹⁾. The Norwegian authorities believed that matches likely existed for the remaining 30% as well, but explained that they had limited the search to only those services with more than 50 000 NOK turnover ⁽⁶⁰⁾.
- (48) The complainant, however, was not convinced by this benchmark, arguing that the Municipality, due to its size and position as a large buyer, could have negotiated better prices. Consequently, a comparison with smaller enterprises in the region did not rule out 'over price'. Such comparisons should instead be made by reference to entities with a similar negotiating position as the Municipality. Accordingly, although the contract between the individual municipal entities and Remiks Næring was based on similar terms to what was offered to smaller enterprises, the complainant held that the Municipality should have obtained far better terms ⁽⁶¹⁾.
- (49) Seeking to demonstrate the effects of negotiations, the complainant provided an example of a private customer seemingly getting a better offer from Remiks Næring after being approached by a competitor ⁽⁶²⁾. The complainant also noted that the Municipality had stated in correspondence with Remiks Næring that it would be economically favourable to the Municipality to follow a tender procedure, thus indicating that the remuneration paid was above that which would have resulted from competition ⁽⁶³⁾.

⁽⁵⁷⁾ See Opening Decision, paragraphs 57 and 58.

⁽⁵⁸⁾ See Opening Decision, paragraph 59.

⁽⁵⁹⁾ See letter from Remiks Næring dated 29 September 2016, Document No 821156.

⁽⁶⁰⁾ Ibid.

⁽⁶¹⁾ See for example presentation by the complainant, Document No 874324.

⁽⁶²⁾ See Annex IV to letter from the complainant dated 15 December 2012, Document No 831579.

⁽⁶³⁾ See letter from the complainant dated 15 December 2012, Document No 831575.

- (50) The Norwegian authorities disputed that the Municipality should be viewed as a single entity in this context. They explained that the municipal institutions and entities had varying needs, making it necessary to conduct separate agreements. Remiks Næring thus treated each unit as an independent customer, invoicing them directly and separately ⁽⁶⁴⁾. They further noted that, during the period in question, different municipal units had, to varying degrees, approached Remiks Næring to order changes to the type, frequency, and scope of the service ⁽⁶⁵⁾.
- (51) In the Opening Decision, ESA considered it unclear whether the documented examples were representative. ESA therefore invited the Norwegian authorities to provide information on the proportion of customers that had purchased comparable services for similar prices to the municipal entities ⁽⁶⁶⁾.

3.1.2.4 The increase in remuneration

- (52) Prior to the Opening Decision, the complainant asserted that the increase in remuneration paid to Remiks Næring from 2010–2016 indicated ‘over price’, as this represented a nearly 50% rise in compensation over six years ⁽⁶⁷⁾.
- (53) The Norwegian authorities, however, claimed that the increase was mainly driven by an expansion of municipal activity over this period, resulting in more commercial waste produced and thus a greater need for waste collection services ⁽⁶⁸⁾. In this regard, the Norwegian authorities documented that the number of inhabitants and municipal employees had grown by 9% and 19% ⁽⁶⁹⁾, respectively; the stock of municipally-owned fixed assets had increased by 44% ⁽⁷⁰⁾, and there had been a corresponding 45% rise in Remiks Næring’s operating cost from 2010–2016 ⁽⁷¹⁾.
- (54) The Norwegian authorities further explained that there had been moderate price increases for the services in question – a few per cent annually, to compensate for general increases in prices and cost ⁽⁷²⁾. They stressed, however, that such adjustments applied equally to Remiks Næring’s municipal customers and its external public and private customers. The Norwegian authorities documented a concrete example of a private customer buying the same service for the same price and sustaining the same price increases as a municipal unit during 2010–2016 ⁽⁷³⁾.
- (55) Finally, the Norwegian authorities argued that Remiks Næring increased its total revenues by 58% during the period, without the municipal payment constituting a dominant share of the revenues (~15%) ⁽⁷⁴⁾. They claimed such a turnover increase would not have been possible without offering competitive prices.
- (56) In the Opening Decision, ESA expressed doubts as to whether the information provided could sufficiently explain the price increase and invited the Norwegian authorities to provide further information justifying the rise in remuneration ⁽⁷⁵⁾.

3.1.2.5 The comparison with Remiks Husholdning

- (57) With effect from 1 February 2017, the Municipality terminated the arrangement with Remiks Næring and instructed Remiks Husholdning to collect its commercial waste. According to the new contract, the payments to Remiks Husholdning should reflect Remiks Husholdning’s cost of carrying out the service (so-called ‘full-cost price’).

⁽⁶⁴⁾ See letter from Tromsø Municipality, dated 31 October 2017, Document No 880582.

⁽⁶⁵⁾ See letter from Remiks Næring dated 30 October 2017, Document No 880602.

⁽⁶⁶⁾ See Opening Decision, paragraph 62.

⁽⁶⁷⁾ See Opening Decision, paragraph 63.

⁽⁶⁸⁾ See letter from Tromsø Municipality, dated 5 March 2018, Document No 901147.

⁽⁶⁹⁾ See Document Nos 901171 and 901173.

⁽⁷⁰⁾ See Document No 901167.

⁽⁷¹⁾ See Document No 901169.

⁽⁷²⁾ See letter from Remiks Næring dated 30 October 2017, Document No 880602.

⁽⁷³⁾ See Document No 901163.

⁽⁷⁴⁾ See letter from Tromsø Municipality, dated 5 March 2018, Document No 901147.

⁽⁷⁵⁾ See Opening Decision, paragraph 65.

- (58) Prior to the Opening Decision, the complainant noticed a significant gap between the remuneration paid to Remiks Næring in 2016 (MNOK 11.4) and Remiks Husholdning's budgeted cost for 2017 (MNOK 8.2). From this, the complainant deduced that Remiks Næring had a 30% margin on the municipal sale in 2016 – significantly higher than what they considered to be the normal range of 0–8% ⁽⁷⁶⁾.
- (59) The Norwegian authorities, however, denied that Remiks Næring had obtained such margins, asserting that the complainant's assumption of cost similarities was invalid. Rather, the cost of the activity had decreased when Remiks Husholdning took over, because Remiks Husholdning could exploit synergies when coordinating household and commercial waste. They also held that the timing of the comparison was relevant, as Remiks Husholdning was operating at peak efficiency in 2017, and therefore had low capital cost ⁽⁷⁷⁾. Moreover, the Norwegian authorities argued that the services provided were different, rendering a direct comparison inappropriate. While Remiks Næring provided 'fixed price' services, Remiks Husholdning charged a 'cost price' based on weight, see paragraph (37) for information. As a result, they involved different risks regarding final payment ⁽⁷⁸⁾.
- (60) In the Opening Decision, ESA considered that it had not been presented with sufficient documentation supporting these explanations. ESA therefore invited the Norwegian authorities to supply further information to substantiate the claims ⁽⁷⁹⁾.

3.1.3 *Comments from the Norwegian authorities during the formal investigation procedure*

3.1.3.1 Benchmarking with local private customers

- (61) During the formal investigation procedure, the Norwegian authorities maintained that the Municipality should not be viewed as a single large purchaser in this context ⁽⁸⁰⁾. They further clarified that Remiks Næring operated with a general 'price list' for its regular service offerings, which applied to all its customers, regardless of their size and whether they were publicly or privately owned ⁽⁸¹⁾. Importantly, quantity discounts were not granted on the services covered by the general price list.
- (62) The Norwegian authorities explained that because the same equipment and staff were used simultaneously to serve many customers on its collection routes, individual cost/risk assessment was less relevant. Remiks Næring therefore did not set prices individually for each customer but determined prices at an aggregate level based on market conditions (costs developments, innovation, market trends, competition etc.). In this context, the Norwegian authorities provided the price list, which applied to all customers, for the services offered during 2014 – 2018 ⁽⁸²⁾.
- (63) To demonstrate that private customers paid the same price as the Municipality, the Norwegian authorities provided additional evidence of external customers having bought the same services as the municipal entities for the same prices, through several concrete examples ⁽⁸³⁾ ⁽⁸⁴⁾ ⁽⁸⁵⁾. Specifically, the Norwegian authorities submitted an overview of seven categories of services sold between 2010–2016, featuring examples of both municipal and external customers. Additionally, they submitted an overview of customers per service in 2010 and 2014 – 2016, revealing that there were several 'matching' external customers for nearly all services bought by the Municipality. The

⁽⁷⁶⁾ See letter from the complainant, dated 22 June 2017, Document No 862433 and letter from the complainant dated 13 November 2017, Document No 882172.

⁽⁷⁷⁾ See letter from Tromsø Municipality dated 5 March 2018, Document No 901147.

⁽⁷⁸⁾ Ibid.

⁽⁷⁹⁾ See Opening Decision, paragraph 70.

⁽⁸⁰⁾ See letter from Remiks Næring dated 13 February 2020, Document No 1114892.

⁽⁸¹⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁸²⁾ See Annex 3 to letter from the Norwegian authorities of 25 March 2023, entitled 'Prices Remiks Næring subscription service', Document No 1278144.

⁽⁸³⁾ See Attachment 1.1 to letter from Norwegian authorities of 17 February 2020, entitled 'Examples of customers services and price increase, Document No 1114886.

⁽⁸⁴⁾ See Attachment 1.2 to letter dated 17 February 2020, Customers per service 2014– 2016, Document No 1114884.

⁽⁸⁵⁾ See Attachment 1.3 to letter from the Norwegian authorities of 17 February 2020, entitled 'Customers per service 2010', Document No 1114888.

Norwegian authorities clarified that the absence of matching customers for some of the services did not imply that external customer had paid different prices. Instead, it merely indicated that the Norwegian authorities had not identified any such customers buying those services during that time ⁽⁸⁶⁾.

- (64) The Norwegian authorities further informed ESA that determining the exact proportion of external customers for each service over the six-year period was nearly impossible, as Remiks Næring could not retrieve such information from its database. They explained that to document the proportion, as requested by ESA, it would require Remiks Næring to manually investigate thousands of invoices. To complete this task, Remiks Næring would have to halt its business operation, as all administrative resources would need to be reassigned to this task for an extended period. However, the Norwegian authorities stressed that the samples provided to ESA were not chosen to mislead, but rather constituted a representative selection ⁽⁸⁷⁾.
- (65) Concerning the price list referred to above, the Norwegian authorities explained that this price list was adjusted each year based on the consumer price index ('CPI') and occasionally based on a discretionary adjustment if there were cost increases on important inputs not captured by the index. The examples provided on external customers paying the same prices also demonstrate that the external customers experienced the same price increases as the municipal entities when buying the same services ⁽⁸⁸⁾.
- (66) The Norwegian authorities clarified that, in some cases, individual customers may have approached Remiks Næring to negotiate on prices but added that this was mainly relevant for non-standardised or one-off assignments, rather than for its standardised service offerings. In any event, the Norwegian authorities explained that the scope of such rebates was limited, and that municipal entities had equally benefited from this policy ⁽⁸⁹⁾.
- (67) Finally, the Norwegian authorities argued that Remiks Næring's average operating margin of 4.59% during the period was not excessive when compared to normal industry returns ⁽⁹⁰⁾, purported by the complainant to range from 0–8%, see paragraph (58). The Norwegian authorities also highlighted that Remiks Næring's margin was within the normal range both before and after 2017, when the arrangement with the Municipality was terminated, indicating that margins on the municipal sale were not higher than on the external customers ⁽⁹¹⁾.

3.1.3.2 The increase in remuneration

- (68) During the formal investigation, the Norwegian authorities continued to argue that an expansion of municipal activity during the period, and thus an increase in waste volumes and service needs, explained the rise in the total remuneration paid ⁽⁹²⁾.
- (69) Remiks Næring confirmed that it had indeed experienced a rise in the number of municipal purchases and in the scope of activity demanded by these customers during this time. It further noted that the focus on sustainability had increased, which had led to more complex services demanded by the customers, more rigorous regulatory requirements to comply with and thus higher cost and prices.

