Brussels, 4 December 2019
Case No: 84370
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Decision No: 085/19/COL

Ministry of Trade, Industry and Fisheries
P.O. Box 8090 Dep
0032 Oslo
Norway

Subject: Waste handling in Tromsø

1 Summary

(1) The EFTA Surveillance Authority (the 'Authority') wishes to inform Norway that, having assessed a complaint relating to (i) Tromsø municipality's purchase of waste collection services from Remiks Næring AS, (ii) Remiks Husholdning AS' purchase of waste treatment services from Remiks Produksjon AS, and (iii) transactions from Tromsø municipality to the Remiks Group in 2010 and 2012 (the 'measures'), the Authority has doubts as to whether the measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement, and as to the compatibility of the measures with the EEA Agreement. Therefore, the Authority is required to open a formal investigation procedure ([1]).

(2) The complainant has also submitted a separate complaint about alleged violations of the public procurement rules. This decision, however, concerns the state aid complaint only, and remains without prejudice to the ongoing investigation concerning public procurement handled by the Authority's Internal Market Affairs Directorate ([2]).

(3) The Authority has based its decision on the following considerations.

2 Procedure

(4) By letter dated 16 August 2016, Norsk Industri, the Federation of Norwegian Industries, (the 'complainant') lodged a complaint against the measures ([3]).

(5) The Norwegian authorities submitted comments to the complaint on 5 October 2016 ([4]). The Authority requested further information from the Norwegian authorities on 18 January 2017 ([5]), which was provided by letters dated 28 February ([6]) and 20 March 2017 ([7]).

(6) The Authority provided the complainant with a preliminary view on the complaint by letter dated 24 May 2017 ([8]). The Authority received further information from

([1]) Reference is made to Article 4(4) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
([2]) Case No 78085.
([3]) Document No 814858.
([4]) Document No 821154.
([5]) Document No 840687.
([6]) Document No 844198.
([7]) Document No 848555.
([8]) Document No 854974.

the complainant on 22 June 2017 ([9]), and from the Norwegian Authorities on 22 August 2017 ([10]).

(7) By letter dated 31 August 2017, the Authority requested further information from the Norwegian authorities ([11]). By letters dated 31 October and 20 November 2017, the Norwegian authorities replied to the information request ([12]).

(8) By letter dated 16 January 2018, the Authority requested further information from the Norwegian authorities ([13]), and the Norwegian authorities provided information by letter dated 5 March 2018 ([14]).

(9) The complainant sent additional information by emails of 14 December 2016; 15 September and 13 November 2017; and 12 January, 31 January and 22 May 2018 ([15]).

3 Background

3.1 Historical development

(10) In Norway, waste handling services are regulated by the Pollution Control Act ([16]). The Act makes a distinction between household waste, which is all waste from the municipalities' households, and industrial waste, which is the waste from public and private enterprises.

(11) Up until 2009, Tromsø municipality organised its waste management services in-house through municipal units and enterprises. In 2009, the municipal council decided to organise the municipality's waste management in a group of limited liability companies ([17]). This was done to put an "arm's length" between the municipality and the activities exposed to competition ([18]).

(12) In June 2009, the municipal council converted the municipal enterprise Tromsø Miljøpark KF ([19]), which had previously performed waste management services for Tromsø municipality, into Remiks Miljøpark AS ([20]). In December 2009, three subsidiaries were established under Remiks Miljøpark AS ([21]): Remiks Husholdning AS ('Remiks Husholdning'), Remiks Næring AS ('Remiks Næring')

([9]) Document No 862433.
([10]) Document No 870978.
([11]) Document No 870978.
([12]) Documents No 880582 and 884931.
([13]) Document No 882703.
([14]) Document No 901145.
([15]) Documents No 831575, 873959, 882172, 896066, 895954 and 914528.
([16]) *Forurensningsloven*, LOV-1981-03-13-6.
([17]) Attachments 2, 3 and 4b to letter dated 3.5.18, Documents No 901215, 901211 and 901203; Tromsø municipality's letter dated 31.10.2017, Document No 880582, and Attachment 7 to the letter, Document No 880592.
([18]) Preparatory papers from Tromsø municipality's administration to the municipality council, Attachment 2 to letter dated 5.3.18, Document No 901215.
([19]) A municipal enterprise (in Norwegian: *kommunalt foretak*, shortened KF) is an administrative branch of the central municipality, and not a separate legal entity. Municipal enterprises are regulated by the Local Government Act chapter 11.
([20]) Tromsø municipality's letter, dated 31.10.2017, Document No 880582, and Attachments 6 and 7 to the letter, Documents No 880590 and 880592.
([21]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145, and Attachment 4 to the letter, Document No 901219, and Tromsø municipality's letter dated 31.10.2017, Document No 880582 and Attachment 7 to the letter, Document No 880592.

and Remiks Produksjon AS ('Remiks Produksjon'). Collectively the companies are referred to as the 'Remiks Group'.

