

Case No: 83835  
Document No: 1263306  
Decision No 108/24/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 10 July 2024

concerning alleged aid granted by the Municipality of Farsund in conjunction with a property development cooperation through Farsund Vekst

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 Articles 7(2) and 26(3) of Part II, and having called on interested parties to submit their comments and having regard to their comments.

Whereas:

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## I. FACTS

### 1 Procedure and structure of the decision

#### 1.1 The complaint and information exchanges prior to the opening decision

- (1) On 16 April 2018, ESA received a complaint alleging that the Municipality of Farsund ('the Municipality') had granted unlawful State aid to Glastad Farsund AS ('Glastad Farsund'), Farsund Vekst AS ('Farsund Vekst') and Nordkapp Utvikling AS ('Nordkapp Utvikling'), in connection with the development of real estate in Farsund <sup>(1)</sup>.
- (2) On 18 April 2018, ESA forwarded the complaint to the Norwegian authorities and invited them to comment on it <sup>(2)</sup>. By letter dated 19 June 2018, the Norwegian authorities provided their comments <sup>(3)</sup>.
- (3) On 10 October 2018, ESA requested additional information from the Norwegian authorities <sup>(4)</sup>. By letter dated 6 December 2018, the Norwegian authorities replied to this information request <sup>(5)</sup>.
- (4) On 27 November 2018 <sup>(6)</sup>, the Norwegian authorities forwarded a letter from the complainant dated 22 November 2018 <sup>(7)</sup> with supplementary information. On 13 December 2018, ESA invited the Norwegian authorities to comment on the supplementary information and requested a meeting to discuss the case <sup>(8)</sup>. On 10 January 2019, a videoconference was held between ESA and the Norwegian authorities. By a letter dated 1 March 2019, the Norwegian authorities provided their comments on the supplementary information from the complainant <sup>(9)</sup>. The complainant submitted comments to this letter by a letter dated 13 April 2019 <sup>(10)</sup>.
- (5) On 21 May 2019, the complainant sent an email to ESA <sup>(11)</sup>.

#### 1.2 The formal investigation procedure

- (6) By Decision No 052/19/COL of 10 July 2019 ('the opening decision'), ESA initiated the formal investigation procedure <sup>(12)</sup>. In line with Article 6(1) of Part II of Protocol 3, ESA invited the Norwegian authorities to submit their comments by 12 August 2019. Moreover, in paragraph 105 of the opening decision, the Norwegian authorities were asked to provide all documents, information and data needed for the assessment of the measures in light of the State aid rules.

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<sup>(1)</sup> Document No. 909653. Since the complaint concerned alleged unlawful State aid, ESA's investigation has been limited to potential breaches of the State aid rules set out in the EEA Agreement. Consequently, ESA has not assessed the conduct under scrutiny against other legislation, such as the rules on public procurement.

<sup>(2)</sup> Document No. 909644.

<sup>(3)</sup> Document No. 1045487.

<sup>(4)</sup> Document No. 932210.

<sup>(5)</sup> Document No. 1042409.

<sup>(6)</sup> Document No. 1040145.

<sup>(7)</sup> Document No. 1040147.

<sup>(8)</sup> Document No. 1042765.

<sup>(9)</sup> Document No. 1057574.

<sup>(10)</sup> Document No. 1320097.

<sup>(11)</sup> Document No. 1070527.

<sup>(12)</sup> [ESA Decision No 052/19/COL](#).

- (7) By letter dated 31 October 2019, the Norwegian authorities provided their comments to the opening decision <sup>(13)</sup>.
- (8) On 22 August 2019, the opening decision was published in the Official Journal of the European Union <sup>(14)</sup>. All interested parties were invited in the opening decision to submit their comments within one month of this publication.
- (9) ESA received comments from an anonymous third party through a letter dated 21 July 2019 <sup>(15)</sup>. These comments were forwarded to the Norwegian authorities on 24 September 2019 <sup>(16)</sup>.
- (10) On 5 December 2019, ESA forwarded the opening decision to the complainant <sup>(17)</sup>. The complainant provided its comments in a letter dated 24 January 2020 <sup>(18)</sup>. The comments were forwarded to the Norwegian authorities on 27 January 2020 <sup>(19)</sup>. The Norwegian authorities commented on the complainant's comments by letter dated 26 February 2020 <sup>(20)</sup>.
- (11) On 29 January 2020, the complainant sent an email to ESA <sup>(21)</sup>. The complainant submitted additional comments by letter dated 11 June 2020 <sup>(22)</sup>.
- (12) By email of 20 August 2021, the Norwegian authorities submitted additional information to ESA <sup>(23)</sup>.
- (13) On 3 September 2021, ESA requested additional information from the Norwegian authorities <sup>(24)</sup>. By letters dated 2 November 2021 <sup>(25)</sup> and 15 November 2021 <sup>(26)</sup>, the Norwegian authorities replied to this information request. By emails of 19 November 2021 <sup>(27)</sup> and 6 December 2021 <sup>(28)</sup>, the Norwegian authorities submitted the complete annexes relating to their letter of 15 November 2021.
- (14) On 2 December 2021, ESA requested further information from the Norwegian authorities <sup>(29)</sup>. The Norwegian authorities replied to this information request by a letter dated 11 January 2022 <sup>(30)</sup>.

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<sup>(13)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version). Due to a misunderstanding, the Norwegian authorities did not submit all the annexes to the letter until 12 March 2021 (Document No. 1187209).

<sup>(14)</sup> [OJ C 284, 22.8.2019, page 3](#) and the [EEA Supplement No 67, 22.08.2019, page 2](#).

<sup>(15)</sup> Document No. 1082078.

<sup>(16)</sup> Document No. 1088894.

<sup>(17)</sup> Document No. 1101763.

<sup>(18)</sup> Document No. 1110408.

<sup>(19)</sup> Document No. 1110359.

<sup>(20)</sup> Document No. 1117269.

<sup>(21)</sup> Document No. 1110773.

<sup>(22)</sup> Document No. 1137814.

<sup>(23)</sup> Document No. 1309024.

<sup>(24)</sup> Document No. 1223993.

<sup>(25)</sup> Document No. 1245162.

<sup>(26)</sup> Document No. 1248476.

<sup>(27)</sup> Document No. 1250013.

<sup>(28)</sup> Document No. 1253678.

<sup>(29)</sup> Document No. 1250864.

<sup>(30)</sup> Document No. 1261765.

- (15) By their letter of 10 December 2021, the Norwegian authorities submitted additional information to ESA <sup>(31)</sup>.
- (16) By email of 21 January 2022, ESA requested further information from the Norwegian authorities <sup>(32)</sup>. The Norwegian authorities provided their final reply to this information request by email of 24 January 2022 <sup>(33)</sup>.
- (17) On 25 February 2022, ESA requested further information from the Norwegian authorities <sup>(34)</sup>. The Norwegian authorities replied to this information request by letter dated 1 April 2022 <sup>(35)</sup>. By email of 29 March 2022, Glastad Farsund provided their comments to ESA's request for information of 25 February 2022 <sup>(36)</sup>.
- (18) By email of 7 April 2022, ESA requested further information from the Norwegian authorities <sup>(37)</sup>. The Norwegian authorities replied to this information request by email of 19 April 2022 <sup>(38)</sup>.
- (19) By email of 5 May 2022, the complainant provided additional information to ESA <sup>(39)</sup>.
- (20) By emails of 12 May 2022 <sup>(40)</sup> and 16 May 2022<sup>(41)</sup>, ESA requested further information from the Norwegian authorities. By letter of 19 May 2022, Glastad Farsund provided replies to some of the questions, as well as comments to previous requests for information from ESA to the Norwegian authorities <sup>(42)</sup>. On 19 August 2022, Glastad Farsund provided a reply to one of the questions in ESA's email of 16 May 2022 <sup>(43)</sup>.
- (21) By email of 8 September 2022, ESA requested further information from the Norwegian authorities <sup>(44)</sup>. The Norwegian authorities replied to ESA's questions by email of 16 September 2022 <sup>(45)</sup>.
- (22) By email of 20 September 2022, ESA sent another request for information to the Norwegian authorities <sup>(46)</sup>. The Norwegian authorities replied to this information request in their email of 28 September 2022 <sup>(47)</sup>. By email of 29 September 2022, Glastad Farsund commented on the reply from the Norwegian authorities <sup>(48)</sup>.

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<sup>(31)</sup> Document No. 1309682.

<sup>(32)</sup> Document No. 1271338.

<sup>(33)</sup> Document No. 1265316.

<sup>(34)</sup> Document No. 1270949.

<sup>(35)</sup> Document No. 1281002.

<sup>(36)</sup> Document No. 1279066.

<sup>(37)</sup> Document No. 1309041.

<sup>(38)</sup> Document No. 1309040.

<sup>(39)</sup> Document No. 1287067.

<sup>(40)</sup> Document No. 1309034.

<sup>(41)</sup> Document No. 1309031.

<sup>(42)</sup> Document No. 1327502.

<sup>(43)</sup> Document No. 1307887.

<sup>(44)</sup> Document No. 1311424.

<sup>(45)</sup> Document No. 1313551.

<sup>(46)</sup> Document No. 1314152.

<sup>(47)</sup> Document No. 1316143.

<sup>(48)</sup> Document No. 1316240.

- (23) ESA requested additional information from the Norwegian authorities by email of 21 September 2022 <sup>(49)</sup>. The Norwegian authorities replied to this information request by email of 29 September 2022 <sup>(50)</sup>.
- (24) ESA sent another request for information to the Norwegian authorities by email of 26 September 2022 <sup>(51)</sup>. The Norwegian authorities replied to this information request by email of 28 September 2022 <sup>(52)</sup>.
- (25) By email of 4 October 2022, ESA requested further information from the Norwegian authorities <sup>(53)</sup>. By email of 11 October 2022, the Norwegian authorities replied to this information request <sup>(54)</sup>. By email of 11 October 2022, ESA clarified its request for information of 4 October 2022 in some respects <sup>(55)</sup>. Following this clarification, the Norwegian authorities provided an updated reply by email of 17 October 2022 <sup>(56)</sup>. Glastad Farsund then commented on the reply from the Norwegian authorities in their email of 19 October 2022 <sup>(57)</sup>.
- (26) By email of 27 October 2022, ESA requested further information from the Norwegian authorities <sup>(58)</sup>. The Norwegian authorities replied to this information request by email of 2 November 2022 <sup>(59)</sup>. ESA then requested additional information from the Norwegian authorities by email of 2 November 2022 <sup>(60)</sup>. The Norwegian authorities replied to this latter request by email of 9 November 2022 <sup>(61)</sup>. Glastad Farsund subsequently commented on the two sets of replies from the Norwegian authorities by their email of 9 November 2022 <sup>(62)</sup>.
- (27) By email of 30 November 2022, ESA requested further information from the Norwegian authorities <sup>(63)</sup>. In their email of 9 December 2022, the Norwegian authorities asked ESA to clarify this request <sup>(64)</sup>. ESA provided its clarifications by email of 9 December 2022 <sup>(65)</sup>, and the Norwegian authorities then replied to the information request by email of 14 December 2022 <sup>(66)</sup>.
- (28) By email of 15 December 2022, Glastad Farsund commented on the latter reply from the Norwegian authorities <sup>(67)</sup>. ESA encouraged Glastad Farsund to elaborate

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<sup>(49)</sup> Document No. 1314645.

<sup>(50)</sup> Document No. 1317177.

<sup>(51)</sup> Document No. 1315224.

<sup>(52)</sup> Document No. 1316245.

<sup>(53)</sup> Document No. 1317715.

<sup>(54)</sup> Document No. 1320495.

<sup>(55)</sup> Document No. 1320507.

<sup>(56)</sup> Document No. 1321554.

<sup>(57)</sup> Document No. 1321966.

<sup>(58)</sup> Document No. 1324111.

<sup>(59)</sup> Document No. 1324743.

<sup>(60)</sup> Document No. 1324756.

<sup>(61)</sup> Document No. 1326437.

<sup>(62)</sup> Document No. 1326424.

<sup>(63)</sup> Document No. 1333231.

<sup>(64)</sup> Document No. 1336461.

<sup>(65)</sup> Document No. 1336462.

<sup>(66)</sup> Document No. 1337805.

<sup>(67)</sup> Document No. 1337804.

on its comments by email of 15 December 2022 <sup>(68)</sup>. Glastad Farsund replied by email of 4 January 2023 <sup>(69)</sup>.

- (29) ESA requested additional information from the Norwegian authorities by email of 5 January 2023 <sup>(70)</sup>. Glastad Farsund provided the information requested by email of 1 February 2023 <sup>(71)</sup>.
- (30) By email of 8 June 2023 <sup>(72)</sup>, ESA requested further information from the Norwegian authorities. The Norwegian authorities replied by email of 15 June 2023 <sup>(73)</sup>. ESA requested additional information from the Norwegian authorities by email of 21 June 2023 <sup>(74)</sup>. The Norwegian authorities replied to this request by email of 29 June 2023 <sup>(75)</sup>.
- (31) Glastad Farsund repeated some of the points it had previously brought forward by email of 29 June 2023 <sup>(76)</sup>, before providing additional information on 24 October 2023 <sup>(77)</sup>. ESA encouraged Glastad Farsund to clarify certain aspects of the latter submission by email of 24 October 2023 <sup>(78)</sup>. Glastad Farsund provided the clarifications by email of 27 October 2023 <sup>(79)</sup>.
- (32) Based on a request from Glastad Farsund, a virtual status meeting was held between Glastad Farsund and ESA on 14 December 2023. In this meeting, ESA updated Glastad Farsund on the expected timeline for closing the case and reiterated what issues it was looking into. Following this meeting, Glastad Farsund submitted additional information on 6 February 2024 <sup>(80)</sup> and 5 April 2024 <sup>(81)</sup>.
- (33) On 21 February 2024, the complainant submitted its closing comments in the case <sup>(82)</sup>.
- (34) On 5 May 2024, Glastad Farsund submitted a letter and valuation report relating to Nordkapp <sup>(83)</sup>.
- (35) On 18 June 2024, ESA informed Glastad Farsund in a phone call that it would appear that ESA had not been provided with the 2011 option agreement concerning Ferjeveien. Glastad Farsund submitted this agreement in an email on the next day <sup>(84)</sup>.

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<sup>(68)</sup> Document No. 1337821.

<sup>(69)</sup> Document No. 1340491.

<sup>(70)</sup> Document No. 1340523.

<sup>(71)</sup> Document No. 1349512.

<sup>(72)</sup> Document No. 1377996.

<sup>(73)</sup> Document No. 1379496.

<sup>(74)</sup> Document No. 1380981.

<sup>(75)</sup> Document No. 1384214.

<sup>(76)</sup> Document No. 1384627.

<sup>(77)</sup> Document No. 1407864.

<sup>(78)</sup> Document No. 1407880.

<sup>(79)</sup> Document No. 1409005.

<sup>(80)</sup> Document No. 1434128.

<sup>(81)</sup> Document No. 1466434.

<sup>(82)</sup> Document No. 1437892.

<sup>(83)</sup> Document No. 1466433.

<sup>(84)</sup> Document No. 1466134.

### 1.3 Structure of the decision

- (36) In the below Section 2, ESA will firstly, in Section 2.1, provide a high-level presentation of the events that form the background for the case, as set out in the opening decision. Against this background, ESA will go on to identify, in Section 2.2, the grounds of the complaint and how the scope of the opening decision was defined.
- (37) The comments received during the formal investigation will be recalled in Section 3. Thereafter, ESA will set out the factual understanding it has developed on the basis of the information received in Section 4.
- (38) ESA's State aid assessment is set out in Part II of this decision. After establishing the relevant legal starting points under Sections 5 and 6, ESA will assess the measures concerned in Sections 7 to 9. This assessment is structured in line with the updated presentation of facts in Section 4.

## 2 The background for the formal investigation

### 2.1 The cooperation between the Municipality and Glastad Farsund relating to the development of certain properties in Farsund

#### 2.1.1 *The initial scope and regulation of the property development cooperation*

- (39) Glastad Farsund is a privately owned real estate company investing in hotels, housing and commercial property. The company is part of the Glastad group of companies headed by Glastad Holding AS.
- (40) In 2010, the Municipality and Glastad Farsund ('the parties') initiated a cooperation concerning the possible development of housing and commercial real estate in the city of Farsund. From the outset, the cooperation related to the possible development of the following three areas: the Nordkapp area ('Nordkapp'), the Farøy area ('Farøy') and the Ferjeveien area ('Ferjeveien'). Nordkapp and Farøy were owned by the Municipality, whereas Ferjeveien was owned by Glastad Farsund.
- (41) The properties were to be developed through the limited liability company Farsund Vekst AS ('Farsund Vekst'), which was to be established for this purpose. In line with this, Glastad Farsund incorporated Farsund Vekst on 6 December 2010. At this time, the share capital was NOK 100 000 and Glastad Farsund owned 100% of the shares <sup>(85)</sup>.
- (42) On 21 December 2010, the realtor *Næringsmegleren Sædberg & Hodne AS* ('Sædberg & Hodne') issued a report where it assessed the monetary value of each of the three properties <sup>(86)</sup>. The report contained one valuation of the Nordkapp-area, one valuation of the Farøy-area and one valuation of the Ferjeveien area.
- (43) On 27 May 2011, the parties signed five contracts regulating the property development cooperation. These were respectively a cooperation agreement ('the cooperation agreement') <sup>(87)</sup>, a shareholder agreement ('the shareholder agreement') <sup>(88)</sup> relating to Farsund Vekst, and three option agreements which

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<sup>(85)</sup> Document No. 1250016.

<sup>(86)</sup> Document No. 1045487, pages 13 to 19.

<sup>(87)</sup> Document No. 1042409, pages 9 to 12.

<sup>(88)</sup> Document No. 1042409, pages 13 to 15.

provided Farsund Vekst with options to purchase respectively the Nordkapp, Farøy and Ferjeveien areas.

- (44) As will be reflected below, the Norwegian authorities and Glastad Farsund have highlighted that the five contracts were commercially interlinked, and that the terms in each of the contracts, such as for example those contained in the option agreements, should therefore not be assessed in isolation from the commercial context defined by the five contracts as a whole. Equally, the Norwegian authorities and Glastad Farsund have highlighted how the parties were bound by the contracts once they had been entered into, and that their subsequent actions can consequently not be assessed in isolation from the contractual obligations that existed at the time in question.

### 2.1.2 *The Nordkapp options*

- (45) The original option agreement for Nordkapp ('the Nordkapp option')<sup>(89)</sup>, signed on 27 May 2011, provided Farsund Vekst with the exclusive right to buy the area defined in the option for a fixed price of NOK 25 million within a period of 18 months. No price development adjustment clause or option premium were included.
- (46) On 22 November 2012, five days prior to the expiry of the option, Farsund Vekst sent a notice informing the Municipality that it made use of its right to purchase the property according to the terms defined in the Nordkapp option ('exercised the option')<sup>(90)</sup>. However, for reasons which the Norwegian authorities and Glastad Farsund have elaborated on in their comments, no sales agreement was set up at this point.
- (47) As will be described in further detail below, the Municipality and Glastad Farsund subsequently agreed to initiate, through Farsund Vekst, the development of a combined mall and residential development called *Amfi Farsund* at Nordkapp. For reasons that will also be elaborated on below, it was furthermore decided that the development of Nordkapp was to take place in three phases, each of which comprising a part of that area covered by the original 2011 Nordkapp option.
- (48) On 10 March 2015, the Municipality entered into a sales agreement with Farsund Vekst's subsidiary Nordkapp Utvikling, whereunder Nordkapp Utvikling bought that part of Nordkapp onto which *Amfi Farsund* was to be constructed (Nordkapp part 1) for NOK 8.5 million<sup>(91)</sup>. On 14 October 2015, the partitioning of the development of Nordkapp into three phases, each of which covering a distinct area ('Nordkapp part 1/2/3'), was formalised in a revised option agreement<sup>(92)</sup>. In addition to the previous purchase of the Nordkapp 1 area, Farsund Vekst was provided with options to purchase the two remaining areas (Nordkapp 2 and 3) for respectively NOK 9 million and NOK 7.5 million. In total, the agreed prices for Nordkapp 1, 2 and 3 equated to the price for Nordkapp which had been set out in the original 2011 Nordkapp option (MNOK 8.5+9+7.5 = 25).

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<sup>(89)</sup> Document No. 909656.

<sup>(90)</sup> Document No. 1042409, page 47.

<sup>(91)</sup> Document No. 1268510.

<sup>(92)</sup> Documents Nos. 909658 and 1042409.

- (49) The options to purchase Nordkapp 2 and 3 also did not include option premiums or price development adjustment clauses in the event of increased market prices.

### *2.1.3 The Farøy options*

- (50) The original option agreement for Farøy ('the 2011 Farøy option'), which was also signed on 27 May 2011, provided Farsund Vekst with the exclusive right to prepare the development and rezoning of the area defined in the option, and to purchase it for a fixed price of NOK 10.5 million <sup>(93)</sup>. The option had to be exercised within a period of 18 months calculated from the day of signature of the cooperation agreement.
- (51) While the 2011 Farøy option was not exercised in its original form, the Municipality and Farsund Vekst entered into an amended option agreement on 14 October 2015 ('the 2015 Farøy option') <sup>(94)</sup>. While the agreed purchase price remained NOK 10.5 million, other conditions were changed compared to the terms of the original option agreement.

### *2.1.4 The Ferjeveien option*

- (52) The Ferjeveien option agreement was also signed on 27 May 2011, and provided Farsund Vekst with the exclusive right to purchase the Ferjeveien property for a price of NOK 4 million <sup>(95)</sup>. The option had to be exercised within a period of 18 months calculated from the day of signature of the cooperation agreement.
- (53) The Ferjeveien option was not exercised within this deadline.

### *2.1.5 The Municipality's sale of its shares in Farsund Vekst*

- (54) In their comments to the opening decision, the Norwegian authorities and Glastad Farsund have provided extensive additional information on the events taking place between the time when the Municipality entered into the five original agreements governing the property development cooperation, and the Municipality's sale of its shares in Farsund Vekst in 2015. This information will be presented in further detail in Section 4 below.
- (55) In the opening decision, however, ESA noted that on 14 October 2015, it was agreed that Glastad Farsund would buy the shares the Municipality held in Farsund Vekst (50%) at that point in time <sup>(96)</sup>. The price was set to NOK 21 million, based on the total equity capital of Farsund Vekst <sup>(97)</sup>.
- (56) In addition, the parties agreed that the right, which was subject to approval from the Municipality as building authority, to build a third and fourth floor on the rooftop of the shopping centre, should be sold to the Municipality. At the time of the agreement, this right was controlled by Farsund Vekst.
- (57) In a valuation report of 7 August 2015, Sædberg & Hodne AS estimated the monetary value of the right to develop the rooftop at NOK 8 million (if developed solely as a commercial property) or NOK 42.5 million (if developed as residential

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<sup>(93)</sup> Document No 1042409, pages 34 to 36.

