

Case

E-1/16

Synnøve Finden



**The Norwegian Government, represented
by the Ministry of Agriculture and Food**

*(Product coverage of the EEA Agreement – Dairy products –
State aid–State resources – Effect on trade and distortion of competition –
Freedom of establishment)*

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Report for the Hearing

Summary of the Judgment

- 1 Pursuant to Article 34 SCA, any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment. The Court may only refuse to rule on a question where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.
- 2 A finding that a certain measure constitutes State aid within the meaning of Article 61 EEA presupposes that four conditions are met: there is an intervention by the State or through State resources, the intervention is liable to affect trade between EEA States, it confers a selective advantage on the beneficiary and it distorts or threatens to distort competition.
- 3 As regards the criterion of an intervention through State resources, the Court recalls that a measure must be granted directly or indirectly through State resources and that grant must be attributable to the State. Funds financed through compulsory charges imposed by national legislation, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 61 EEA.
- 4 As regards the conditions that a measure must be liable to affect trade between EEA States and distort or threaten to distort competition, it is not necessary to demonstrate that the aid has an appreciable effect on trade and that competition is actually being distorted, but only to examine whether that aid is liable to affect trade and distort competition. Furthermore, the fact that the aid

amount or the beneficiary undertaking is relatively small does not in itself preclude the possibility that trade between the EEA States might be affected.

- 5 Any national measure which is “inseparably linked” to the trade in products that fall outside the scope of the EEA Agreement falls in itself outside that scope.
- 6 If the measure at issue is to the benefit of products both inside and outside the scope of the Agreement, the proper functioning of EEA State aid law requires that an aid scheme must, as a whole, be notified to ESA in accordance with Article 1(3) of Part I of Protocol 3 SCA, provided that the referring court finds that the measure constitutes a State aid as defined above.
- 7 A national court will not have cause to assess a State aid scheme in light of the freedom of establishment in Article 31 EEA, unless it can be assessed separately in law from the State aid measure.

Judgment of the Court

15 December 2016¹

*(Product coverage of the EEA Agreement – Dairy products – State aid – State resources
– Effect on trade and distortion of competition – Freedom of establishment)*

In Case E-1/16,

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (Oslo tingrett), in a case pending before it between

Synnøve Finden AS

≡and≡

The Norwegian Government, represented by the Ministry of Agriculture and Food,

concerning the interpretation of the Agreement on the European Economic Area, and in particular Articles 31 and 61 thereof,

1 Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

The Court

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Synnøve Finden AS (“Synnøve Finden”), represented by Jan Magne Juuhl-Langseth, advocate;
- the Norwegian Government, represented by the Ministry of Agriculture and Food (“the Norwegian Government”), represented by Torje Sunde, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Maria Moustakali and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Luigi Malferrari, Donatella Recchia and Markéta Šimerdová, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Synnøve Finden, represented by Jan Magne Juuhl-Langseth; the Norwegian Government, represented by Torje Sunde; ESA, represented by Maria Moustakali and Marlene Lie Hakkebo; and the Commission, represented by Luigi Malferrari, Donatella Recchia and Markéta Šimerdová at the hearing on 21 June 2016,

gives the following

Judgment

I LEGAL BACKGROUND

EEA LAW

- 1 Article 8 of the Agreement on the European Economic Area (“EEA Agreement” or “EEA”) reads as follows:
 1. *Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
 - ...
 3. *Unless otherwise specified, the provisions of this Agreement shall apply only to:*
 - (a) *products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
 - (b) *products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*
- 2 Dairy products fall within Chapter 4 of the Harmonized Commodity Description and Coding System (“the Harmonized System”).
- 3 Article 1(1) of Protocol 3 to the Agreement reads as follows:

The provisions of the Agreement shall apply to the products listed in Tables I and II, subject to the provisions of this Protocol.

4 Table I in Protocol 3 to the Agreement includes the following items:

HS heading No	Description of products
0403	<p data-bbox="461 342 1157 596">Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa:</p> <p data-bbox="409 615 593 651">10 – Yogurt:</p> <p data-bbox="368 660 1083 733">ex 10 – – Flavoured or containing added fruit, nuts or cocoa</p> <p data-bbox="404 751 580 788">90 – Other:</p> <p data-bbox="365 797 1083 869">ex 90 – – Flavoured or containing added fruit, nuts or cocoa</p>

5 Article 31(1) EEA reads as follows:

Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

6 Article 61(1) EEA 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.

7 Article 1 of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) reads as follows:

1. *The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*

2. *If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*

...