⁽⁸⁶⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁸⁷⁾ See both letter from Remiks Næring AS of 14 February 2020, Document No 1114890 and letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁸⁸⁾ See Attachment 1.1 to letter from the Norwegian authorities of 17 February 2020, Document No 1114886.

⁽⁸⁹⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148. The Norwegian authorities have also provided information on this in meetings with ESA.

⁽⁹⁰⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁹¹⁾ See letter from Tromsø Municipality dated 17 February 2020, Document No 1114906 and letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁹²⁾ See letter from Remiks Næring dated 13 February 2020, Document No 1114892.

- (70) The Norwegian authorities informed ESA, however, that it was impossible to document the exact development in waste volumes, as such data was not recorded for the 'fixed price' services. This was because the 'fixed price' services were not based on weight, but on the number and size of bins. In order to get an overview of the number of bins purchased, thousands of invoices would have to be investigated, as mentioned in paragraph (64) ⁽⁹³⁾. The Norwegian authorities noted that the appropriate indicator would, in any case, be the prices charged for the services, and not the total remuneration as such. In this regard, the Norwegian authorities reiterated that annual price adjustments were made, but that these did not go beyond normal cost and price inflation ⁽⁹⁴⁾. Importantly, as described in paragraph (63), they provided documentation illustrating that prices paid by external clients increased by the same amount.

3.1.3.3 The comparison with Remiks Husholdning

- (71) During the formal investigation procedure, the Norwegian authorities provided additional evidence to refute the complainant's assertion that the observed gap between the remuneration paid to Remiks Næring in 2016 and the cost incurred by Remiks Husholdning in 2017 indicated high margins on the municipal sale.
- (72) To start, the Norwegian authorities showed that the scope of the services was substantially different. While Remiks Næring's service involved collecting waste and receiving self-delivered waste, Remiks Husholdning only assumed the collection task ⁽⁹⁵⁾. As a result, a considerable part of the municipal sale ($\sim 1/3$) remained with Remiks Næring also after the activity was assigned to Remiks Husholdning. Accounting for this difference, the Norwegian authorities showed that the imputed gap was 14% – far less than the 30% margin purported by the complainant ⁽⁹⁶⁾.
- (73) The Norwegian authorities also continued to refute the complainant's assumption that Remiks Husholdning and Remiks Næring had incurred the same costs when carrying out the service ⁽⁹⁷⁾.
- (74) First, the Norwegian authorities emphasised that the two entities did not operate under the same conditions. Remiks Næring – as a commercial entity, had to operate with some overcapacity to obtain new contracts and adjust to customers' needs, while Remiks Husholdning – as a statutory entity, was set up to serve an exact number of households with a standardised and cost-optimised service. Moreover, as Remiks Næring operated under commercial conditions which entailed a continuous risk compared to an entity that can rely on public funds to cover its costs, it therefore had to take this cost risk into account when determining prices.
- (75) Second, the Norwegian authorities reiterated that Remiks Husholdning was able to exploit synergies when combining household and commercial waste. Tromsø is a large municipality with a scattered settlement, where the city centre is located on an island in the middle, connected to the mainland and surrounding islands by two bridges and a tunnel. As a result, there are long distances between the residential and commercial areas. Since most municipal units were located in residential parts (kindergartens, schools etc.), it was more efficient to combine the collection of household waste and municipal commercial waste, than combining municipal and private commercial waste. As Remiks Husholdning already collected waste in residential areas, minimal route changes were needed.
- (76) Third, the Norwegian authorities explained how Remiks Husholdning's optical sorting system reduced the number of trips required and thus the cost of the service. Without optical sorting, the customer must use different bins for each waste fraction, and the waste collector must make separate trips to the location for each fraction. Conversely, with optical sorting, waste is sorted in coloured bags, which can be disposed of in the same bin and collected on the

⁽⁹³⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148. The Norwegian authorities have also provided information on this in meetings with ESA.

⁽⁹⁴⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽⁹⁵⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 11114900.

⁽⁹⁶⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 11114900 and Attachment 2-2 to letter from the Norwegian authorities entitled 'Remiks Næring AS omsetning Tromsø kommune', Document No 1114896.

⁽⁹⁷⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 11114900.

same trip, as a robotic system will later sort the fractions. According to the Norwegian authorities, Remiks Husholdning was the only provider with such facilities within the Municipality at the time. The Norwegian authorities provided examples illustrating the cost savings associated with optical sorting, with estimates of saved driving hours for some locations.

- (77) Lastly, the Norwegian authorities asserted that Remiks Husholdning had lower vehicle costs than Remiks Næring, as it had procured collection vehicles when the currency conditions were favourable. They noted that even though the vehicle's market value was high, Remiks Husholdning's 'cost price' principle required that its price reflected the historical cost of the assets involved.

3.1.4 *Comments from the complainant*

3.1.4.1 Benchmarking with local private customers

- (78) Regarding the benchmarking with Remiks Næring's external private customers, the complainant maintained that the Municipality should be viewed as a single large customer who could have taken advantage of its position. The complainant further noted that for some of the services provided to the municipal entities, no external 'matching' customers had been identified, making them difficult to 'market test'.
- (79) Finally, the complainant added that Remiks Næring's profit margin had decreased after 2017, when the arrangement with the Municipality ended, by nearly 50% ⁽⁹⁸⁾.

3.1.4.2 The increase in remuneration

- (80) During the formal investigation, the complainant continued to argue that the rise in remuneration paid to Remiks Næring implied an advantage. The complainant did not consider the growth in municipal employees and inflation to sufficiently explain the increase in payment ⁽⁹⁹⁾ and highlighted the lack of documentation supporting increases in waste volumes ⁽¹⁰⁰⁾. Additionally, the complainant found it improbable that private customers experienced comparable price increases.

3.1.4.3 The comparison with Remiks Husholdning

- (81) Regarding the comparison with Remiks Husholdning, the complainant revised its calculations relating to Remiks Husholdning's realised costs (as opposed to those which were budgeted), finding an even larger gap between Remiks Næring's 2016 remuneration and Remiks Husholdning's 2017 cost. According to the new calculation, Remiks Næring had an estimated profit margin of around 65% on the municipal sale in 2016, a level even further above what the complainant considered the normal range of 0 – 8% ⁽¹⁰¹⁾.
- (82) The complainant further held that the Norwegian authorities' reasoning for cost differences appeared implausible. First, the complainant asserted that a business strategy of overcapacity appeared contrary to normal commercial conduct. Second, the complainant claimed that around one-third of the municipal entities had optical sorting already from 2013, finding no reason to believe the remaining benefits of this system had not already been exploited in the years after. Third, the complainant asserted that a search on Google Maps revealed that several commercial waste producers were located near the municipal entities used as examples by the Norwegian authorities, thus raising doubts about their evidentiary value. Finally, the complainant found the potential for cost savings from synergies negligible ⁽¹⁰²⁾.

⁽⁹⁸⁾ See letter from the complainant dated 1 July 2022, Document No 1300165.

⁽⁹⁹⁾ See letter from the complainant dated 12 August 2020, Document No 1147832.

⁽¹⁰⁰⁾ See letter from the complainant dated 1 July 2022, Document No 1300165.

⁽¹⁰¹⁾ See letter from the complainant dated 6 March 2020, Document No 1118791.

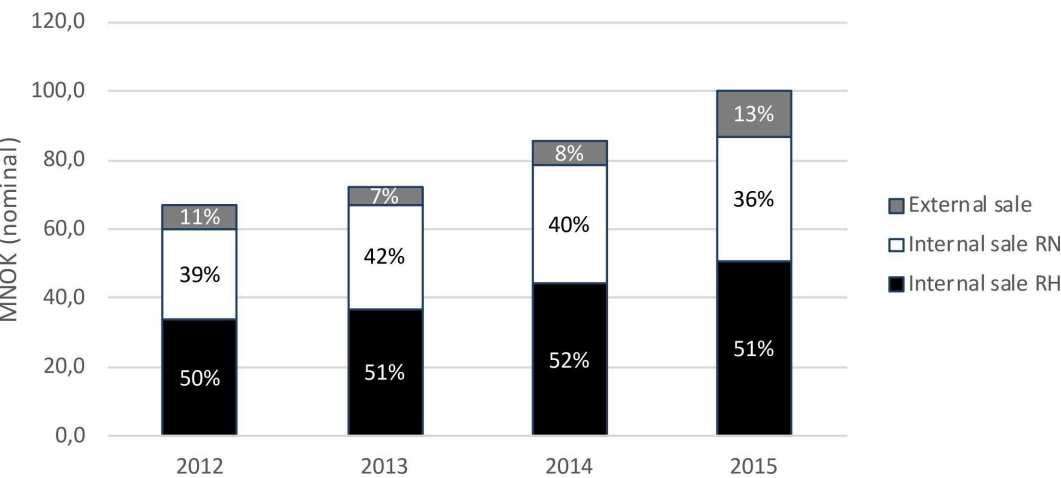
⁽¹⁰²⁾ See letter from the complainant dated 12 August 2020, Document No 1147832.

3.2 Measure 2: waste processing and treatment services

3.2.1 Background

- (83) As described in Section 2.2.1, the Municipality historically ensured the handling of ‘household waste’ via municipal enterprises. Following the 2010 reorganisation and formation of the Remiks Group, Remiks Husholdning assumed responsibility for this task. From 1 February 2017, Remiks Husholdning was further instructed to handle the Municipality’s ‘own’ commercial waste, previously handled by Remiks Næring.
- (84) Furthermore, with the reorganisation into the Remiks Group, the Municipality’s waste processing activities were assigned to Remiks Produksjon, including the task of arranging for further downstream waste treatment and disposal. Although Remiks Produksjon was a commercial entity, its revenues derived mainly from internal sales to Remiks Husholdning and Remiks Næring (~90%). Remiks Produksjon’s external customers were mainly large individual commercial waste producers.
- (85) Figure 3 displays the development in Remiks Produksjon’s total revenues during 2012–2015, and the share of revenues from sale to internal and external customers.

Figure 3: Remiks Produksjon’s total revenues during 2012 – 2015 (MNOK) ⁽¹⁰³⁾



- (86) During the household waste management process, the waste collected by Remiks Husholdning would be transported to the Miljøpark site where it would be sorted and then passed-on to Remiks Produksjon for further processing and treatment. Remiks Produksjon would directly handle reception, processing (sorting, pressing, grinding, packaging etc.) and intermediate storage of the waste, but engaged external providers in various downstream markets for the final waste treatment. The payment from Remiks Husholdning to Remiks Produksjon for such services was thus considered an ‘internal transaction’, as they were entities within the same group.
- (87) Table 1 below displays the development in the household waste volumes (tonnes) delivered by Remiks Husholdning to Remiks Produksjon’s in each year during the period from 2010 to 2019 ⁽¹⁰⁴⁾. The data reveals a notable increase in household waste volumes processed over this period, particularly by 45% throughout the entire period from 2010 to 2019, with approximately 15% growth between 2012 and 2015.

⁽¹⁰³⁾ Only the numbers from 2012 – 2015 are presented because the complainant argues that the increase in remuneration between these years indicates payment of ‘overprice’.

⁽¹⁰⁴⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

Table 1

Remiks Produksjon's processing of household waste from 2010 – 2019.