<sup>(94)</sup> Document No. 909657.

<sup>(95)</sup> Document No. 1466134.

<sup>(96)</sup> Document No. 909659.

<sup>(97)</sup> Document No. 1045487 (attachments 4–7).

units to the maximum capacity) <sup>(98)</sup>. In their subsequent negotiations, the Municipality and Glastad Farsund agreed that the purchase price for the right to build on the rooftop should be set at NOK 23.5 million.

- (58) In view of the agreed prices for respectively the Farsund Vekst shares and the right to build on the rooftop, the Municipality agreed to pay the difference of NOK 2.5 million (NOK 23.5 million minus NOK 21 million equals NOK 2.5 million) to Glastad Farsund.

## 2.2 The opening decision

### 2.2.1 The scope of the complaint

- (59) In the opening decision, the scope of the complaint was defined in Section 4.1. As reiterated here, ESA based its opening of the formal investigation procedure on the complainant having alleged that the Municipality has granted unlawful State aid to Glastad Farsund, Farsund Vekst and Nordkapp Utvikling, through the following measures connected to the development of the Nordkapp and Farøy areas.

- a) By providing option agreements for the Nordkapp and Farøy areas that have no price adjustment mechanism in case of future price increases and where the Municipality is not compensated for the options.
- b) By selling Nordkapp part 1 at a price below market price.
- c) By selling the Municipality-owned shares in Farsund Vekst AS at a price below market price.

### 2.2.2 The measures encompassed by the opening decision

- (60) In line with the delineation of the scope of the complaint set out in Section 4.1 of the opening decision, the following measures were addressed in the advantage assessment set out in Section 6 of the opening decision:

- a) The Nordkapp and the 2011 Farøy options (Section 6.2.2), and the 2015 Farøy option (Section 6.2.3).
- b) The sale of Nordkapp part 1 (Section 6.2.4).
- c) The Municipality's sale of its shares in Farsund Vekst (Section 6.2.4).

- (61) As regards the Nordkapp options and the 2011 Farøy option, ESA doubted that a market economy operator ('MEO') would have entered into such option agreements on similar conditions as the Municipality, without requiring separate remuneration for the options and other potentially favourable conditions. Furthermore, ESA held that, by having limited itself in the option agreements to requiring sales prices based on the valuation of the properties in 2010, the Municipality ran the risk of granting State aid through the prospective future sales according to the terms of the option agreements if property prices were to increase <sup>(99)</sup>.

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<sup>(98)</sup> Document No. 909660.

<sup>(99)</sup> Paragraph 73 of the opening decision.

- (62) With respect to the 2015 Farøy option, ESA similarly questioned that no separate remuneration was required for the option in addition to the sales price based on the valuation in the 2010 report from Sædberg & Hodne. In ESA's preliminary view, this would seem to imply that the option was granted for free <sup>(100)</sup>.
- (63) ESA additionally noted that five years had passed since the 2010 valuation, when the 2015 Farøy option agreement was entered into, that the most recent zoning proposals available at the time indicated a higher allowed utilisation than the level originally foreseen, that a new shopping mall was about to open close by, and that the additional area for a recreational park provided in the 2015 Farøy option was located in front of a plot that was owned by a shareholder in Glastad Farsund. Lastly, ESA observed that while the 2015 Farøy option provided Farsund Vekst with the right to reduce the purchase price stipulated in the option if the level of utilisation allowed turned out to be below 2 400m<sup>2</sup> of housing, it did not include a corresponding right for the Municipality to require a higher price in the event that a higher level of utilisation was allowed for. Based on these factors, ESA doubted whether a private market economy operator would have entered into such an option agreement <sup>(101)</sup>.
- (64) As concerns the sale of Nordkapp 1 to Farsund Vekst on 10 March 2015, ESA pointed out that the purchase price of NOK 8.5 million was based on approximately one third of the sum indicated in the 2010 valuation report from Sædberg & Hodne. However, as five years had passed since this valuation at the time of the sale, and seeing as how the information submitted would seem to indicate that property prices in the area had increased between 2005 and 2010, ESA doubted whether the price of NOK 8.5 million reflected the market value of Nordkapp 1 at the time of the sale. Consequently, ESA doubted whether a market economy operator would have accepted the terms agreed to by the Municipality <sup>(102)</sup>.
- (65) Finally, as regards the Municipality's sale of its shares in Farsund Vekst, ESA raised doubts as to whether a market economy operator would have accepted the sales price agreed to by the Municipality. In this connection, ESA pointed out that the sale was not based on an open tender procedure, and that it was not aware of any efforts having been made to find another buyer than Glastad Farsund <sup>(103)</sup>.
- (66) ESA acknowledged that the Municipality's sale of its shares in Farsund Vekst would seem to be connected with it entering into the revised option agreement addressing Nordkapp 1, 2 and 3, as well as its purchase of the right to build on the rooftop of the two first floors of Amfi Farsund. However, even though the sale of its shares in Farsund Vekst involved an obligation for the Municipality to buy the right to build on the rooftop on Amfi Farsund for NOK 23.5 million, ESA questioned why no independent valuation of the shares in Farsund Vekst was obtained. While the agreed price for the shares allegedly reflected half of Farsund Vekst's equity at the time of the sale, it could appear that no value was placed on the option agreements, the half-finished shopping mall or the rooftop of Amfi Farsund when defining the price of the shares <sup>(104)</sup>.

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<sup>(100)</sup> Paragraph 74 of the opening decision.

<sup>(101)</sup> Paragraphs 74-78 of the opening decision.

<sup>(102)</sup> Paragraphs 79-82 of the opening decision.

<sup>(103)</sup> Paragraph 86 of the opening decision.

<sup>(104)</sup> Paragraph 87 of the opening decision.

- (67) Based on these factors, ESA questioned whether a market economy operator would have sold the shares in Farsund Vekst for the price agreed to by the Municipality <sup>(105)</sup>.
- (68) To the extent that the above measures conferred an economic advantage on the alleged aid beneficiaries, ESA concluded that they would also likely fulfil the remaining conditions in Article 61(1) of the EEA Agreement <sup>(106)</sup>. Furthermore, in the event that the measures would qualify as State aid, ESA entertained doubts as to their compatibility with the functioning of the EEA Agreement <sup>(107)</sup>.

### **3 Comments to the opening decision**

#### **3.1 Comments from the complainant**

##### *3.1.1 The complainant's initial comments*

###### 3.1.1.1 General comments

- (69) In its initial comments to the opening decision, the complainant agreed with ESA that there were grounds to doubt whether the measures were compatible with the functioning of the EEA Agreement <sup>(108)</sup>.
- (70) In terms of the procedure for choosing its partner for the property development cooperation, the complainant argued that the Municipality should actively have approached prospective tenderers and solicited offers from these. Furthermore, the Municipality did not have a sufficient basis for assuming that only local investors would be interested in developing the concerned properties <sup>(109)</sup>.
- (71) The complainant also questioned whether the measures were necessary for spurring economic activity and employment in the region. In this context, the complainant cited statistics indicating that unemployment numbers were relatively low and that the area of Farsund experienced population levels which were stable or even slightly increasing <sup>(110)</sup>.

###### 3.1.1.2 Specific comments on the alleged aid elements

###### 3.1.1.2.1 The option agreements had an inherent value which should be compensated separately

- (72) As regards the concerned option agreements, the complainant argued that the Municipality had failed to require compensation for the value of the options. This was so because each of the options had an inherent value which would not be compensated by the lump sum to be paid by the option holder in the event that it exercised the option in question. Moreover, since municipalities are not professional private investors, the fact that municipalities may not require option premiums does not establish that this is in line with normal market practices <sup>(111)</sup>.

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<sup>(105)</sup> Paragraph 88 of the opening decision.

<sup>(106)</sup> Sections 6.1, 6.3 and 6.4 of the opening decision.

<sup>(107)</sup> Section 8 of the opening decision.

<sup>(108)</sup> Document No. 1110408, page 1.

<sup>(109)</sup> Document No. 1110408, pages 3-6.

<sup>(110)</sup> Document No. 1110408, page 4.

<sup>(111)</sup> Document No. 1110408, pages 6-7.

### 3.1.1.2.2 The complainant's quantification of the alleged economic advantages resulting from sales according to the revised option agreements for Nordkapp

- (73) The complainant went on to suggest how the aid which it considered would result from sales according to the terms of the option agreements should be quantified. This quantification started from the premise that the maximum buildable area on the land covered by the option agreements would imply that the price per square metre of buildable area equated to NOK 667 <sup>(112)</sup>.
- (74) By comparison, the valuation from Sædberg & Hodne of 7 August 2015 <sup>(113)</sup> did in the complainant's interpretation imply that the value per square metre of those residential units, which may be constructed on the rooftop of the two first floors of *Amfi Farsund* at Nordkapp, would be NOK 6 666. In the complainant's interpretation, the valuation also entailed that the value per square metre for commercial property at the same location would be NOK 2 000. As the valuation of 7 August 2015 contained the most up-to date figures available to the complainant, it based its calculations on these <sup>(114)</sup>. The complainant, however, also referred to an offer from Hellvik Hus, which in its view implied a valuation of residential units in the area at NOK 5 300 per square metre <sup>(115)</sup>.
- (75) Regarding the sale of Nordkapp 1 <sup>(116)</sup> (measure (b)), the complainant did on this basis provide its own calculations indicating that the total value transferred by the Municipality was NOK 91.8 million. This included the property value of the shopping centre and the rooftop, filling costs, redemption and demolition of properties for access roads, as well as other costs for infrastructure, walkways and shorefront. Given that the payment received by the Municipality when it sold Nordkapp 1 was NOK 8.5 million <sup>(117)</sup>, the complainant argued that the net economic benefit transferred through this sale was NOK 83 317 211 <sup>(118)</sup>.
- (76) As concerns the options relating to Nordkapp 2 and 3 (measure (a)), the complainant considered that the property values could not be accurately assessed. However, based on the square metre prices indicated by the rooftop valuation from Sædberg & Hodne of 7 August 2015 and the maximum buildable area allowed in the zoning plan, the complainant calculated the net economic benefit which would in its assessment be transferred to Farsund Vekst if the properties were sold according to the terms of the revised 2015 option agreements <sup>(119)</sup><sup>(120)</sup>.
- (77) With respect to Nordkapp part 2, the complainant's calculations indicated that a net value of NOK 100 359 452 would be transferred to the option holder if this plot was sold for the NOK 9 million specified in the revised 2015 Nordkapp option agreement <sup>(121)</sup>. As concerns Nordkapp part 3, the complainant calculated that a net value of NOK 10 228 874 would be transferred to the option holder if this property was sold

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<sup>(112)</sup> Document No. 1110408, pages 8-9.

<sup>(113)</sup> Document No. 1110408, pages 8-9.

<sup>(114)</sup> See Section 4.4.2.3.1 below.

<sup>(115)</sup> Document No. 1110408, page 9.

<sup>(116)</sup> See Sections 4.3.3.3, 4.3.3.4 and 4.3.3.5.4 below.

<sup>(117)</sup> See Section 4.3.3.5.4 below.

<sup>(118)</sup> Document No. 1110408, pages 13-14.

<sup>(119)</sup> See Section 4.4.3.1 below.

<sup>(120)</sup> Document No. 1110408, pages 11-13.

<sup>(121)</sup> See Section 4.4.3.1 below.

for the NOK 7.5 million required under the revised 2015 option agreement <sup>(122)</sup>. In addition to the estimated property value, the calculations included estimates of filling costs to be incurred by the Municipality <sup>(123)</sup>.

3.1.1.2.3 The complainant's quantification of the economic advantage which would result from a sale according to the revised option agreement for Farøy

- (78) The complainant also provided its quantification of the net economic advantage, which would in its assessment result from a sale according to the terms of the revised 2015 option agreement for Farøy (measure (a)) in 2020 <sup>(124)</sup>. According to the complainant, a net economic benefit of NOK 17 728 400 would be conferred upon the option holder given that it paid the agreed purchase price of NOK 10.5 million. This estimation reflected the complainant's own valuation of the property, which was based on the square metre price suggested in the rooftop valuation from Sædberg & Hodne of 7 August 2015 and the maximum buildable area allowed. The complainant had furthermore estimated the value of the boathouses and marina, which may be constructed, as well as demolition costs and other infrastructure costs to be incurred by the Municipality <sup>(125)</sup>.

3.1.1.2.4 The complainant's quantification of the economic advantage resulting from the sale of the shares in Farsund Vekst (measure (c))

- (79) With respect to the Municipality's sale of its shares in Farsund Vekst (measure (c)) <sup>(126)</sup>, the complainant pointed out that the assessment from Pangea Property Partners ('Pangea') <sup>(127)</sup> relating to *Amfi Farsund* was made *ex-post*. It furthermore considered that the conclusions were sensitive to adjustments in the assumptions made, and that the results were odd insofar as they indicated that a company with a positive cash flow had a negative value <sup>(128)</sup>.
- (80) Based on its estimates of the value of the properties encompassed by the options from 2015 (Nordkapp 2 and 3 and the revised Farøy option), and having deducted the purchase prices agreed in these agreements, the complainant furthermore considered that the option agreements should be counted as assets of a value of NOK 105 766 155, when establishing the value of the shares in Farsund Vekst at the time of the sale of the Municipality's shares in 2015 <sup>(129)</sup>.

3.1.1.3 Effect on trade and distortion of competition

- (81) The complainant agreed with ESA's assessment in the opening decision that prospective aid granted by virtue of the measures would be liable to affect trade and distort competition within the EEA. In this regard, the complainant pointed out that Farsund Vekst was a subsidiary of Glastad Farsund, which in turn was part of a larger conglomeration of companies engaged in intra-EEA trade <sup>(130)</sup>.

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<sup>(122)</sup> See Section 4.4.3.1 below.

<sup>(123)</sup> Document No. 1110408, pages 11-13.

<sup>(124)</sup> See Section 4.4.3.24.4.3.1 and 4.4.3.3 below.

<sup>(125)</sup> Document No. 1110408, pages 10-11.

<sup>(126)</sup> See Section 4.4.2 below.

<sup>(127)</sup> See Section 4.4.2.4 below.

<sup>(128)</sup> Document No. 1110408, page 14.

<sup>(129)</sup> Document No. 1110408, page 15.

<sup>(130)</sup> Document No. 1110408, pages 15-16.

#### 3.1.1.4 Compatibility of the alleged aid with the functioning of the EEA Agreement

- (82) As has already been touched upon, the complainant considered that the alleged aid was not necessary to spur the development of the concerned properties. Furthermore, the complainant argued that the purported aid was in any case disproportionate, and questioned whether it pursued a legitimate objective <sup>(131)</sup>.

#### 3.1.2 *The subsequent comments from the complainant*

##### 3.1.2.1 The comments of 11 June 2020

- (83) In its submission of 11 June 2020, the complainant elaborated on its previous submissions in light of the comments received from the Norwegian authorities.
- (84) In this regard, the complainant highlighted that the valuation reports from Sædberg & Hodne did in its assessment not provide a basis for direct sales in compliance with Article 61(1) of the EEA Agreement. The complainant maintained that Sædberg & Hodne was not sufficiently independent from Glastad Farsund, and that another, and independent, realtor should have been tasked with assessing current property prices. The complainant also highlighted that the Municipality was responsible for building public roads up to the concerned properties, and that the building costs assumed by Farsund Vekst did not affect the value of the financial contributions from the Municipality through its investments <sup>(132)</sup>.
- (85) In respect of the realism in its calculations of the alleged economic advantages conferred, the complainant considered that property purchasers can generally be expected to build up to the limit on the maximum level of utilisation allowed in the applicable zoning plan. Based on this premise, the complainant also claimed that the prices demanded by market economy operators for unbuilt properties will generally correspond with the maximum level of utilisation allowed. In the view of the complainant, the Municipality's position that there was no market demand for projects making use of the maximum level of utilisation of the concerned properties appeared unconvincing <sup>(133)</sup>.
- (86) In respect of the application of the market economy operator principle, the complainant furthermore underscored that its calculations would suggest that the Municipality's involvement in Farsund Vekst, including, in particular, through the (prospective) sale of the concerned properties according to the terms of the revised 2015 option agreements, would result in a significant loss for the Municipality. According to the complainant, this means that the Municipality has not acted in compliance with the market economy operator principle, since a market economy operator would not choose to sell at a loss. In this regard, the complainant also highlighted that the property sale in Oslo Municipality assessed in an ESA decision from 2005 <sup>(134)</sup> had been conducted after testing the market through obtaining competing bids <sup>(135)</sup>.

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<sup>(131)</sup> Document No. 1110408, page 16.

<sup>(132)</sup> Document No. 1137814, pages 1-2.

<sup>(133)</sup> Document No. 1137814, page 2.

<sup>(134)</sup> EFTA Surveillance Authority Decision No 55/05/COL of 11 March 2005 to close the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale of 1744 rental apartments in Oslo (Norway), OJ L 324, 23.11.2006, pages 11–29.

<sup>(135)</sup> Document No. 1137814, page 3.

- (87) The complainant also provided some updates on recent developments in Farsund. In this regard, the complainant explained that to its knowledge, the Municipality had completed filling out the land covered by the Nordkapp options, as required under the revised 2015 option agreement <sup>(136)</sup>. Furthermore, the complainant argued that anecdotal evidence supported that the shopping centre at Nordkapp (*Amfi Farsund*) had moved commercial activity away from the city centre, and that the Municipality had, to its understanding, entered into an agreement to rent areas in Amfi Farsund for a price equating to at least NOK 2 000 per square metre per year. According to the complainant, this price appeared exorbitant insofar as it was comparable to prices charged just outside Oslo <sup>(137)</sup>.
- (88) With regard to the latter allegation, ESA notes that its opening decision did not comprise alleged overcompensation resulting from the Municipality renting areas in Amfi Farsund <sup>(138)</sup>. Such a measure therefore falls outside the scope of the formal investigation concluded through the present decision. Furthermore, through its investigation of facts <sup>(139)</sup>, ESA has not identified indications that either of the measures subject to the formal investigation were conditional on the Municipality potentially renting areas in Amfi Farsund at prices above market rates at a later point in time. Consequently, the alleged overcompensation in the form of rents above market rates in any event falls outside the commercial context in which each of the measures comprised by the formal investigation were concluded. On this basis, the alleged overcompensation through the rent for areas in Amfi Farsund is irrelevant for the State aid assessment of those measures comprised by the formal investigation. As a result, this alleged overcompensation will not be assessed below.

#### 3.1.2.2 The comments of 5 May 2022

- (89) In its letter of 5 May 2022, the complainant addressed the settlement agreement entered into between the Municipality and Farøy Brygge AS following the exercise of the revised 2015 Farøy option <sup>(140)</sup>.
- (90) In the view of the complainant, the terms of this settlement conferred additional economic advantages on Farøy Brygge AS compared with the revised 2015 Farøy option agreement. This was so because the terms of the settlement allegedly deviated from the revised 2015 Farøy option agreement to the benefit of the option holder. In addition, the complainant asserted that the terms of the settlement favoured a third party <sup>(141)</sup>.
- (91) In the same way as for the alleged excessive rent paid by the Municipality for areas within Amfi Farsund, the opening decision did not comprise alleged aid resulting from the settlement agreement between the Municipality and Farøy Brygge AS <sup>(142)</sup>. It is furthermore clear that the settlement agreement did not form part of the commercial context of those measure comprised by ESA's opening decision as it was concluded after those measures. On this basis, the alleged deviation in the settlement agreement from the terms of the revised 2015 Farøy option is irrelevant

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<sup>(136)</sup> See Section 4.4.3.1 below.

<sup>(137)</sup> Document No. 1137814, pages 4-6.

<sup>(138)</sup> See Section 2.2.2 above.

<sup>(139)</sup> See Section 4 below.

<sup>(140)</sup> See Sections 4.4.3.2 and 4.4.3.3 below.

<sup>(141)</sup> Document No. 1287067.

<sup>(142)</sup> See Section 2.2.2 above.

for the State aid assessment of those measures comprised by the formal investigation. As a result, the settlement agreement entered into between the Municipality and Farøy Brygge AS, following the exercise of the revised 2015 Farøy option, will not be assessed below.

### 3.1.2.3 The closing comments of 21 February 2024

- (92) In its closing comments of 21 February 2024, the complainant reiterated and elaborated on its previous submissions.
- (93) Regarding the settlement agreement entered into between the Municipality and Farøy Brygge AS following the exercise of the revised 2015 Farøy option, the complainant underscored that this settlement did in its view confer additional economic advantages compared to the terms of the revised 2015 Farøy option agreement. As identified in paragraphs (90)-(91) above, however, ESA will not assess the terms of this settlement agreement in the present decision as it falls outside the scope of the opening decision, and since it was not part of the commercial context prevailing when the measures encompassed by the formal investigation were adopted <sup>(143)</sup>.
- (94) In respect of the Farøy option agreements, the complainant furthermore asserted that the Municipality had undertaken to pay for demolition, pollution handling and safety measures without these costs being reflected in the agreed price for the property. According to the complainant, a market economy operator would have required compensation for such costs. Based on the latest information available to the complainant, the Municipality had incurred costs of NOK 3 806 868 at that time <sup>(144)</sup>.
- (95) As for the categorisation of the Municipality's interventions through the agreements and cooperation, the complainant considered that they might legitimately be perceived as reflecting an aid scheme. The complainant furthermore upheld its views that a competition should have been organised, and that it is impossible to know what terms could have been offered by other investors than Glastad Farsund, when no such investors were invited <sup>(145)</sup>.
- (96) With respect to the question of whether an economic advantage has been conferred by the Municipality, the complainant furthermore argued that the market values of the plots in 2010 are of limited interest as the assessment must consider the totality of the interventions. Given that the real estate market in Farsund was not very 'liquid', it was also difficult to establish the market value at that time through other means than an open bidding process. In any event, the valuations did in the view of the complainant have no bearing on the terms for the sale of the Farsund Vekst shares from the Municipality to Glastad Farsund. Furthermore, the complainant considered that the option agreements conferred value elements which were not foreseen in the valuations <sup>(146)</sup>.
- (97) In the view of the complainant, any cost or risk carried by the Municipality, which would otherwise have to be carried by Glastad Farsund, constitutes an advantage

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<sup>(143)</sup> Document No. 1437892, Section 2.1.

<sup>(144)</sup> Document No. 1437892, Section 2.2.

<sup>(145)</sup> Document No. 1437892, Section 3.1.