3. *The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

8 Article 2(1) of Part II of Protocol 3 SCA reads as follows:

Save as otherwise provided in this Protocol or relevant provisions of the EEA Agreement, any plans to grant new aid shall be notified to the EFTA Surveillance Authority in sufficient time by the EFTA State concerned. The EFTA Surveillance Authority shall inform the EFTA State concerned without delay of the receipt of a notification.

9 Article 3 of Part II of Protocol 3 SCA reads as follows:

Aid notifiable pursuant to Article 2(1) of this Chapter shall not be put into effect before the EFTA Surveillance Authority has taken, or is deemed to have taken, a decision authorising such aid.

NATIONAL LAW

10 The milk sector in Norway is characterised by a quota system and a subsidy for milk production, a target price system for milk, a price differentiation for milk as a raw material for different uses, market regulation and import barriers.

11 In 1997, a new price equalisation system was introduced in Norway. Its purpose is to grant milk producers the possibility of equal price for milk regardless of the place of production and the specific use of the milk. The system is intended to allow competition from independent market operators in areas where the operator Tine SA (“Tine”) previously held a monopoly on sales. The price equalisation system has been modified several times, and is currently laid down in Regulation of 29 June 2007 No 832 on a price equalisation system for milk (“the PE Regulation”).

12 The price equalisation system is a scheme of levies and subsidies for milk products that are processed and sold as milk products by dairy undertakings based in Norway. Pursuant to Section 4 of the PE Regulation, milk products are placed in different price categories depending on the use of the milk. A price category may be subject to

a levy, a subsidy or to neither of those. The rates applicable are determined by the Norwegian Agriculture Agency. As an additional competition policy measure, the levy is reduced or the subsidy increased by a fixed rate for milk sold to or used by dairy undertakings not affiliated to Tine. From 2008 until 2011, Q-Meieriene AS (“Q-dairies”) and Synnøve Finden were also entitled to an additional levy reduction or subsidy increase due to the fact that they had for a long time been Tine’s main competitors.

- 13 Section 8 of the PE Regulation concerns the equalisation of distribution costs. Distribution subsidies are granted to dairy undertakings that collect milk from their own milk producers, for the distribution of liquid milk products in Northern Norway and for distribution to kindergartens and schools. In addition, at the relevant time the third paragraph of Section 8 provided for a special distribution subsidy for Q-dairies:

[Q-dairies] is granted NOK 0.50 per litre for a quantity limited upwards to 100 million litres for the distribution of liquid milk products from dairy facilities belonging to the group.

- 14 The term liquid milk products is defined in Section 3(c) of the PE Regulation and includes yogurt and milk for consumption.
- 15 The special distribution subsidy was introduced in 2004. Its basis was a finding by the Norwegian authorities of wide differences between Tine’s and Q-dairies’ costs of distributing liquid milk products from dairy to retail outlets. These differences were considered a competitive disadvantage for Q-dairies in setting up business in the milk for consumption sector. The distribution subsidy has been subject to adjustments and revisions.

II FACTS AND PROCEDURE

- 16 Tine is a cooperative undertaking owned by milk producers from all parts of the country. In its role as market regulator, it is obliged to supply raw milk to independent operators within certain limits. Tine also produces several milk products under licences with foreign dairies, and it imports a number of products and ingredients for use in its activities. Tine has very large market shares in the markets for milk for consumption, semi-soft white cheese and yogurt.
- 17 Synnøve Finden is a limited liability company registered in Norway. It produces several solid milk products in Norway and is supplied with milk in accordance with Tine's supply obligation. Synnøve Finden has production facilities in Alvdal and Namsos (both in Norway), but has not yet produced any liquid milk products in Norway. It imports, however, yogurt from Greece.
- 18 Q-dairies is a third actor in the Norwegian milk market. Q-dairies produces and sells solid and liquid milk products. The company receives about two thirds of the milk it uses from its own milk producers, while the rest is supplied under Tine's supply obligation. A fourth actor in the Norwegian milk market is Rørosmeieriet AS ("Rørosmeieriet").
- 19 From 1997 onwards, only Tine, Q-dairies and Rørosmeieriet have distributed and sold liquid milk products from their own dairy facilities in Norway. In September 2014, Synnøve Finden informed the Ministry of Agriculture and Food that it was planning to commence production of yogurt and milk for consumption. The purpose of the letter was to obtain confirmation of the framework conditions for such production. The letter mentioned in particular the special distribution subsidy granted to Q-dairies.