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Volume (tonne)	20 697	22 242	25 949	25 638	28 221	29 900	30 132	29 761	29 793	29 987
% change from 2010		7%	25%	24%	36%	44%	46%	44%	44%	45%

3.2.2 Grounds for opening the formal investigation procedure

- (88) Before the Opening Decision, the complainant alleged that Remiks Husholdning's purchase of waste processing services from Remiks Produksjon was not on market terms, as the contract had not been subjected to a public tender procedure ⁽¹⁰⁵⁾.
- (89) The Norwegian authorities, however, contended that the internal prices were market conform, as the contract was negotiated in accordance with the 'arm's length' principle of the Norwegian Limited Liability Companies Act ⁽¹⁰⁶⁾, section 3-9 ⁽¹⁰⁷⁾. They informed ESA that, lacking external benchmarks, they had used the internal prices negotiated by Remiks Næring for such service as a basis for setting the prices, due to the similarity in the waste types, volumes, and processing cost, and Remiks Næring's commercial character and exposure to competitive pressure ⁽¹⁰⁸⁾.
- (90) In the Opening Decision, ESA expressed doubts that a price paid by another company within the same group could serve as a benchmark for market price. ESA thus invited the Norwegian authorities to provide documentation substantiating that the price paid to Remiks Produksjon was in line with normal market conditions ⁽¹⁰⁹⁾.

*3.2.3 Comments from the Norwegian authorities during the formal investigation procedure**3.2.3.1 Internal benchmarking*

- (91) During the formal investigation, the Norwegian authorities asserted that there was no direct allegation, example, or proof from the complainant of any overpayment being present in Remiks Husholdning's contract with Remiks Produksjon, and thus nothing to contradict ⁽¹¹⁰⁾. They therefore reaffirmed that the agreement came about after real, commercial negotiations and reiterated that no auditors had remarked any irregularities concerning these internal transactions ⁽¹¹¹⁾.
- (92) The Norwegian authorities noted that waste markets are geographically delineated, as the distance to the waste processing facility is decisive for the customer's choice of provider. They also claimed that there is no equivalent alternative provider to Remiks Produksjon in the region. For example, Remiks Produksjon is the only provider with a 'handle all' service that can treat optically sorted paper, food waste, plaster, etc. As a result, Remiks Husholdning could not collect offers and compare prices, thus making it impossible to establish an external comparator ⁽¹¹²⁾.

⁽¹⁰⁵⁾ See Opening Decision, paragraph 74.

⁽¹⁰⁶⁾ Lov om aksjeselskaper (aksjeloven), LOV-1997-06-13-44.

⁽¹⁰⁷⁾ See Opening Decision, paragraph 75.

⁽¹⁰⁸⁾ See letter from Tromsø Municipality dated 5 March 2018, Document No 901147.

⁽¹⁰⁹⁾ See Opening Decision, paragraph 77.

⁽¹¹⁰⁾ See letter from Remiks Husholdning received 17. February 2020, Document No 1114908.

⁽¹¹¹⁾ Ibid.

⁽¹¹²⁾ See letter from Remiks Husholdning received 17. February 2020, Document No 1114908.

- (93) The Norwegian authorities further explained that there is variation in processing costs across different areas and providers, for reasons such as differences in the infrastructure, economies of scale, social and environmental standards, technology, and the availability of and distance to further downstream treatment facilities. This makes benchmarking with prices charged in other areas inappropriate ⁽¹¹³⁾.
- (94) Given this situation, the Norwegian authorities maintained that Remiks Næring was a suitable benchmark. Remiks Næring purchased the same services from Remiks Produksjon, waste volumes were comparable, and the processing costs of household and commercial waste were similar.
- (95) The Norwegian authorities further reasoned that because Remiks Næring was a commercial operator – offering its services in a competitive market, it had an incentive to negotiate competitive internal prices. If Remiks Næring had agreed to paying excessive prices, the high cost would in turn need to be reflected in Remiks Næring's service prices. This would spur customer churn to competitors, causing Remiks Næring to lose market share ⁽¹¹⁴⁾. According to the Norwegian authorities, such effects did not materialise, thus indicating that neither Remiks Næring nor Remiks Husholdning paid 'over price' to Remiks Produksjon.
- (96) The Norwegian authorities further explained that the contract between Remiks Husholdning and Remiks Produksjon, which formalised the terms of the arrangement, contained an annex setting out the 'unit prices' for the various waste fractions ⁽¹¹⁵⁾. Each fraction requires distinct processing methods and treatment routes and therefore has different price associated with its handling. The final payment from Remiks Husholdning therefore depended on the composition and weight of the waste delivered to Remiks Produksjon for processing.
- (97) The Norwegian authorities informed ESA that this contract included an adjustable pricing mechanism, which stipulated that the prices would be subject to yearly adjustments, following negotiations to reflect market developments. It further made clear that in the event of a failure to reach a mutual agreement, the price would be adjusted based on the CPI or on documented cost increases not captured by the index, provided these were beyond Remiks Produksjon's control ⁽¹¹⁶⁾. In this regard, the Norwegian authorities reiterated that Remiks Produksjon only performs a limited part of the waste processing procedure, as it procures further waste treatment services from operators in downstream markets where prices are volatile ⁽¹¹⁷⁾.
- (98) Finally, the Norwegian authorities pointed to the results of Remiks Produksjon and Remiks Næring, arguing that neither company had abnormal margins during these years. They reasoned that if Remiks Næring (and thus Remiks Husholdning) had paid excessive prices, Remiks Produksjon would have made extraordinary profits. This, they claimed, was not supported by the accounts, which revealed that Remiks Produksjon's average operating margin was around 6% during 2010 – 2020 ⁽¹¹⁸⁾.
- (99) The Norwegian authorities acknowledged however that they did not have data on normal margins specifically for waste processing services, as there was limited public information available, and it was difficult to determine whether companies operated exclusively within such services.
- (100) As a general consideration however, they assumed operating margins in the industry would be high, as waste processing was a capital-intensive business with considerable investment needs. In this regard, they noted that the local waste operator Perpetuum Circuli AS had an average operating margin of 37% during 2010 – 2020, which was active in the field of 'treatment of non-hazardous waste'. Although they did not necessarily consider this a representative number, they deemed it an indication of a high-margin industry ⁽¹¹⁹⁾.

⁽¹¹³⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 1114908 and letter from the Norwegian authorities dated 27 February 2017, Document No 844196.

⁽¹¹⁴⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 1114908 and letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽¹¹⁵⁾ See letter from Remiks Husholdning received 17 February 2020, Document No 1114908.

⁽¹¹⁶⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽¹¹⁷⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽¹¹⁸⁾ Ibid.

⁽¹¹⁹⁾ Ibid.

3.2.3.2 The increase in remuneration

- (101) After the Opening Decision, the complainant argued that an observed increase in the remuneration paid to Remiks Produksjon during 2012 – 2015 indicated that Remiks Husholdning paid ‘over price’ ⁽¹²⁰⁾, see section 3.2.4.2, below.
- (102) The Norwegian authorities, however, asserted that an increase in payment did not, as such, imply unlawful State aid. The Norwegian authorities stressed that any adjustments of prices had been based on cost increases experienced by Remiks Produksjon, such as changes in the prices of downstream treatment services, waste and incineration taxes, as well as increased costs associated with an improved service offering during this period (i.e., extended opening hours and a new recycling centre) ⁽¹²¹⁾.
- (103) They explained that the contract between Remiks Husholdning and Remiks Produksjon was based on unit prices. Consequently, if there had been an increase in waste volumes delivered for processing, the total payment from Remiks Husholdning would increase accordingly. In this regard, they reiterated that the increase in remuneration was mainly explained by a rise in waste volumes, as the number of municipal inhabitants had grown during the period ⁽¹²²⁾.
- (104) Furthermore, the Norwegian authorities pointed out that Remiks Husholdning's share of Remiks Produksjon's total billable work remained constant during this time (~50%). They reasoned that if the increase in total turnover was merely coming from ‘overpayments’ by Remiks Husholdning, Remiks Produksjon's share of billable work from Remiks Husholdning would have been increasing over this period ⁽¹²³⁾.
- (105) Finally, the Norwegian authorities considered the time period 2012–2015 to be ‘cherry-picked’ to suit the complainant's argument, as the annual increase from 2015 onwards was not comparable to that during the selected period ⁽¹²⁴⁾ ⁽¹²⁵⁾.

3.2.4 *Comments from the Complainant*

3.2.4.1 Internal benchmarking

- (106) During the formal investigation procedure, the complainant held that the internal benchmarking with Remiks Næring was inappropriate and stated that Remiks Næring did not offer the same services as Remiks Produksjon, and that Remiks Produksjon was a service provider to Remiks Næring ⁽¹²⁶⁾.
- (107) The complainant further questioned the Norwegian authorities' claim that normal profit margins indicated market conform internal pricing, as overcompensation on one contract could be used to offer prices below market price to other customers ⁽¹²⁷⁾.
- (108) Concerning the 37% margin achieved by Perpetuum Circuli AS, referred to by the Norwegian authorities, the complainant asserted that this company operated a landfill in Balsfjord, and was permitted to dispose of ordinary and inert waste, polluted earth and hazardous waste, services not similar to those offered by Remiks Produksjon. As an alternative benchmark, the complainant suggested Perpetuum Mobile AS, a local operator that offers both waste collection and waste processing services, which suffered losses in seven of the past 12 years of operation (2010 – 2021) ⁽¹²⁸⁾.

⁽¹²⁰⁾ See letter from the complainant dated 6 March 2020, Document No 1118791.

⁽¹²¹⁾ See letter from Remiks Husholdning 7 April 2020, Document No 1126335.

⁽¹²²⁾ Ibid.

⁽¹²³⁾ See letter from Remiks Husholdning 7 April 2020, Document No 1126335.

⁽¹²⁴⁾ For the sake of completeness, ESA has verified that the development in the years following did not indicate a similar upwards trend.

⁽¹²⁵⁾ See letter from Remiks Husholdning 7 April 2020, Document No 1126335.

⁽¹²⁶⁾ See letter from the letter from the complainant of 12 August 2020, Document No 1147832.

⁽¹²⁷⁾ Ibid.

⁽¹²⁸⁾ See letter from the complainant dated 1 July 2022, Document No 1300165.

3.2.4.2 The increase in remuneration

- (109) As indicated above, the complainant further pointed to a 50% increase in the remuneration paid by Remiks Husholdning to Remiks Produksjon between 2012 and 2015 ⁽¹²⁹⁾, which they found could not be fully explained by the 15% increase in household waste volumes and inflation ⁽¹³⁰⁾. They further clarified that there was no waste or incineration tax as alleged by the Norwegian authorities ⁽¹³¹⁾ and that Remiks Produksjon should document the purported downstream cost increases.

3.3 Measure 3: the capitalisation of the Remiks Group

3.3.1 *Background*

- (110) As outlined in section 2.2.1, the Municipality established ⁽¹³²⁾ Tromsø Miljøpark KF in 2004 to manage the development of the 'Miljøpark' property, an industrial area spanning approximately 100 000 m² on the north end of Tromsøya. The initial aim of the project was to consolidate waste management activities in a single location, accommodating both the Municipality's own activities and private operators ⁽¹³³⁾.
- (111) The mandate given to Tromsø Miljøpark KF in 2004 included the construction of a waste reception and processing facility, known as the 'production building', along with an administrative building. Construction work started in 2005 and the facilities were operational from 2006. The Municipality further established Remiks Tromsø KF in 2007 to consolidate the Municipality's waste management activities within a single entity. The new entity's main operations were located at the Miljøpark, where it leased the production and administration building from Tromsø Miljøpark KF.
- (112) As stated in paragraph (29), the Municipality eventually dissolved both Tromsø Miljøpark KF and Remiks Tromsø KF in 2009 – 2010, and incorporated Remiks Miljøpark AS, a limited liability company, which subsequently established the three subsidiaries Remiks Husholdning, Remiks Næring, and Remiks Produksjon. The process leading up to this is further described below.