3.2 Transactions involving the Remiks Group in 2010 and 2012

(13) On 23 June 2010, Tromsø municipal council made the formal decision to transfer the capital and liabilities that were left in the municipal enterprises Tromsø Miljøpark KF and Remiks Tromsø KF to Remiks Miljøpark AS ([22]). The transactions involved movables, capital, liabilities, and real estate, including the waste handling facility Remiks Miljøpark (the same name as the parent company) where the Remiks Group companies have their business. The assets were converted into share capital in Remiks Miljøpark AS ([23]).

(14) In 2012, Tromsø municipal council decided to transfer real estate and a loan to Remiks Miljøpark AS, in addition to adjusting the value of the real estate transferred in 2010 ([24]). In both the preparatory paper ([25]) and the decision ([26]), Tromsø municipality specified a requirement for a 9% return on the investment.

3.3 The current company structure

(15) Per November 2019, the Remiks Group is organised as follows ([27]):

- Remiks Miljøpark AS is the parent company in the Remiks Group. It is owned 99.99% by Tromsø municipality and 0.01% by Karlsøy municipality ([28]). It provides services and rents out property to its subsidiaries.

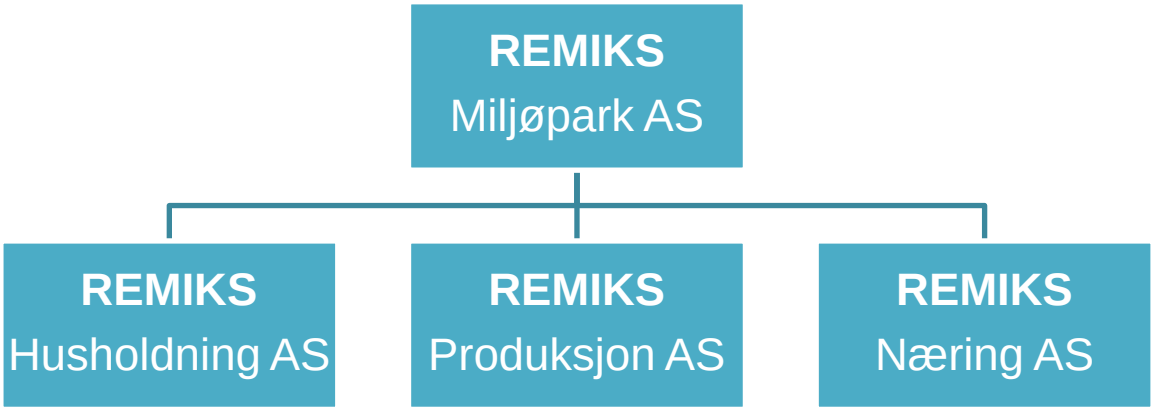
- Remiks Husholdning is owned 100% by Remiks Miljøpark AS. Until 2017, it only collected household waste for Tromsø municipality. As of 1 February 2017, it also collectes Tromsø municipality's own industrial waste.

- Remiks Næring is owned 100% by Remiks Miljøpark AS. Remiks Næring specialises in the collection of industrial waste, and offers such services on the market. Until 1 February 2017, it had an agreement with Tromsø municipality for the collection of Tromsø municipality's own industrial waste.

- Remiks Produksjon is owned 100% by Remiks Miljøpark AS. It provides waste treatment services on the market, primarily to its sister companies.

(16) Below is an illustration of the Remiks Group's structure:

([22]) Attachment 8a to Tromsø municipality's letter dated 5.3.2018, Document No 901189. The transfers were decided on in 2010, but backdated to the establishment of Remiks Miljøpark AS in 2009.
([23]) Attachments 4, 4c and 8a to Tromsø municipality's letter dated 5.3.2018, Documents No 901219, 901205 and 901189.
([24]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145, and attachments 8, 8b, 8c, 8d and 9 to the letter, Documents No 901183, 901181, 901177, 901179 and 901175.
([25]) In Norwegian: *saksfremlegg*.
([26]) Attachment 9 to the letter from Tromsø municipality, dated 5.3.2018, Document No 901175.
([27]) Based on information obtained at www.purehelp.no 21.11.2019.
([28]) The 0.01% ownership by Karlsøy municipality seems to be related to intentions that Tromsø and Karlsøy would cooperate on waste handling, but this seems not to have materialised. See letter from Tromsø municipality, dated 5.3.2018, Document No 901145.



3.4 Household waste

(17) The Norwegian Pollution Control Act, section 27a, first paragraph, defines household waste as waste from private households, including large objects such as furniture, etc.

(18) Under the Pollution Control Act, sections 29 and 30, the municipalities are obliged to collect and have facilities to treat household waste ([29]). The costs associated with the waste management are to be covered by a fee, levied on the inhabitants ([30]). The municipal waste fee are to be calculated based on a self-cost principle; covering the total costs of collecting and handling the waste on behalf of the municipality, without generating a profit for the municipality, in accordance with the Waste Regulation, chapter 15 ([31]).