- 20 The Ministry replied in October 2014. As regards the arrangement under which Q-dairies receives a special distribution subsidy, the Ministry stated: “This was a subsidy granted to Q-dairies based on the special situation that existed at the time when the dairy was established. The purpose was to compensate for the costs that the company still incurred as a consequence of that situation. It has not, therefore, been an issue to extend the circle of recipients of this subsidy.”
- 21 In May 2015, Synnøve Finden brought an action against the Norwegian Government before Oslo District Court, claiming primarily that the third paragraph of Section 8 of the PE Regulation be declared invalid. In the alternative, Synnøve Finden claims that this provision entails unlawful State aid.
- 22 In the proceedings before Oslo District Court the Norwegian Government provided an overview of the yearly amounts of the special distribution subsidy granted to Q-dairies from 2006 to May 2015. Of the yearly amounts granted, the Norwegian Government has also sought to specify the amounts relating to the distribution of liquid milk products that fall within the scope of the EEA Agreement. The figure was relatively low in 2015 because Q-dairies no longer produces flavoured yogurt in Norway, which is the most important milk product within the scope of the EEA Agreement.

Year:	Total subsidy:	Subsidy related to EEA products:
2006	NOK 19 700 000	
2007	NOK 29 900 000	NOK 154 076
2008	NOK 32 600 000	NOK 292 376
2009	NOK 34 300 000	NOK 647 396
2010	NOK 35 600 000	NOK 502 739
2011	NOK 39 400 000	NOK 481 086
2012	NOK 44 900 000	NOK 831 391
2013	NOK 39 500 000	NOK 888 316
2014	NOK 41 100 000	NOK 851 248
Jan.-May 2015	NOK 18 000 000	NOK 90 732

23 By a letter dated 6 January 2016, registered at the Court as Case E-1/16 on 18 January 2016, Oslo District Court requested an Advisory Opinion from the Court. The following questions were submitted:

- 1.1 *Is the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation an arrangement of a nature whereby the court, on considering its lawfulness, must consider it in relation to the rules on the freedom of establishment in Article 31 of the EEA Agreement?*
- 1.2 *If the court is required to consider Article 31 of the EEA Agreement in relation to the lawfulness of the third paragraph of Section 8 of the PE Regulation, will Article 31 of the EEA Agreement only be relevant if there is a cross-border element in the case?*

- 1.3 *If the court is required to consider Article 31 of the EEA Agreement in relation to the lawfulness of the third paragraph of Section 8 of the PE Regulation, will Article 31 of the EEA Agreement only be relevant in relation to what are commonly referred to as ‘Protocol 3 products’, or will it be deemed to constitute transport aid of relevance to all product categories, even if transport is limited to the party’s own products?*
- 2.1 *Is the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation an arrangement that requires prior notification to ESA pursuant to Article 61 of the EEA Agreement?*
- 2.2 *If the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation requires prior notification to ESA pursuant to Article 61, does this only concern what are commonly referred to as ‘Protocol 3 products’, or will it be deemed to constitute transport aid of relevance to all product categories?*
- 24 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ADMISSIBILITY

ARGUMENTS SUBMITTED TO THE COURT

- 25 The Norwegian Government argues that the last part of Questions 1.3 and 2.2, in which the referring court asks whether the measure constitutes “transport aid of relevance to all product categories”, appears unrelated to the actual facts of the main action or hypothetical and, thus, should be considered inadmissible.

FINDINGS OF THE COURT

- 26 Pursuant to Article 34 SCA, any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment.
- 27 The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogeneous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Joined Cases E-26/15 and E-27/15 *Criminal Proceedings against B and B v Finanzmarktaufsicht*, judgment of 3 August 2016, not yet reported, paragraph 52 and case law cited).
- 28 It is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Criminal Proceedings against B and B v Finanzmarktaufsicht*, cited above, paragraph 53 and case law cited).
- 29 The Court does not find that such exceptional circumstances are applicable to the questions in the case at hand. It follows that the questions referred are admissible.