3.3.1.1 The preparatory paper ⁽¹³⁴⁾ of 29 April 2009

- (113) The preparatory paper of 29 April 2009, entitled 'Future organisation of Remiks' ⁽¹³⁵⁾, was produced ahead of the Municipal Council on 17 June 2009.
- (114) After considering the options available for reorganisation, the paper recommended a limited liability legal form and a 'group' structure with a parent entity and two or more subsidiary companies. This recommendation was motivated by the necessity of establishing a clear separation between the Municipality's market-oriented waste management activities and its monopoly remit in relation to household waste. The new structure was also deemed more suitable for achieving operational efficiency.
- (115) Furthermore, the paper proposed that when Tromsø Miljøpark KF no longer existed, Remiks Miljøpark AS should become the parent entity of the group and assume the role of 'property manager' of the Miljøpark facilities, responsible for further developing the area and leasing out the facilities on the site. Consequently, as part of the recommended reorganization, an 'opening balance' sheet, and the initial capitalization level of the new Remiks Miljøpark had to be determined.

⁽¹²⁹⁾ See letter from the complainant dated 6 March 2020, Document No 1118791 and Audit Report Document No 1118793.

⁽¹³⁰⁾ See letter from the complainant of 1 July 2022. Document No 1300165.

⁽¹³¹⁾ see letter from the complainant of 12 August 2020, Document No 1147832.

⁽¹³²⁾ Decisions on creating municipal enterprises or other companies are made by the Municipal Council – the highest decision-making body within the Municipality.

⁽¹³³⁾ See preparatory paper of 29 April 2009, Document No 901215.

⁽¹³⁴⁾ In this regard, a 'preparatory paper' is a formal document that presents a specific case for consideration during the council meetings. This document provides background information, analysis, and recommendations to guide the decision-making process and is prepared by the administration.

⁽¹³⁵⁾ See preparatory paper of 29 April 2009, Document No 901215, entitled in Norwegian 'Fremtidig organisering av Remiks'.

- (116) On that background, the paper suggested an initial step of transferring the contents of Tromsø Miljøpark KF to the new Remiks Miljøpark AS, and to further consider appropriate plots for certain expansion plans. At the time, there was uncertainty concerning the exact size and value of the plots needed in this regard. Subsequently, following further preparatory measures, the paper suggested to dissolve Remiks Tromsø KF and transfer the contents to Remiks Miljøpark AS, which would establish two or more subsidiaries for the waste collection and processing operations, where the activities relating to the monopoly remit would be placed in a distinct entity.
- (117) During the subsequent council meeting on 17 June 2009, the Municipal Council followed the recommendation ⁽¹³⁶⁾. The Municipality thus established Remiks Miljøpark AS on 1 September 2009 ⁽¹³⁷⁾, which established three subsidiaries on 8 December 2009 ⁽¹³⁸⁾. At the time, all entities were supplied with the minimum equity required for incorporation. Importantly, Remiks Husholdning would operate as a 'statutory entity' dedicated to the legal monopoly remit within household waste ⁽¹³⁹⁾.
- (118) The Municipality further engaged Byggtakst Nord AS ('Byggtakst'), an independent appraiser, to determine the value of the property associated with the buildings at the Miljøpark. According to the valuation report dated 3 January 2010, the specified plot, spanning around 466 000 m², had a market value of NOK 42.6 million ⁽¹⁴⁰⁾.
- (119) Byggtakst observed that the plot was unlikely to have further development potential, as the levelled parts had been fully developed and the buildings were operational. Byggtakst also confirmed that the valuation had been performed in accordance with Section 18B, point 2.2 (a) of ESAs Guidelines on State aid elements in sales of land and buildings by public authorities ('ESA Guidelines on the sale of land') ⁽¹⁴¹⁾.

3.3.1.2 The preparatory paper of 11 June 2010

- (120) The preparatory paper of 11 June 2010 titled 'Remiks - capital infusion' ⁽¹⁴²⁾, was produced ahead of the Municipal Council meeting on 23 June 2010.
- (121) In the paper, the administration proposed a two-phased capitalisation plan. In the initial 'phase one', the contents of Tromsø Miljøpark KF would be transferred to Remiks Miljøpark, including the buildings at the site, in addition to the plot of land beneath the buildings valued by Byggtaks. In 'phase two', an additional part of the property would be transferred to Remiks Miljøpark as further in-kind contribution.
- (122) Furthermore, the preparatory paper emphasised the importance of adhering to the MEIP under the EEA State aid rules. In this regard, the following considerations were made by the municipal administration.
- (123) First, the prospect of a market-based return on the capital should be analysed with consideration of the allocation of this capital between the legally mandated activities and the commercial operation. As one of the subsidiaries would only be active within the regulated monopoly remit based on the 'full-cost principle', intra-group dividends would be limited to the entities active in commercial operations. At the same time, because one of the subsidiaries operated within the monopoly remit, the risk of the investments would be somewhat reduced. In this regard, the paper stated that only 40% of the group's activities were market exposed, while 60% concerned the monopoly remit.

⁽¹³⁶⁾ See Municipal Council protocol of 17 June 2009, Document No 880590. Council decisions are the outcomes of the vote at the council meeting and represent the Municipality's official stance.

⁽¹³⁷⁾ See founding document Remiks Miljøpark AS, Document Nos 901203 and 880592.

⁽¹³⁸⁾ See founding documents for Remiks Næring, Remiks Husholdning and Remiks Produksjon, Document No 880592.

⁽¹³⁹⁾ See Articles of Association for Remiks Husholdning, Document No 880592.

⁽¹⁴⁰⁾ See Appraisal from Byggetakst Nord AS, Document No 901213, entitled in Norwegian 'Verditakst for tomt på Skattøra til Remixanlegget'.

⁽¹⁴¹⁾ See EFTA Surveillance Authority Decision No of 17 November 1999 275/99/COL introducing guidelines on State aid elements in sales of land and buildings by public authorities and amending for the 20th time the Procedural and Substantive Rules in the field of State aid, OJ L 137, 8.6.2000, p. 28 and EEA Supplement No. 26, 8.6.2000, p. 19.

⁽¹⁴²⁾ See preparatory paper of 11 June 2010, Document No 901219, entitled in Norwegian 'Remiks Miljøpark AS – Innskudd egenkapital'.

- (124) Second, the return requirement was linked to the prospects of dividend pay-outs. In this regard, a key objective of the consolidation had been to exploit synergies through the co-location and coordination of household and commercial waste. Although the processing facility had primarily been built for the household waste management task, handling commercial waste within the same facilities would contribute significantly to revenues and to reducing the per-tonne processing cost.
- (125) Finally, the paper considered it pertinent to determine the appropriate equity ratio to meet the minimum requirements for operations, taking account of the level of equity a private investor in a comparable situation would have committed. In this regard, with the planned transfers, the equity ratio of the group and the parent entity would be 11% and 20.7%, respectively. This level was considered in line with the MEIP, as an equity ratio < 30% was not considered to entail 'overcapitalisation'.
- (126) During the subsequent council meeting on 23 June 2010 ⁽¹⁴³⁾, the Municipal Council approved the proposed transactions, which applied retroactively as the group had already started its operations. After 'phase one', the total value of the equity amounted to NOK 40 million, which was converted to share capital and premium.
- (127) In November 2010, the Municipality engaged Byggtakst to determine the value of the plot planned for 'phase two' of the Remiks Miljøpark capitalisation plan. This plot formed part of the Miljøpark zoning plan, but had not yet been developed or used for waste management activities. According to the valuation report dated 12 January 2011, the specified plot spanned around 33 000 m² and was worth NOK 39.6 million ⁽¹⁴⁴⁾. Byggtakst affirmed that the valuation had been performed in accordance with Section 18B, point 2.2 (a) of ESA Guidelines on the sale of land.

3.3.1.3 The preparatory paper of 11 April 2012

- (128) According to the preparatory paper of 11 April 2012 ⁽¹⁴⁵⁾, produced ahead of the Municipal Council on 19 June 2012, the additional land was required to further develop Remiks Miljøpark's waste management activities and to refinance loans linked to the financing of the buildings.
- (129) Moreover, according to the preparatory paper, the Municipality had discovered that the value of the plot transferred in 2010 had been incorrectly stated in the accounts, as the Municipality had misunderstood the premise for the valuation. Accounting for infrastructure cost, the paper proposed adjusting the value to NOK 38.8 million.
- (130) Furthermore, the preparatory paper stressed the importance of adhering to the MEIP. In this regard, the following considerations were made by the Municipality.
- (131) First, with the planned contribution and the correct value of the first plot, the equity ratio of the group would be 26.3%. This ratio would not be considered abnormal as it mirrored the average of comparable companies in the industry.
- (132) Second, the paper considered the level of return that should be required. Based on certain assumptions regarding risk-free interest, inflation, tax rate, marked risk and illiquidity premium, the required rate of return was estimated to be 9%. However, several of the assumptions required further assessment. For example, whether the risk-free rate should be lower, considering lower rates were expected. Furthermore, there were few benchmarks available for ascertaining the risk premium. Finally, the liquidity premium should be evaluated, considering the investment was long-term.

⁽¹⁴³⁾ See Municipal Council Protocol of 23 June 2010, Document No 901189.

⁽¹⁴⁴⁾ See Appraisal from Byggetakst Nord AS, Document No 901181, entitled in Norwegian 'Verditakst for tomt g.nr. 125 B.nr 2 på Skattøra'.

⁽¹⁴⁵⁾ See preparatory paper of 11 April 2012, Document No 901183.

- (133) Third, with regards to the financial prospects of the activities, and whether the equity would contribute to an income increase as required under the MEIP, the paper asserted that the additional plot was needed for furthering the operation; the Remiks Group was in a growth phase, engaged in a business development program and actively exploring further development possibilities for the property, including plans to relocate waste processing activities from Tromsdalen to the site and collaborate with regional partners on establishing a waste treatment facility. These initiatives were foreseen to enhance operational efficiency and generate additional income from recyclable waste, ultimately leading to improved financial performance.
- (134) Finally, the paper reverted to the question of whether the proposed return requirement should be applied to the full investment, or whether it should be limited to 40% of that amount, considering 60% of the group's turnover related to the household waste activity, which did not allow for a market-based return or dividend payments.
- (135) Based on the above considerations, the final recommendation of the paper was to carry out a further assessment of the return requirement, to provide documentation on the portion of the invested capital that should be allocated to the commercial activities, and to undertake an economic assessment of the return prospect.
- (136) The subsequent municipal council meeting of 19 June 2012 ⁽¹⁴⁶⁾ authorised the additional transfer to Remiks Miljøpark and the correction to the accounts. With the additional in-kind contribution and the correct value of the first plot, the Municipality's total equity invested in the group amounted to NOK 102.5 million.

Table 2

Investments

Initial share capital and share premium upon establishment	NOK	195 000
Net equity transferred from the municipal enterprises	NOK	23 578 814
Transfer of land from the Municipality (first plot)	NOK	38 779 906
Transfer of land from the Municipality (second plot)	NOK	39 600 000
Total paid-in capital	NOK	102 153 720

3.3.2 *Grounds for opening the formal investigation procedure*

- (137) Prior to the Opening Decision, the complainant raised concerns about the initial 2010 capitalisation of Remiks Miljøpark, questioning whether it had complied with the MEIP. In particular, the complainant considered that the Municipality had not presented any documentation showing that the opening balance of the new entity had been set in accordance with this principle or documentation demonstrating that the municipality had required a normal return on the invested capital ⁽¹⁴⁷⁾.
- (138) Furthermore, the complainant noted that the 9% return requirement decided in 2012 appeared to have been established on the assumption of a 40/60 split between the group's commercial and non-commercial activities. However, as this ratio had shifted in the years after, with 58% of revenues deriving from commercial activities in 2016, the premise for setting the return rate had changed. The Municipality should therefore have adjusted its requirement accordingly and failing to do so had resulted in the Municipality not demanding a sufficient return ⁽¹⁴⁸⁾.