(19) When Tromsø municipality reorganised its waste handling services and established the Remiks Group in 2010, by way of its control in Remiks Husholdning it instructed Remiks Husholdning to collect the household waste on behalf of the municipality, based on the self-cost principle. Remiks Husholdning collects and sorts the waste. However, it purchases the waste treatment services, consisting of incineration, depositing and recycling, from its sister company Remiks Produksjon.

3.5 Industrial waste

(20) The Norwegian Pollution Control Act, section 27a, second paragraph, defines industrial waste as waste from public and private enterprises and institutions.

(21) The Norwegian Pollution Control Act does not oblige the municipalities to organise the collection or handling of industrial waste. Any operator can therefore offer these services on the market. However, all producers of industrial waste are obliged to ensure the proper disposal and handling of their waste. Tromsø

([29]) This means that any private operator needs an explicit permission from the municipality, in order to provide the service.
([30]) The Pollution Control Act, section 34. The fees can be secured through a statutory charge pursuant to the Mortgage Act (*panteloven*, LOV-1980-02-08-2).
([31]) The Waste Regulation (*avsfallsforskriften*, FOR-2004-06-01-930), chapter 15.

municipality, as a producer of industrial waste, is therefore obliged to ensure the proper collection and treatment of its own industrial waste, produced by the different municipal units (kindergartens, hospitals, nursing homes, municipal offices, etc.) ([32]).

(22) Before 2010, Tromsø municipality ensured the collection of its own industrial waste through a municipal enterprise ([33]). When Tromsø municipality reorganised its waste handling services and established the Remiks Group, Remiks Næring took over the collection of the municipality's own industrial waste ([34]). Therefore, the agreements for the services were not tendered out or renegotiated. From 2010, Remiks Næring merely continued to provide the same services to the municipality as the municipal enterprise had done before the reorganisation. The only thing that changed was the invoicing system, from internal and centralised to external and decentralised. This meant that each municipal unit (municipal offices, kindergarten, etc.) paid for the service from their budget, and Remiks Næring treated them as individual customers ([35]).

(23) Because of this continuation of the collection services, Remiks Næring and Tromsø municipality never entered into a formal contract for the waste collection services ([36]). The Norwegian authorities have described the arrangement as an unwritten framework agreement where each municipal unit decided its need for waste collection, and was invoiced separately ([37]). The Authority will refer to the arrangement between Tromsø municipality and Remiks Næring, regarding the collection of industrial waste, simply as an agreement.

(24) In 2016, Tromsø municipality decided to terminate the agreement with Remiks Næring, and concluded a new framework agreement with Remiks Husholdning for the collection of the municipality's industrial waste, starting 1 February 2017. The agreement was awarded directly, and based on a self-cost principle, meaning that the compensation covers the full costs, but no profits ([38]).

(25) Remiks Husholdning foresaw a total price for the services in 2017 of approximately NOK 8.2 million. This was NOK 3.2 million less than the combined total price all the individual municipal units paid to Remiks Næring in 2016 ([39]).

4 Measures covered by the complaint

(26) The complainant has complained about three separate measures:

(27) First, alleged overpayment under the agreement between Tromsø municipality and Remiks Næring for collection of industrial waste for the period running from 2010 until 1 February 2017.

([32]) The Pollution Control Act, section 32, first paragraph.
([33]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145.
([34]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145.
([35]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145.
([36]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145.
([37]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145, and letter of 31.10.2017, Document No 880582.
([38]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145, and attachment 16 to the letter, Document No 901161.
([39]) This is based on calculations conducted by the complainant in letter from the complainant dated 22.6.17, Document No 862433.

(28) Second, alleged overpayment in relation to Remiks Husholdning's purchase of waste treatment services from its sister company Remiks Produksjon. This agreement has been in force since the establishment of Remiks Husholdning in 2010 and is ongoing.

(29) Third, certain transactions from Tromsø municipality to the Remiks Group in 2010 and 2012, which allegedly were not conducted on market terms.

5 Presence of state aid

5.1 Introduction

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

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

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

5.2 Presence of state resources

5.2.1 Introduction

(32) For the measure to constitute aid, it must be granted by the State or through state resources. State resources include all resources of the public sector, including resources of intra-state entities (decentralised, federated, regional or other) ([40]).

(33) The transfer of state resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A positive transfer of funds does not have to occur; waiving revenue that would otherwise have been paid to the state constitutes a transfer of state resources ([41]).

5.2.1 Tromsø municipality's purchase of industrial waste collection services

(34) The remuneration Tromsø municipality paid to Remiks Næring for the collection of industrial waste came from the budget of Tromsø municipality, as does the remuneration which Remiks Husholdning is currently receiving for the same services. The remuneration therefore constitutes state resources.