<sup>(146)</sup> Document No. 1437892, Section 3.2.

within the meaning of Article 61(1) of the EEA Agreement. In this regard, the complainant considers that the prices paid to the Municipality omit significant value elements <sup>(147)</sup>.

- (98) With respect to the sale of Nordkapp 1, the complainant argued that the land value exceeded that found by Sædberg & Hodne in 2010, and that the Municipality covered preparation and infrastructure costs not normally borne by developers. Furthermore, it was submitted that the Municipality granted favourable contract terms in conjunction with this sale <sup>(148)</sup>.
- (99) These points were also made in respect of Farøy. Based on the previous argument made by the complainant that ESA's assessment must relate to the totality of the Municipality's interventions, and the reference to 'Farøy Brygge', it appears that the arguments relating to Farøy concern in particular the revised 2015 Farøy option agreement and the subsequent settlement entered into that was linked to this agreement <sup>(149)</sup>.
- (100) As concerns the Municipality's purchase of the shares in Farsund Vekst, the complainant upheld its position that the purchase price of the shares did not reflect the underlying values in the company. In particular, this is illustrated by the fact that the Municipality agreed to pay NOK 23.5 million for the right to develop property on the rooftop of Amfi Farsund while simultaneously only receiving NOK 21 million from Glastad Farsund for the sale of the Municipality's 50% shareholding in Farsund Vekst <sup>(150)</sup>.
- (101) Lastly, the complainant argued that the Municipality should have required a premium for the options relating to Nordkapp 2 and 3, and that the value of these options was also not reflected in the price agreed for the Municipality's sale of its shares in Farsund Vekst <sup>(151)</sup>.
- (102) As concerns the question of whether the effects of the alleged aid were purely local, the complainant underscored that this issue cannot be assessed solely from the perspective of Farsund Vekst. In addition, it is necessary to consider the cross-border interest to invest in shopping centres, as well as the fact that aid to Farsund Vekst would ultimately benefit its owner, Glastad Farsund. Given that companies in the Glastad group are involved in trade with a cross-border interest, it can therefore not be ruled out that the alleged aid strengthens the position of an undertaking engaged in cross-border trade <sup>(152)</sup>.

### 3.2 Comments from the Norwegian authorities

- (103) As is evident from the presentation of the information exchanges during the formal investigation procedure in Section 1.2 above, ESA has received very extensive information from the Norwegian authorities. As this information will be presented at length in Section 4 below, ESA will only summarise the main arguments set out in the comments from the Norwegian authorities in this Section 3.

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<sup>(147)</sup> Document No. 1437892, Section 3.2.

<sup>(148)</sup> Document No. 1437892, Section 3.2.

<sup>(149)</sup> Document No. 1437892, Section 3.2.

<sup>(150)</sup> Document No. 1437892, Section 3.2.

<sup>(151)</sup> Document No. 1437892, Section 3.2.

<sup>(152)</sup> Document No. 1437892, Section 3.3.

- (104) In their initial comments to the opening decision, provided by letter of 31 October 2019, the Norwegian authorities submitted that all transactions questioned by ESA in the opening decision were on market terms and therefore did not entail State aid <sup>(153)</sup>.
- (105) In this regard, the Norwegian authorities underscored the chronology of events and that the measures were all connected to the joint property development cooperation relating to Nordkapp, Farøy and Ferjeveien, which the Municipality and Glastad Farsund entered into in 2011. As has already been identified, this property development cooperation was regulated in respectively the cooperation, shareholder and option agreements of 27 May 2011. Moreover, the Norwegian authorities highlighted that the prices in the option agreements were based on the valuations of the properties from Sædberg & Hodne <sup>(154)</sup>.
- (106) As for the subsequent events, the Norwegian authorities explained that, during the course of the property development cooperation, it became clear that the Municipality was not able to fulfil its contractual obligations by reclaiming land as required under the 2011 Nordkapp option agreement. This default on the part of the Municipality made it necessary to revise the plans and contracts. Furthermore, the Municipality's prioritisations later changed to the effect that it wanted to exit from the property development cooperation and project relating to Amfi Farsund at Nordkapp. The conditions for the sale of the shares in Farsund Vekst formed part of the negotiated terms for that exit <sup>(155)</sup>.
- (107) Against this backdrop, the Norwegian authorities consider that all the measures encompassed by the opening decision comply with the market economy operator principle ('the MEOP'). In particular, the Norwegian authorities have highlighted that, given the commercial context of the option agreements, it was rational and in line with normal practice that these did not contain option premiums or price adjustment mechanisms. Equally, the Norwegian authorities consider that the Municipality acted as a prudent market economy operator during its participation in, and exit from, the property development cooperation and project. In the view of the Norwegian authorities, ESA is required to undertake a concrete assessment reflecting the commercial situation in which the Municipality actually found itself <sup>(156)</sup>.
- (108) In any event, the complainant has in the view of the Norwegian authorities not submitted evidence positively establishing that the sales prices set out in the concerned option agreements, nor in the sales agreement regarding Nordkapp 1, lay below the range of market prices which could be expected to be obtained through a sale on the open market. In the same vein, the Norwegian authorities

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<sup>(153)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), page 2.

<sup>(154)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), page 2.

<sup>(155)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), pages 2-3.

<sup>(156)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), pages 8-22.

consider that the available evidence suggests that the price for the Municipality's shares in Farsund Vekst was not set below the market value of those shares <sup>(157)</sup>.

- (109) Given their position that the concerned measures did not confer an advantage on the alleged beneficiaries within the meaning of Article 61(1) EEA, the Norwegian authorities consider that the measures do not qualify as State aid. In addition, however, due to the local character of the measures, the Norwegian authorities are of the view that they were not liable to affect trade and distort competition within the EEA. Also for this reason, the Norwegian authorities purport that the measures do not qualify as State aid within the meaning of Article 61(1) of the EEA Agreement <sup>(158)</sup>.
- (110) The Norwegian authorities have furthermore asserted that, in the event that the concerned measures should be deemed to constitute State aid, ESA should declare this aid to be compatible with the EEA Agreement on the basis of its Article 61(3)(c). In this regard, the Norwegian authorities have pointed out that one of the goals of the property development cooperation was to reverse the negative economic development trend and contribute to growth and value creation in Farsund. In turn, this contribution to regional development could also play a role as basis for sustaining population levels <sup>(159)</sup>.
- (111) In their subsequent submissions <sup>(160)</sup>, the Norwegian authorities have upheld and elaborated on the facts underpinning the views set out in their initial comments to the opening decision.

### 3.3 Comments from Glastad Farsund

- (112) As identified in Section 1.2 above, Glastad Farsund has provided information in response to several requests for information from ESA to the Norwegian authorities. Glastad Farsund has also provided supplementary comments to the information provided by the Norwegian authorities and on its own initiative.
- (113) In its comments, Glastad Farsund has essentially echoed the substantive views of the Norwegian authorities, while also providing additional nuances and factual clarifications. This new information is reflected in the presentation of facts in Section 4 below.

### 3.4 Comments from an anonymous third party

- (114) By letter dated 21 July 2019, an anonymous third party expressed its grievances concerning the outcome of a case before the Lister District Court in 2011 <sup>(161)</sup>. In that case, the Lister District Court had established the compensation to be paid by the Municipality for its expropriation of two properties in Farsund.

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<sup>(157)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), pages 22-24.

<sup>(158)</sup> Document No. 1095046 (confidential version) and Document No. 1095009 (non-confidential version), pages 24-27.

<sup>(159)</sup> Document No. 1095046 (confidential version) or Document No. 1095009 (non-confidential version), pages 27-28.

<sup>(160)</sup> See the reference in Section 1.2 above to the submissions made by the Norwegian authorities.

<sup>(161)</sup> Document No. 1082078.

- (115) According to the third party, the properties were undervalued by the Lister District Court. As a result, the original owners were not fully compensated for the Municipality's expropriation of their properties.
- (116) The alleged under-compensation of the original owners for the Municipality's expropriation falls outside the scope of the formal investigation closed through the present decision <sup>(162)</sup>. Furthermore, such an event would in any case have no relevance for the State aid assessment of the measures encompassed by the opening decision. On this basis, the allegation that the Municipality paid less than the prevailing market rates when it expropriated the two properties in 2011 will not be addressed in the below State aid analyses.

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<sup>(162)</sup> See Section 2.2.2 above.

## 4 ESA's factual understanding

### 4.1 Introduction

(117) As already mentioned, ESA has received extensive comments and documentation. This information has developed ESA's understanding of the facts compared with the situation at the time of the opening decision. ESA's understanding of the facts will be set out in this Section 4.

### 4.2 The Municipality's entry into the property development cooperation with Glastad Farsund

#### 4.2.1 The entry decision of 8 February 2011

(118) In its decision of 8 February 2011, the Municipal Council decided that the Municipality should partake in a cooperation with Glastad Farsund with a view to develop certain properties in Farsund. The decision stated in its presentation of facts that the cooperation was to be governed by 5 contracts. These were respectively a cooperation agreement, a shareholder agreement, and three option agreements relating to the properties Nordkapp, Farøy and Ferjeveien. The decision made by the Municipal Council entailed that the Municipality became contractually bound by the five agreements <sup>(163)</sup>.

(119) According to the decision, one of the aims of the property development to take place within the framework of the cooperation was to generate profits for the Municipality and Glastad Farsund. The decision also referred to the State aid rules and explained that the prices in the option agreements were set pursuant to an external valuation to ensure that they did not contain an aid element <sup>(164)</sup>.

(120) The decision made clear that the Municipality would participate with a stake of 50% in the prospective projects concerning the development of the three properties. In keeping with this, it was set out that the Municipality and Glastad Farsund should cover planning costs on an equal basis. Such costs should initially be covered by granting loans to Farsund Vekst. These loans would subsequently be paid back prior to the disbursement of any dividends. In the event that none of the properties were developed in accordance with the options, the planning costs would constitute sunk costs for the Municipality and Glastad Farsund <sup>(165)</sup>.

#### 4.2.2 The formalisation of the cooperation through the cooperation, shareholder and option agreements

##### 4.2.2.1 The cooperation agreement

(121) As established above, the cooperation between the Municipality and Glastad Farsund was governed by a cooperation agreement, a shareholder agreement, and three option agreements.

(122) In line with this, it was reiterated in Section 1 of the cooperation agreement <sup>(166)</sup> that its purpose was to establish principles for the cooperation between the Municipality

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<sup>(163)</sup> Document No. 1320495, *Farsund Vekst background*, page 1.

<sup>(164)</sup> Document No. 1320495, *Farsund Vekst background*, page 2.

<sup>(165)</sup> Document No. 1320495, *Farsund Vekst background*, pages 2-3.

<sup>(166)</sup> Document No. 1042409, pages 9-12.

and Glastad Farsund, concerning the possible development of the three properties Nordkapp, Farøy and Ferjeveien <sup>(167)</sup>.

- (123) Pursuant to Section 2 of the cooperation agreement, the cooperation was divided into 4 steps <sup>(168)</sup>. These steps reflected a principle of equal contributions and rewards, in the sense that Glastad Farsund and the Municipality should contribute equally, take on risk to the same extent, and be entitled to the same level of profits from the property development.
- (124) In the first step of the cooperation, Glastad Farsund was to establish Farsund Vekst as a limited liability company. The operating expenses of this company were to be covered equally by the Municipality and Glastad Farsund through the granting of loans to Farsund Vekst. These loans were to be paid back in conjunction with the realisation of the property development projects relating to Nordkapp, Farøy and Ferjeveien.
- (125) As part of the first step, the Municipality and Glastad Farsund also committed to establishing the option agreements entitling Farsund Vekst to purchase the three properties pursuant to the terms set out in these agreements.
- (126) Lastly, the first step of the cooperation entailed Farsund Vekst commencing the necessary planning and preparation relating to the prospective development of the three properties.
- (127) The second step of the cooperation, as set out in Section 2 of the cooperation agreement, would entail Farsund Vekst exercising one or more of the options within the time limits set out in the option agreements.
- (128) In the event that one or more of the options were exercised, the concerned properties were to be regarded as contributions in kind into Farsund Vekst. With the aim of ensuring that the Municipality and Glastad Farsund each owned 50% of the shares in Farsund Vekst and had each contributed with 50% of the share capital, Glastad Farsund committed to purchasing additional shares as necessary to ensure this balance.
- (129) In the third step of the cooperation, Farsund Vekst would consider increasing the share capital by making offers to the public or other property developers.
- (130) The fourth step of the cooperation concerned the stage subsequent to the prospective realisation of one or more of the three property development projects facilitated by the options. At this stage, the parties would consider investing in new projects. The Municipality would however be entitled to decide unilaterally that Farsund Vekst should not engage in further activities and distribute the values it held to the Municipality and Glastad Farsund.

#### 4.2.2.2 The shareholder agreement

- (131) Section 1 of the shareholder agreement <sup>(169)</sup> concerned the Municipality's and Glastad Farsund's ownership of Farsund Vekst. Section 1 also made clear that the shares in Farsund Vekst were wholly owned by Glastad Farsund at the time of its

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<sup>(167)</sup> Document No. 1042409, page 9.

<sup>(168)</sup> Document No. 1042409, pages 9-11.

<sup>(169)</sup> Document No. 1042409, pages 13-15.

incorporation, but that the Municipality was entitled to purchase shares pursuant to the terms of the cooperation agreement.

- (132) While the shareholder agreement foresaw, in line with the stipulations in the cooperation agreement, that 50% of the shares in Farsund Vekst would formally be transferred to the Municipality at a later stage, it also established that the Municipality should be regarded as an equal owner of Farsund Vekst prior to this formal transfer. In this regard, it was set out in Section 2 of the shareholder agreement that the Municipality was to be regarded as a 50% owner of Farsund Vekst in all dealings between the parties, and that it was therefore entitled to vote on behalf of 50% of the shares in the general assembly of Farsund Vekst.
- (133) In the same vein, it followed from Section 3 of the shareholder agreement that the Municipality was entitled to appoint two of the four board members in Farsund Vekst. The right to appoint the chair of the board was however reserved for Glastad Farsund. In the event of a tie of votes, the vote of the chair should generally count double.
- (134) In derogation from this, it was set out in Section 4 of the shareholder agreement that the adoption of the budget for the planning costs relating to the development of the three properties required unanimity. Unanimity was also required to engage in additional projects concerning other properties.
- (135) Section 5 of the shareholder agreement concerned capital increases. When a capital increase was considered necessary by one of the parties to ensure the development of the properties, this Section required the other party to vote in favour of and contribute to the capital increase in question.
- (136) It follows from the above that the shareholder agreement also reflected the principle of equal contributions and rewards. While Glastad Farsund was entitled to appoint the chair of the board, the implications of this right were modified by the Municipality's equal representation in the general assembly, as well as by the provisions requiring unanimity in the board in specific matters.

#### 4.2.2.3 The option agreements

##### 4.2.2.3.1 Nordkapp

- (137) The three original option agreements relating to Nordkapp, Farøy and Ferjeveien were structured in the same way and contained similar conditions. At the same time, each of the agreements stipulated conditions that were specific to the agreement in question.
- (138) According to Section 1 of the 2011 Nordkapp option agreement <sup>(170)</sup>, it provided Farsund Vekst with the right to purchase Nordkapp from the Municipality pursuant to the terms set out in the agreement.
- (139) The concerned property was identified in further detail in Section 2 of the option agreement. Pursuant to this Section, the option comprised the areas KF1, 2, 3 and 4, identified on the map attached as annex 1 to the agreement. This total area was estimated to 16 300 m<sup>2</sup>. It was however underlined that this estimate was not accurate, and that deviations in the actual land area within a range between -10%

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<sup>(170)</sup> Document No. 909656.

and +10% of the estimate could not give rise to adjustments of the option price. Under the terminology of the Norwegian land register, the areas comprised by the option would be located on plots assigned with the cadastral numbers 1/199 and others.

- (140) Section 3 of the option agreement concerned the Municipality's obligations. It followed from the first and second paragraphs of Section 3 that the option agreement provided Farsund Vekst with the exclusive right to work towards the development of the property, and that there was an ambition that (parts) of the developed property would be rented out to a tenant within the public sector. The Municipality was however not obliged to rent any areas.
- (141) The third paragraph of Section 3 stipulated requirements on the state of the property at the time of its transfer to Farsund Vekst. Pursuant to this paragraph, the property should be flat and ready to build on. As identified in the entry decision of the Municipal Council of 8 February 2011 and reflected on the map attached as annex 1 to the option agreement, this would require for the Municipality to fill out sea areas with 200 000 m<sup>3</sup> of additional masses <sup>(171)</sup>. The required connecting infrastructure, in the form of water and sewage pipes and a public road, should furthermore be completed and available at the property border.
- (142) In the unforeseen event that the ground turned out to be contaminated, the fourth paragraph of Section 3 placed the risk for this with the Municipality. Pursuant to the fifth paragraph of Section 3, and provided that such requirements were to follow from an applicable zoning decision, the Municipality would also be responsible for fulfilling requirements pertaining to other infrastructure that would need to be in place prior to commencing building works on the property.
- (143) According to the sixth paragraph of Section 3, the Municipality would lastly be responsible for working towards facilitating the establishment of a marina with a capacity for 50 boats in conjunction with the property. The Municipality could however not undertake to allow for the establishment of a marina as the legality of such an installation would depend on the eventual decision to be taken by the Municipality as zoning authority.
- (144) Section 4 of the option agreement concerned the obligations of the option holder, Farsund Vekst. Pursuant to this Section, Farsund Vekst would be responsible for establishing 200 public parking spaces to replace those parking spaces that were available at Nordkapp prior to the commencement of the project.
- (145) The price to be paid for the property by Farsund Vekst in the event that it exercised the option was set out in Section 5 of the option agreement. Pursuant to the first paragraph of this Section, Farsund Vekst was entitled to purchase the property for a price of NOK 25 million, in accordance with the valuation of 21 December 2010. It was specified that this sum included compensation to the Municipality for the reclamation and flattening of land that it was required to undertake, and which had been estimated to cost NOK 12 million. Therefore, the agreed price of NOK 25 million corresponded to the lower range of the valuation (NOK 13 million), with the addition of these estimated costs (NOK 12 million).

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<sup>(171)</sup> Document No. 1320495, *Farsund Vekst background*.

- (146) In the second paragraph of Section 5, it was agreed that Farsund Vekst should cover prospective VAT costs incurred by the Municipality as a result of the works relating to the reclamation of land. Pursuant to the third paragraph of Section 5, Farsund Vekst would also be liable to pay the transaction costs relating to the transfer of the property.
- (147) The duration of the option was regulated in Section 6 of the option agreement. It was stipulated in the first paragraph of this Section that the option would be valid for a period of 18 months, calculated from the time of signature of the cooperation agreement. Pursuant to the second paragraph of Section 6, works on the property should commence at the latest three years after the exercise of the option. If this condition was not adhered to, the Municipality would be entitled to purchase the property back from Farsund Vekst for the price it was purchased for by Farsund Vekst (the option price).
- (148) Section 7 of the option agreement concerned the formalisation of the purchase in a contract in the event that the option was exercised. Pursuant to this provision, a standard contract for property transactions should be finalised immediately upon the exercise of the option.
- (149) In Section 8 of the option agreement, the Municipality undertook to ensure that no liens existed against the property at the time of its sale. In addition, Farsund Vekst confirmed that it had been made aware of other rights relating to the property and accepted these.
- (150) Pursuant to Section 9 of the option agreement, Farsund Vekst was lastly entitled to demand that the agreement was registered in the Norwegian Land Register.

#### 4.2.2.3.2 Farøy

- (151) As has already been mentioned, the three option agreements are structured in the same way and contain similar conditions. ESA will therefore only identify those conditions which were specific to Farøy in this section. As regards the remaining common conditions for the three properties, reference is made to the above presentation of the option agreement concerning Nordkapp.
- (152) The concerned property was identified in detail in Section 2 of the option agreement<sup>(172)</sup>. Pursuant to this Section, the Farøy option comprised the properties with cadastral numbers 3/80 and 49 (section numbers 1 and 2), as well as parts of the property with cadastral number 3/23. This total area was estimated to 1 900 m<sup>2</sup>.
- (153) In the third and fourth paragraphs of Section 2, it was identified that the property was zoned for industrial purposes and public transport, and that the option agreement presupposed that it would be re-zoned to allow for residential properties and/or other commercial purposes.
- (154) According to the fourth paragraph of Section 3, the Municipality should work towards facilitating the establishment of boat slips in conjunction with the contemplated residential development. By expressing this intention, the

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<sup>(172)</sup> Document No. 1042409, pages 34-36.

Municipality did however not commit itself to allow for boat slips in its capacity of zoning authority.

- (155) Pursuant to the first paragraph of Section 5, Farsund Vekst was entitled to purchase the property at a price of NOK 10.5 million, in accordance with the valuation of 21 December 2010. Since it was necessary to re-zone the property to develop it as intended, it was however specified in the second paragraph of Section 5 that a new valuation should be obtained if it took more than three years from the initial valuation to the completion of the re-zoning.
- (156) In the same way as for Nordkapp, it was stipulated in the first paragraph of Section 6 that the option would be valid for a period of 18 months calculated from the time of signature of the cooperation agreement. In addition, however, the property would have to be re-zoned to allow for residential properties and/or other commercial purposes before this deadline would start to run.

#### 4.2.2.3.3 Ferjeveien

- (157) As reiterated above, the three option agreements are structured in the same way and contain similar conditions. On this basis, only those conditions which were specific to the 2011 Ferjeveien option agreement will be discussed in the following.
- (158) The concerned property was identified in detail in Section 2 of the option agreement <sup>(173)</sup>. Pursuant to this Section, the Ferjeveien option comprised the property with cadastral number 3/59. The total area was estimated to 1 210 m<sup>2</sup>. In the same way as in the option agreement concerning Nordkapp, however, it was underlined that this estimate was not accurate, and that deviations in the actual land area within a range between -10% and +10% of the estimate could not justify adjustments of the option price.
- (159) According to the first paragraph of Section 5, Farsund Vekst was entitled to purchase the property at a price of NOK 4 million, in accordance with the valuation of 21 December 2010. It was furthermore specified that the option price should not be adjusted if the property was re-zoned to allow for commercial buildings as well as residential housing.
- (160) In the same way as in the other option agreements, it was stipulated in the first paragraph of Section 6 that the option would be valid for a period of 18 months calculated from the time of signature of the cooperation agreement.

### 4.2.3 The valuations

#### 4.2.3.1 The mandate

- (161) On 21 December 2010, the Municipality obtained a valuation of the three properties from the commercial property realtor Sædberg & Hodne <sup>(174)</sup>.
- (162) Under Section 1 of the report, the three properties were identified as those subject to the option agreements. In the last paragraph of Section 1, it was made clear that Sædberg & Hodne had previously undertaken assignments for the Glastad-family and that this had been communicated to the Municipality.