IV ANSWERS OF THE COURT

INTRODUCTORY REMARKS

- 30 The national court has referred five questions relating to the special distribution subsidy granted to Q-dairies pursuant to the third paragraph of Section 8 of the PE Regulation. The three first questions concern the application of the rules on freedom of establishment under Article 31 EEA (Questions 1.1 to 1.3). The two remaining questions concern the possibility that the subsidy should be considered State aid under Article 61 EEA (Questions 2.1 and 2.2).
- 31 In light of the facts presented by the referring court, the Court finds it appropriate to consider, first, the questions concerning State aid, before providing an answer to the questions concerning the freedom of establishment.
- 32 It is undisputed that certain products encompassed by the measure at issue, in particular flavoured yogurt, are specified in Protocol 3 to the EEA Agreement and therefore fall within the scope of the EEA Agreement, in accordance with Article 8 thereof.

QUESTION 2.1.

- 33 By Question 2.1, the referring court asks, in essence, whether the aid scheme mentioned in the third paragraph of Section 8 of the PE Regulation requires prior notification to ESA as a State aid measure pursuant to Article 61 EEA.

OBSERVATIONS SUBMITTED TO THE COURT

- 34 Synnøve Finden argues that the aid is granted to an undertaking and is selective, since it is granted only to Q-dairies. Further, as the inherent objective of the distribution subsidy is to strengthen the

competitive position of Q-dairies, the measure also distorts or threatens to distort competition. As regards the question of whether the measure actually confers an advantage on Q-dairies, Synnøve Finden proposes two alternative means of assessment. First, Synnøve Finden contends that the distribution subsidy must be considered a grant of money from the public to Q-dairies. In the alternative, Synnøve Finden suggests that the distribution subsidy may also be assessed in a wider context, as part of the national system of taxation for the use of milk. From this perspective, the distribution subsidy represents a tax reduction for Q-dairies, which comes within the notion of “measures which favour an undertaking” under Article 61(1) EEA.

- 35 Synnøve Finden further submits that the funds generated through taxation under the PE Regulation remain constantly under the State’s control. Thus, the subsidy must be regarded as granted through State resources. Finally, Synnøve Finden contends that the measure at hand is liable to affect trade between the Contracting Parties. Consequently, Synnøve Finden takes the view that all the conditions of Article 61(1) EEA are fulfilled.
- 36 The Norwegian Government submits that the aid is fully financed through the levies imposed on and collected from private companies. Thus, the compensation could be seen as granted from private, not State resources. Further, the Norwegian Government takes the view the amounts granted are close to the *de minimis* ceiling of EUR 200 000. There are no indications that trade is affected. Thus, trade between the Contracting Parties is not affected in a negative way by the PE Regulation. In any event, this is a matter for the referring court to determine.
- 37 ESA considers that some requirements of Article 61(1) EEA, namely the criterion of conferral of a selective advantage and the criterion of distortion of competition, are clearly met. ESA contends that the special distribution subsidy is a State measure, since it was

introduced by and is still provided for in the PE Regulation. Moreover, the levies are compulsory and the Ministry of Agriculture and Food can impose administrative penalties on a dairy farm that fails to pay the levy in accordance with Section 15 of the PE Regulation. ESA submits that the amounts granted to Q-dairies by the public authority remain under public control which means that the special distribution subsidy is granted through State resources. Finally, the third paragraph of Section 8 of the PE Regulation is liable to discourage undertakings from other EEA States from entering the milk market in Norway. ESA thus concludes that the measure in question constitutes State aid and is subject to the notification requirement irrespective of whether the dairy products in question fall within the product scope of the EEA Agreement.

- 38 The Commission contends that the special distribution subsidy granted to Qdairies clearly originates with the public authorities, is enshrined in a legal act and aims at increasing competition in the milk sector, which is a public policy objective. Thus, the criterion concerning the use of State resources is fulfilled. The Commission also maintains that the criterion of selective advantage is met in the case and that this issue does not appear to be disputed between the parties. The measure at stake is further liable to improve the competitive position of Qdairies compared to other undertakings with whom it competes. As regards intra-EEA trade, the Commission maintains that in the case at hand it is not disputed that several other undertakings, including those from other Contracting Parties, are able to provide the same product as the one benefiting from the subsidy. This is sufficient to affect intra-EEA trade. Article 61 EEA must therefore be interpreted as meaning that a special distribution subsidy, such as the one at issue in the main proceedings, constitutes State aid. The Commission contends that it is for the national court to draw the appropriate consequences of this qualification. That court must, in particular, order the EEA State to stop implementing the aid and order repayment of the aid granted to the beneficiary.