5.2.2 Remiks Husholdning's purchase of waste treatment services from Remiks Produksjon

(35) The notion of state aid as expressed in Article 61(1) of the EEA Agreement is to be interpreted widely, therefore it covers not only aid granted directly via the state budget but also compulsory contributions imposed by state legislation. Measures financed through parafiscal charges or compulsory contributions

([40]) See the Authority's Guidelines on the notion of state aid ('NoA'), OJ L 342, 21.12.2017, p. 35, and EEA Supplement No 82, 21.12.2017, p. 1, para. 48.
([41]) NoA, para. 51.

imposed by the State and managed and apportioned in accordance with the provisions of public rules imply a transfer of state resources, even if not administered by the public authorities ([42]).

(36) Remiks Husholdning is financed through the waste fee, which is fixed in accordance with the principles laid down in section 34 of the Pollution Control Act and chapter 15 of the Waste Regulation. The fee is collected by the municipality and disbursed via the municipal budget ([43]). Thus, the public authorities determine both the size and use of the fee. Further, its legal basis and the way it is collected indicates that it is under the permanent control of public authorities. The fee must therefore be considered to constitute state resources. This Assessment is in line with the Authority's conclusion in its decision on the financing of municipal waste collectors in Norway in 2013 ([44]).

(37) Further, it must be considered whether Remiks Husholdning's purchase of waste treatment services from Remiks Produksjon is imputable to Tromsø municipality. That is, whether Tromsø municipality must be regarded as having been involved in the adoption of the measures ([45]).

(38) Remiks Husholdning is indirectly owned by Tromsø municipality and subject to public law, such as the public procurement rules ([46]). The purchase of waste treatment services from Remiks Produksjon is conducted under the control and instruction of Tromsø municipality, in accordance with the Pollution Control Act. Furthermore, as Remiks Husholdning has been granted an exclusive right to collect the household waste by Tromsø municipality it is not subject to competition on the market, but rather operating under a monopoly ([47]).

(39) Based on this, Remiks Husholdning's purchase of waste treatment services from Remiks Produksjon appears imputable to Tromsø municipality, so as to constitute state resources for the purposes of Article 61(1) EEA.

5.2.3 The transactions involving the Remiks Group in 2010 and 2012

(40) If public authorities or public undertakings provide goods or services at a price below market rates, or invest in an undertaking in a manner that is inconsistent with the market economy operator ('MEO') principle, this implies foregoing state resources (as well as the granting of an advantage) ([48]).

(41) Therefore, if the transactions from Tromsø municipality to the Remiks Group in 2010 and 2012 were not conducted on market terms, state resources within the meaning of Article 61(1) of the EEA might have been involved.

5.3 Undertaking

(42) Only advantages granted to 'undertakings' are subject to state aid law. The concept of an undertaking covers any entity that engages in an economic activity

([42]) See NoA, para. 58; Decision No 306/09/COL of 8.7.2009 on the Norwegian Broadcasting Corporation, section 1.2.1, and judgment in *Italy* v *Commission*, 173/73, EU:C:1974:71, para. 16.
([43]) The fifth paragraph of section 34 of the Pollution Control Act.
([44]) Decision No 91/13/COL of 27.2.2013, on the financing of municipal waste collectors, para. 26.
([45]) Judgment in *France* v *Commission*, C-482/99, EU:C:2002:294, para. 52.
([46]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145.
([47]) Letter from Tromsø municipality, dated 5.3.2018, Document No 901145. See also NoA, para. 43.
([48]) NoA, para. 52.

regardless of its status and the way it is financed. Hence, the public or private status of an entity, or the fact a company is partly or wholly publicly owned, has no bearing on whether or not the entity is an 'undertaking' ([49]).

(43) An activity is economic in nature where it consists in offering goods and services on a market ([50]). The assessment of the activity must be based on the factual evidence, and the question is whether there is a market for the services concerned ([51]). In this regard, it is relevant to consider whether the entities receive compensation for the services, at what level, and whether they face competition from other undertakings ([52]).

(44) Remiks Næring has, since its establishment in 2010, been providing services for collection of industrial waste for remuneration in competition with other undertakings. Based on this, Remiks Næring appears to engage in economic activity so as to constitute an undertaking.

(45) Remiks Produksjon offers waste treatment services. The services are offered on the market for remuneration and in competition with other providers. Remiks Produksjon thus appears to engage in economic activity so as to constitute an undertaking.

(46) In relation to the transfers from Tromsø municipality to the Remiks Group in 2010 and 2012, the Group must be considered to form one economic unit ([53]). An entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking ([54]).

(47) The subsidiaries in the Remiks Group are fully owned by Remiks Miljøpark AS, and the Authority does not have any indications that Remiks Miljøpark AS is not involved in the management of its fully owned subsidiaries. The Authority has preliminarily concluded that both Remiks Næring and Remiks Produksjon undertake economic activity (see immediately above). With this, it is also the Authority's preliminary conclusion that the Remiks Group, as one economic unit, constitutes an undertaking for the purposes of the application of state aid rules, in so far as it is engaged in the economic activities of Remiks Næring and Remiks Produksjon ([55]).