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<sup>(173)</sup> Document No. 1042409, pages 34-36.

<sup>(174)</sup> Document No. 1045487, annex 1.

(163) The mandate for the valuation was identified in Section 1.1. It was stated in the first paragraph of this Section that Sædberg & Hodne had been tasked with establishing normal sales values for the three properties. It was furthermore explained that the term normal sales value denoted that price which two purchasers would normally be willing to pay for the property in a voluntary sale under normal market conditions.

#### 4.2.3.2 Nordkapp

(164) In respect of the utilisation of Nordkapp, it was identified in the second paragraph of Section 1.1 that the utilisation, which formed the starting point for the valuation, was based on information from the parties (the Municipality and Farsund Vekst). In the fourth paragraph of Section 2.1, it was explained that this information entailed that the following functions would be included in the building(s) to be constructed:

- 8 000 m<sup>2</sup> of retail areas.
- 1 000 m<sup>2</sup> of office space.
- 1 500 m<sup>2</sup> of space for a gym or other health related services.
- 2 000 m<sup>2</sup> of residential property/apartments.
- 2 000 m<sup>2</sup> of public spaces/cinema/other uses.
- 12 000 m<sup>2</sup> of parking space.

(165) Under Section 2.3 of the report, Sædberg & Hodne remarked that the zoning plan allowed for a higher degree of utilisation than this.

(166) It is also evident from the report that Sædberg & Hodne had been made aware of the contemplated conditions relating to the state of the property, which were later included in Sections 3 and 4 of the 2011 Nordkapp option agreement. In this regard, it was stated in the last paragraph of Section 2.1 of the report that the Municipality had reserved for itself the right to 200 parking spaces for public use within the areas to be developed. In the same vein, it was stated in the last paragraph of Section 2.3 that the valuation was conditional on the required connecting infrastructure, in the form of water and sewage pipes and a public road, being completed and available at the property border. Moreover, the expected costs of filling out the areas in the sea and flattening the land (NOK 12 million) were reflected in Section 2.4 <sup>(175)</sup>, whereas the prospects for establishing boat slips were addressed in Section 2.5.

(167) The overall assessment of Sædberg & Hodne was set out in Section 2.5 of their report. In the first paragraph of this Section, the realtors noted that the property was in principle interesting for development purposes due to its location in the centre of Farsund. At the same time, however, it was underlined that the market for development properties of this character had been weak for several years. In the opinion of the realtors, it was also necessary to take into account that the development of the property would require substantial capital to cover groundworks and financing costs.

(168) Sædberg & Hodne went on to state, in the second paragraph of Section 2.5, that the markets for rental and sale of the real estate that was to be constructed could

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<sup>(175)</sup> According to the presentation of facts in the Municipality's entry decision of 8 February 2011, the estimate of the costs for reclamation and flattening had been provided by the external consultant *Asplan Viak* (see the attachment *Farsund Vekst background*, filed under Document No. 1320495, on page 3).

be expected to be challenging, and that the property would consequently have to be developed over time.

- (169) As expressed in the third paragraph of Section 2.5, the realtors also doubted that there would be a basis for utilising the property to the degree envisioned by the parties within the foreseeable future. In this regard, the realtors referred to the existing trade and population patterns in the region. On this basis, the realtors assumed that the desired degree of utilisation would necessitate a development in stages.
- (170) On the other hand, Sædberg & Hodne noted that the zoning plan allowed for the establishment of boat slips. In their view, this represented a development potential in addition to that reflected in the utilisation assumed by the parties.
- (171) In view of this balancing of considerations, Sædberg & Hodne concluded that the market value of Nordkapp lay within the range of NOK 13 and 15 million. As already mentioned, it would additionally be necessary to incur costs in the range of NOK 12 million to reclaim land and make the property ready for construction.

#### 4.2.3.3 Farøy

- (172) As concerns Farøy, it was explained in the third paragraph of Section 1.1 of the report that the objective of the assessment was to establish the value of the land. Consequently, the prospective costs and income relating to existing buildings that were in any event to be demolished, were not assessed.
- (173) In the second paragraph of Section 3.1, Sædberg & Hodne clarified that their assignment entailed assessing the value of the property based on the premise that the zoning conditions would be revised to allow for residential property.
- (174) As regards the level of utilisation, Sædberg & Hodne explained in the third paragraph of the same Section that they had been asked to perform their valuation based on the assumption that 20 apartments of 120m<sup>2</sup> would be built over 2 floors, that two parking spaces would be established for each of these apartments, and that each apartment would be entitled to one boat slip in a common marina. In the view of the realtors, however, the property would be utilised better if the apartments were not uniform in size. As clarified in the fourth paragraph of Section 3.1, therefore, the valuation reflected this possibility.
- (175) In Section 3.2 of the report, the realtors expressed that the property was very suitable for being developed as a residential property. Farøy was considered as one of the more attractive properties in the area for this purpose.
- (176) In keeping with this, Sædberg & Hodne expressed in their assessment under Section 3.3 that significant interest could be expected for the project, and that the contemplated apartments should sell for comparatively high prices for Farsund. On the other hand, the realtors reiterated that the market for development properties had been weak in the preceding years. In spite of this, and in light of the qualities of the property, Sædberg & Hodne considered the project to be economically sound.
- (177) Based on a holistic assessment, Sædberg & Hodne concluded in Section 3.4 of their report that the market value of Farøy was NOK 10.5 million.

#### 4.2.3.4 Ferjeveien

- (178) With regard to Ferjeveien, it was explained in the fourth paragraph of Section 1.1 of the report from Sædberg & Hodne that the valuation was based on the utilisation permitted under the zoning plan in force at the time. As established in the first paragraph of Section 4.3 of the report, this zoning plan allowed for residential property with a total area of 1 450 m<sup>2</sup>. The zoning plan furthermore required for the establishment of 1.5 parking spaces per residential unit.
- (179) In view of this, the realtors explained in the second paragraph of Section 4.3 that the valuation assumed that apartments of different sizes would be constructed and that the required parking spaces were established on the property. Sædberg & Hodne also noted that while the zoning plan allowed for the establishment of a floating dock, a dialogue had been initiated with the neighbours to achieve a common docking solution as the weather conditions could present a challenge.
- (180) In the third paragraph of the same Section, Sædberg & Hodne noted that the zoning plan stipulated requirements for the area to be developed in stages. It was furthermore made clear that the valuation assumed that any prior works which were required to build on the property had been completed. The property was in other words valued based on the premise that it was ready for construction.
- (181) In keeping with this, the realtors went on to state in the last paragraph of Section 4.3 that their assessment assumed that the property was connected to the public water and sewage networks, and that it had public road access. Based on the information received, Sædberg & Hodne also clarified in Section 4.4 that their valuation assumed that areas in the sea had been filled out to the degree necessary.
- (182) In their overall assessment in Section 4.5 of the report, Sædberg & Hodne noted that the property was centrally located in Farsund, that it bordered the sea, and that the views from it were good. On the other hand, the property was somewhat exposed in terms of weather and noise conditions. The access to daylight was deemed satisfactory.
- (183) In view of these considerations, Sædberg & Hodne concluded that the market value of Ferjeveien was NOK 4 million.

### **4.3 The Municipality's participation in the property development cooperation with Glastad Farsund**

#### *4.3.1 The exercise of the 2011 Nordkapp option and subsequent revision of the option agreement*

##### 4.3.1.1 The exercise of the 2011 Nordkapp option

- (184) As identified above, the first paragraph of Section 6 of the 2011 Nordkapp option agreement stipulated that the option would be valid for a period of 18 months calculated from the signature of the cooperation agreement <sup>(176)</sup>. The Norwegian authorities and Glastad Farsund have both explained <sup>(177)</sup> that the option was

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<sup>(176)</sup> Document No. 909656.

<sup>(177)</sup> Document Nos. 1095046, page 11, 1261765, 1327502, pages 11-12, 1321554, and 1384627, page 3.

exercised within this deadline through the notice <sup>(178)</sup> from Farsund Vekst of 22 November 2012.

4.3.1.2 The revision of the 2011 Nordkapp option agreement through the mutual agreement to depart from it

- (185) Pursuant to Section 7 of the 2011 Nordkapp option agreement, a standard contract for property transactions should be finalised immediately upon the exercise of the option. At the same time, however, the third paragraph of Section 3 stipulated requirements on the state of the property at the time of its transfer to Farsund Vekst. Pursuant to this paragraph, the property should be flat and ready to build on. In order to comply with this provision, the Municipality would have to reclaim areas in the sea by filling them out with 200 000 m<sup>3</sup> of additional masses <sup>(179)</sup>.
- (186) The Norwegian authorities and Glastad Farsund have both explained that, at the time when Farsund Vekst exercised the 2011 Nordkapp option through the notice of 22 November 2012, the Municipality had not performed the requisite reclamation of land, as required under Section 3 of the 2011 Nordkapp option agreement. Furthermore, the Norwegian authorities have admitted that the Municipality was unable to complete the reclamation of land within the envisioned time frame, and that it was therefore in default with respect to its contractual obligations <sup>(180)</sup>. This position is shared by Glastad Farsund <sup>(181)</sup>.
- (187) As acknowledged by the Norwegian authorities, therefore, the main reason that the exercise of the option did not lead to a sales agreement being drawn up, was that the Municipality was unable to deliver the property in the state required under the contract on time <sup>(182)</sup>. In this situation, and in keeping with the finding in the valuation report from Sædberg & Hodne that the plot covered by the 2011 Nordkapp option agreement would likely have to be developed in stages, the Municipality's business partner in Farsund Vekst, Glastad Farsund, was open to reconsidering the terms of the option agreement and plan for developing Nordkapp <sup>(183)</sup>. In this regard, it is also evident from the information submitted to ESA that it took considerable efforts for Farsund Vekst to obtain a loan to finance the first property development project it eventually decided to carry out within the plot covered by the 2011 Nordkapp option agreement <sup>(184)</sup>. This process of obtaining financing will be further elaborated on below.
- (188) In view of the above, ESA finds that the Municipality and Farsund Vekst mutually agreed to revise the 2011 Nordkapp option agreement in 2013 by refraining from drawing up a final sales agreement based on this option agreement, and instead await future developments before finalising a revised contractual framework. Given the principle of freedom of contract under Norwegian contract law, and the absence of a form requirement that the option agreement could only be revised through a written agreement, this mutual agreement amounted a contractual revision of the 2011 Nordkapp option agreement.

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<sup>(178)</sup> Document No. 1042409, page 47.

<sup>(179)</sup> Document No. 1042409, page 47.

<sup>(180)</sup> Document No. 1095046, pages 3 and 11.

<sup>(181)</sup> Document No. 1095046, pages 3 and 11.

<sup>(182)</sup> Document Nos. 1327502, pages 2 and 12, and 1384627, page 3.

<sup>(183)</sup> Document Nos. 1045487, page 3, 1042409, page 4, and 1057574, page 5.

<sup>(184)</sup> Document Nos. 1326424, and 1327502, page 2.

#### 4.3.2 *The initial loans to cover administrative and planning costs*

(189) As already mentioned, Section 2 of the cooperation agreement stipulated that the operating expenses of Farsund Vekst were to be covered equally by the Municipality and Glastad Farsund <sup>(185)</sup>. In the initial phase(s) of the property development cooperation, this was to be done through the granting of loans, which would be paid back in conjunction with the realisation of the projects at Nordkapp, Farøy and/or Ferjeveien.

(190) In line with this, the Municipality provided a total of four loans to Farsund Vekst between May 2011 and May 2014 <sup>(186)</sup>. Equal loans were provided by Glastad Farsund <sup>(187)</sup>.

#### 4.3.3 *The construction of the two first floors of Amfi Farsund at Nordkapp*

##### 4.3.3.1 The partitioning of the development of the property covered by the 2011 Nordkapp option into three phases

(191) As mentioned above, the Municipality and Farsund Vekst mutually agreed to revise the 2011 Nordkapp option agreement in 2013. The final terms of the revised contractual framework were however not spelled out until in 2015, in conjunction with the Municipality's exit from the property development cooperation.

(192) At the same time, it is evident from the documentation submitted that the Municipality and Farsund Vekst agreed on partitioning the development of the property covered by the 2011 Nordkapp option well before the Municipality's exit from the property development cooperation. According to the Norwegian authorities, the Municipality and Farsund Vekst had ongoing discussions on how to develop Nordkapp. It was eventually decided that the prospective development of the areas covered by the 2011 Nordkapp option should take place in three phases, each of which covering a distinct part of the land included in the original option <sup>(188)</sup>. In this regard, the Norwegian authorities and Glastad Farsund have referred to the delays on the part of the Municipality in performing the necessary reclamation of land, which meant that areas in the sea covered by the original option were not yet available <sup>(189)</sup>. In addition, the Norwegian authorities have explained that the Municipality had to deal with several complaints from neighbors <sup>(190)</sup>.

##### 4.3.3.2 The process of obtaining project financing

(193) The discussions on how to develop Nordkapp gradually became more precise. The parties were aiming to establish a new mall, *Amfi Farsund*, as a first phase in the prospective development of Nordkapp.

(194) In this connection, Farsund Vekst and its subsidiary Nordkapp Utvikling applied to different banks for project financing. Initially, however, these applications were rejected. Therefore, to reduce the need for guaranteed rental income and/or

<sup>(185)</sup> Document No. 1042409, pages 9-11.

<sup>(186)</sup> Document Nos. 1250017, 1250018, 1250019, and 1250020.

<sup>(187)</sup> Document Nos. 1279066, page 2, and 1434128, page 3.

<sup>(188)</sup> Document No. 1042409, page 5.

<sup>(189)</sup> Document Nos. 1095046, page 11, and 1327502, page 12.

<sup>(190)</sup> Document No. 1095046, page 11.

contributions of capital, the scope of the development in the first phase was reduced<sup>(191)</sup>.

(195) On 24 April 2014, the local bank *Sparebanken Sør* offered project financing up to a limit of NOK 127 million to Nordkapp Utvikling for the construction of Amfi Farsund. The offer stipulated a number of conditions. These included that<sup>(192)</sup>:

- The property title for the relevant part of Nordkapp would need to be transferred from the Municipality to Nordkapp Utvikling.
- The developed property would have to serve as collateral.
- Guarantees of respectively NOK 10 million and NOK 28.927.720 were to be provided by Glastad Farsund.
- NOK 33 million would have to be provided free of loan financing. This sum would have to be used before the building loan could be drawn upon.
- Rental agreements covering no more than 80% of the areas available for rent, at a yearly sum of no less than NOK 9.6 million, would have to be signed prior to the signature of the loan agreement.
- In the event that the project resulted in total costs exceeding NOK 177.303.000, the excess would have to be covered by Glastad Farsund.

(196) In addition, it was stipulated as a condition in the loan offer that the Municipality could not vote as a shareholder in Farsund Vekst before it had purchased 50% of the shares.

#### 4.3.3.3 The investment decision of Farsund Vekst

(197) According to a memorandum from the chairman of the board of Farsund Vekst, summarising the state of play on 10 November 2014, the board had adopted a unanimous decision to invest in the development of Amfi Farsund on 19 September 2014. This investment decision was subsequently put into effect by the administration of Farsund Vekst. In terms of corporate structure, the project was to be organised in Nordkapp Utvikling<sup>(193)</sup>.

(198) According to the investment decision, Amfi Farsund was to consist of 12-13.000 m<sup>2</sup> of commercial areas spread over two floors. In addition, parking for 350-380 cars was to be established<sup>(194)</sup>.

(199) The land area to be developed in this first phase of the development of Nordkapp comprised approximately 30% of the areas that had been included in the 2011 Nordkapp option. The Municipality had agreed to finalise the necessary preparations so that the area could be handed over to Farsund Vekst by mid-February 2015. The building works could then commence immediately, with completion planned for the spring of 2016<sup>(195)</sup>.

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<sup>(191)</sup> Documents Nos. 1326424, and 1327502, page 2.

<sup>(192)</sup> Document No. 1279066, Annex 4.

<sup>(193)</sup> Document No. 1057574, page 113.

<sup>(194)</sup> Document No. 1057574, page 113.

<sup>(195)</sup> Document No. 1057574, page 113.

- (200) It was explained in the memorandum that as a possible second step in the development of Amfi Farsund, two additional floors could be added later. These floors could cover a total area of 12-15.000 m<sup>2</sup> <sup>(196)</sup>.
- (201) In conjunction with preparing the investment decision, the Municipality and Farsund Vekst had also agreed on certain adjustments to the Municipality's obligations to make available the remaining areas on Nordkapp. These adjustments included reducing and delaying the reclamation of land. In addition, an agreement was reached as to how parking spaces were to be provided by Farsund Vekst during the construction of Amfi Farsund <sup>(197)</sup>.
- (202) The memorandum also sketched out a possible final model for the amended contractual framework between the Municipality and Farsund Vekst concerning the development of Nordkapp. This model distinguished between respectively the area that was to be developed in the first phase, pursuant to the investment decision of 19 September 2014, and the remaining 60% of the area which was covered by the original 2011 Nordkapp option <sup>(198)</sup>.
- (203) With respect to the part which was to be developed in the first phase through the construction of Amfi Farsund (Nordkapp 1), the suggested model entailed that the Municipality would transfer the right of ownership to Nordkapp Utvikling by 15 January 2015 against payment of NOK 8.5 million. In addition, it was suggested that Nordkapp Utvikling was granted the necessary road rights to establish a filling station as part of the first phase. Nordkapp Utvikling would lastly be required to establish the agreed number of parking spaces prior to the completion of Amfi Farsund <sup>(199)</sup>.
- (204) Regarding the remaining 60% of the areas covered by the 2011 Nordkapp option, it was proposed to split these in two parts which were almost equal in size.
- (205) The first of these parts concerned the areas identified in the situation plan as *KF1* and *KF2*. According to the suggested model, the second phase of the prospective development of Nordkapp would be facilitated by granting Nordkapp Utvikling an option of purchasing these areas for NOK 9 000 000. Nordkapp Utvikling would have to exercise this option and pay the agreed purchase price at the latest at the time when the development of the additional two floors on Amfi Farsund was commenced <sup>(200)</sup>.
- (206) The second part, regarding the third stage of developing Nordkapp, concerned those areas in the western end of Nordkapp which remained under water. The suggested model would entail providing Farsund Vekst with an option of purchasing these areas for NOK 7 500 000. The details of the reclamation of land that was to be undertaken by the Municipality would be agreed later <sup>(201)</sup>.
- (207) With respect to the financing of the first step of the first phase (the two first floors of Amfi Farsund), the memo reiterated that Farsund Vekst had accepted the offer of

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<sup>(196)</sup> Document No. 1057574, page 114.

<sup>(197)</sup> Document No. 1057574, page 114.

<sup>(198)</sup> Document No. 1057574, page 115.

<sup>(199)</sup> Document No. 1057574, page 115.

<sup>(200)</sup> Document No. 1057574, page 115.

<sup>(201)</sup> Document No. 1057574, pages 115-116.

project financing identified above. In order to fulfil the conditions set for this financing, the competent organ in the Municipality would have to make decisions authorizing it to <sup>(202)</sup>:

- Utvikling with the necessary rights to establish a filling station. Formally purchase 50% of the shares in Farsund Vekst by 31 December 2014. The purchase price would be NOK 50 000.
- Contribute with 50% of the additional equity required.
- Measuring, delineating and transferring the land to be developed in the first step of the first phase against payment of NOK 8.5 million from Farsund Vekst.
- Guarantee for NOK 5 000 000 throughout the duration of the loan.
- Provide Farsund Vekst/Nordkapp.

(208)The memo lastly summarized what contributions Glastad Farsund had provided, and was prepared to provide, in conjunction with the development of the two first floors of Amfi Farsund. Firstly, and in keeping with the cooperation and shareholder agreements, the board of Glastad Farsund had authorized for it to contribute on an equal basis as the Municipality to increase the equity of Farsund Vekst. Secondly, Glastad Farsund would provide an identical guarantee as the Municipality in relation to the loan <sup>(203)</sup>.

(209)In addition, however, Glastad Farsund pledged to make further contributions to meet the financing conditions from the bank. In this regard, Glastad Farsund would provide an additional guarantee of NOK 25 million during the building period on the condition that the Municipality would continue to adhere to the existing agreements as an equal partner. Furthermore, Glastad Farsund would be willing to guarantee for future rental income in the event that the conditions stipulated by the bank in this regard were not fulfilled at the time of commencing the building works <sup>(204)</sup>.

#### 4.3.3.4 The investment decision of the Municipality

(210)On 4 December 2014, the Municipal Council made its binding decision to invest in the development of the two first floors of Amfi Farsund, in line with the board decision of Farsund Vekst of 19 September 2014. Moreover, it follows from points one to seven of the operative part of the decision that the Municipality effectively authorized the model presented in the memorandum from the chairman of the board of Farsund Vekst <sup>(205)</sup>.

(211)According to their wording, points one to seven of the operative part of the decision entailed that the competent organ in the Municipality authorised <sup>(206)</sup>:

1. The sale of a part of Nordkapp to Farsund Vekst/ Nordkapp Utvikling for a price proportionate to that agreed in the 2011 Nordkapp option agreement for the entire Nordkapp area (NOK 8.5 million).
2. Reducing the reclamation of land to be undertaken by the Municipality, as presented on an enclosed map.

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<sup>(202)</sup> Document No. 1057574, pages 115-116.

<sup>(203)</sup> Document No. 1057574, page 116.

<sup>(204)</sup> Document No. 1057574, page 116.

<sup>(205)</sup> Document No. 1245212, pages 1-2.

<sup>(206)</sup> Document No. 1245212, pages 1-2.

3. Granting Farsund Vekst/ Nordkapp Utvikling the right to utilize an area on Nordkapp for the purposes of establishing a filling station, as specified in an enclosed illustration.
4. For the Municipality to purchase 50% of the shares in Farsund Vekst.
5. That the Municipality would provide NOK 20.75 million to increase the equity of Farsund Vekst. NOK 8.5 million of this sum would be provided in kind in conjunction with the sale of the reduced part of Nordkapp addressed in point one.
6. That the Municipality would provide a guarantee of NOK 5 million for the loan to be taken up to finance the construction of the two first floors of Amfi Farsund.
7. That the Municipality would complete pedestrian roads and quays in keeping with the zoning plan.

(212) Pursuant to point eight of the operative part of the decision, the mayor was furthermore authorized to carry out the necessary steps to ensure the fulfilment of points one to seven. In addition, the mayor was authorized under this point to commence negotiations with a view for the Municipality to withdraw from the property development cooperation and project(s). It was underlined, however, that such an exit could not be carried out before it was practically and economically justifiable <sup>(207)</sup>.