FINDINGS OF THE COURT

- 39 A finding that a certain measure constitutes State aid within the meaning of Article 61 EEA presupposes that four conditions are met. These are that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition.
- 40 It does not appear to be in dispute that the distribution subsidy at issue confers an advantage on Q-dairies as a producer of the products in question, as the measure consists of a cash benefit. Likewise, it does not appear to be disputed that the measure at issue is selective. Not only does it favour the production of certain goods, namely liquid milk products, it also favours a certain undertaking, namely Q-dairies.
- 41 As regards the criterion of an intervention through State resources, the Court recalls that a measure must be granted directly or indirectly through State resources and that grant must be attributable to the State (compare the judgment in *Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16 and case law cited). In the case at issue, it is not disputed that the measure is attributable to the State, as the distribution subsidy is provided for by national legislation. However, the parties appear to disagree on whether the measure is granted through State resources.
- 42 The concept of intervention “through State resources in any form whatsoever” is intended to cover advantages granted through a public or a private body appointed or established by that State to administer the aid (compare the judgment in *Vent De Colère! and Others*, cited above, paragraph 20 and case law cited). Funds financed through compulsory charges imposed by national legislation, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning

of Article 61 EEA (compare the judgment in *Vent De Colère! and Others*, cited above, paragraph 25 and case law cited).

- 43 In the present case it appears that the funds at issue are administered by the Norwegian Agricultural Agency, and that the distribution subsidy is financed by the levies charged under the system. Moreover, the PE Regulation apparently provides for an administrative penalty. It appears that the criterion of the aid being granted through State resources is fulfilled.
- 44 As regards the conditions that a measure must be liable to affect trade between EEA States and distort or threaten to distort competition, it is not necessary to demonstrate that the aid has an appreciable effect on trade and that competition is actually being distorted, but only to examine whether that aid is liable to affect trade and distort competition (see Joined Cases E-4/10, E-6/10 and E-7/10, *Liechtenstein and Others v ESA* [2011] EFTA Ct. Rep. 16, paragraph 95 and case law cited). Furthermore, the fact that the aid amount or the beneficiary undertaking is relatively small does not in itself preclude the possibility that trade between the EEA States might be affected.
- 45 When aid granted by an EEA State strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid. However, it is not necessary that the beneficiary undertaking is itself involved in intra-EEA trade. Where an EEA State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other EEA States to access the market in that State are thereby reduced (see Case E-6/98 *Norway v ESA* [1999] EFTA Ct. Rep. 74, paragraph 59).

- 46 On an initial examination, the measure at issue appears to fulfil all the requirements to constitute a State aid measure within the meaning of Article 61 EEA. It is, however, for the referring court to determine, having regard to all the facts before it and the guidance provided by the Court, whether this is the case.
- 47 In the event that the referring court concludes that the measure at hand constitutes a State aid measure, Protocol 3 SCA provides that State aid shall be notified to ESA. It is for ESA to assess whether the aid in question is compatible with the EEA Agreement. Furthermore, Article 1(3) of Part I and Article 3 of Part II of Protocol 3 SCA provide that the State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision. National courts must ensure, in accordance with rules of national law and the duty to interpret national law as far as possible in conformity with EEA law, the observance of this requirement of Article 1(3) of Part I and Article 3 of Part II of Protocol 3 SCA. When a national court makes a ruling in such a matter, it cannot decide on the compatibility of State aid with the functioning of the EEA Agreement. The final determination on that matter is, save for certain cases not relevant to the present case, the exclusive responsibility of ESA, subject to review by the Court (compare the judgment in *Fédération nationale du Commerce Extérieur de Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon*, C-354/90, EU:C:1991:440, paragraph 14).
- 48 Finally, a national court must, when it finds that State aid has been put into effect contrary to the notification requirement laid down in Protocol 3 SCA, draw the necessary consequences (compare the judgment in *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49 and case law cited).
- 49 Based on the above, the Court holds that Article 61 EEA must be interpreted as meaning that a mechanism, provided for by national regulation, according to which an undertaking is granted NOK 0.50

per litre for a quantity limited up to 100 million litres for the distribution of certain products, some of which fall within the scope of the EEA Agreement, constitutes a State aid measure, provided that the referring court, having regard to all the facts before it and the guidance provided by the Court, finds that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition. Such a finding by the referring court would render the scheme subject to the notification requirement laid down in Article 1(3) of Part I of Protocol 3 SCA.