5.4 Advantage

5.4.1 Introduction

(48) The qualification of a measure as state aid requires that it confers an advantage on the recipient. An advantage, within the meaning of Article 61(1) of the EEA

([49]) Judgment in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, para. 42.
([50]) NoA, section 2.1.
([51]) Judgment in *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17, EU:T:2019:652, para. 56.
([52]) Case E-29/15 *Sorpa* [2016] EFTA Ct. Rep. 825, paras 51–64.
([53]) NoA, para. 11.
([54]) Judgment in *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, para. 49.
([55]) NoA, para. 11.

Agreement, is any economic benefit that an undertaking could not have obtained under normal market conditions ([56]).

(49) The measure constitutes an advantage not only if it confers positive economic benefits, but also in situations where it mitigates charges normally borne by the budget of the undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities ([57]).

(50) Economic transactions carried out by public bodies are considered not to confer an advantage on the counterpart of the agreement, and therefore not to constitute aid, if they are carried out in line with normal market conditions ([58]). This is assessed pursuant to the MEO principle ([59]). Therefore, when public authorities purchase a service, it is generally sufficient, to exclude the presence of an advantage, that they pay market price.

(51) Whether a transaction is in line with market conditions can be established on the basis of a generally accepted, standard assessment methodology, relying on the available objective, verifiable and reliable data, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations ([60]).

5.4.2 Tromsø municipality's purchase of waste collection services from Remiks Næring

5.4.2.1 Introduction

(52) According to the MEO principle, the decision to carry out a transaction must have been taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational MEO (with characteristics similar to those of the public body concerned) would have carried out to determine the profitability or economic advantage of the transaction ([61]). When examining compliance with the principle it is only the information known at the time of the decision which is relevant ([62]).

(53) The purchase of the services through a competitive tender is only one of several methods for ensuring that a transaction does not confer an advantage within the meaning of Article 61(1) of the EEA Agreement. To establish whether a transaction is in line with market conditions, that transaction can be assessed in the light of the terms on which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking) ([63]) or through a qualified financial assessment ([64]).

(54) Below, the Authority examines the different lines of reasoning that the complainant has brought forward in support of its assertion that Remiks Næring has been overcompensated.

([56]) NoA, para. 66.
([57]) NoA, para. 68.
([58]) Judgment in *SFEI and others*, EU:C:1996:285, C-39/94, paras 60–62.
([59]) NoA, para. 76.
([60]) NoA, para. 101.
([61]) NoA, para. 79.
([62]) NoA, para. 78.
([63]) NoA, paras 98–100.
([64]) NoA, paras 101–105.

5.4.2.2 Benchmarking

(55) The complainant alleges that Tromsø municipality has paid disproportionally more than Bodø municipality for similar waste collection services in the same period.

(56) The complainant states that Tromsø municipality in 2016 paid to Remiks Næring five times what Bodø municipality paid to Retura Iris AS for collection of industrial waste. Both Tromsø and Bodø are municipalities in the North of Norway, located by the coast, and with a road network interrupted by fjords. The complainant argues that the two municipalities are comparable in size and population density. While there are 5 100 people working in Tromsø municipality at 160 municipal locations, there are 3 100 people working in Bodø municipality, at 100 locations. On that basis, the complainant argues that the price paid in Tromsø should not exceed a price which is proportionally higher (approximately 60–65% higher) than that paid in Bodø for similar services ([65]).

(57) The Norwegian authorities argue that the agreements in Tromsø and Bodø are different in both size and nature, and that the agreement with Bodø municipality therefore cannot serve as an appropriate benchmark. The municipality of Tromsø has paid a fixed price for waste collection services, based on the size of the bins, regardless of the actual weight. Thus, Remiks Næring carried the risk of the municipality disposing of more waste than budgeted for. The fixed price also covered additional services such as picking up waste that had fallen outside of the bins and additional bags placed next to the bins – in addition to educating the public, raising climate and environmental awareness ([66]). The municipality of Bodø had an agreement where it paid a price based on the actual weight of waste collected, which means the municipality carried the risk of disposing of more waste than budgeted for. Thus, the scope of and risk allocation under the two agreements are different.

(58) Further, the Norwegian authorities argue that the difference in geography, the population density, and municipal locations, including the number of municipal employees, justify different prices for the collection of industrial waste in Tromsø and Bodø.

(59) Based on the above, it is the Authority's preliminary conclusion that benchmarking against Bodø municipality is not an appropriate way to evaluate the market price for the waste collection services ([67]).

5.4.2.3 Negotiating a better price

(60) The complainant argues that the municipality of Tromsø is the largest purchaser of waste collection services in the area concerned, and that it therefore should have been able to negotiate a better price ([68]).

(61) An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit, which an undertaking could not have obtained under normal market conditions ([69]). To establish whether a transaction complies with market

([65]) The Complaint, dated 15.8.2016, Document No 814858, and Annexes IV–VII to the complaint, Documents No 818909–818911.
([66]) Letter from Remiks Group, dated 30.10.2017, Document No 880602.
([67]) See also the Authority's letter dated 24.5.2017, Document No 854974.
([68]) Letter from the complainant, dated 15.12.2016, Document No 831575.
([69]) NoA, para. 66.

conditions, the transaction can be assessed in the light of the terms under which comparable transactions carried out by a comparable private operator would have taken place in a comparable situation ([70]).