#### 4.3.3.5 The implementation of the investment decisions

##### 4.3.3.5.1 The additional loans to cover administration and planning costs

(213) As established above, the Municipality and Glastad Farsund had provided loans with equal amounts and at the same points in time to finance the operation of Farsund Vekst. Two additional loans were provided by the Municipality and Glastad Farsund with equal amounts on 10 December 2014. Including interest, the total amount of the loans granted amounted to NOK 4.32 million on 19 January 2015 <sup>(208)</sup>. Until this date, the operation of Farsund Vekst was financed exclusively by the equal loans provided by the Municipality and Glastad Farsund.

##### 4.3.3.5.2 The Municipality's purchase of 50% of the shares in Farsund Vekst

(214) On 13 January 2015, the Municipality purchased 50% of the shares in Farsund Vekst from Glastad Farsund for NOK 53 000 <sup>(209)</sup>. The purchase price accurately reflected the equity (NOK 100 000) and premium (NOK 6 000) contributed with by Glastad Farsund when it incorporated Farsund Vekst on 6 December 2010 <sup>(210)</sup>. Following the purchase of the shares, Glastad Farsund and the Municipality had contributed with exactly the same amounts of capital to Farsund Vekst, in keeping with the principle of equal contributions in the cooperation and shareholder agreements.

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<sup>(207)</sup> Document No. 1245212, pages 1-2.

<sup>(208)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, pages 2-3.

<sup>(209)</sup> Document No. 1250022.

<sup>(210)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 2.

#### 4.3.3.5.3 The equity increase through the conversion of debt and additional injections

- (215) On 19 January 2015, Farsund Vekst held an extraordinary general assembly <sup>(211)</sup> in which it was resolved to issue a total of 500 new shares by way of subscription of shares through debt conversion. The loans previously provided by Glastad Farsund and the Municipality were converted into equity through this process <sup>(212)</sup>.
- (216) In addition, it was decided by the General Assembly that Glastad Farsund and the Municipality should each inject NOK 10 million as new share capital into Farsund Vekst <sup>(213)</sup>. The Municipality injected equity in line with this decision on 26 February 2015 <sup>(214)</sup>.
- (217) Subsequent to this, it was decided in the board meeting of 13 April 2015 and the general assembly of 18 May 2015 that the Municipality and Glastad Farsund should make further equity injections into Farsund Vekst. Pursuant to the first of these decisions, they should inject NOK 5 million each. According to the second decision, they were to inject an additional NOK 5.75 million each <sup>(215)</sup>. The Municipality injected equity as specified in these decisions on 20 April 2015 <sup>(216)</sup> and 26 May 2015 <sup>(217)</sup>.

#### 4.3.3.5.4 The Municipality's sale of that part of Nordkapp onto which Amfi Farsund was to be constructed (Nordkapp part 1)

- (218) On 10 March 2015, the Municipality and Nordkapp Utvikling entered into the sales agreement whereunder Nordkapp Utvikling bought that part of Nordkapp onto which Amfi Farsund was to be constructed (Nordkapp part 1) for NOK 8.5 million <sup>(218)</sup>. On 27 May 2015, Nordkapp Utvikling paid NOK 8.5 million plus transaction costs for this plot <sup>(219)</sup>.

### 4.4 The Municipality's exit from the property development cooperation with Glastad Farsund

#### 4.4.1 The exit-decision of 17 September 2015

- (219) On 17 September 2015, the Municipal Council decided that the Municipality should exit from the property development cooperation with Glastad Farsund. The operative part of the decision reads as follows <sup>(220)</sup>:

1. The Municipality sells its shares in Farsund Vekst (50%) to Glastad Farsund for NOK 21 million pursuant to the agreement of 10 September 2015.
2. Under the same agreement, the Municipality is obligated to purchase the rooftop on the Nordkapp-property (Amfi Farsund) from Farsund Vekst.

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<sup>(211)</sup> Document No. 1250024.

<sup>(212)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 1.

<sup>(213)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 1.

<sup>(214)</sup> Document No. 1250023.

<sup>(215)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 2 and 3.

<sup>(216)</sup> Document No. 1250025.

<sup>(217)</sup> Document No. 1250026.

<sup>(218)</sup> Document No. 1268510.

<sup>(219)</sup> Document No. 1057574, page 120.

<sup>(220)</sup> Document No. 909661, page 1.

Following this purchase, Farsund Vekst would be obligated to allow the Municipality to commence with the second step of the development of Amfi Farsund [the two additional floors on top of the rooftop]. The purchase shall take the form of a purchase of the shares of that company which owns the rooftop, in accordance with the agreement of 10 September 2015.

3. The Municipality adopts the agreement amending the option agreement of 27 May 2011 between the Municipality and Farsund Vekst regarding the property with cadastral numbers 1/199 and others (Nordkapp).
4. The Municipality adopts the amended option agreement with Farsund Vekst regarding the development of the properties with cadastral numbers 3/80 and 49 (section numbers 1 and 2), as well as parts of the property with cadastral number 3/23 (Farøy).
5. The mayor is authorised to sign the agreements encompassed by the above points 1-4.

(220) In the accompanying background text to this operative part of the decision, it was explained that the Municipality and Glastad Farsund had for some time negotiated with a view for the Municipality to exit as shareholder in Farsund Vekst. The parties agreed on mutually acceptable terms on 9 September 2015 <sup>(221)</sup>.

(221) In the assessment by the municipal administration, it was reiterated that it was important for the city and the Municipality that the development of Nordkapp was realised. It was also stated that exiting from Farsund Vekst would alleviate any concerns relating to the Municipality's role as administrative authority. In respect of the prospective ownership of the rooftop of Amfi Farsund, the administration noted that this property had a significant development potential, but that further assessments were necessary to decide whether this should be utilised to cover the Municipality's own needs or be made available to private parties <sup>(222)</sup>.

(222) While the administration pointed at these considerations, it is evident from the concluding sentence of its recommendation that this was based on the clear desire of the Municipal Council to exit from Farsund Vekst. Based on this desire, the administration recommended that the negotiated terms for the exit be adopted by the Municipal Council <sup>(223)</sup>.

#### 4.4.2 *The Municipality's sale of its shares in Farsund Vekst*

##### 4.4.2.1 The sales agreement

(223) In line with the Municipality's exit decision, the Municipality, Farsund Vekst and Glastad Farsund entered into a sales agreement on 14 October 2015 <sup>(224)</sup>. In addition, the amended option agreements concerning Nordkapp and Farøy were signed on the same day. These revised options will be addressed in further detail below.

(224) The sales agreement concerned, firstly, the sale of the Municipality's 50% stake of the shares in Farsund Vekst to Glastad Farsund. According to Section 3.1 of the sales agreement, these shares were to be sold for a price of NOK 21 million.

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<sup>(221)</sup> Document No. 909661, page 2.

<sup>(222)</sup> Document No. 909661, pages 2-3.

<sup>(223)</sup> Document No. 909661, page 3.

<sup>(224)</sup> Document No. 1268508.

- (225) Secondly, the sales agreement concerned the separation of the ownership of the two first floors, and that of the rooftop, on Amfi Farsund (the mall). Pursuant to Section 4.1 of the sales agreement, the Municipality was entitled and obligated to purchase the rooftop, including the associated right to develop two additional floors on it.
- (226) The purchase of the rooftop was to take place through the Municipality acquiring all of the shares in that company owning it. To facilitate this, Glastad Farsund was obligated to demerge Farsund Vekst upon having purchased the Municipality's shares and place the ownership of the rooftop in a single purpose company.
- (227) Pursuant to Section 5 of the sales agreement, the Municipality was to purchase the shares in the company owning the rooftop after the demerger. The price for the shares was set to NOK 23.5 million. This base-price would be subject to certain adjustments as specified in Section 5 of the sales agreement.
- (228) In Section 6 of the sales agreement, Farsund Vekst reserved for itself the right to purchase the company owning the rooftop back from the Municipality. As further specified in Section 6.2, this right was contingent upon several conditions. Firstly, the option would only apply from the time when 24 months had passed since the Municipality's purchase of the company. Secondly, the option would only apply in the event that the Municipality had not declared in writing its intentions to develop the rooftop. Thirdly, Farsund Vekst would be required to pay the Municipality for the company within 30 days of exercising the option. Pursuant to Section 6.5 of the sales agreement, the option price should be based on the price which the Municipality paid for purchasing the shares in the company, subject to certain adjustments specified in this paragraph.
- (229) Section 7 of the sales agreement furthermore stipulated that Glastad Farsund would be entitled to purchase the company or the rooftop in the event that the Municipality decided to sell either of these to a third party. To exercise this right, Glastad Farsund would have to pay the price which had been offered by the concerned third party.

#### 4.4.2.2 The basis for the valuation of the shares

- (230) As already mentioned, it was set out in Section 3.1 of the sales agreement that the Municipality's stake of 50% of the shares in Farsund Vekst should be sold to Glastad Farsund for a price of NOK 21 million. Furthermore, it was stipulated in the last sentence of this Section that the price was based on the value adjusted equity of Farsund Vekst at the time.
- (231) In line with this, ESA has been provided with an extract from the internal accounts of Farsund Vekst. According to this extract, 50% of the value adjusted equity of Farsund Vekst amounted to NOK 21 million on 31 October 2015 <sup>(225)</sup>. It was specified in note 5 to the accounts that the guarantees which had been put up by Glastad Farsund to provide the security required by the bank for the building loan had not been taken into account.

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<sup>(225)</sup> Document No. 1045487, page 28.

#### 4.4.2.3 The basis for the valuation of the right to acquire the rooftop property

##### 4.4.2.3.1 The valuation from Sædberg & Hodne

- (232) In conjunction with the preparation of the sales agreement, Farsund Vekst tasked Sædberg & Hodne with valuating the rooftop property on top of the two first floors of Amfi Farsund. Their valuation was set out in a report of 7 August 2015. At the time of writing the report, the rooftop property was not yet completed as the construction works were still ongoing <sup>(226)</sup>.
- (233) The mandate of Sædberg & Hodne was set out in Section 1.1 of the report. It was stated in the first paragraph of this Section that the realtors had been tasked with establishing the normal sales value of the property. This term was defined as that price which purchasers would normally be willing to pay for the property in a voluntary sale under normal market conditions.
- (234) Section 1.1 furthermore referred to a number of stipulations which had been provided by Farsund Vekst as basis for the valuation. These included that:
- Residential apartments or commercial areas could be constructed on the property. In the event that residential apartments were to be constructed, they could number up to 85 in total at an average size of 75m<sup>2</sup>. As for the prospective commercial areas, this could be up to 4 000 m<sup>2</sup> (BTA).
  - The seller would only be entitled to payment of the agreed purchase price to the extent that the purchaser actually built on the property. For example, if the property was to be developed in stages, the seller would only be entitled to payment per completed stage.
- (235) In the presentation of the property in Section 2 of the report, the realtors noted that it was situated centrally in Farsund. While it would be exposed in terms of weather conditions, the views would also be excellent. Sædberg & Hodne furthermore underlined that they had not assessed whether the contemplated development would be in line with the applicable zoning plan, and that their assessment reflected the premise that the risk for the load-carrying abilities of the two first floors of Amfi Farsund was placed with the seller of the rooftop.
- (236) The assessment of Sædberg & Hodne was set out in Section 3 of their report. In the first paragraph of this Section, the realtors recalled once more that the property was located centrally in Farsund, that it would be ready to build on, and that, based on the information provided, the risk for the contemplated development not being approved by the building authorities would be negligible. Similarly, the realtors considered other potential risks, such as those related to ground works, as low. The fact that the property could be developed both for residential and commercial purposes was also considered to be a plus for its value.
- (237) With reference to the preliminary terms for the property purchase set out in their mandate, Sædberg & Hodne noted, in the second paragraph of Section 3, that a prospective purchaser would consider it attractive that these removed the purchaser's liability to pay the agreed purchase price to the extent that the property remained unbuilt. Conversely, Sædberg & Hodne were of the view that, if the property was sold under terms where the purchase price would have to be paid

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<sup>(226)</sup> Document No. 1182381.

shortly after the conclusion of the sales agreement, the valuation would have been significantly lower. Indeed, the realtors questioned whether it would be possible to find a purchaser in such a scenario. Sædberg & Hodne furthermore went on to state that they considered the terms suggested in the mandate atypical insofar as they did not include an option premium, an indexation mechanism, or a time limitation of the right to purchase the property.

(238) Having considered these specifics of the suggested terms for the sale, Sædberg & Hodne addressed the general market characteristics in Farsund. In this regard, they noted that the markets for commercial real estate and development properties had been weak for several years. The markets for larger projects, such as the property up for assessment, had been particularly weak. This weak demand side in the area was considered as a minus in the valuation of the property.

(239) In light of these considerations, Sædberg & Hodne concluded in Section 4 of their report that the property could be valued to NOK 500 000 per residential property unit and NOK 2 000 per *BTA* of commercial property. With respect to the specifications in the mandate, this equated to a value of NOK 42.5 million if 85 residential apartments of an average size of 75 m<sup>2</sup> were built. In the event that the property was developed exclusively into 4 000 m<sup>2</sup> (*BTA*) of commercial areas, its value would be NOK 8 million according to the valuation.

#### 4.4.2.3.2 The adjustments made by the parties to the sales agreement

(240) As explained above, the valuation from Sædberg & Hodne suggested that the rooftop property could be worth up to NOK 42.5 million.

(241) However, as has also been mentioned above, this valuation reflected a number of assumptions provided in the mandate from Farsund Vekst. One of these assumptions was that the seller would only be entitled to payment of the agreed price to the extent that the purchaser actually built on the property. With reference to this assumption, Sædberg & Hodne underlined in Section 3 of their report that if the property was sold instead under terms stipulating payment shortly after the conclusion of the sales agreement, the valuation would have been significantly lower.

(242) As it transpired, the terms in the sales agreement, which was concluded did not stipulate that the Municipality would only be obligated to pay for the rooftop property to the extent that this was actually built on. Rather, these final terms stipulated that the Municipality would have to pay for the shares in the company owning the rooftop ten days subsequent to the demerger where the ownership of the rooftop was separated into this company <sup>(227)</sup>.

(243) Consequently, it follows directly from the assessment of Sædberg & Hodne that the realtors considered the sums suggested in their report as a significant overvaluation for a sale on the terms which were actually agreed on. In line with this, and also considering that the valuation very much depended on the actual utilisation of the property, the Municipality and Farsund Vekst agreed on a significantly lower price than the NOK 42.5 million indicated as the upper ceiling in the valuation from

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<sup>(227)</sup> Document No. 1268508, Sections 5.2 and 5.3.

Sædberg & Hodne <sup>(228)</sup>. As has been explained above, the price of the company owning the rooftop was set to NOK 23 million in the sales agreement.

#### 4.4.2.4 The *ex-post* valuation by Pangea

- (244) In September 2019, Pangea finalised a report commissioned by Farsund Vekst <sup>(229)</sup>. The mandate for the report was to establish the value of the shares in Farsund Vekst in October 2015 <sup>(230)</sup>.
- (245) It was stated in the report that the value of the rooftop property was taken into account in Pangea's valuation of the Farsund Vekst shares, and that Pangea did not find a basis for challenging the parties' valuation of the rooftop property at NOK 23.5 million in the sales agreement. The potential value of the options held by Farsund Vekst was however not addressed by Pangea <sup>(231)</sup>.
- (246) According to the Norwegian authorities, this limitation in Pangea's mandate reflected normal practice and the inherent difficulties in assessing the extent to which options will be profitable. For the same reason, the potential values of the options were not included in Farsund Vekst's yearly financial statements <sup>(232)</sup>.
- (247) In Pangea's assessment, the market value of 50% of the shares in Farsund Vekst was in the range of NOK 11-21 million in October 2015. This would imply that Glastad Farsund purchased the shares at a premium <sup>(233)</sup>.
- (248) The information which was relied on by Pangea is summarised on page 5 of their report. This information included data which was available in October 2015, but also newer data. To provide a basis for the valuation, this available information had to be interpreted. Therefore, the assumptions relied on reflect to some extent Pangea's own assessments.
- (249) One of the assumptions in the report concerned the rent roll/letting status on 15 September 2015. Considering that lease contracts had only been signed for 65% of the available areas at this time, the remaining areas were defined as vacant irrespective of ongoing negotiations. In this regard, Pangea referred to the extensive uncertainty which existed <sup>(234)</sup>.
- (250) In the same vein, given that Amfi Farsund would be a new shopping centre, Pangea had to make qualified assumptions about e.g. the landlord's property costs (NOK 175 per m<sup>2</sup>), when the available areas would be fully let (September 2016), and the structural vacancy (4%) <sup>(235)</sup>.
- (251) In terms of methodology, Pangea also explained that the valuation was based on the estimated value at the time of the opening of the shopping centre (12 May 2016).

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<sup>(228)</sup> Document No. 1279066, pages 11-12.

<sup>(229)</sup> Document No. 1187209, pages 55-87.

<sup>(230)</sup> Page 3 of the report.

<sup>(231)</sup> Page 3 of the report.

<sup>(232)</sup> Document No. 1316143, under the heading *letter dated 26 February 2020*.

<sup>(233)</sup> Page 4 of the report.

<sup>(234)</sup> Page 6 of the report.

<sup>(235)</sup> Page 6 of the report.

This valuation was then discounted back to October 2015 (the time when the sales agreement was entered into) <sup>(236)</sup>.

#### 4.4.3 The amended option agreements

##### 4.4.3.1 The 2015 option agreement concerning Nordkapp

(252) It followed from Section 8.3 of the Sales agreement that it was contingent upon the Municipality entering into revised option agreements concerning Nordkapp and Farøy with Farsund Vekst and/or Nordkapp Utvikling <sup>(237)</sup>. In line with this, and as already mentioned, the Municipality concluded such revised option agreements with Farsund Vekst on 14 October 2015.

(253) At the time of the conclusion of the revised option agreement regarding Nordkapp, the area comprising the footprint of Amfi Farsund had already been sold to Farsund Vekst for NOK 8.5 million. Consequently, the amended option agreement addressed only the remaining areas on Nordkapp (Nordkapp 2 and 3) <sup>(238)</sup>.

(254) According to Section 2.1 of the amended option agreement, Farsund Vekst was firstly entitled to purchase the remainder of the land on Nordkapp, which had been reclaimed for NOK 9 million. This right could be exercised until that point in time where works on the construction of the two potential floors on top of the rooftop property were commenced (the second step of the development of Amfi Farsund).

(255) In addition, the last paragraph of Section 2.1 granted Farsund Vekst and Nordkapp Utvikling the right to utilise the space encompassed by the option until that time where the option was exercised.

(256) Pursuant to Section 2.2 of the amended option agreement, Farsund Vekst would secondly be entitled to purchase the part of Nordkapp, which had yet to be reclaimed for NOK 7.5 million. The details on the future reclamation of land were to be agreed on between the parties.

(257) According to the revised option agreement, each of the areas covered by Sections 2.1 and 2.2 amounted to approximately 1/3 of the total area covered by the 2011 Nordkapp option.

##### 4.4.3.2 The 2015 option agreement concerning Farøy

(258) The background for the amended 2015 option agreement concerning Farøy was described in further detail in a lawsuit by Farøy Brygge AS ("Farøy Brygge") against the Municipality before Aust-Agder District Court. The initial submission in the case was made by Farøy Brygge on 10 June 2021 <sup>(239)</sup>.

(259) In its submission, Farøy Brygge explained that Glastad Farsund had been hesitant to accept the Municipality's exit from the property development cooperation in 2015 as the risk associated with the commitments and activities of Farsund Vekst at that time [Amfi Farsund] were considered substantial. Therefore, Glastad Farsund expressed in the negotiations that it would not be willing to let the Municipality exit

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<sup>(236)</sup> Page 6 of the report.

<sup>(237)</sup> Document No. 1268508.

<sup>(238)</sup> Document No. 1268509.

<sup>(239)</sup> Document No. 1309025.

from the cooperation, including as shareholder in Farsund Vekst, without Glastad Farsund obtaining compensatory measures <sup>(240)</sup>.

(260) In line with this, the Municipality and Glastad Farsund agreed that the 2015 option agreement concerning Farøy should cover a larger area than the 2011 Farøy option for the same option price. More particularly, the 2015 option covered a larger part of the property with cadastral number 3/23. This meant that the area covered by the revised option went all the way down to the sea in one direction, and all the way to Farøy park in another <sup>(241)</sup>.

(261) In addition to the risks associated with becoming sole owner of Farsund Vekst, the submission also referred to the fact that, at the time when the revised option agreement was entered into in 2015, Farøy had not yet been re-zoned to allow for residential development. Therefore, the value of an option which was contingent on such re-zoning was uncertain <sup>(242)</sup>.

(262) In light of this, the 2015 Farøy option agreement incorporated an additional compensatory measure. While the 2011 option price (NOK 10.5 million) was kept for the adjusted area, the 2015 Farøy option agreement additionally stipulated that this price was contingent upon the new zoning plan allowing for 2 400m<sup>2</sup> of residential development. In the event that the prospective future zoning plan only allowed for a lower utilisation than this, a proportional reduction should be made in the option price <sup>(243)</sup>.

(263) In terms of structure, the 2015 Farøy option agreement was based on the option agreement entered into in 2011. In line with this, the encompassed property was identified in Section 2 of the option agreement <sup>(244)</sup>.

(264) The obligations of the Municipality with respect to the state of the property were defined in Section 3 of the option agreement. These obligations remained unchanged from the 2011 option agreement and included, amongst others, that the required infrastructure pertaining to water, sewage and public road access, should be available for connection at the property border.

(265) Section 4 of the 2015 Farøy option agreement also remained unchanged from the 2011 Farøy option agreement.

(266) With respect to the option price, this was regulated in Section 5 of the 2015 Farøy option agreement. As already identified, the option price of 10.5 million was kept unchanged in spite of the enlargement of the scope of the option. In addition, Section 5 included the proportional price reduction mechanism which was to apply if the new zoning plan allowed for less than 2 400m<sup>2</sup> of residential development.

(267) As already mentioned, Section 5 of the 2011 Farøy option agreement included a stipulation that a new valuation would be required if more than three years passed from the valuation, which the 2011 option agreement was based on until the re-zoning, which was to trigger the commencement of the option period under that

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<sup>(240)</sup> Page 5 of the submission.

<sup>(241)</sup> Page 5 of the submission.

<sup>(242)</sup> Page 5 of the submission.

<sup>(243)</sup> Page 5 of the submission.