QUESTION 2.2

50 By Question 2.2, the referring court asks, in essence, whether Article 61 EEA applies only in so far as the subsidy at issue relates to the products specified in Protocol 3 to the EEA Agreement, or whether Article 61 EEA is applicable to the subsidy with regard to all the product categories that the subsidy encompasses.

OBSERVATIONS SUBMITTED TO THE COURT

51 Synnøve Finden submits that Article 61 EEA cannot be applied in relation to products that fall outside the scope of the EEA Agreement where the transport service is inseparably linked to the trade in those products. However, transport services for distribution to the wholesale and retail sector cannot be regarded as inseparably linked to the trade in the transported products. Such an interpretation of the product coverage rule of Article 8(3) EEA would be contrary to the very aim of the Agreement. What is more, there are no provisions to prevent Qdairies' activities within the scope of the EEA

Agreement from benefiting from the aid in question. The recipient is free to use the funds as it wishes provided that the products in question are actually distributed. Therefore, such funds may indirectly benefit other parts of the recipient's production line.

- 52 The Norwegian Government deduces from Article 8(3) EEA that the EEA Agreement does not apply to liquid milk products save for those listed in Protocol 3. Referring to Case E-4/04 Pedicel ([2005] EFTA Ct. Rep. 1), the Norwegian Government submits that, in the present case, the distribution activity is inseparably linked to the trade in products not covered by the scope of the Agreement. Accordingly, the measure falls outside the scope of both Articles 31 and 61 EEA insofar as it relates to products not covered by the scope of the EEA Agreement.
- 53 ESA contends that the Court's judgment in Pedicel only concerned the fundamental freedoms. Any spill over effects of the interpretation of fundamental freedoms to provisions on State aid are precluded by the autonomous character of the procedure relating to State aid control. The EEA Agreement applies irrespective of whether the undertaking in question deals with products falling within or outside the scope of the EEA Agreement. Thus, aid favouring certain undertakings – as opposed to the production of certain goods – ought to be considered in the light of Article 61 EEA.
- 54 The Commission takes the view that, as the EEA Agreement is limited in terms of product scope, as specified in Article 8(3) thereof, State aid rules apply only to the products which are covered by Protocol 3. This appears to be confirmed by the EEA State aid rules themselves. First, the Chapter on State aid does not contain any rules determining its scope of application. In contrast, Article 21 EEA on customs matters makes specific provision on product scope. Second, the adaptations provided for in point 1ea(a) and point 1j(j) of Annex XV to the Agreement appear to support a limited scope of

application of the State aid rules. Thus, according to the Commission, in light of the wording of Article 8(3) EEA as well as the logic and the aim of the EEA Agreement, it appears that State aid rules apply only to the products specified in Article 8(3) EEA.

FINDINGS OF THE COURT

- 55 The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules. The Agreement is thus intended to create a homogenous European Economic Area so that the internal market is extended to the EFTA States.
- 56 There are, however, certain differences in the scope of the EEA Agreement with regard to agricultural and fishery products, if compared to the Treaties of the European Union. As for the free movement of goods between the Contracting Parties, it follows from Article 8(3) EEA that the provisions of the Agreement do not apply, unless otherwise specified, to products falling outside Chapters 25 to 97 of the Harmonized System or to products not specified in Protocol 3. The reason for excluding certain goods from the scope of the EEA Agreement is that the Contracting Parties wished to maintain freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement (see *Pedidel*, cited above, paragraphs 24 and 25).
- 57 Article 8(3) EEA provides that products that are not covered by points (a) or (b) fall outside the scope of application of “the provisions of this Agreement”. This indicates that the Contracting Parties intended, unless otherwise specified, for those products to be outside the scope of the EEA Agreement and not only outside the scope of the rules on free movement of goods. Accordingly, for any EEA rule to apply to such products, a specific legal basis in EEA law is required.