(62) The Norwegian authorities have provided documentation indicating that a number of private undertakings have purchased comparable products at the same or a higher price than Tromsø municipality ([71]). However, it is not clear whether the list includes the majority of Remiks Næring's other customers, or only a smaller selection. The Authority invites the Norwegian authorities to provide further information on the proportion of other customers that have purchased comparable products to a price equal to or higher that paid by Tromsø municipality.

5.4.2.4 Increase in remuneration during the contract period

(63) The complainant further points out that the total compensation paid to Remiks Næring for the relevant services increased from NOK 7.7 million in 2010 to NOK 11.4 million in 2016, so almost 50% over six years.

(64) The Norwegian authorities have provided documentation showing that the number of inhabitants and municipal employees has increased in the same period, and that the municipality has made several investments in new municipal buildings and units, which has led to an increase in the production of waste. The increase in remuneration to Remiks Næring is also mirrored in a corresponding increase in operating expenditure ([72]).

(65) The Authority, however, has doubts as to whether the information provided can explain a 50% increase in price over a period of six years. The Authority therefore invites the Norwegian authorities to provide further information on the basis for the increases in the total remuneration paid.

5.4.2.5 Difference compared to the price budgeted by Remiks Husholdning for 2017

(66) As of 1 February 2017, Tromsø municipality terminated the agreement with Remiks Næring, and instructed Remiks Husholdning to collect the municipal industrial waste on an in-house basis, at a price not exceeding the costs (self-cost). Remiks Husholdning estimated budget for 2017 was NOK 8.2 million, which is NOK 3.2 million less than the NOK 11.4 million that Remiks Næring received for the services in 2016.

(67) The complainant argues that, provided the costs for the waste collection services were the same in 2016 and 2017, Remiks Næring would have had a profit of NOK 3.2 million for the services it provided in 2016. This would entail a margin on these services of 30%, which is considerably higher than the market standard, which the complainant estimates at 0–8% ([73]).

(68) The Norwegian authorities argue that the services provided by Remiks Næring under the 2016 agreement and the services provided by Remiks Husholdning under the 2017 agreement are materially different. Under the agreement with

([70]) NoA, para. 98.
([71]) Letter from Remiks Næring, dated 29.9.2016, Document No 821156.
([72]) Letter from Tromsø Municipality, dated 5.3.2018, Document No 901145.
([73]) Letter from the complainant, dated 13.11.2017, Document No 882862.

Remiks Næring, Tromsø municipality had a fixed price agreement whereby Remiks Næring carried the risk of the municipality disposing of more waste than budgeted for ([74]). Under the self-cost agreement with Remiks Husholdning, Tromsø municipality entered into an agreement based on the actual weight disposed, which means that the municipality carries the risk of disposing of more waste than budgeted for. The Norwegian authorities argue that the allocation of risk under the two agreements is thus not comparable, and justifies different prices.

(69) Further, the Norwegian authorities argue that Remiks Husholdning has been able to take advantage of synergies and efficiency gains when coordinating the collection of industrial waste with the collection of household waste, leading to lower overall costs. It is also argued that Remiks Husholdning is currently at its most efficient, and therefore able to take full advantage of its resources. In the view of the Norwegian authorities, this justifies the difference in price between the remuneration paid to Remiks Næring in 2016 and Remiks Husholdning's budget for 2017.

(70) While the Norwegian authorities have provided explanations seeking to justify the difference in remuneration in 2016 and 2017, the Authority has not been provided with documentation underlying these explanations. The Authority therefore invites the Norwegian authorities to provide documentation evidencing the efficiency gains and synergies said to justify the difference.

5.4.2.6 Conclusion

(71) Based on the above, the Norwegian authorities have not at present time provided sufficient evidence showing that the price paid to Remiks Næring for collection of industrial waste, complies with the MEO principle.

(72) In light of the above, and in particular in light of the absence of sufficient evidence supporting that the price paid for the collection of industry waste in the period from 2010 to 1 February 2017 was determined in line with normal market conditions, the Authority has formed the preliminary view that Remiks Næring may have received an advantage, within the meaning of Article 61(1) of the EEA Agreement.

5.4.3 Remiks Husholdning's purchase of waste treatment services from Remiks Produksjon

(73) The Norwegian authorities argue that it is impossible for Remiks Husholdning to purchase waste treatment services from any other undertaking than Remiks Produksjon. The reason being that for Remiks Husholdning to purchase waste treatment services from such a third party, the waste that goes through Remiks Husholdning's optical sorting machine would have to be transported out of Remiks Miljøpark, through Remiks Produksjon's business area. Remiks Produksjon has not consented to allowing third parties to enter its business area, let alone transport waste through it. This explains why Remiks Husholdning has been purchasing waste treatment services from Remiks Produksjon without tendering out the services ([75]).