<sup>(244)</sup> Document No. 909657.

agreement. Given that the 2015 option agreement was based on the same price as the 2011 option agreement, this clause was not maintained in the former agreement.

(268) As for the option period, this was regulated in Section 6 of the 2015 Farøy option agreement. In keeping with the corresponding provision in the option agreement from 2011, the first paragraph stipulated that the option would be valid for a period of 18 months calculated from the time when the property was re-zoned to allow for residential properties. In the same way, it also followed from the second paragraph of Section 6 of the 2015 Farøy option agreement that works on the property should commence at the latest three years after the exercise of the option. If this condition was not adhered to, the Municipality would be entitled to purchase the property back from Farsund Vekst for the option price of NOK 10.5 million.

(269) In addition, however, Section 6 of the 2015 Farøy option agreement contained three paragraphs, which were not found in the 2011 option agreement. According to these third, fourth and fifth paragraphs of Section 6, the option holder should firstly notify the zoning authority before submitting its proposal for a zoning plan. Secondly, it was stipulated that the option would cease to exist in any event if the development of the area had not commenced within 15 years from the date of the signature of the option agreement. Thirdly, in the event that it would become clear that the zoning authority would not accept the desired re-zoning, it was stipulated in the last paragraph of Section 6 that the option holder could nevertheless make use of the option. In such a scenario, the price should be based on the compensation set out in Section 5 and the area of the pre-existing buildings on the land comprised by the option.

(270) Sections 7, 8 and 9 of the 2015 Farøy option agreement contained the same clauses as the 2011 option agreement concerning respectively the formalisation of the prospective purchase in a sales contract, the Municipality's duty to ensure that no liens existed against the property, and Farsund Vekst's right to demand that the agreement was registered in the Norwegian Land Register.

#### 4.4.3.3 The exercise of the 2015 Farøy option agreement and subsequent settlement

(271) On 13 January 2020, Farsund Vekst exercised the 2015 Farøy option <sup>(245)</sup>. It is undisputed that this exercise was made within the deadline set out in the 2015 option agreement.

(272) Subsequently, a dispute did, as already mentioned, arise as to the correct interpretation of the 2015 option agreement. This dispute was settled in a settlement agreement of 8 November 2021 <sup>(246)</sup>. As established in paragraph (91) above, however, the terms of this settlement agreement are not relevant for ESA's State aid assessment of those measures encompassed by the formal investigation. Accordingly, the settlement agreement will not be addressed below.

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<sup>(245)</sup> Document No. 1110894.

<sup>(246)</sup> Document No. 1309682.

## II. ASSESSMENT

### 5 The State aid prohibition in Article 61(1) of the EEA Agreement

(273) Article 61(1) of the EEA Agreement reads as follows: ‘Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.’

(274) The qualification of a measure as State 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. Consequently, if one or more of the cumulative conditions is not met, the measure does not qualify as State aid.

### 6 Legal starting points relating to the condition of an economic advantage

#### 6.1 ESA’s burden of proof and obligation to conduct a diligent and impartial investigation

(275) As identified in the opening decision, a key question in determining whether the measures encompassed by the opening decision qualify as State aid is whether an economic advantage has been conferred upon Glastad Farsund, Farsund Vekst or Nordkapp Utvikling by virtue of these measures. As was also expressed in the opening decision, this question has to be assessed pursuant to the market economy operator principle (‘the MEOP’) <sup>(247)</sup>.

(276) It follows from settled case-law that it is for ESA to objectively prove the existence of State aid <sup>(248)</sup>. For this purpose, ESA is required to conduct a diligent and impartial examination so that it has at its disposal the most complete and reliable information possible for assessing the measures in question <sup>(249)</sup>.

(277) Even when faced with an EEA EFTA State which, in breach of its duty to cooperate, fails to provide the information requested, ESA must base its decision on reasonably robust and coherent evidence, which provides a reasonable basis for presuming that the beneficiary has received an advantage. In doing so, ESA cannot simply proceed on the basis of a negative presumption that the concerned undertaking has benefited from an advantage in the absence of other evidence enabling it to conclude positively that such an advantage has been conferred <sup>(250)</sup>.

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<sup>(247)</sup> Opening decision, Section 6.2.

<sup>(248)</sup> See for example Judgment of 19 September 2018, *Commission v France and IFP Énergies Nouvelles*, C-438/16 P, EU:C:2018:737, paragraph 110.

<sup>(249)</sup> See Judgment of 3 April 2014, *France v Commission*, C 559/12 P, EU:C:2014:217, paragraph 63.

<sup>(250)</sup> 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.

## 6.2 The applicability and application of the MEOP

(278) It has been confirmed in recent case-law that the applicability of the MEOP cannot be excluded on the basis that the concerned investment decision pursues public policy objectives. When applying the principle, however, such objectives cannot be taken into account. In its recent judgment in *Volotea*, the CJEU stated in this regard that:

*‘Similarly, the second ground relied on by the General Court by no means ruled out the applicability of the market economy operator principle, as is apparent from the case-law cited in paragraph 106 above and as the Advocate General observed in points 80, 82 and 95 of her Opinion. The pursuit of public policy objectives is in fact inherent in most of the State measures which may be classified as ‘State aid’ and examined, to that end, in the light of that principle (see, to that effect, judgments of 21 March 1991, Italy v Commission, C-305/89, EU:C:1991:142, paragraph 20, and of 14 September 1994, Spain v Commission, C-42/93, EU:C:1994:326, paragraph 14). The consequence of applying that principle, however, is that those measures must be examined while leaving aside such objectives (see, to that effect, judgment of 10 July 1986, Belgium v Commission, 234/84, EU:C:1986:302, paragraph 14) and the benefits linked to the State’s situation as a public authority which the implementation of those objectives is liable to generate (see, to that effect, judgments of 5 June 2012, Commission v EDF, C-124/10 P, EU:C:2012:318, paragraph 79, and of 6 March 2018, Commission v FIH Holding and FIH Erhvervsbank, C-579/16 P, EU:C:2018:159, paragraphs 55, 57 and 58)’ (251).*

(279) It furthermore follows from case-law that compliance with the MEOP must be examined on an *ex-ante* basis, having regard to the information that was available when the measure was decided upon. Therefore, it is not sufficient in itself to demonstrate compliance with the MEOP that the measure was actually profitable for the State (252). In this regard, a prudent market economy operator will 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 (253).

(280) At the same time, the CJEU also clarified in its *Volotea*-judgment that the application of the MEOP requires for ESA to conduct an overall assessment of whether the potential beneficiary could have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Moreover, in order to conclude that the measure(s) gave rise to an economic advantage, ESA must show

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(251) Judgment of 17 November 2022 in Joined Cases C-331/20 P and C-343/20 P, *Volotea SA and easyJet Airline Co. v Commission*, EU:C:2022:886, paragraph 120. See also the judgment of the EFTA Court of 21 March 2024 in Case E-10/22, *Evinj AS v EFTA Surveillance Authority*, in paragraphs 61 and 64.

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

(253) 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, pages 35–84 and EEA Supplement No. 82, 21.12.2017, page 1, paragraph 78.

that the potential beneficiary would *manifestly* not have obtained a comparable advantage in such a scenario:

*‘As regards, in particular, the application of the market economy operator principle in a specific case, it follows from the settled case-law of the Court that this involves the Commission showing, following an overall assessment that takes into consideration all the relevant evidence in the case, that the undertaking or undertakings benefiting from the State measure at issue would manifestly not have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Within that overall assessment, the Commission must have regard to all the options that such an operator would reasonably have envisaged, all the information available and likely to have a significant influence on its decision, and the developments that were foreseeable at the time when the decision to confer an advantage was taken (see, to that effect, judgments of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraphs 28 to 31 and 65, and of 11 November 2021, *Autostrada Wielkopolska v Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraphs 108 to 113)’<sup>(254)</sup>.*

(281) It follows from this that ESA must assess concretely, and through a sufficient overall assessment, whether it is conceivable that the alleged aid beneficiary could have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. If ESA is not able to show that the alleged beneficiary would manifestly not have obtained a comparable advantage in such a scenario, ESA is bound to conclude that the transaction was made on market terms.

(282) In situations where a measure taken by the State was matched by an equal measure taken by a private party, the behaviour of this private party may serve as direct evidence that the measure taken by the State was undertaken on market terms. Therefore, in public private partnerships where a transaction has been carried out under the same terms and conditions by the public and private partner(s), it can normally be inferred that the transaction was on market terms. Conversely, if a public body and a private operator took part in the same transaction under different terms or conditions, this could indicate that the intervention of the public body was not in line with market conditions<sup>(255)</sup>. However, in light of the case-law referred to above, ESA must undertake a sufficient overall assessment also in the latter scenario. Moreover, ESA can only conclude that an advantage has been conferred if it is able to show, following such an assessment, that the potential beneficiary would manifestly not have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions.

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<sup>(254)</sup> Judgment of 17 November 2022 in Joined Cases C-331/20 P and C-343/20 P, *Volotea SA and easyJet Airline Co. v Commission*, EU:C:2022:886, paragraph 113. See also the judgment of the EFTA Court of 21 March 2024 in Case E-10/22, *Eviny AS v EFTA Surveillance Authority*, in paragraphs 61 and 64.

<sup>255</sup> NoA, paragraph 81 and the case-law cited.

### **6.3 The implications of the new information for ESA's analysis under the MEOP**

(283) As was mentioned in Section 2.2.2 above, the following measures were encompassed by and assessed in the opening decision:

- a) *The Nordkapp and the 2011 Farøy options (Section 6.2.2), and the 2015 Farøy option (Section 6.2.3).*
- b) *The sale of Nordkapp part 1 (Section 6.2.4).*
- c) *The Municipality's sale of its shares in Farsund Vekst (Section 6.2.4).*

(284) At the same time, as presented in further detail in Section 4 above, the Norwegian authorities and Glastad Farsund have submitted extensive information shedding light on the commercial context of the measures encompassed by the opening decision. This information concerns respectively the Municipality's entry into the property development cooperation with Glastad Farsund, the Municipality's participation in this property development cooperation, and the Municipality's subsequent exit from the property development cooperation.

(285) While the operative part of the present decision closing the formal investigation must necessarily be limited to those measures which were the subject of the opening decision, it follows from the legal starting points presented in Section 6 above that the application of the MEOP requires an overall assessment which uses as its reference point a situation as alike as possible to that which the alleged aid grantor faced when it adopted the concerned measures, and where all relevant information is taken into account. Consequently, while the formal investigation does not encompass the Municipality's entry into, participation in and exit from the property development cooperation as such, an approach where the concerned measures were assessed in isolation from this commercial context would be fundamentally flawed.

(286) On this basis, the following assessment is structured around the chronological events of the Municipality's involvement in the property development cooperation with Glastad Farsund, namely its entry into, participation in, and exit from that cooperation. While the operative part of the decision will be limited to the measures encompassed by the opening decision, the remaining terms and events relating to the Municipality's entry, participation and exit will be assessed for the purposes of establishing that commercial context, which must be taken into account in order to correctly apply the MEOP to those measures encompassed by the opening decision.

## **7 The Municipality's entry into the property development cooperation with Glastad Farsund**

### **7.1 Introduction**

(287) As stated in paragraph (283) above, the opening decision encompassed the Nordkapp and Farøy options from 2011. These options were provided in conjunction with the Municipality's entry into the property development cooperation with Glastad Farsund. In its below assessment, ESA will firstly establish the commercial context of the concerned options by assessing the remaining conditions for the Municipality's entry into the property development cooperation and whether these reflect normal market conditions. Thereafter, and against this relevant

context, ESA will conduct its State aid assessment of the 2011 Nordkapp and Farøy options.

## **7.2 The conditions for the Municipality's entry into the property development cooperation, as defined by the cooperation, shareholder and option agreements**

- (288) The conditions for the Municipality's entry into the property development cooperation were presented in detail in Section 4.2 above.
- (289) Under the applicable case-law, the determination of whether the Municipality's entry into the property development cooperation was a market-based transaction requires an assessment of whether the potential beneficiary would manifestly not have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. In this regard, it should be noted at the outset that the cooperation and shareholder agreements regulated the establishment, management and winding down of a property development cooperation relating to the three properties Nordkapp, Farøy and Ferjeveien. By cooperating in this way, the parties were able to share the risk of the contemplated property development in an area with weak market expectations. This cannot generally be regarded as contrary to normal market conditions.
- (290) As has also been explained above, the cooperation and shareholder agreements were furthermore based on a principle of equal contributions and rewards for the Municipality and Glastad Farsund. In keeping with this, it followed from Section 2 of the shareholder agreement that the Municipality was to be regarded as a joint owner of Farsund Vekst from the very inception of the cooperation. The design of the agreements also ensured that for the duration of the cooperation, the Municipality and Glastad Farsund should each contribute with 50% of the capital and be entitled to 50% of the return.
- (291) While the chairman of the board in Farsund Vekst was to be appointed by Glastad Farsund, and even though the vote of the chairman was to count double in the event of a tie of votes, such a regulation can be perceived as a practical assurance against the board becoming ineffective in the event of a stalemate. Furthermore, as reiterated in paragraph (136) above, the implications of this right were modified by the Municipality's equal representation in the general assembly, as well as by the provisions requiring unanimity in the board in specific matters.
- (292) Those elements in the option agreements that were identified in the opening decision as potential aid measures will be assessed specifically in Section 7.3 below. Generally speaking, however, the 2011 option agreements were designed so as to ensure that no economic advantage was conferred upon Farsund Vekst or its shareholders by virtue of their terms. Both with respect to the properties that were owned by the Municipality (Nordkapp and Farøy), and that property which was controlled by Glastad Farsund (Ferjeveien), the option agreements therefore stipulated that Farsund Vekst could only purchase the concerned property if it paid

a price reflecting the market valuation established in the report from Sædberg & Hodne <sup>(256)</sup>.

- (293) While Sædberg & Hodne may have performed work for the Glastad family previously, this is not sufficient in itself to establish that the valuations were inaccurate. In fact, it is specifically stated in the valuation report that it was based on an instruction from the Municipality to assess the value of the properties in question <sup>(257)</sup>. Furthermore, the clients of leading realtors typically include both public and private entities. In a small Municipality such as Farsund, it is therefore not surprising if Sædberg & Hodne had previously had engagements for the Glastad family and its businesses. Given the professional and contractual obligations of Sædberg & Hodne, the fact that it had previously had assignments for the Glastad family does not in itself establish that it sought to favour companies controlled by that family when it conducted the valuation based on an instruction from the Municipality.
- (294) As for the content of the valuations, ESA cannot see that the evidence submitted positively establishes that they reflected conditions which manifestly reduced the estimated values compared with the ranges of market prices that could be expected in an open sale. As identified in Section 4.2.3 above, it followed expressly from the mandate of Sædberg & Hodne that they were tasked with establishing *normal sales values*, defined as that price which two purchasers would normally be willing to pay for the property in a voluntary sale under normal market conditions. Furthermore, it is evident from the report that the realtors exercised discretion and deviated from the specifications provided by the Municipality when this was considered appropriate. With respect to Farøy, for example, Sædberg & Hodne took account of the possibility that the property could in their view be utilised better if the apartments constructed were not uniform in size <sup>(258)</sup>.
- (295) In its submissions, the complainant has essentially argued in favour of a mechanical approach to the valuation of the concerned plots in Farsund, where square metre prices for finished real estate are assumed to be constant. Under such an approach, the market value of the property would be a function of an estimated square metre price for finished real estate, multiplied with the maximum level of utilisation allowed. The complainant has however not sought to underpin its approach by providing evidence establishing such a direct linear relationship between the level of utilisation allowed and the market values for comparable plots.
- (296) In ESA's assessment, the complainant's hypothesis is too simplistic as it does not account for differences in demand. As illustrated in the report from Sædberg & Hodne, and explained by the Norwegian authorities, the fact that a certain level of utilisation is allowed, does not mean that there is sufficient market demand for a commercial developer to build up to the maximum level of utilisation allowed. In the report from Sædberg & Hodne, it was mentioned in relation to the valuation of several of the properties that the markets for development properties were weak in Farsund at the time when the valuation report was drafted. In fact, the complainant

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<sup>(256)</sup> As explained in point (145) above, the price of NOK 25 million corresponded to the lower range of the valuation (NOK 13 million) with the addition of the Municipality's estimated costs of reclaiming and flattening the land (NOK 12 million).

<sup>(257)</sup> Document No 1045487, page 14.

<sup>(258)</sup> Document No 1045487, page 18.

has itself alluded to the lack of demand in Farsund by pointing out that property markets were not very 'liquid'.

- (297) Given the above, ESA will proceed on the basis that the valuation report from Sædberg & Hodne established the market values of the concerned properties. Furthermore, since these estimates were incorporated as the option prices in the 2011 option agreements, ESA's starting point is that the prices in the option agreements reflected the market values of the properties at the time they were entered into.
- (298) The remaining terms of the option agreements can generally be described as balanced. In particular, the option agreements required for the options to be exercised within deadlines which can hardly be characterised as unusual in light of the commercial rationale of facilitating joint development projects relating to the concerned properties. Separate deadlines, which also do not appear unduly lengthy, were furthermore set to commence building works. In the event that building works were not commenced on Nordkapp and Farøy within those latter deadlines, the option agreements provided the Municipality with the right to purchase the concerned property back for the price it was purchased for by Farsund Vekst (the option price).
- (299) In view of these factors, the available evidence does in ESA's assessment not establish that a normally prudent and diligent private operator, acting under normal market conditions, would not have agreed to terms such as those accepted by the Municipality in a situation as alike as possible. As ESA is unable to show that the terms for the Municipality's entry into the property development cooperation with Glastad Farsund conferred a manifest advantage on Farsund Vekst, Nordkapp Utvikling or Glastad Farsund, ESA is bound to consider that the Municipality's entry into the property development cooperation amounted to a transaction on market terms.

### **7.3 Measure (a) – the absence of option premiums and additional price adjustment mechanisms in the 2011 option agreements for Nordkapp and Farøy**

- (300) As already mentioned, the relevant comparator for establishing whether the transactions conferred a manifest economic advantage on Farsund Vekst and/or Glastad Farsund is a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Moreover, as reiterated above, it cannot be considered abnormal for private operators to engage in cooperative property development through a jointly controlled sole purpose company in cases where the risk and reward profile makes this more rational than for one of the parties to invest alone.
- (301) On this basis, the relevant question for assessing whether the absence of option premiums and additional price adjustment mechanisms in the 2011 option agreements concerning Nordkapp and Farøy constituted a manifest advantage is not whether such mechanisms are typically included when normally prudent and diligent market economy operators provide options to purchase property in Norway. Rather, it must be ascertained whether the inclusion of such mechanisms would have been a non-negotiable demand from a normally prudent and diligent market

economy operator in a situation as alike as possible as that faced by the Municipality when it entered into the joint property development cooperation.

- (302) In the same vein, the judgment from the EFTA Court in Case E-12/11 *Asker Brygge* cannot be understood as an expression of a general principle that option agreements must require option premiums in order not to confer an economic advantage on the option holder. The finding upheld by the EFTA Court in that case was that under the particular market circumstances, which constituted the context of the option agreement that had been assessed by ESA, a normally diligent and prudent private operator would have demanded for an option premium to be included <sup>(259)</sup>.
- (303) As concerns the concrete circumstances affecting whether a normally diligent and prudent private operator would have demanded for option premiums and additional price adjustment mechanisms to be included in comparable option agreements as the 2011 agreements concerning Nordkapp and Farøy, the Norwegian authorities and Glastad Farsund have underlined the context of the option agreements and the geographical location of the concerned properties. By way of example, the Norwegian authorities and Glastad Farsund have also referred to other option agreements not including option premiums <sup>(260)</sup>.
- (304) With respect to the context of the agreements, it should be noted that they were concluded as part of the setting up of the property development cooperation governed by the cooperation agreement, the shareholder agreement and the three option agreements concerning Nordkapp, Farøy and Ferjeveien. Assessing the conditions of the option agreements in isolation from this commercial context would not entail comparing the behaviour of the Municipality with that of a normally diligent and prudent market economy operator in a situation as alike as possible, but a comparison with a hypothetical transaction under different circumstances. This would not be in line with the concrete and nuance-based approach that is to be undertaken according to recent case-law.
- (305) Based on the commercial context of the concerned option agreements, ESA finds it plausible that a normally diligent and prudent market economy operator, acting under circumstances as alike as possible to those observed, would also not have required option premiums or additional price adjustment mechanisms. In this regard, it should be recalled that at the time of the conclusion of the option agreements, the question of whether to include option premiums or additional price adjustment mechanisms must have appeared wholly peripheral considering that the commercial rationale for the cooperation was the development of the three properties through the jointly controlled single purpose company Farsund Vekst. Given this, ESA cannot see that a normally prudent private operator would necessarily have insisted on negotiating option premiums or price adjustment mechanisms as this could be liable to sour the cooperation.
- (306) When assessing whether the Municipality acted as a normally prudent and diligent market operator would have done in a situation as alike as possible, it is furthermore

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<sup>(259)</sup> Case E-12/11 *Asker Brygge AS v EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 536. See also ESA [Decision No 232/11/COL](#) on the notification of the sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the Municipality of Asker.

<sup>(260)</sup> Document Nos. 1045487, page 8, 1057574, page 11, 1095046, pages 14-15, 1327502, page 17, and 1384627, page 3.

relevant that the private party which participated in the cooperation, Glastad Farsund, did not require for option premiums or additional price adjustment mechanisms to be included in the option agreement that was entered into for Ferjeveien. This option agreement was also established within the framework of the cooperation and shareholder agreement, and on the basis of the preceding market valuation performed by Sædberg & Hodne. The option agreement for Ferjeveien furthermore incorporates the same structure and principles as those option agreements concerning Nordkapp and Farøy. Consequently, given that Glastad Farsund was in a comparable situation to that of the Municipality when it entered into the option agreement for Ferjeveien, the non-inclusion of an option premium or additional price adjustment mechanism in this latter option agreement corroborates that the Municipality acted as a normally prudent and diligent private operator when it did not insist on the inclusion of such mechanisms in the agreements concerning Nordkapp and Farøy.

(307)Based on the information provided by the Norwegian authorities and Glastad Farsund, including the information in the valuation report from Sædberg & Hodne, it is in any event evident that the market for development properties in Farsund was weak at the time of the conclusion of the option agreements, and that there were no indications of a substantial improvement in the foreseeable future. In markets with such a weak demand side, it cannot merely be assumed that options for property purchases of a limited duration have an inherent commercial value which can meaningfully be quantified as an option premium to be paid on top of the agreed sales price. Given the limited potential for price growth, ESA is also not in a position to exclude that normally prudent and diligent private operators would not have requested for price adjustment clauses to be incorporated in option agreements of a comparable duration under such market circumstances. Indeed, the complainant has provided little in the way of concrete documentation supporting its allegation that option premiums and price adjustment clauses are necessarily incorporated in option agreements entered into under comparable market circumstances as those observed in Farsund at the time.