⁽¹⁴⁶⁾ See Municipal Council Protocol, Document No 901175.

⁽¹⁴⁷⁾ See letter from the complainant dated 31 January 2018, Document No 895954.

⁽¹⁴⁸⁾ See letter from the complainant dated 22 May 2018, Document No 914528.

- (139) In the Opening Decision, ESA recalled that compliance with the market economy operator principle ('MEOP') must be examined on an ex-ante basis, having regard to the information available at the time the transactions were decided upon. The question was therefore whether a rational market operator, with characteristics similar to the Municipality, would have carried out the transactions at issue based on the information available at the time ⁽¹⁴⁹⁾.
- (140) With regards to the initial 2010 set of transfers, ESA noted that the preparatory paper, drafted ahead of the municipal council decision, underlined the importance of complying with the MEOP. However, ESA considered it unclear how the Municipality had eventually ensured such compliance. ESA therefore invited the Norwegian authorities to provide further information in this regard.
- (141) Furthermore, with regards to the 2012 plot transfer and the value correction, ESA noted that the Municipal Council had decided on a 9% return requirement, but the decision lacked economic reasoning for why this rate would be appropriate. Moreover, the preparatory paper, which underlined the need to comply with the MEOP, included a discussion on whether the 40/60 split would be relevant in this regard. However, the paper did not seem to reach a conclusion. ESA therefore invited the Norwegian authorities to provide further documentation and elaborate on the basis for the return rate and on compliance with the MEOP principle.

3.3.3 Comments from the Norwegian authorities during the formal investigation procedure

- (142) During the formal investigation procedure, the Norwegian authorities have provided documentation showing how the 9% return requirement was determined and commented on the ex-ante prospects of obtaining such returns on the investments in the group.
- (143) The Norwegian authorities have illustrated that the Municipality, at the time of establishing Remiks Miljøpark, followed the procedure in the then applicable ESA guidelines on the sale of land, which was applicable at the time, by commissioning valuation reports by an independent appraiser.
- (144) With regards to the 9% return requirement adopted in 2012, the Norwegian authorities presented a legal opinion prepared by Ernst and Young ('EY') for the Municipality on 14 November 2011 ⁽¹⁵⁰⁾. In the report, EY estimated the rate of return the Municipality should have required for the 'phase one' transfers and, similarly, the rate it should require when evaluating the 'phase two' contribution.
- (145) Using the Weighted Average Cost of Capital (WACC) methodology, including the Capital Asset Pricing Model (CAPM), EY concluded that a required rate of return of 7.5% – 9% could be appropriate for the investment concerning the commercial activities, depending on whether a 4% liquidity premium should be included. The estimate was derived from the capital structure in the consolidated accounts.

Table 3

Parameters of the WACC estimates

WACC parameter	Valuation date	Long-term expectation
Risk-free interest rate	3%	4,5%
Inflation	2,5%	2,5%
Marked risk premium	6%	5%
Liquidity premium	4%	4%
Beta value		
Unlevered beta	0,7	0,7
Levered beta	2,367	2,367

⁽¹⁴⁹⁾ See Opening Decision, paragraph 84.

⁽¹⁵⁰⁾ See Legal Opinion from Ernst & Young dated 14 November 2011, Document No 1116638.

CAPM	21,2%	20,3%
Tax rate	28%	28%
Debt premium	1,5%	1,5%
Cost of debt	3,24%	4,32%
WACC	8,55%	9,06%

- (146) However, EY made clear that it had not been provided with projections, evaluations, budgets or other documentation that could enable it to ascertain whether it would be *realistic* to obtain the required rate of return on the investment at issue, which would be the decisive element for establishing compliance with the MEOP.
- (147) In this regard, during the formal investigation procedure, the Norwegian authorities acknowledged that no such information was provided to EY at the time. They further informed ESA that no such documentation exist today, other than the annual operating budgets for the years in questions ⁽¹⁵¹⁾. However, these would not provide sufficient information on the longer-term financial outlook at the time.
- (148) Beyond the preparatory papers and the opinion prepared by EY, the Norwegian authorities confirmed, upon request by ESA, that it could not obtain or present any other documentation to substantiate the considerations made at the time of the investment that could shed light on its prospective return ⁽¹⁵²⁾. The Norwegian authorities further acknowledged that the preparatory papers lacked a thorough economic assessment as required under the MEIP ⁽¹⁵³⁾. For this reason, they could not demonstrate full compliance with the MEOP to the standard required by ESA ⁽¹⁵⁴⁾. However, they considered that it should be taken into account that the Municipality, in good faith, had attempted to comply with the principle.
- (149) The Norwegian authorities further explained that the focus of the Municipality at the time was to ensure that the transactions would supply Remiks Miljøpark with the necessary capital to run its business. Maintaining the well-functioning and cost-effective handling of household waste was imperative. Even though the Municipality would be considered a market operator in this context, they considered it relevant to view the transactions in light of the need to continue the handling of household waste, which was a public responsibility.
- (150) The Norwegian authorities also stressed that the Municipality always had the objective of achieving a return on its investments ⁽¹⁵⁵⁾. The Norwegian authorities maintained that the investment had been made based on realistic expectations of obtaining a market return. The Municipality had had no reason to doubt that the group could operate efficiently when compared to the existing private operators; the municipality had solid experience in waste handling, which it could leverage when providing commercial services. As a result, when the decision was made, the Municipality had considered the activity to be commercially viable and had no intention of granting State aid. The Municipality was therefore of the opinion that it had demonstrated sound 'investor discretion' when investing in the group ⁽¹⁵⁶⁾.

⁽¹⁵¹⁾ See letter from the Municipality dated 17 February 2020, Document No 1114906.

⁽¹⁵²⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽¹⁵³⁾ See letter from the Municipality dated 17 February 2020, Document No 1114906.

⁽¹⁵⁴⁾ Ibid.

⁽¹⁵⁵⁾ See letter from the Norwegian authorities dated 25 March 2022, Document No 1278148.

⁽¹⁵⁶⁾ Ibid.

- (151) The Norwegian authorities further noted that the subsequent development in the company's financial situation confirmed that the Municipality's ex-ante assumptions had been correct, and the investment was thus justified on commercial grounds. The Municipality had therefore invested on terms acceptable to a private investor. Although compliance with the MEIP requires an ex-ante analysis, they considered ex-post results to serve as a 'reality check' to gauge the purported advantage ⁽¹⁵⁷⁾.
- (152) Based on the above considerations, the Norwegian authorities reiterated that there was nothing indicating that Remiks Miljøpark, upon its establishment, had been awarded an advantage, as all assets were transferred according to market value and the Municipal Council, guided by the prospects of long-term profitability, had been correct in its assessment of the investment.

3.3.4 *Comments from the Complainant*

- (153) During the formal investigation, the complainant referred to previous arguments ⁽¹⁵⁸⁾ and highlighted that the Norwegian authorities had acknowledged that the transactions made in 2010 and 2012 were not thoroughly assessed in advance and therefore failed to comply with the required standard of the MEOP ⁽¹⁵⁹⁾.

3.4 **Measures not covered by the Opening Decision**

- (154) After the Opening Decision, the complainant asked ESA to investigate transactions and loans between the different companies within the Remiks Group and made reference also to a municipal guarantee ⁽¹⁶⁰⁾. As the formal investigation does not cover these transactions, or any other allegations raised by the complainant at a later stage, see paragraph (12), arguments provided by the parties in this regard will not be further described or addressed in this decision.

II. ASSESSMENT

4 **Presence of State aid**

4.1 **Introduction**

- (155) Article 61(1) of the EEA Agreement reads as follows: '[...] 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.'
- (156) The qualification of a measure as aid within the meaning of this provision 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.
- (157) In the case at hand, ESA finds it appropriate to begin the assessment by analysing whether the second criterion is met for each measure, which involves determining whether the measures conferred an advantage on the respective undertakings. Should these measures not amount to an advantage, there would be no need to assess the remaining conditions of Article 61(1) of the EEA Agreement.

⁽¹⁵⁷⁾ Ibid.

⁽¹⁵⁸⁾ See letter from the complainant dated 12 August 2020, Document No 1147832.

⁽¹⁵⁹⁾ See letter from the complainant dated 1 July 2022, Document No 1300165.

⁽¹⁶⁰⁾ See letter from the complainant dated 6 March 2020, Document No 1118791.

4.2 Advantage

4.2.1 Legal background

- (158) The qualification of a measure as aid requires that it confers an advantage on the recipient undertaking. 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 ⁽¹⁶¹⁾.
- (159) Economic transactions carried out by public bodies are considered not to confer an advantage on the counterpart, and therefore not to constitute aid, if they are carried out in line with normal market conditions ⁽¹⁶²⁾. This is assessed pursuant to the ‘market economy operator principle’), which is a principle that has been developed with regard to different economic transactions ⁽¹⁶³⁾, such as the ‘market investor test’ and the ‘private acquirer test’ as outlined below ⁽¹⁶⁴⁾.
- (160) The MEOP is applicable unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create, or the State acted in its capacity as a public authority. In respect of the latter, it must be observed that the mere exercise of the prerogatives of a public authority, such as the use of means that are legislative or fiscal in nature, does not by itself render that principle inapplicable. It is the economic nature of the State intervention at issue and not the means put into effect for that purpose that renders that principle applicable ⁽¹⁶⁵⁾. However, the *application* of the MEOP should leave aside all public policy considerations, for example social, regional or sectoral policy considerations ⁽¹⁶⁶⁾.

4.2.1.1 The private acquirer test

- (161) The Court of Justice of the European Union has developed the ‘private acquirer test’ to identify the presence of an advantage in cases of public acquisition of goods or services on a given market ⁽¹⁶⁷⁾. In such situations, the advantage corresponds to the difference between the remuneration which the seller could have expected to achieve under normal market conditions and that actually paid to them ⁽¹⁶⁸⁾.
- (162) When public authorities purchase goods or services, it is generally sufficient to exclude the presence of an advantage when they pay market price. In this regard, a competitive tender is only one of several methods of ensuring that a transaction does not confer an advantage on the counterpart within the meaning of Article 61(1) of the EEA Agreement. Whether a transaction is in line with market conditions or not can also be established on the basis of other methods ⁽¹⁶⁹⁾.

⁽¹⁶¹⁾ 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], (“NoA”), OJ L 342, 21.12.2017, p. 35–84 and EEA Supplement No. 82, 21.12.2017, p. 1, paragraph 66.

⁽¹⁶²⁾ NoA, paragraph 74.

⁽¹⁶³⁾ NoA, paragraph 74.

⁽¹⁶⁴⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraphs 109 and 123.

⁽¹⁶⁵⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraph 108.

⁽¹⁶⁶⁾ NoA, paragraph 77 and Judgment of the EFTA Court of 27 January 2014 in Case E-1/13 Mila, paragraph 95.

⁽¹⁶⁷⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraph 123.

⁽¹⁶⁸⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraph 129.

⁽¹⁶⁹⁾ NoA, paragraph 97.

- (163) For instance, a transaction can be assessed in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking) ⁽¹⁷⁰⁾. If the purchase is carried out on the same terms by public bodies and private operators which are in a comparable situation, the purchases by private operators represent a benchmark, from which it can normally be inferred that the transaction is in line with market conditions ⁽¹⁷¹⁾. In contrast, if a public body and private operators which are in a comparable situation purchase the same service at the same time but under different terms or conditions, this normally indicates that the transaction is not in line with market conditions ⁽¹⁷²⁾.
- (164) To identify an appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned, the type of transaction at stake, and the market or markets concerned ⁽¹⁷³⁾. For instance, in market situations where volume discounts are granted, and prices therefore depend on the transaction volume of the buyer, the size of the purchase can be a relevant factor for establishing an appropriate benchmark transaction. Conversely, when volume discounts are not awarded, considerations relating to transaction volumes do not apply in the same manner.
- (165) In each of these scenarios, benchmarking often does not establish one precise reference value, but rather establishes a range of possible values by assessing a set of comparable transactions. In this regard, as long as the transaction falls within the aforementioned range, it is not necessary to determine whether the State could have made a better deal ⁽¹⁷⁴⁾. Rather the question is whether the seller, at the time, could have sold the goods or services for the same price in the private market ⁽¹⁷⁵⁾.