([74]) Further explained in section 7.4.2.2.
([75]) Letter from Tromsø municipality, dated 5.3.18, Document No 901145.

(74) The complainant intimates that the purchase of these services, without a tender, has led to Remiks Husholdning paying a price above market price for waste treatment services.

(75) The Norwegian authorities argue that the services Remiks Husholdning purchase from Remiks Produksjon are provided on market terms and in accordance with the arm's length principle in the Limited Liability Companies Act, section 3-9 ([76]).

(76) In determining an appropriate price for Remiks Husholdning's purchase of waste treatment services from Remiks Produksjon, the two parties looked at the price Remiks Næring paid to Remiks Produksjon for waste treatment services. Remiks Husholdning and Remiks Næring considered that the services Remiks Husholdning purchased were comparable in type and volume to those purchased by Remiks Næring, and that the costs for treating household and industrial waste are similar.

(77) The Authority is, however, not convinced that the prices paid by another company in the same group is an appropriate benchmark for establishing market price.

(78) In light of the above, and in particular in light of the absence of evidence supporting that the compensation paid to Remiks Produksjon did not lead to overcompensation, the Authority has formed the preliminary view that Remiks Produksjon may have received an advantage within the meaning of Article 61(1) of the EEA Agreement.

(79) The Authority invites the Norwegian authorities to provide documentation to substantiate that the compensation paid to Remiks Produksjon in line with normal market conditions ([77]).

5.4.4 Transactions to the Remiks Group in 2010 and 2012

(80) The complainant argues that Tromsø municipality did not require a sufficient return on the transactions from Tromsø municipality to the Remiks Group in 2010 and 2012.

(81) With the establishment of the Remiks Group in 2010, Tromsø municipality transferred (a) capital, (b) debt, (c) movables and (d) real estate to the Remiks Group ([78]). The assets were converted into share capital. The preparatory paper drafted for the purpose of the transactions ([79]) underlined the importance of complying with the MEO principle. However, it is not clear how the municipality actually ensured compliance with the principle.

(82) In 2012, Tromsø municipality transferred (a) real estate and (b) debt to Remiks Miljøpark AS, in addition to (c) adjusting the value of the real estate transferred in 2010 ([80]). The Tromsø municipal board decided to require a 9% return. The preparatory paper prepared for the purpose of the transactions underlined the need to determine an appropriate level of return on the basis of the MEO principle. The preparatory paper included a discussion on whether the fact that

([76]) *Lov om aksjeselskaper*, LOV-1997-06-13-44.
([77]) NoA, para. 74.
([78]) Attachment 8a to letter dated 5.3.2018, Document No 901189.
([79]) Attachments 4, 4a, 4b and 4c to the letter from Tromsø municipality dated 5.3.2018, Documents No 901219, 901213, 901203 and 901205.
([80]) Attachment 9 to letter dated 5.3.2018, Document No 901175.

only 40% of the Remiks Group's activities are conducted in a competitive market, while the remaining 60% are activities for which the municipality cannot obtain a profit, is relevant for the MEO principle, but does not seem to reach a conclusion on this point ([81]). The preparatory paper found a 9% return appropriate ([82]), but did not set out the economic assessment explaining why.

(83) The complainant further argues that the 9% level of return set in 2012 was determined based on only 40% of the Remiks Group's turnover originating from the group's commercial activities (Remiks Næring and Remiks Produksjon). According to the complainant, the division between commercial and non-commercial activity shifted, and in 2016, 58% of the turnover was linked to the commercial activities in Remiks Næring and Remiks Produksjon ([83]). Allegedly, as the conditions for setting the relevant rate of return changed, Tromsø municipality should have adjusted the level of return ([84]).

(84) Whether a transaction complies with the MEO principle must be examined on an *ex ante* basis, having regard to the information available at the time the transactions were decided. The relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the investment decision was made ([85]).

(85) The question is therefore whether, based on the information available at the time, a rational market economy operator (with characteristics similar to Tromsø municipality) would have carried out similar transactions.

(86) In relation to the transactions referred to in paragraph (81) above, the Authority invites the Norwegian authorities to provide further information on the transfers and how these comply with the MEO principle.

(87) In relation to the transactions referred to in paragraph (82) above, the Authority invites the Norwegian authorities to provide documentation for, and further elaborate on, the assessments forming the basis for an assessment of compliance with the MEO principle, and the relevant level of return.

5.5 Selectivity

(88) To be characterised as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must also be selective in that it favours 'certain undertakings or the production of certain goods'. Not all measures which favour economic operators fall under the notion of aid, only those which grant an advantage in a selective way to certain undertakings, categories of undertakings or to certain economic sectors.