(308)In view of these factors, ESA does not have a sufficient basis for concluding that the absence of option premiums or additional price adjustment mechanisms in the 2011 option agreements concerning Nordkapp and Farøy conferred a manifest advantage on Farsund Vekst, Nordkapp Utvikling or Glastad Farsund. Given this, ESA is bound to conclude that the option agreements did not confer any State aid as they were entered into on market terms.

#### **7.4 Summary**

(309)The relevant question for assessing whether the absence of option premiums and additional price adjustment mechanisms in the 2011 option agreements concerning Nordkapp and Farøy constituted a manifest advantage is not whether such mechanisms are typically included when prudent and diligent market economy operators provide options to purchase property in Norway. Rather, it must be ascertained whether a normally prudent and diligent market economy operator, acting under normal market conditions and in a situation as alike as possible as that faced by the Municipality when it entered into the option agreements, would have demanded for such mechanisms to be included.

(310) Following such a concrete and nuance-based approach, which has taken into account the commercial context of the option agreements and the market situation in Farsund at the time, ESA finds that it does not have a sufficient basis for concluding that the absence of option premiums or additional price adjustment mechanisms in the 2011 option agreements concerning Nordkapp and Farøy conferred a manifest advantage on Farsund Vekst, Nordkapp Utvikling, or Glastad Farsund. Given this conclusion and recalling that ESA has the burden of establishing that an alleged State aid measure has conferred an economic advantage on the potential beneficiaries, ESA is bound to close the formal investigation into these measures based on a finding of no aid.

## **8 The Municipality's participation in the property development cooperation with Glastad Farsund**

### **8.1 Introduction**

(311) In the above Section 7, ESA assessed the Nordkapp and Farøy options from 2011. Consequently, the remaining potential aid measures encompassed by the opening decision are:

- a) Those options concerning Nordkapp that were granted later than 2011, as well as the 2015 Farøy option (Sections 6.2.2 and 6.2.3 of the opening decision).
- b) The sale of Nordkapp part 1 (Section 6.2.4 of the opening decision).
- c) The Municipality's sale of its shares in Farsund Vekst (Section 6.2.5 of the opening decision).

(312) It follows from the updated presentation of facts in Section 4 above that, with the exception of the sale of Nordkapp part 1, these potential aid measures were all concluded in conjunction with the Municipality's exit from the property development cooperation in 2015. Consequently, given the limited scope of the opening decision, ESA cannot conclude in the operative part of the decision closing the formal investigation on whether other elements than the sale of Nordkapp part 1 conferred State aid upon the alleged beneficiaries during the Municipality's participation in the property development cooperation.

(313) At the same time, and as already pointed out, the application of the MEOP requires for an overall assessment where all the relevant circumstances are taken into account. On this basis, ESA will set out its assessment of the developments and events that took place during the Municipality's participation in the property development cooperation in this Section 8. With the exception of the State aid assessment of the sale of Nordkapp part 1, this information should be regarded as part of establishing the commercial context on which ESA's holistic assessment of the measure encompassed by ESA's opening decision is based.

### **8.2 The exercise of the 2011 Nordkapp option and subsequent revision of the option agreement**

(314) As was identified in Section 4.3.1.2 above, the Municipality and Farsund Vekst mutually agreed to revise the 2011 Nordkapp option agreement shortly after it was exercised on 22 November 2012. While the complete terms of the revised contractual framework were not spelled out until in conjunction with the Municipality's exit from the property development cooperation in 2015, it is evident from the documentation submitted that the Municipality and Farsund Vekst agreed

on partitioning the development of the property covered by the 2011 Nordkapp option well before this time. This agreement entailed that the prospective development of the areas covered by the 2011 Nordkapp option should take place in three phases, each of which covering a distinct part of the land included in the original option. The part which was intended used to establish the new mall (Amfi Farsund) was to be developed first.

(315) Furthermore, as was also reiterated in Section 4.3.1.2 above, the Municipality and Glastad Farsund have both explained that the partitioning of the development resulted in particular from the delays on the part of the Municipality with respect to making the necessary reclamation of land. The Municipality was therefore in default with respect to its contractual obligations, and it was consequently necessary to discuss an alternative approach to what was envisioned at the time of entering into the 2011 Nordkapp option.

(316) Given its default, ESA cannot see that the fact that the Municipality did not insist on drawing up a final purchase agreement pursuant to the 2011 Nordkapp option agreement immediately upon the exercise of the option on 22 November 2012 conferred a manifest advantage on Farsund Vekst or Glastad Farsund. As has already been explained, the Municipality was not in a position to enforce the 2011 option agreement as it was unable to reclaim land in line with its obligations under this agreement. Consequently, the revision of the option agreement through the mutual agreement on awaiting future developments before drawing up a revised contractual framework amounted to a compromise which reflected well the commercial situation and bargaining power of the parties. As such, this course of action can hardly be considered as outside the range of options which may plausibly have been adopted by a prudent private operator in a situation as alike as possible to that of the Municipality. Lastly, ESA recalls that the 2011 option agreement required substantial investments and works by the Municipality with respect to the reclamation of land, and that the Municipality's default of these obligations did therefore not entail that the revision of the 2011 Nordkapp option agreement took place in a situation which cannot be characterised as normal market conditions. Indeed, it is not uncommon that private parties miscalculate their abilities and find themselves unable to deliver according to their contractual obligations relating to property development projects.

### **8.3 The initial loans to cover administrative and planning costs**

(317) As established in Section 4.3.2 above, the Municipality provided four loans to Farsund Vekst between May 2011 and May 2014 <sup>(261)</sup>. These loans were granted in accordance with Section 2 of the cooperation agreement <sup>(262)</sup>, whereunder the operating expenses of Farsund Vekst were to be covered equally by the Municipality and Glastad Farsund.

(318) Considering that the terms governing the Municipality's entry into the property development cooperation were, for the reasons set out in Section 7 above, in line with normal market conditions, the Municipality's subsequent observance of these terms also amounted to market-based transactions. In keeping with Section 2 of the

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<sup>(261)</sup> Document Nos. 1250017, 1250018, 1250019, and 1250020.

<sup>(262)</sup> Document No. 1042409, pages 9-11.

cooperation agreement, equivalent loans were granted by the Municipality's business partner Glastad Farsund <sup>(263)</sup>.

#### **8.4 The decision to invest in the construction of the two first floors of *Amfi Farsund* at Nordkapp**

##### *8.4.1 Background*

(319) As explained in further detail in Section 4.3.3.4 above, the competent organ in the Municipality made a binding decision on 4 December 2014 to invest in the development of the two first floors of Amfi Farsund on Nordkapp 1. This decision reflected the previous mutual agreement to partition the development of the property covered by the 2011 Nordkapp option into three phases (see Sections 4.3.1.2 and 4.3.3.1), the conditions for the external project financing to be provided by Sparebanken Sør, as well as the subsequent investment decision taken by Glastad Farsund and Farsund Vekst (see Sections 4.3.3.2 and 4.3.3.3).

(320) As established in points (211)-(212) above, the wording of points one to seven of the operative part of the Municipality's investment decision entailed that the competent organ in the Municipality authorized <sup>(264)</sup>:

1. The sale of a reduced part of Nordkapp to Farsund Vekst/ Nordkapp Utvikling for a price proportionate to that agreed in the 2011 Nordkapp option agreement for the entire Nordkapp area (NOK 8.5 million).
2. Reducing the reclamation of land by the Municipality, as presented on an enclosed map.
3. Granting Farsund Vekst/ Nordkapp Utvikling the right to utilise an area on Nordkapp for the purposes of establishing a filling station, as specified in an enclosed illustration.
4. For the Municipality to purchase 50% of the shares in Farsund Vekst.
5. That the Municipality would provide NOK 20.75 million to increase the equity of Farsund Vekst. NOK 8.5 million of this sum would be provided in kind in conjunction with the sale of the reduced part of Nordkapp addressed in point one.
6. That the Municipality would provide a guarantee of NOK 5 million for the loan to be taken up to finance the construction of the two first floors of Amfi Farsund.
7. That the Municipality would complete pedestrian roads and quays in keeping with the zoning plan.

(321) Pursuant to point eight of the investment decision, the mayor was furthermore authorized to carry out the necessary steps to ensure the fulfilment of points one to seven. In addition, the mayor was authorized under this point to commence negotiations with a view for the Municipality to withdraw from the property development cooperation and project(s). It was underlined, however, that such an exit could not be carried out before it was practically and economically justifiable <sup>(265)</sup>.

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<sup>(263)</sup> Document Nos. 1279066, page 2, and 1434128, page 3.

<sup>(264)</sup> Document No. 1245212, pages 1-2.

<sup>(265)</sup> Document No. 1245212, pages 1-2.

8.4.2 *Whether a normally prudent private operator would manifestly not have invested on the terms agreed to by the Municipality in a situation as alike as possible*

- (322) As reiterated in point (320) above, the sale of Nordkapp part 1 for NOK 8.5 million was one of seven points decided on in the decision of the Municipal Council to invest in the development of the two first floors of Amfi Farsund on 4 December 2014. The terms for the sale of Nordkapp part 1 can therefore not be assessed in isolation from the remaining terms of this investment decision, which formed part of the commercial context for the sale. Accordingly, it is necessary to assess whether the Municipality's decision of 4 December 2014 to invest in the development of the two first floors of *Amfi Farsund* lay manifestly outside the range of alternative courses of action, which may have been adopted by a normally prudent private operator in a situation as alike as possible.
- (323) In this assessment, it is important to recognize as a starting point that the Municipality continued to be bound by the terms of the cooperation and shareholder agreements described in Section 4.2.2 above, as well as by the Nordkapp option agreement, as previously modified, due to the Municipality's failure to reclaim land as agreed (see Section 8.2). The purpose of these agreements was to ensure the joint development of one or more of the concerned properties through Farsund Vekst. In line with this, the agreements did not provide any exit clause allowing either of the parties to unilaterally decide to leave the cooperation before a project initiated by the exercise of an option had been completed. Accordingly, at the time of making its investment decision, the Municipality could not simply walk away from the cooperation and the Amfi Farsund-project without breaching its contractual obligations towards Glastad Farsund and Farsund Vekst.
- (324) While it is true that the Municipality contemplated exiting the property development cooperation at the time of making its investment decision of 4 December 2014, as recalled in point 8 of this decision (see Section 4.3.3.4 above), the investment decision merely authorized the mayor to commence negotiations with a view for the Municipality to withdraw at that future point in time when this was deemed practically and economically justifiable. Therefore, no binding exit decision was actually made at the time when the Municipality decided to invest in the development of the first two floors of Amfi Farsund. Rather, it would have to be assessed later by the competent decision-making body of the Municipality whether the results of the negotiations which the mayor was authorized to undertake could justify the desired premature exit.
- (325) In summary, the situation that the Municipality found itself in was that it was bound by an existing contractual framework governing a property development cooperation and project which had been entered into at market terms, that it contemplated exiting from the cooperation and project, but that this would amount to a contractual breach. In such a situation, ESA does not find that it has a basis for concluding that the decision of the Municipality to invest in the construction of Amfi Farsund as such, as opposed to exiting the cooperation and project at that point, manifestly lay outside the range of alternative courses of action which may have been adopted by a normally prudent private operator in a situation as alike as possible. In this regard, ESA recognizes that breaching a mutually agreed contractual framework, which had been established after considerable planning, thereby effectively undermining a property development project which the parties

had invested considerable resources in preparing, would have portrayed the Municipality as an unusually unreliable business partner. Furthermore, the Municipality would become liable for damages if it intentionally did not adhere to its contractual obligations. In ESA's assessment, these are considerations which could plausibly have been taken into account by a normally prudent private operator and led it to adopt the same course of action as the Municipality in a situation as alike as possible.

- (326) As for the terms of the investment, as specified in points one to seven of the operative part of the Municipality's investment decision, the sale of Nordkapp part 1 for NOK 8.5 million (point one of the investment decision) amounted to a partial finalization of the terms of the renegotiation of the 2011 Nordkapp option agreement, which had been made necessary by the Municipality's inability to reclaim land as agreed (see Section 8.2 above). The second and third points of the Municipality's investment decision also reflect that required renegotiation. It is evident from these points that the Municipality would be allowed to reclaim land to a lesser extent than originally foreseen, whereas Farsund Vekst was granted compensatory rights to establish a filling station.
- (327) When viewed in this light, ESA cannot see that the Municipality acted manifestly outside the range of options which a normally prudent private operator could have agreed to by accepting the terms relating to the sale of Nordkapp part 1, as set out in the first three points of its investment decision of 4 December 2014. Since Farsund Vekst had in fact exercised the 2011 Nordkapp option, the Municipality was bound by the terms in this option agreement, as subsequently amended by the mutual agreement of the parties. Consequently, it could not unilaterally amend those terms, but was reliant on the acceptance of the joint shareholder in Farsund Vekst, Glastad Farsund. Therefore, for ESA to insist that a new valuation should have been performed for Nordkapp part 1 would not entail assessing a situation as alike as possible as that faced by the Municipality, but a hypothetical transaction made under entirely different circumstances.
- (328) As for the remaining terms reflected in the Municipality's investment decision, points 4 to 7 were generally in line with the principle of equal contributions and rewards set out in the cooperation and shareholder agreements. In keeping with this principle, the Municipality committed to purchasing 50% of the shares in Farsund Vekst (point four of the investment decision), to provide additional equity injections with the same amounts as Glastad Farsund (point five of the investment decision – see also Section 8.5 below), and to provide a guarantee at the amount of NOK 5 million in respect of the loan to be taken up to cover building costs (point six of the investment decision). In respect of the guarantee, however, the Municipality did in fact contribute to a lesser extent than Glastad Farsund. As explained in Sections 4.3.3.2 and 4.3.3.3 above, Glastad Farsund pledged to guarantee for a larger amount in order to meet the conditions stipulated by Sparebanken Sør for the building loan it had undertaken to provide.
- (329) Lastly, as concerns the final point of the investment decision (point 7), whereunder the Municipality decided to invest in pedestrian roads and quays according to the zoning plan, ESA cannot see that the information submitted establishes that the decision of the Municipality to invest in such public infrastructures represented a saving for Glastad Farsund, Farsund Vekst, or Nordkapp Utvikling compared with normal practice for establishing such public infrastructures in Norway.

### 8.4.3 Summary

- (330) The Municipality's decision to sell Nordkapp part 1 for NOK 8.5 million, identified as measure (b) in the opening decision, was an integral part of its decision to invest in the construction of the two first floors of Amfi Farsund of 4 December 2014. Accordingly, the decision to sell Nordkapp part 1 for NOK 8.5 million cannot be assessed in isolation from the commercial context of, and remaining terms in, that investment decision. The sale of Nordkapp part 1 for NOK 8.5 million also cannot be assessed in isolation from the previous default by the Municipality of the 2011 Nordkapp option agreement by failing to reclaim land as agreed, and the subsequent agreement of the parties to revise this option agreement by working towards a development in stages and agree on the precise details of the revised option agreement when these plans had matured.
- (331) When assessed in this light, ESA finds that the Municipality's decision to sell Nordkapp part 1 for NOK 8.5 million did not manifestly lay outside the range of options which may conceivably have been agreed to by a normally prudent market economy operator in a situation as alike as possible. On this basis, ESA concludes that this decision was made on market terms.

## 8.5 The implementation of the investment decisions

### 8.5.1 The additional loans to cover administration and planning costs

- (332) As addressed in Section 4.3.2 above, the Municipality and Glastad Farsund had in the initial phase of the property development cooperation provided loans with equal amounts and at the same time to finance the operation of Farsund Vekst. Subsequent to the decisions made by Glastad Farsund, Farsund Vekst and the Municipality to invest in the development of Amfi Farsund, the Municipality and Glastad Farsund did, as explained in Section 4.3.3.5.1 above, provide two additional loans of NOK 250 000 each on 10 December 2014 <sup>(266)</sup>.
- (333) These additional loans were provided in keeping with the principle of equal contributions reflected in the contractual framework, which ESA has in its above analyses considered to reflect market terms. On this basis, and in the same way as for the previous loans, the observance of the agreed terms through the provision of the loans on 10 December 2014 also amounted to a transaction on market terms.

### 8.5.2 The Municipality's purchase of 50% of the shares in Farsund Vekst

- (334) As identified in Section 4.3.3.5.2 above, the Municipality purchased 50% of the shares in Farsund Vekst from Glastad Farsund for NOK 53 000 on 13 January 2015 <sup>(267)</sup>. Furthermore, as has also been explained above, this purchase price accurately reflected the equity (NOK 100 000) and premium (NOK 6 000) contributed with by Glastad Farsund when it incorporated Farsund Vekst on 6 December 2010 <sup>(268)</sup>, thereby ensuring that Glastad Farsund and the Municipality had contributed with exactly the same amounts of capital to Farsund Vekst.
- (335) On this basis, it is evident that the Municipality's purchase of 50% of the shares in Farsund Vekst was made in keeping with the provisions of the cooperation and

<sup>(266)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, pages 2-3.

<sup>(267)</sup> Document No 1250022.

<sup>(268)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 2.

shareholder agreements ensuring equal contributions, as well as the Municipality's decision to invest in the development of the two first floors of Amfi Farsund on 4 December 2014. Since ESA has previously concluded that these terms lay within that range which may conceivably have been accepted by a normally prudent market economy operator in a situation as alike as possible, the subsequent observance of the terms through the purchase of the shares also amounted to a transaction on market terms.

### 8.5.3 *The equity increase through the conversion of debt and additional injections*

- (336) As described in further detail in Section 4.3.3.5.3 above, it was decided by the General Assembly of Farsund Vekst on 19 January 2015 that 500 new shares should be issued to the owners by way of subscription of shares through debt conversion <sup>(269)</sup>. The equal loans previously provided by the Municipality and Glastad Farsund were converted into equity through this process <sup>(270)</sup>.
- (337) In addition, as has also been explained, it was decided by the General Assembly that Glastad Farsund and the Municipality should each inject NOK 10 million as share capital into Farsund Vekst <sup>(271)</sup>. The Municipality honoured this obligation on 26 February 2015 <sup>(272)</sup>.
- (338) Subsequently, it was, as previously mentioned, decided in the board meeting of 13 April 2015 and the general assembly of 18 May 2015 that the Municipality and Glastad Farsund should make further equity injections into Farsund Vekst. Pursuant to the first of these decisions, each of the shareholders should inject an additional NOK 5 million. According to the second decision, each shareholder should inject NOK 5.75 million <sup>(273)</sup>. The Municipality injected equity as specified in these decisions on 20 April 2015 <sup>(274)</sup> and 26 May 2015 <sup>(275)</sup>.
- (339) In the same way as for the loans, ESA finds that the above equity increases were provided in line with the principle of equal contributions in the existing, market-conform contractual framework. In this regard, ESA notes that there is no indication that Glastad Farsund did not honour its obligations according to the decisions and contribute with the same amount of equity as the Municipality.
- (340) The aggregate effect of the Municipality's equity injections was furthermore that it contributed with NOK 20.75 million, in keeping with point five of its market-based investment decision of 4 December 2014. While that point originally foresaw that part of the NOK 20.75 million contribution should consist in the Municipality refraining from demanding payment of the agreed purchase price of NOK 8.5 million for Nordkapp 1 (contribution in kind), the parties agreed instead for Nordkapp Utvikling to pay this sum upon the finalisation of the sales agreement (see Section

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<sup>(269)</sup> Document No. 1250024.

<sup>(270)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 1.

<sup>(271)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 1.

<sup>(272)</sup> Document No. 1250023.

<sup>(273)</sup> Document No. 1279066, *Glastad Farsund's supplementary answers to ESA's RFI of 25 February 2022*, page 3 and Annex 2 and 3.

<sup>(274)</sup> Document No. 1250025.

<sup>(275)</sup> Document No. 1250026.

8.5.3 below). The net financial effect on the Municipality of the approach adopted was therefore equal to that originally envisioned.

(341) On this basis, since they merely reflected its existing and market-based commitments, ESA considers that the Municipality's equity contributions addressed in this Section 8.5.3 were also provided on market terms.

*8.5.4 Measure (b) – the Municipality's sale of that part of Nordkapp onto which Amfi Farsund was to be constructed (Nordkapp part 1)*

(342) As was outlined in Section 4.3.3.5.4, the Municipality and Nordkapp Utvikling entered into a binding sales agreement whereunder Nordkapp Utvikling bought that part of Nordkapp onto, which Amfi Farsund was to be constructed (Nordkapp part 1) for NOK 8.5 million on 10 March 2015 <sup>(276)</sup>. On 27 May 2015, Nordkapp Utvikling paid NOK 8.5 million, plus transaction costs for this plot <sup>(277)</sup>.

(343) While the right to purchase Nordkapp part 1 for NOK 8.5 million was therefore arguably not conferred upon Nordkapp Utvikling before 10 March 2015, the sales contract implemented the Municipality's investment decision of 4 December 2014. For the reasons set out in Section 8.4 above, ESA considers this decision to reflect market terms. Given the complexity of the investment decision, it can furthermore not be considered abnormal that a period of three months transpired before the finalisation of the sale according to the terms of the investment decision. Therefore, since the Municipality's investment decision of 4 December 2014 was in keeping with the range of actions which may conceivably have been adopted by a normally prudent market economy operator in a situation as alike as possible, the subsequent implementation of point one of this investment decision through the sale of Nordkapp part 1 to Nordkapp Utvikling for NOK 8.5 million was incapable of conferring State aid.

*8.5.5 Summary*

(344) For the reasons set out above, ESA considers that the Municipality's investment decision of 4 December 2014, relating to the construction of the two first floors of Amfi Farsund, was within the range of actions, which may conceivably have been adopted by a normally prudent market economy operator acting under normal market conditions and in a situation as alike as possible. It follows from this that the subsequent implementation of this investment decision, including through the sale of Nordkapp part 1 to Nordkapp Utvikling for NOK 8.5 million, was incapable of conferring State aid.

(345) On this basis, ESA closes the investigation into measure (b) (the sale of Nordkapp part 1) based on a finding of no aid.

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<sup>(276)</sup> Document No 1268510.

<sup>(277)</sup> Document No 1057574, page 120.

## 9 The Municipality's exit from the property development cooperation with Glastad Farsund

### 9.1 Introduction

(346) In Section 7 above, ESA addressed the Nordkapp and Farøy options from 2011. Subsequently, the sale of Nordkapp part 1 was assessed in Section 8. Therefore, those remaining measures encompassed by the opening decision which have yet to be assessed are the following:

- a) The 2015 Nordkapp and Farøy options (Section 6.2.3 of the opening decision).
- c) The Municipality's sale of its shares in Farsund Vekst (Section 6.2.5 of the opening decision).