- 58 Liquid milk products, as defined in Section 3(c) of the PE Regulation, are dairy products which, in general, fall under Chapter 4 of the Harmonized System. As such they are, by virtue of Article 8 EEA, excluded from the scope of the Agreement. However, the category of liquid milk products also includes flavoured yogurt, which is listed in Protocol 3 to the EEA Agreement and therefore falls within the scope of application of the EEA Agreement.
- 59 Any national measure which is “inseparably linked” to the trade in products that fall outside the scope of the EEA Agreement, falls in itself outside that scope (see *Pedicel*, cited above, paragraph 34). It must therefore be determined whether the subsidy in question is inseparably linked to the trade in products that fall outside the scope of the EEA Agreement.
- 60 The measure at issue is a subsidy for the distribution of liquid milk products. The subsidy is granted according to the volume of liquid milk products distributed and is limited upwards to 100 million litres annually. The subsidy is therefore inseparably linked to trade in the underlying products.
- 61 However, the distribution subsidy applies not only to products falling outside the scope of the EEA Agreement, but also to products which are within the scope of the Agreement. Hence, the subsidy is not exclusively linked to products that fall outside the scope of the EEA Agreement. The aid scheme is therefore subject to EEA rules on State aid, in so far as it benefits products within the scope of the EEA Agreement.
- 62 All products covered by the distribution subsidy at issue are, although distinguishable by their nature, distributed together. The measure at issue is, thus, to the benefit of products both inside and outside the scope of the Agreement.

- 63 In those circumstances, the proper functioning of EEA State aid law requires that an aid scheme, such as that provided for in the third paragraph of Section 8 of the PE Regulation must, as a whole, be notified to ESA in accordance with Article 1(3) of Part I of Protocol 3 SCA, provided that the referring court, having regard to all the facts before it and the guidance provided by the Court, finds that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition. This will enable ESA to assess, to the extent that the distribution aid is governed by EEA State aid rules, whether the aid scheme is compatible with the functioning of the EEA Agreement.
- 64 The Court adds that the distribution subsidy at issue does not appear to constitute transport aid. It has not been alleged that Q-dairies offers transport services.
- 65 The answer to Question 2.2 must therefore be that in the event that a State aid measure is inseparably linked to certain products not exclusively outside the scope of the EEA Agreement, the aid measure as a whole must be notified to ESA.

QUESTION 1.1.

- 66 By Question 1.1 the referring court asks whether the arrangement at issue is of a nature whereby the referring court, on considering its lawfulness, must assess it under the rules on the freedom of establishment in Article 31 EEA.

OBSERVATIONS SUBMITTED TO THE COURT

- 67 Synnøve Finden contends that the selective and exclusive distribution subsidy to Q-dairies in the third paragraph of Section 8 of the PE Regulation is not necessary for the attainment of the objective of strengthening competition on the Norwegian dairy market. Thus, it is possible to evaluate the effects of the distribution subsidy separately under both Articles 31 and 61 EEA.
- 68 The Norwegian Government maintains that Article 31 EEA does not apply if a measure constitutes aid within the meaning of Article 61 EEA. However, if certain aspects of the aid scheme may be evaluated separately, those aspects may be assessed under other provisions, such as Article 31 EEA.
- 69 ESA considers that the effects that the special distribution subsidy has on the freedom of establishment are inherent in its State-supportive elements. Referring to Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland v ESA* ([2006] EFTA Ct. Rep. 42), ESA thus concludes that these elements are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately under the freedom of establishment.
- 70 The Commission notes that Synnøve Finden does not claim that the aid should be declared unlawful. Indeed, a claim of that kind would run contrary to the powers conferred on ESA. Rather, Synnøve Finden claims that the measure at stake should be qualified as State aid, thus requiring the national court to draw the necessary consequences. Thus, in the Commission's view, the measure at stake can be assessed under both Articles 31 and 61 EEA. However, the Commission shares ESA's view that the effects of the measure on the freedom of establishment are inherent in its character as State aid. Hence, having regard to considerations of procedural economy, the

Commission does not deem it necessary for the Court to address the measure at issue also in light of Article 31 EEA.