([81]) The same assessment is included in the preparatory paper in relation to the 2010 transfer, Attachment 4 to the letter from Tromsø municipality dated 5.3.2018, Document No 901219.
([82]) Attachments 8, 8b, 8c, 8d to letter dated 5.3.18, Documents No 901183, 901181, 901177 and 901197.
([83]) Note that some of the revenues in Remiks Produksjon stem from treating household waste from Remiks Husholdning. The complainant has not explained whether or how this affects the calculations.
([84]) The complainant's letter dated 22.5.2018, Document No 914528.
([85]) Judgment in *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paras 83–85 and 105; judgment in *France* v *Commission*, C-482/99, EU:C:2002:294, paras 71–72.

(89) The purchase of services from Remiks Næring and Remiks Produksjon are specific transactions benefitting the two undertakings respectively.

(90) Similarly, the transfers to the Remiks Group are specific transactions benefitting the company group.

(91) Accordingly, the alleged measures must be considered selective in the sense of Article 61(1) of the EEA Agreement.

5.6 Effect on trade and distortion of competition

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

(93) Measures granted by the State are considered liable to distort competition when they are liable to improve the position of the recipient compared to other undertakings with which it competes. A distortion of competition within the meaning of Article 61(1) of the EEA Agreement is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([86]).

(94) Public support may be liable to distort competition even if it does not help the recipient undertaking to expand or gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided ([87]).

(95) To the extent that the relevant measures have not been carried out in line with normal market conditions, they have conferred an advantage on the relevant undertakings which may have strengthened the undertakings' position compared to other undertakings competing with them.

(96) The measures must also be liable to affect trade between EEA States. Where state aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, this is assumed to have effect on trade between EEA States ([88]).

(97) The Authority has previously found that public support to waste collection services in Norway is liable to distort competition and affect trade between EEA States ([89]). Waste collection and treatment is increasingly an international industry. In 2017, Norway exported 1.7 million tons of waste ([90]). The practice of tendering out waste services also means that undertakings from other EEA States can compete for waste handling contracts in other municipalities ([91]).

(98) The competitive situation is also highlighted in one of the preparatory papers in relation to the establishment of the Remiks Group in 2010. The paper notes

([86]) NoA, para. 187.
([87]) NoA, para. 189.
([88]) Judgment in *Eventech*, C-518/13, EU:C:2015:9, para. 66.
([89]) Decision No 91/13/COL of 27.2.2013, on the financing of municipal waste collectors, para. 41.
([90]) Report from the Nordic Competition Authorities, Competition in the waste management sector, section 3.2.4: https://konkurransetilsynet.no/wp-content/uploads/2018/08/Nordic-Report-2016-Waste-Management-Sector.pdf
([91]) Judgment in *Altmark*, C-280/00, EU:C:2003:415, paras 78–79.

an increasing number of undertakings competing on the markets for collection and handling of industrial waste, and highlights that the competition includes both national companies and companies with international owners ([92]).

(99) Thus the Authority cannot exclude that the measures are liable to distort competition and affect trade within the EEA.

5.7 Conclusion

(100) Based on the information provided by the Norwegian authorities and the complainant, the Authority cannot exclude that the measures described above may entail state aid within the meaning of Article 61(1) of the EEA Agreement.

6 Procedural requirements

(101) Pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Protocol 3'): 'The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. […] The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision.'

(102) The Norwegian authorities did not notify the measures before putting them into effect. The Authority therefore concludes that, if the measures constitute state aid, the Norwegian authorities will not have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

7 Compatibility of the aid measure

(103) The Norwegian authorities have not provided any arguments substantiating why the measures, if they were to constitute state aid, should be considered compatible with the functioning of the EEA Agreement. The Authority has also not identified any clear grounds for compatibility.

(104) Thus, if the measures constitute state aid, the Authority has doubts as to their compatibility with the functioning of the EEA Agreement

8 Conclusion

(105) As set out above, the Authority has doubts as to whether the measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement, and as to their compatibility with the functioning of the EEA Agreement.

(106) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority hereby opens the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures do not constitute state aid, or are compatible with the functioning of the EEA Agreement.

(107) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit, by **6 January 2020,**

([92]) Preparatory paper 29.4.2009, attachment 2 to letter dated 5.3.2018, Document 901215. The Authority's office translation.

their comments and to provide all documents, information and data needed for the assessment of the measures in light of the state aid rules.

(108) The Norwegian authorities are requested to immediately forward a copy of this decision to the Remiks Group.

(109) If this letter contains confidential information which should not be disclosed to third parties, please inform the Authority by **13 December 2019**, identifying the confidential elements and the reasons why the information is considered to be confidential. In doing so, please consult the Authority's Guidelines on Professional Secrecy in State Aid Decisions ([93]). If the Authority does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter on the Authority's website: http://www.eftasurv.int/state-aid/state-aid-register/.

For the EFTA Surveillance Authority,

Yours faithfully,

Bente Angell-Hansen
President
Responsible College Member

Frank J. Büchel
College Member

Högni Kristjánsson
College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.

([93]) OJ L 154, 8.6.2006, p. 27 and EEA Supplement No 29, 8.6.2006, p. 1.