4.2.1.2 The market investor principle

- (166) As outlined above, the MEOP has been developed with regard to different economic transactions. The Court of Justice of the European Union and the EFTA Court have developed the '*market economy investor principle*' to identify the presence of State aid in cases of public investments.
- (167) To determine, based on the MEIP, whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size and operating in normal conditions of a market economy, could have been prompted to make the investment in question ⁽¹⁷⁶⁾.
- (168) Compliance with the MEIP must be examined on an *ex-ante* basis, having regard to the information that was available to the public body at the time the intervention was decided upon. Compliance with the MEIP can be demonstrated through an *ex-ante* business plan, which formed the basis for the investment decision. In fact, any prudent market economy operator would normally carry out its own *ex-ante* assessment of the strategy and financial prospects of a project, for instance, by means of a business plan ⁽¹⁷⁷⁾. A State can only invoke objective and verifiable elements available prior to or at the time of the decision to make an investment, and it is not enough to rely on ex-post economic evaluations entailing a retrospective finding that the investment made by the State was actually profitable, or on subsequent justifications of the course of action actually chosen ⁽¹⁷⁸⁾.

⁽¹⁷⁰⁾ NoA, paragraph 98.

⁽¹⁷¹⁾ See NoA, paragraph 86. See also Decision by the EFTA Surveillance Authority of 9 July 2014 on alleged State aid to Icelandair, Decision No 272/14/COL, paragraph 58 and following.

⁽¹⁷²⁾ NoA, paragraph 86.

⁽¹⁷³⁾ NoA, paragraph 99.

⁽¹⁷⁴⁾ To this view, see for example Judgment of 13 July 2022 in case T-150/20, EU: T:2022:443, paragraph 52.

⁽¹⁷⁵⁾ ⁰ See argumentation in Judgment in Heleba I, T-163/05, EU: T:2010:59, paragraph 175 and See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraph 129.

⁽¹⁷⁶⁾ NoA, paragraph 74.

⁽¹⁷⁷⁾ NoA, paragraph 78.

⁽¹⁷⁸⁾ See Judgment in *Commission v EDF*, C-124/10 P, EU:2012:318, paragraphs 82 to 86 and 105.

4.2.2 *The burden of proof for establishing an advantage*

- (169) It is settled case-law that it is for ESA to objectively prove the existence of State aid ⁽¹⁷⁹⁾. In particular, ESA is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence of State aid, the most complete and reliable information possible for that purpose ⁽¹⁸⁰⁾.
- (170) Even where ESA is faced with an EFTA State which, in breach of its duty to cooperate, fails to provide the information requested, it must base its decisions on reasonably robust and coherent evidence which provides a reasonable basis for presuming that a company has received an advantage which constitutes State aid, and which is therefore capable of supporting the conclusions which it has reached. In doing so, ESA cannot simply proceed on the assumption that an advantage constituting State aid has accrued to an undertaking, because it does not have information to conclude otherwise, in the absence of other evidence to conclude positively that such an advantage is based on a negative presumption ⁽¹⁸¹⁾ ⁽¹⁸²⁾.

4.2.3 **Measure 1:** *The Municipality's purchase of commercial waste collection services from Remiks Næring*

4.2.3.1 Factual background

- (171) As described in Section 3.1, during 2010–2016, the Municipality purchased waste collection services from Remiks Næring without a prior tendering procedure. The complainant raised concerns regarding this arrangement, alleging the Municipality paid above market price to Remiks Næring. The Norwegian authorities however, provided examples illustrating that the municipal entities had paid prices on par with those of Remiks Næring's private customers. Nevertheless, in the Opening Decision, ESA expressed doubts as to whether the examples were representative.
- (172) As a starting point for the assessment, ESA notes that the lack of a public tendering procedure does not lead to a presumption of an advantage ⁽¹⁸³⁾. Without prejudice to any possible breaches of public procurement rules, the arguments raised by the complainant in this regard can therefore not be conclusive for the State aid assessment.
- (173) Moreover, the initial complaint was founded on comparing the Municipality's total payment with the amount paid by the Municipality of Bodø for similar services. In the Opening Decision ⁽¹⁸⁴⁾, ESA reached the preliminary conclusion that this benchmarking was inadequate, because prices varied greatly between different areas of Norway, as well as the content and quality of the service. During the formal investigation, no further arguments were provided to challenge this conclusion. ESA therefore considers that benchmarking with Bodø is not an appropriate manner to assess the measure. In the following, ESA will therefore only address the remaining arguments raised.

4.2.3.2 Benchmarking

- (174) Against the legal background outlined in Section 4.2.1, the decisive element to consider is whether the Municipality's purchase of waste collection services granted Remiks Næring an advantage. The question to be assessed is thus whether Remiks Næring, during the relevant time, could have sold the equivalent waste collection services for the same prices in the private market, see paragraph (165).

⁽¹⁷⁹⁾ See for example Judgment of the Court (Fifth Chamber) of 19 September 2018, in Case C-438/16 P, EU:C:2018:737, paragraph 110.

⁽¹⁸⁰⁾ See Judgment of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 63.

⁽¹⁸¹⁾ See Judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraphs 67 to 70 and the case-law cited, and Judgment of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding v Commission*, C-148/19 P, EU:C:2020:354, paragraphs 48 to 51 and the case-law cited.

⁽¹⁸²⁾ Note that there is a certain presumption in the case of guarantees, see Judgment of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraphs 98 and 99.

⁽¹⁸³⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraphs 128 and 132.

⁽¹⁸⁴⁾ Opening Decision, paragraph 59.

- (175) As described in paragraph (39), Remiks Næring offered the same waste collection services to both its internal municipal customers and its external public and private customers, with external customers accounting for 85% of the total customer base. During the formal investigation, the Norwegian authorities have clarified that Remiks Næring operated with a general 'price list' for its regular services, which has been shared with ESA. The price list applied equally to all customers regardless of their legal status or purchase volume, see paragraph (61). In other words, Remiks Næring did not set individual prices for each customer, see paragraph (62).
- (176) As detailed in paragraph (46), the Norwegian authorities presented certain evidence of external benchmarks before the Opening Decision. In this regard, ESA notes that competing providers operated in the waste collection market in question, who could provide an alternative service for external customers. During the formal investigation, the Norwegian authorities provided additional documentation confirming that external private customers purchased the same services as those bought by the Municipality, and that these customers paid the same prices as the Municipality for those services, see paragraphs (63)–(64). Both specific examples and the number of matching external customers per service were provided. Through the same submission, they further documented that external customers were subject to the same price adjustments as the Municipality over the years. The Norwegian authorities have described that they faced administrative constraints, see paragraph (64), in documenting the precise portion of 'matching' external customers for each service, and ESA recognises that such constraints do in fact exist. Nevertheless, ESA considers the information provided to be sufficiently extensive to demonstrate that the findings are representative and fair. As a result, the documentation carries substantial weight on its own.
- (177) Concerning the complainant's claim that the Municipality should have leveraged its position as a large volume buyer to negotiate better prices, ESA acknowledges the importance of using a comparable transaction as a benchmark. In the case at hand, ESA observes that the various services were in practice supplied to all customers, regardless of size, according to the annually fixed price list, to which volume discounts were not granted. Consequently, purchase volumes did not impact the final price paid. Moreover, the scope for individual rebates was very limited, and they were in any case granted on a non-discriminatory basis and independent of size.
- (178) In these circumstances, all the transactions entered into with external customers must be considered comparable benchmarks. Thus, the question of whether the Municipality should be viewed as a single large volume buyer or multiple smaller customers has no significance for the current benchmarking exercise. Rather, the relevant question is whether the Municipality paid prices on a par with those paid by external private customers (who generally had access to alternative competing service providers). In this regard, given the extensive documentation provided during the formal investigation, ESA considers that the Municipality has demonstrated that it paid a market price to Remiks Næring.
- (179) On that background, since the Norwegian authorities have demonstrated that they adhered to the conditions outlined in Section 4.2.1, the initial doubts expressed by ESA in the Opening Decision have effectively been removed. Consequently, ESA considers that the Municipality's purchase of waste collection services from Remiks Næring did not provide Remiks Næring with an advantage. However, for the sake of completeness, ESA will in the following address the remaining arguments raised.

4.2.3.3 The increase in remuneration

- (180) As noted in Section 3.1.2.4, the complainant argued that the observed increase in remuneration paid between 2010 and 2016 indicated an advantage. The Norwegian authorities however, attributed the increase to the expansion of municipal activity, resulting in higher demand for services, see paragraphs (53), (68) and (69). However, figures supporting this claim could not be provided due to administrative constraints as mentioned in paragraph (64). As indicated above, ESA recognises that such constraints do in fact exist and that it would not be reasonable to perform a manual check of all invoices. This is also due to the fact that ESA does not find the increase in remuneration to entail a state aid issue in itself.

- (181) In fact, ESA notes the distinction between an increase in remuneration and an increase in the prices for the services. An increase in the remuneration paid does not by itself imply the presence of an advantage. Instead, the relevant indicator would be price increases, as a rise in remuneration can also be caused by an increase in the sales volumes or a change in the content of the services purchased. Thus, the key question centres on whether there was an increase in price that resulted in the Municipality paying above-market rates for the services in question.
- (182) In this regard, it is undisputed that there were certain price increases over the years in question, see paragraphs (54), (65) and (70). However, the Norwegian authorities have explained that annual price adjustments were made to the general price list and reflected changes in the CPI and cost increases. Supporting this claim, Remiks Næring's annual accounts ⁽¹⁸⁵⁾ confirm the presence of a corresponding increase in operating cost during this time. Importantly, these accounts also indicate that there was no rise in the operating margin during the same period, signifying that the price rises were driven by legitimate economic factors rather than any deliberate attempt to elevate Remiks Næring's margin through overcharging the Municipality.
- (183) The Norwegian authorities have also documented that the price adjustments had been applied to internal and external customers in the same manner, through an overview of categories of services and examples of external customers having been subject to the same increase in price, cf. paragraph (176) above ⁽¹⁸⁶⁾. Moreover, Remiks Næring's annual accounts demonstrate that the rise in remuneration was accompanied by an even greater rise in the company's total revenues ⁽¹⁸⁷⁾. As a result, there was a reduction in the proportion of revenues attributed to the Municipality. This documentation thus further indicates that the price adjustments were uniformly implemented, as the rise in remuneration aligns with the corresponding surge in total revenues
- (184) Based on the above, ESA concludes that the increase in the remuneration paid to Remiks Næring during the specified period cannot be considered evidence that an advantage was granted to Remiks Næring through 'over price'.

4.2.3.4 The comparison with Remiks Husholdning

- (185) As set out in Sections 3.1.2.5, 3.1.3.3 and 3.1.4.3, there was a notable gap between the remuneration paid to Remiks Næring in 2016 and the costs incurred by Remiks Husholdning in 2017. Initially, the complainant argued that this gap indicated a 30% margin on the municipal sales, see paragraph (58). During the formal investigation, the complainant adjusted the estimate to 65%, see paragraph (81). The Norwegian authorities however argued that the gap would be less than 14%, due to differences in the scope and cost of the services provided by the entities, see paragraph (72).
- (186) Regarding the calculations presented by both the complainant and the Norwegian authorities, ESA has the following remarks: First, ESA finds the complainant's calculation, indicating a 65% margin, to be flawed. As described by the Norwegian authorities in paragraph (72), Remiks Husholdning only assumed the collection task, while self-delivered waste remained with Remiks Næring. Failure to account for this difference results in severely overestimated margins. Second, ESA finds the calculation by the Norwegian authorities to be incomplete. While it accounts for the difference in scope, it fails to adjust for the fact that Remiks Husholdning's costs did not reflect a full year of operation as it took over the service from 1 February 2017.
- (187) When adjusting for both defects, ESA finds a 7% gap between Remiks Næring's remuneration and Remiks Husholdning's costs. In other words, the hypothetical operating margin on the municipal sale would be 7%. ESA notes that this margin falls within the range considered normal by the complainant, see paragraph (81).