(347) As explained in Section 4.4, however, these measures were both concluded in conjunction with the Municipality's exit from the property development cooperation and ongoing property development project regarding Amfi Farsund. More precisely, as established in Section 4.4.1, the Municipality decided simultaneously on the measures in its exit decision of 10 September 2015.

### 9.2 Assessment

#### 9.2.1 *The commercial context in which the Municipality agreed to the terms of the exit*

(348) As has been established above, the application of the MEOP requires for ESA to assess concretely, and through a sufficient overall assessment, whether it is conceivable that the alleged aid beneficiary would have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. If ESA is not able to show that the alleged beneficiary would manifestly not have obtained a comparable advantage in such a scenario, ESA is bound to conclude that the transaction was made on market terms.

(349) In its above analyses in Sections 7 and 8, ESA concluded that the terms for the Municipality's entry into the property development cooperation, as well as for its subsequent participation in that cooperation through, *inter alia*, the amendment of the 2011 Nordkapp option agreement, its sale of Nordkapp part 1 and investment in the development of the two first floors of Amfi Farsund, were also market based. Consequently, in its below analysis, ESA will take as its starting point that the Municipality found itself in a situation within the range of normal market conditions when it made its decision to exit the property development cooperation on 10 September 2015.

(350) Given that the Municipality acted under normal market conditions, the relevant comparator for establishing whether an advantage was conferred on either of the alleged aid beneficiaries by virtue of the terms for the exit, is a normally prudent and diligent private operator in a situation as alike as possible as that which the Municipality made its exit-decision in. It follows from this that an approach where ESA compared individual terms for the exit, such as the price for the Farsund Vekst shares or the 2015 Nordkapp and Farøy options, with a hypothetical transaction, which did not involve the pre-existing contractual obligations and investment, would be fundamentally flawed. Such an approach would not entail a comparison with a normally prudent and diligent private operator in a situation as alike as possible.

(351) Given the existing contractual framework governing the parties rights and obligations, which did as previously explained not contain any exit clause allowing either of the parties to unilaterally decide to leave the cooperation before a project initiated by the exercise of an option had been completed, a hypothetical market operator in a situation as alike as possible to that which the Municipality found itself in would have had to expect to pay a price for exiting from its obligations in breach of the contracts. The relevant question is therefore whether the terms of the exit were so favourable for the alleged aid beneficiaries as to lay outside the range of market terms which may conceivably have been agreed to by a normally prudent private operator in a situation as alike as possible.

(352) Considering the uniqueness of the situation the Municipality found itself in, such an assessment can necessarily not be conducted on the basis of external comparators. Furthermore, while private operators will often make *ex-ante* profitability assessments before undertaking investments, the dynamic for exit-decisions may be different. In the private sector, decisions to exit markets or projects often reflect changes in high-level strategic assessments on future prioritisations which are hard to quantify. Accordingly, ESA does not have a basis for concluding that a normally prudent private operator would necessarily have refrained from exiting even if this was more costly than remaining in the existing cooperation and project. As already mentioned, the question is rather whether the result of the exit negotiations, as set out in the Municipality's exit decision and those contracts implementing this, was manifestly so unfavourable that a normally prudent private operator in a situation as alike as possible to that of the Municipality would not have agreed to it. Moreover, as has also been set out above, it is ESA which has the burden of proving, on the basis of sufficiently reliable evidence, that this is the case.

*9.2.2 Whether the terms for the Municipality's exit conferred advantages on the alleged beneficiaries which they would manifestly not have obtained from a normally prudent commercial operator in a situation as alike as possible*

*9.2.2.1 Points 1 and 2 of the exit decision – the sale of the shares in Farsund Vekst (measure (c)) in conjunction with the obligation for the Municipality to purchase the rooftop*

(353) As explained in Section 4.4.2.1 above, the terms for the sale of the shares in Farsund Vekst were set out in the sales agreement of 14 October 2015. The sales agreement concerned, firstly, the sale of the Municipality's 50% stake of the shares in Farsund Vekst to Glastad Farsund for a price of NOK 21 million. Secondly, the sales agreement concerned the Municipality's purchase of all the shares in the company owning the rooftop on the two first floors of Amfi Farsund for NOK 23.5 million <sup>(278)</sup>.

(354) The sales agreement therefore concerned two different transactions. However, considering that both of them amounted to a partial implementation of the result of the previous negotiations set out in the exit decision of the Municipality, it is clear that terms for the Municipality's sale of the shares in Farsund Vekst cannot be assessed in isolation from the terms for its purchase of the shares in the company owning the rooftop. Equally, the transactions regulated by the sales agreement cannot be assessed in isolation from the revised option agreements which were

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<sup>(278)</sup> Document No. 1268508.

entered into on the same day, and which also partially implemented the results of the previous negotiations and exit decision of the Municipality. These measures all formed part of the same commercial context, namely the terms regulating the Municipality's exit from the property development cooperation and ongoing project concerning Amfi Farsund.

- (355) With respect to the price for the shares in Farsund Vekst (measure (c)), ESA notes that both the Norwegian authorities and Glastad Farsund have explained that this accurately reflected the value adjusted equity in Farsund Vekst at the time. In order to substantiate this, ESA has, as identified in Section 4.4.2.2, been provided with an extract from the internal accounts of Farsund Vekst. This extract shows that the value adjusted equity of Farsund Vekst amounted to NOK 21 million on 31 October 2015 <sup>(279)</sup>.
- (356) While the complainant has argued in general terms that the shares were undervalued in light, in particular, of the value of Amfi Farsund, it has not presented any concrete and reliable evidence capable of positively establishing its position. In this regard, ESA notes that Farsund Vekst had a unique portfolio in a small area with weak growth expectations and a consequent lack of projects. As a result, ESA has not found any suitable benchmarks in the form of other comparable transactions. In the same vein, while Statistics Norway has since the second quarter of 2005 produced quarterly statistics for used housing real estate in the Agder and Rogaland region <sup>(280)</sup>, these data are in ESA's assessment too general to serve as a sufficiently reliable basis for establishing that the shares in Farsund Vekst were manifestly undervalued. In this regard, ESA notes that the statistics concern housing real estate in general, and that their geographical scope comprises a region which is much larger than, and not necessarily comparable with, the centre of Farsund.
- (357) While it is true that the Municipality sold the shares directly to Glastad Farsund, this is not sufficient in itself to establish that the shares were manifestly undervalued compared with the range of market prices which could have been obtained by a normally prudent private operator in an *open* sale. In light of established case-law, ESA cannot merely infer, based on a negative presumption, that the sale did not reflect market terms since the price was based on direct negotiations.
- (358) As concerns the fact that the value of the rooftop was set higher (NOK 23.5 million) than the value of 50% the shares in Farsund Vekst (NOK 21 million) in the sales agreement, this difference could indeed imply that the market value of the project relating to the two first floors of Amfi Farsund was considered negative. However, for the reasons set out above, ESA is unable to positively establish, on the basis of sufficiently reliable evidence, that the price for the shares in Farsund Vekst, as agreed between the Municipality and Glastad Farsund, was manifestly lower than the range of market prices which a normally prudent private operator could have expected to achieve in an *open* sale. This is sufficient for ESA to conclude that measure (c) must be classified as no aid.

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<sup>(279)</sup> Document No. 1045487, page 28.

<sup>(280)</sup> At the time when the present decision was adopted, the data were available through the following link: <https://www.ssb.no/statbank/table/07221/>.

- (359) In any event, and as has been explained in further detail above, the terms for the sale of the shares in Farsund Vekst cannot be assessed in isolation from their commercial context, including the existing contractual obligations of the Municipality. As has already been identified, a normally prudent private operator in a situation as alike as possible to that of the Municipality would also have had to expect to pay a price for exiting since this would represent a contractual breach and leave Glastad Farsund with all of the risk inherent in the property development project the parties had already initiated on Nordkapp (Amfi Farsund). Furthermore, ESA cannot see that a normally prudent private operator in a position as alike as possible to that of the Municipality would have been in a position to force Glastad Farsund to accept an open sale of the shares in Farsund Vekst, since Glastad Farsund had never invested with a view to control Farsund Vekst together with any other entity than the Municipality.
- (360) Consequently, and as has already been pointed out, the determining question in the application of the MEOP is not whether the Municipality could theoretically have achieved a higher price in an open sale of the shares in Farsund Vekst, but whether a private operator in a situation as alike as possible to that of the Municipality would manifestly not have accepted a sales price as low as NOK 21 million.
- (361) In this regard, ESA notes that it has not uncovered any concrete documentation substantiating that the Municipality did not negotiate as effectively as a normally prudent private operator would have done in a situation as alike as possible. Furthermore, as has also been identified above, the question of whether to exit an existing business engagement is not infrequently determined on the basis of changes in high-level strategic priorities which can be hard to quantify. When such changes in priorities do occur, it is furthermore not uncommon that private operators are willing to pay a significant price to exit speedily and without reputational damage.
- (362) Consequently, to the extent that the sales price of NOK 21 million for the shares in Farsund Vekst reflected a rebate compared with the range of prices a normally prudent *external* purchaser could have been expected to be willing to pay, or the price of NOK 23 million for the rooftop on Amfi Farsund exceeded the price which such a purchaser would have been willing to pay for it, ESA is unable to positively establish that the alleged aid beneficiaries would manifestly not have obtained a comparable advantage from a normally prudent private operator in a situation as *alike as possible* to that of the Municipality. Since ESA has already concluded that this situation reflected normal market conditions, it follows from the applicable case-law that, to the extent that an advantage was inherent in the price for the sale of the Farsund Vekst shares or the purchase of the rooftop, such an advantage does not qualify as State aid as it could conceivably have been conferred in a comparable transaction with a normally prudent private operator in a situation as alike as possible.
- (363) On the basis of the foregoing considerations, ESA finds that the sale of the shares in Farsund Vekst (measure (c)) does not qualify as State aid within the meaning of Article 61(1) of the EEA Agreement.

9.2.2.2 Points 3 and 4 of the exit decision – the 2015 option agreements concerning Nordkapp and Farøy (the remaining elements in measure ((a))

9.2.2.2.1 The 2015 option agreement concerning Nordkapp

- (364) As was reiterated in Section 4.4.3.1 above, it followed from Section 8.3 of the sales agreement that it was contingent upon the Municipality entering into revised option agreements concerning Nordkapp and Farøy with Farsund Vekst and/or Nordkapp Utvikling <sup>(281)</sup>. In line with this, the Municipality concluded such revised option agreements with Farsund Vekst on 14 October 2015.
- (365) As concerns Nordkapp, the situation at the time of the conclusion of the revised option agreement was as previously explained that the area comprising the footprint of Amfi Farsund (Nordkapp 1) had already been sold to Farsund Vekst for NOK 8.5 million. Consequently, the amended option agreement addressed only the remaining areas on Nordkapp (Nordkapp 2 and 3) <sup>(282)</sup>.
- (366) According to Section 2.1 of the revised option agreement, Farsund Vekst was firstly entitled to purchase the remainder of the reclaimed land on Nordkapp for NOK 9 million. Pursuant to Section 2.2 of the amended option agreement, Farsund Vekst would secondly be entitled to purchase that part of Nordkapp, which had not been reclaimed for NOK 7.5 million. The details of the reclamation were to be agreed on between the parties.
- (367) While the crux of the complainant's position would appear to be that a private owner of the property encompassed by the revised option agreement would not have accepted the price and other terms set out in it, including the lack of an option premium and price adjustment mechanism in case of increased market prices, this is not the correct comparator for determining whether the Municipality complied with the MEOP. Rather, as has already been identified, the application of the MEOP requires for ESA to conduct an overall assessment of whether the potential beneficiary could have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Moreover, in order to conclude that the measure(s) gave rise to an economic advantage, ESA must show that the potential beneficiary would manifestly not have obtained a comparable advantage in such a scenario.
- (368) As has been set out above, the factual situation that the Municipality found itself in when it decided to agree on the terms of the exit, including the revised option agreement concerning Nordkapp, was that it was bound by an existing contractual framework, including the shareholder, cooperation and previous option agreement regarding Nordkapp. Moreover, for the reasons set out in Sections 7 and 8 above, this situation was in line with normal market conditions as it resulted from actions from the Municipality which were in line with the MEOP. Consequently, the relevant question to be assessed is whether the terms of the revised option agreement concerning Nordkapp were so favourable that a normally prudent private operator in a situation as alike as possible to that of the Municipality would manifestly not have agreed to them.
- (369) In this regard, it is important to bear in mind that, as addressed in Sections 4.3.1.2, 8.2 and 8.4.2 above, the previous sale of Nordkapp part 1 for NOK 8.5 million

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<sup>(281)</sup> Document No. 1268508.

<sup>(282)</sup> Document No. 1268509.

amounted to a partial finalisation of the terms of the renegotiation of the 2011 Nordkapp option agreement. Since that option agreement was exercised by Farsund Vekst within the deadline set out in it, the Municipality was originally bound to sell the Nordkapp area according to the terms set out in the 2011 Nordkapp option agreement. However, due to the Municipality's failure to reclaim land as agreed, it was necessary to renegotiate the 2011 Nordkapp option agreement. Furthermore, as established in Section 8.2 above, the revision of the 2011 Nordkapp option agreement through the mutual agreement on awaiting future developments before drawing up a revised contractual framework amounted to a compromise which reflected well the commercial situation and bargaining power of the parties.

- (370) When viewed against this background, the finalisation of the renegotiated 2011 Nordkapp option agreement through the 2015 Nordkapp option agreement appears to be a logical consequence of the preexisting contractual relationship and bargaining power of the parties. Since Farsund Vekst had in fact exercised the 2011 option agreement within the deadline set out in this agreement, the Municipality was not in a position to require a higher total price for the Nordkapp area than set out in this agreement. Therefore, it was well founded that the combined effect of the sales agreement concerning Nordkapp part 1 (see Section 4.3.3.5.4 and 8.5.4 above) and the 2015 option agreement concerning the remaining areas on Nordkapp, was that the price for the total areas covered corresponded to that set out in the 2011 Nordkapp option agreement (MNOK 8.5+9+7.5 = 25).
- (371) The terms of the 2015 Nordkapp option agreement can furthermore not be assessed in isolation from the remaining commercial context faced by the Municipality, including, in particular, that it formed part of the combined terms allowing the Municipality to exit from the existing property development cooperation and project, thereby leaving Glastad Farsund with the sole risk for the ongoing engagements. As noted above, Glastad Farsund had not invested with a view to become such a sole investor, and it must therefore be characterised as normal for Glastad Farsund to require compensatory measures for allowing the Municipality its desired premature exit.
- (372) Therefore, to the extent that the terms of the 2015 revised Nordkapp option agreement were more favourable than those which could have been negotiated by the Municipality if it had not been for the exit, the more favourable terms should be perceived as a reflection of that commercial situation which actually existed. In this regard, ESA has been presented with no evidence substantiating that the Municipality did not negotiate effectively, or that it ceded rights in excess of what was required by Glastad Farsund for allowing it to exit. It is furthermore evident that the Municipality did not have any need for the areas for its own use in the short or medium term, as it had previously decided to make them available for development through Farsund Vekst in conjunction with the establishment of the property development cooperation in 2011.
- (373) On this basis, ESA cannot see that the evidence which has been uncovered during the formal investigation positively establishes that a normally prudent private operator in a position as alike as possible to that of the Municipality would manifestly not have accepted the terms set out in the revised 2015 Nordkapp option agreement (measure (a)). To the contrary, it appears that the Municipality's room for negotiating the price was effectively curbed by its existing obligations, and that

it negotiated as effectively as can be expected in that commercial situation which it found itself in.

#### 9.2.2.2.2 The 2015 option agreement concerning Farøy

- (374) As mentioned in Section 4.4.3.2 above, the revised 2015 option agreement concerning Farøy was described in further detail in a submission from Farøy Brygge to Aust-Agder District Court on 10 June 2021 <sup>(283)</sup>.
- (375) It was stated explicitly in this submission that Glastad Farsund had been hesitant to accept the Municipality's exit from the property development cooperation in 2015 as the risk associated with the commitments and activities relating to Amfi Farsund were considered substantial. Therefore, Glastad Farsund had expressed in the negotiations with the Municipality that it would not be willing to let the Municipality exit from the cooperation, including as shareholder in Farsund Vekst, without Glastad Farsund obtaining compensatory measures <sup>(284)</sup>.
- (376) In line with this, as was also established in Section 4.4.3.2 above, the Municipality and Glastad Farsund agreed that the 2015 option agreement concerning Farøy should cover a larger area than the 2011 Farøy option for the same option price. More particularly, the 2015 option covered a larger part of the property with cadastral number 3/23 <sup>(285)</sup>.
- (377) As reiterated in point (262) above, the 2015 Farøy option agreement incorporated an additional compensatory measure stipulating that the option price (NOK 10.5 million) was contingent upon the new zoning plan allowing for 2 400 m<sup>2</sup> of residential development. In the event that the prospective future zoning plan only allowed for a lower utilisation than this, a proportional reduction should be made in the option price <sup>(286)</sup>. In this connection, the submission from Farøy Brygge to Aust-Agder District Court of 10 June 2021 also referred to the fact that, at the time when the revised 2015 option agreement was entered into, Farøy had not yet been rezoned to allow for residential development.
- (378) On the basis of the information contained in the submission from Farøy Brygge to Aust-Agder District Court of 10 June 2021, it would indeed appear that the 2015 Farøy option agreement was deliberately designed so as to provide more favourable conditions on the option holder than could be expected in an open sale. However, as has already been identified, the relevant comparator when applying the MEOP is not a hypothetical transaction made under different conditions, but a normally prudent private operator acting in a situation as alike as possible and under normal market conditions. Moreover, as has also been established above, the commercial situation faced by the Municipality when it accepted the terms of the exit must be characterised as normal since it resulted from previous actions made by the Municipality in compliance with the MEOP.
- (379) On this basis, the relevant question remains whether a normally prudent private operator in a situation as alike as possible to that faced by the Municipality when it agreed to the terms of its exit, including the revised 2015 Farøy option agreement,

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<sup>(283)</sup> Document No. 1309025.

<sup>(284)</sup> Page 5 of the submission.

<sup>(285)</sup> Page 5 of the submission.

<sup>(286)</sup> Page 5 of the submission.

would manifestly have rejected such terms as those contained in the revised 2015 Farøy option agreement on the basis that they conferred an economic advantage on the alleged beneficiaries which was not justified by the existing commercial situation, including in particular the respective bargaining power of the parties. Furthermore, as has also been established above, it is ESA which has the burden for proving, following a sufficient overall assessment and based on reliable evidence, that this is the case.

- (380) As has already been acknowledged, the documentation submitted in the case corroborates the presentation given by Farøy Brygge in its submission to the Aust-Agder District Court on 10 June 2021, namely that Glastad Farsund had never invested with a view to take on the entire risk of the contemplated property development projects, including in particular Amfi Farsund. Furthermore, it is evident that the market and growth expectations in Farsund were weak due to demographic trends and the economic climate, and that the decision of the parties to establish a joint property development cooperation and invest together was therefore well founded in economic realities.
- (381) On this basis and considering that the existing contractual framework did not provide any exit clause entitling the Municipality to walk away from the ongoing cooperation and project relating to Amfi Farsund, it was in line with the commercial situation which existed that Glastad Farsund required compensatory measures in order to accept the Municipality's desired premature exit. Consequently, the fact that the terms of the 2015 Farøy option agreement appears relatively favourable to the option holder when assessed in isolation, is not sufficient in itself to conclude that a normally prudent private operator in a comparable situation to that of the Municipality would have succeeded in insisting on different terms which were more favourable to it. In the same way as a normally prudent private operator in a situation as alike as possible, the Municipality was not in a position, in its role as business partner and co-investor, to force Glastad Farsund to accept terms which were not justified by the prevailing commercial situation and bargaining power of the parties.
- (382) As concerns the question of whether the Municipality negotiated as effectively as a normally prudent private operator would have done in a situation as alike as possible, ESA has unearthed no evidence in the course of the formal investigation positively establishing that this was not the case. ESA has not identified any evidence positively establishing that the Municipality granted advantages which were not founded in the commercial situation and bargaining power of the parties, but exclusively in the Municipality's desire in its capacity as public authority to ensure that the concerned areas were developed. Equally, ESA has not identified any evidence indicating that the Municipality intended to circumvent the State aid rules by establishing the property development cooperation and then exit prematurely at a later stage.
- (383) With respect to the remaining issue of whether the conditions in the 2015 Farøy option agreement were so favourable for the alleged aid beneficiaries that a normally prudent private operator would manifestly have shied away from exiting, but rather accepted to remain in the property development cooperation and project, ESA recalls once more that decisions on whether or not to exit existing engagements may reflect high-level strategic prioritisations which can be hard to quantify. Furthermore, the cooperation and shareholder agreement concerned the

development of several properties, which could foreseeably take many years. Consequently, it is plausible that a normally prudent private operator in a situation as alike as possible to that of the Municipality may be willing to pay a significant price for a premature exit, thereby freeing up resources for activities in line with its changed priorities.

(384) In view of the above, ESA is unable to positively establish on the basis of reliable evidence that a normally prudent private operator in a situation as alike as possible to that which the Municipality found itself in when it agreed to the terms of the 2015 Farøy option agreement, would manifestly not have entered into such an agreement. Consequently, and given that the 2015 Farøy option agreement was negotiated under normal market conditions, ESA concludes that it did not confer any State aid within the meaning of Article 61(1) of the EEA Agreement.

### 9.2.3 Summary and conclusion regarding the remaining elements in measure (a) and measure (c)

(385) The relevant comparator when applying the MEOP is not a hypothetical transaction made under different circumstances, but a normally prudent private operator acting in a situation as alike as possible and under normal market conditions. In light of the situation which the Municipality found itself in when it negotiated the terms of the exit, including the sale of its shares in Farsund Vekst and the revised 2015 Nordkapp and Farøy option agreements, ESA is unable to positively establish on the basis of reliable evidence that a normal prudent private operator in a situation as alike as possible would manifestly not have accepted those terms. On this basis and recalling that the Municipality's situation reflected normal market conditions, ESA is not in a position to conclude that the Municipality's sale of its shares in Farsund Vekst (measure (c)) or the revised 2015 Nordkapp and Farøy option agreements (the remaining elements in measure (a)), conferred economic advantages on the alleged aid beneficiaries within the meaning of Article 61(1) of the EEA Agreement.

## 10 Conclusion

(386) 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 by virtue of the concerned measures.

For the EFTA Surveillance Authority,

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