⁽¹⁸⁵⁾ Annual accounts Remiks Group 2011-2016, Document No 884932.

⁽¹⁸⁶⁾ See Annex 1.1 to letter from Norwegian authorities of 17 February 2020, entitled 'Examples of customers services and price increase', Document No 1114886.

⁽¹⁸⁷⁾ Annual accounts Remiks Group 2011-2016, Document No 884932.

- (188) The Norwegian authorities also claimed that various cost savings materialised when the task was moved to Remiks Husholdning, see paragraphs (73) to (77). While there are diverging views on the magnitude of these savings, see paragraph (82), ESA finds the explanations by the Norwegian authorities on the existence of certain cost savings to be plausible. In particular, the demonstrated synergy effects and optical sorting were likely to have certain cost-saving effects. ESA notes that such cost savings would further reduce the hypothetical margin calculated in paragraph (187) above.
- (189) Based on the above, ESA does not find the gap to indicate that the margin on the municipal sales was excessive. Rather, the evidence indicates that the margin was normal. In paragraph (67), the complainant has stated that Remiks Næring's average operating margin declined after it lost the municipal contract in 2017, presumably implying that this sale shouldered more of the costs or were more profitable compared with the external sales. However, ESA considers that a sudden 15% drop in turnover in a network industry could result in a loss of operational synergies, thus triggering a need for adjustments or price changes. Such recovery can take time. Consequently, a margin decline in the three years after 2017, does not in ESAs view indicate an advantage.
- (190) In light of the above, ESA concludes that the observed gap between the remuneration to Remiks Husholdning and Remiks Næring, and the resulting imputed hypothetical margin of Remiks Næring, does not indicate an advantage.

4.2.3.5 Conclusion

- (191) Based on the assessment presented above, ESA does not find any of the arguments put forward by the complainant or other documentation obtained in the case to support a conclusion that an advantage was granted to Remiks Næring. On the contrary, after carefully examining the documentation and evidence presented, ESA considers that the Municipality's purchase of commercial waste collection services during the period in question was on market terms.

4.2.4 **Measure 2:** *Remiks Husholdning's purchase of waste processing services*

4.2.4.1 Background

- (192) As described in Section 3.2, starting in 2010, Remiks Husholdning, a 'statutory entity' within the Remiks Group, was assigned the responsibility of managing household waste on behalf its owner municipalities. From 1 February 2017, Remiks Husholdning also handled the Municipality's 'own' commercial waste.
- (193) As part of this process, the waste collected by Remiks Husholdning was transported to the Tromsø Miljøpark for sorting and then passed-on to Remiks Produksjon for processing. Remiks Produksjon would directly handle reception, pre-processing, and intermediate storage of waste, but engaged external operators in downstream markets for the final treatment. The arrangement between Remiks Husholdning and Remiks Produksjon was ongoing at the time of the Opening Decision.
- (194) The services were procured without a tender procedure. The complainant raised concerns regarding the lack of tendering, alleging Remiks Husholdning paid prices exceeding market price to Remiks Produksjon. To substantiate this claim, the complainant pointed to the period between 2012 and 2015, where the complainant found there to be a noticeable increase in the total payment made. The Norwegian authorities however, claimed the prices were market conform based on benchmarking with prices paid by Remiks Næring and price adjustments on market terms. In the Opening Decision, ESA expressed doubts regarding the pricing arrangement, questioning the appropriateness of the benchmarking approach used.

4.2.4.2 Assessment

- (195) Against the legal background outlined in Section 4.2.1, the decisive element to consider in the State aid assessment is whether Remiks Husholdning's purchase of waste processing services granted Remiks Produksjon an advantage.

- (196) As a starting point for the assessment, ESA notes that the lack of a public tendering procedure does not lead to a presumption of an advantage ⁽¹⁸⁸⁾. Without prejudice to any possible breaches of the public procurement rules, the argument raised by the complainant in this regard can therefore not be conclusive for the State aid assessment.
- (197) During the formal investigation procedure, the Norwegian authorities have provided information on the characteristics of the market in question. Based on this information, ESA acknowledges that waste processing services are provided within geographically delimited markets, see paragraph (92), each with a distinct catchment area, as the transportation distance to the processing facility is decisive for the customer's choice of provider. The importance of proximity makes local or regional waste collectors the primary customer base, along with the occasional individual waste producer.
- (198) ESA further acknowledges that the services offered by the various providers are differentiated based on the capabilities of the processing facility and other service elements tailored to the customer's needs, and the bundle of services provided under a specific contract, see paragraph (92). Indeed it seems to be the case that there are variations in processing costs across different areas and providers due to factors such as scale economies, technology, social and environmental standards, and the availability of and distance to downstream treatment facilities and markets, see paragraph (92). Finally, ESA also recognises that the cost can vary over time, in particular as rates in the downstream waste treatment markets are volatile, see paragraph (96).
- (199) Considering these market characteristics, ESA accepts the position of the Norwegian authorities that there were no comparable *external providers* of waste processing services in the area concerned with similar facilities and equivalent service offerings to Remiks Produksjon, see paragraph (92). In addition, Remiks Produksjon had no *external customers* with a comparable purchase to that made by Remiks Husholdning, and therefore no external customers could serve as a benchmark.
- (200) In the Opening Decision, ESA expressed doubts regarding the benchmarking with Remiks Næring, as the benchmarking involved internal transactions. However, considering the market situation described directly above, ESA recognises the difficulty in finding valid external benchmarks for the transactions in question. As described above, a multitude of factors influence prices in these markets, making it impossible to collect and compare prices in a straightforward manner. Combined, these factors contribute to a complex contract and region-specific pricing landscape.
- (201) The market characteristics described above further lead ESA to find that the reasoning behind the benchmarking strategy chosen was sound. As described in paragraph (96), the contract between Remiks Husholdning and Remiks Produksjon contained an annex setting out the 'unit prices' for the various waste fractions. The initial prices for each fraction were based on a benchmarking with the prices agreed upon between Remiks Næring and Remiks Produksjon for the former's purchase of services from the latter. In the absence of external references, which made it challenging to establish objective benchmarks for the transactions, the prices agreed between Remiks Næring and Remiks Produksjon for comparable services reflected prices in the area concerned and were therefore a suitable reference point for the contract between Remiks Husholdning and Remiks Produksjon. The main factors supporting this approach was the similarity in the content, cost, and volume of these transactions, as well as the fact that Remiks Næring operated with a commercial purpose within a competitive market alongside external providers.
- (202) Although an external benchmark would have removed the doubts described in the Opening Decision, ESA also recognises the logic of the argument raised by the Norwegian authorities, see paragraph (94). Indeed, when approximately 85% of Remiks Næring's sales related to external clients, see paragraph (39), it is reasonable to assume that excessive internal prices could adversely impact Remiks Næring's competitiveness in the market for commercial waste collection services. Consequently, Remiks Næring had a genuine market-driven incentive to ensure that the internal prices for waste processing services were market oriented.

⁽¹⁸⁸⁾ See Judgment of the Court of 17 November 2022, C-331/20 P and C-343/20 P, *Commission v Italy*, EU:C:2022:886, paragraphs 128 and 132.

- (203) As a result, given the specific market circumstances, ESA considers the internal prices agreed upon between Remiks Næring and Remiks Produksjon to be a reasonable reference point for setting the prices to be paid by Remiks Husholdning. ESA thus finds the benchmarking with Remiks Næring to be an argument supporting the absence of an advantage in the prices paid by Remiks Husholdning to Remiks Produksjon.
- (204) In this regard, ESA also notes that the complainant seemingly has misunderstood the benchmarking exercise performed, see paragraph (106), as it was the prices paid by Remiks Næring to Remiks Produksjon that constituted the benchmark, rather than any price paid to Remiks Næring.
- (205) With regard to subsequent price adjustments, the contract included an adjustable pricing mechanism for the subsequent years, stating that the prices would undergo annual adjustments to reflect market developments, with negotiations being the prescribed method for such revisions, further detailed in paragraph (97). The contract stated that in the event of a failure to reach a mutual agreement, the price would be adjusted based on the CPI or on documented cost increases not captured by the index, provided these were beyond Remiks Produksjon's control.
- (206) ESA notes that the Norwegian authorities have maintained that the price adjustments came about after commercial negotiations between Remiks Husholdning and Remiks Produksjon, in accordance with the arm's length principle under the Limited Liability Company's Act, see paragraph (91). This principle assumes that in a free and open market, unrelated parties will negotiate and agree on prices and conditions based on their own self-interest. The Norwegian authorities have emphasised that no external auditors have noted any irregularities with regards to these internal transactions.
- (207) However, the complainant has in this regard raised concerns about an observed increase in the total remuneration paid by Remiks Husholdning from 2012 – 2015, suggesting this rise in payment indicated a potential discrepancy between the internal pricing structure and the prevailing market rates for comparable services, see paragraph (109).
- (208) ESA acknowledges the possibility that the observed increase in total remuneration could be a result of price adjustments going beyond general market developments. However, ESA does not find the increase to indicate that this is the reason in the case in question.
- (209) First, it is important to consider that the increase in remuneration during 2012 – 2015 is explained, at least in part, by the 15% increase in household waste volumes over the same period, see paragraph (86). In this regard, ESA also notes that the final payment made by a customer is contingent on the weight and composition of the waste delivered to the processing facility. As these parameters fluctuate, they can impact the total remuneration paid by a customer for the waste processing services.
- (210) Second, the Norwegian authorities have provided information indicating that the price adjustments made during this period were primarily driven by higher costs of downstream treatment and cost increases resulting from an improved service offering, which included extended opening hours and the establishment of a new recycling centre, see paragraph (102). ESA finds these reasons plausible, as increased downstream costs and the enhancement of service quality could justify price adjustments. Notably, Remiks Produksjon's annual accounts support this claim, confirming a substantial 34% increase in operating costs over the period.
- (211) Based on the information presented above, ESA's investigation has not uncovered alternative external benchmarks for market prices that could challenge the internal benchmarking approach taken by the Norwegian authorities. The complainant has also not provided any pertinent information in this regard. As mentioned above, ESA recognises the logic of the approach taken by the Norwegian authorities and considers it an argument against a finding of an advantage. Moreover, ESA finds that neither the price adjustments nor the rise in remuneration can provide a conclusive basis for establishing an advantage. On the contrary, the adjustments appear to be justified for the reasons provided, which is also corroborated by the annual accounts.
- (212) For the sake of completeness, ESA adds that it has made efforts to obtain a measure of normal returns in the waste processing industry during the formal investigation procedure, specifically by examining the average annual operating margin for the years 2010–2020.

- (213) However, establishing a reference group of comparator operators has proven challenging due to variations in the scope of activities among different providers, see paragraph (99). Many processing facilities are part of vertically integrated waste management companies, actively involved in multiple layers of the value chain. Thus, there are few examples of operators exclusively providing waste processing services or having established a separate legal entity for this activity with distinct annual accounts. The Norwegian authorities and the complainant also hold differing views on which operators would be the most representative, see paragraphs (99) and (108). In any event, figures from the annual reports of the entities identified show a wide range in average annual operating margins, as observations range from 1% – 37%.
- (214) Based on the above considerations, ESA is not in a position to form a view on what is the normal return in the waste processing industry and whether the operating margins achieved by Remiks Produksjon were within a normal range. While recognising the challenge of finding normal returns in the industry in question, ESA nevertheless observes that the complainant's claim in paragraph (108), proposing a company with a history of losses in seven out of the last 12 years as a benchmark for normal returns, appears inappropriate. In any event, the company that the complainant refers to in this regard is active in both waste collection and processing.
- (215) Even if ESA is not in a position to form a view on what is a normal return in the waste processing industry, the Norwegian authorities emphasised that excessive internal prices could potentially lead to superior financial performance for Remiks Produksjon, see paragraph (98). Citing an overall average operating margin of 6% during 2010–2020, they argued against this scenario, claiming such superiority was not evident. While ESA acknowledges the validity of this assertion, it also considers the viewpoint raised by the complainant in this regard, namely that above-market rates in some contracts could be offset by low rates in others, see paragraph (107).
- (216) Given these considerations, ESA recognises that merely observing an absence of high margins would not be adequate to exclude an advantage. However, ESA still considers that a *positive* finding of significant margins could be indicative of excessive prices, thus warranting further examination of the pricing arrangements. In this regard, ESA takes account of the Norwegian authorities' position that a 6% operating margin does not appear excessive and aligns with this view, considering the 1% – 37% range observed in the industry and the capital intensive nature of the activity, see paragraph (212). Thus, in ESA's view, Remiks Produksjon's margin does not appear abnormal, suggesting further examination would not be warranted on that basis.

4.2.4.3 Conclusion

Based on these findings and the information it has been possible to obtain in the case, ESA considers that there are not sufficient indications of the conferral of an advantage. As ESA bears the burden of proof in this regard, the conclusion reached is that no advantage can be established.

4.2.5 **Measure 3:** *The capitalisation of the Remiks Group*

4.2.5.1 Background

- (217) As outlined in section 3.1.1, between 2009 and 2010, the Municipality carried out an extensive reorganisation of its waste management activity, which involved dissolving the municipal enterprises Tromsø Miljøpark KF and Remiks Tromsø KF and establishing the limited liability company Remiks Miljøpark with subsidiaries.
- (218) During this reorganisation, in 2010, the Municipality transferred the assets, debt and equity of the two municipal enterprises to Remiks Miljøpark, see paragraphs (110) and (136), resulting in a net equity of NOK 23.7 million. The Municipality further made two consecutive in-kind contributions; in 2010, a plot valued at NOK 38.8 million and in 2012, a plot valued at NOK 39.6 million. As a result, the total paid-in equity invested in the Remiks Group in relation to its establishment amounted to NOK 102.5 million, including the initial share capital required for incorporation.

- (219) As detailed in paragraph (118) and (127), the land included in the transfers were reported on the balance sheet of Remiks Miljøpark in accordance with valuation reports carried out by an appraiser. Moreover, as described in paragraph (146), the Municipality requested an opinion by EY on the cost of capital that should guide the investment decision, which found that a WACC of 9% could be appropriate. However, EY lacked information to ascertain whether such yield could be expected.
- (220) The measure in question involves capital allocated by a public body to an undertaking engaged in economic activity. Because such investments are routinely made by private market investors, ESA finds the MEOP to be applicable. In the Opening Decision, ESA had doubts as to whether the Municipality had acted in accordance with the MEOP when establishing the Remiks Group.

4.2.5.2 Assessment

- (221) As described in the legal background outlined in section 4.2.1, the relevant question to assess is thus whether, in similar circumstances, a rational private investor of a comparable size operating in normal conditions of a market economy would have made the investment in question. In this regard, with reference to the MEOP evaluation conducted by the Norwegian authorities, ESA makes the following observations.

The opening balance

- (222) As noted in paragraph (137), the complainant raised concerns about the initial capitalisation of Remiks Miljøpark, questioning if it complied with the MEOP. Of specific concern was the absence of documentation showing that the opening balance had been set in accordance with this principle, which could lead to the return requirement insufficiently reflecting the value of the assets involved.
- (223) In this regard, as detailed in section 3.3.1, the Norwegian authorities have provided documentation on the valuations of the assets, which illustrates that the Municipality worked progressively to ensure that the assets were reported at market value. The Municipality commissioned valuation reports from an independent appraiser, in line with the criteria set out in the former ESA Guidelines on the sale of land. ESA does not have any indications that these valuations were incorrect. On the contrary, subsequent sales of the same property corroborates that the plots were correctly valued⁽¹⁸⁹⁾. Concerning the remaining assets, these were entered at book value in accordance with Norwegian accounting rules. On that basis, ESA has not found reasons to doubt the values, and it has therefore not been deemed necessary to obtain further expert opinions. Consequently, ESA considers that the opening balance of Remiks Miljøpark does not, in isolation, raise State aid concerns.

The required rate of return

- (224) With regard to the return requirement, as described in paragraphs (144) – (144), the Municipality adopted a 9% return criterion on the capital employed in 2012. However, as detailed in paragraphs (132) and (145), in addition to being made only in 2012, this estimate relied on several assumptions, which called for further analysis. Based on the evidence submitted in the case, no such assessment was made at the time.
- (225) However, contrary to the assertion made by the complainant in paragraph (138), the Municipality did not derive its return requirement from an assumed 40/60 split between the economic and non-economic activities. As stated in paragraph (145), the WACC was based on the capital structure of the consolidated accounts.

⁽¹⁸⁹⁾ The valuation of the first plot was NOK 1 200 per m² in 2010, while the valuation of the second plot was NOK 1 300 per m² in 2011. Valuations of a neighbouring plot sold in 2014 ranged between NOK 1 076–1 600 per m², but the price finally agreed was NOK 1 348 per m². In addition, a small part of the second plot at issue was sold for around NOK 1 351 per m² in 2014.

- (226) ESA further notes that the complainant appears to conflate the 'hurdle rate' used to assess the viability of an investment ex-ante, with the continual 'return target' it seeks to derive from its ongoing market operations. These are different concepts. Regarding the hurdle rate, ESA recalls that the investment decision is based on the information available at the time of the decision. As for the latter, the attainment of a return target depends on ongoing market dynamics after the investment has been made. There is no guarantee that an investment will achieve the initially required return rate despite its prediction. Consequently, the argument raised by the complainant in this regard is unrelated ⁽¹⁹⁰⁾.
- (227) Notwithstanding the above, from ESA's review of the documentation provided, it appears that the WACC estimate was overstated; it included a high asset beta of 2.4, which had been levered based on an exaggerated debt-to-equity ratio. Moreover, the inclusion of a high liquidity premium may not have been warranted in this context, considering the Municipality had a long-term perspective on its holdings ⁽¹⁹¹⁾. In this regard, ESA notes that when the public investor is in a controlling position, its actions may be compared with those of a private investor pursuing a long-term structural policy. They do not have to mirror those of private investors with a short-term investment horizon. With the correct D/E ratio and without a liquidity premium, the WACC would be ~ 7%. On that basis, a 9% WACC does not, in isolation, raise a concern.

The prospect of obtaining the required return

- (228) During the formal investigation, the Norwegian authorities asserted that the investment had been made to discharge a public responsibility, see paragraph (148). Although such considerations are not relevant for the MEIP-test, see section 4.2.1, ESA acknowledges that the investment at issue partially pertains to non-economic activities, which is a separate issue.
- (229) In light of this, ESA notes that when a waste management infrastructure is used for both economic and non-economic activities, public funding will fall under the State aid rules only insofar as it covers the costs linked to the economic activities ⁽¹⁹²⁾. As a result, this could be a relevant factor to consider at the investment appraisal stage. However, for the reasons set out below in paragraph (235), ESA has not taken a final position on the correct allocation of capital between the economic and non-economic activities, and the importance of this in regard to obtaining the required return.
- (230) With regard to whether the investment, at the time of the decision, could be expected to yield a return exceeding the capital cost, ESA considers that the contemporaneous assessment carried out by the Municipality, see paragraphs (123) – (125) and paragraphs (131) – (134), as well as arguments raised by the Norwegian authorities during the formal investigation procedure, see paragraph (150), did not provide the Municipality with a sufficient basis for ascertaining the prospective profitability of the investment to the standard required under the MEIP.
- (231) The preparatory papers leading to the investment decision note that the new organisational form and structure was considered better suited to achieve operational efficiency and promote a more focused managerial approach. The co-location and coordination of household and commercial waste were anticipated to yield synergies that could reduce the per-tonne processing cost. Furthermore, the papers characterised the Remiks Group as being in a growth phase, actively pursuing business development initiatives and exploring property developments. These plans included consolidating additional waste activities at the site and collaborating with partners on establishing a waste treatment facility. According to the papers, these initiatives were foreseen to enhance operational efficiency, generate additional income from recyclable waste, and ultimately lead to improved financial performance. However, no economic forecasts were provided.

⁽¹⁹⁰⁾ See for example Commission Decision SA.33846, JOCE L/404/2020, Helsingin Bussiliikenne Oy, paragraphs 68 and 69.

⁽¹⁹¹⁾ ⁰ See for example ESA Decision 339/98/COL, The financing of the Arcus group of companies, OJ L 157, 24.6.1999, p. 49 and EEA Supplement No. 28, 24.06.1999.

⁽¹⁹²⁾ NoA, paragraph 205.

- (232) As stated in paragraph (168), a prudent market economy operator would normally carry out an ex-ante assessment of the strategy and financial prospects of a project, for instance, by means of a business plan. In the present case, it is undisputed that the Municipality did not carry out a thorough profitability assessment ahead of the transactions. Despite the Norwegian authorities' view that the investments were still justified on commercial grounds, the fact that no profitability assessment was conducted indicates that the Municipality did not act as a hypothetical private investor would have done in a similar situation. In this regard, ESA notes that the Norwegian authorities cannot be heard on the argument concerning their good faith attempt to act in compliance with the MEIP, see paragraph (148). In essence, the result remains the same regardless of the Municipality's intention.
- (233) The Norwegian authorities have also provided information on the realised level of return achieved during the years following the investment, see paragraph (151), claiming this confirmed the Municipality's ex-post assumption on the viability of the project. In this regard, as detailed in section 4.2.1, ESA notes that the only relevant factors to consider are the elements available and the developments foreseeable at the time when the decision was taken. As a result, this argument is not relevant.
- (234) Although the Municipality's failure to conduct an ex-ante assessment can indicate that the Municipality did not act as a private investor ⁽¹⁹³⁾, this fact alone is not sufficient to substantiate a conclusion of an advantage. In the course of the case, ESA has thoroughly examined the information received and conducted multiple inquiries to access further information, with the aim of obtaining insight into data that could shed light on the ex-ante return prospects. Unfortunately, the information obtained has not been sufficient to enable such an assessment.
- (235) Regrettably, the lack of adequate ex-ante information prevents ESA from determining whether a private investor, operating under normal market conditions, would have made the investment in question. As stated in Section 4.2.2 above, the burden of proof for establishing an advantage rests with ESA. Given the inability of ESA to positively establish that an advantage was present, ESA is unable to affirm the fulfilment of this criterion. As a result, ESA must conclude that no advantage can be established.

5 Conclusion

- (236) On the basis of the foregoing assessment, ESA concludes that it cannot be established that the Norwegian authorities have granted State aid in breach of Article 1(3) of Part I to Protocol 3 SCA.

Done at Brussels, 27 September 2023.

For the EFTA Surveillance Authority,

Arne RØKSUND
President
Responsible College Member

Árni Páll ÁRNASON
College Member

Stefan BARRIGA
College Member

Melpo JOSÉPHIDES
Countersigning as Director,
Legal and Executive Affairs

⁽¹⁹³⁾ See for example Judgment of the Court in Case C-160/19 P, *Milan airports*, EU:C:2020:1012, paragraph 113.