FINDINGS OF THE COURT

- 71 The aim of Article 61 EEA is to prevent trade between EEA States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Similarly, Article 31 EEA is intended to prevent difference in treatment, as it aims at ensuring that those who wish to establish themselves in another EEA State receive the same treatment as nationals of that State. The provision therefore prohibits any discrimination on grounds of nationality resulting from the legislation of an EEA State.
- 72 However, Articles 31 and 61 EEA apply under distinct conditions and differ as to the legal consequences to be drawn. This relates in particular to the role of ESA under Protocol 3 SCA, which is essential in the implementation of Article 61 EEA. Therefore, the possibility for national courts to assess aspects of a system of aid in light of provisions of the EEA Agreement other than those on State aid, presupposes that the aspects in question can be assessed separately in law.
- 73 State aid is, as a rule, granted to undertakings or products on the territory of the EEA State granting it. Such a practice, and the consequent unequal treatment of undertakings of other EEA States, is thus inherent in the concept of State aid (compare the judgment in *ARGE*, C-94/99, EU:C:2000:677, paragraph 36).

- 74 In the present case, it appears that the only grounds for challenge to the measure under Article 31 EEA are related to the effects on cross-border trade caused by the State aid in and of itself. In such circumstances, a separate assessment under Article 31 EEA is precluded.
- 75 Consequently, in response to Question 1.1, the Court finds that a national court will not have cause to assess a State aid scheme in light of the freedom of establishment in Article 31 EEA, unless it can be assessed separately in law from the State aid measure. A separate assessment does not appear possible in the case at hand.
- 76 In view of the answer given to Question 1.1, the Court finds that there is no need to address Questions 1.2 and 1.3.

V COSTS

- 77 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

The Court

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

- 1. Article 61 EEA must be interpreted as meaning that a mechanism, provided for by national regulation, according to which an undertaking is granted NOK 0.50 per litre for a quantity limited up to 100 million litres for the distribution of certain products, some of which fall within the scope of the EEA Agreement, constitutes a State aid measure, provided that the referring court, having regard to all the facts before it and the guidance provided by the Court, finds that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition. Such a finding by the referring court would render the scheme subject to the notification requirement laid down in Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on a Surveillance Authority and a Court of Justice.**
- 2. In the event that a State aid scheme is inseparably linked to certain products not exclusively outside the scope of the EEA Agreement, the measure as a whole must be notified to the EFTA Surveillance Authority.**

- 3. A national court will not have cause to assess a State aid scheme in light of the freedom of establishment in Article 31 EEA, unless it can be assessed separately in law from the State aid measure.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

*Delivered in open court in Luxembourg on
15 December 2016.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Report for the Hearing

in Case E-1/16

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in a case pending before it between

Synnøve Finden AS

≡V≡

Staten v/Landbruks- og matdepartementet (The Norwegian State, Ministry of Agriculture and Food)

concerning the interpretation of the EEA Agreement, and in particular Articles 31 and 61 thereof.

I INTRODUCTION

- 1 By a letter dated 6 January 2016, registered at the Court as Case E-1/16 on 18 January 2016, Oslo District Court (*Oslo tingrett*) requested an Advisory Opinion in the case pending before it between Synnøve Finden AS (“the plaintiff”) and *Staten v/Landbruks- og matdepartementet* (The Norwegian State, Ministry of Agriculture and Food). By its request, Oslo District Court referred five questions.
- 2 The case before the referring court concerns the validity of a provision of national law set out in Regulation of 29 June 2007 No 832 on a price equalisation system for milk (the “PE Regulation”).

II LEGAL BACKGROUND

EEA LAW

3 Article 8 EEA reads as follows:

1. *Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*

...

3. *Unless otherwise specified, the provisions of this Agreement shall apply only to:*

(a) *products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*

(b) *products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

4 Article 31 EEA reads as follows:

1. *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. *Annexes VIII to XI contain specific provisions on the right of establishment.*

5 Article 33 EEA

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

6 Article 61 EEA reads as follows:

1. *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.*

2. *The following shall be compatible with the functioning of this Agreement:*

(a) *aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;*

(b) *aid to make good the damage caused by natural disasters or exceptional occurrences;*

...

3. *The following may be considered to be compatible with the functioning of this Agreement:*

(a) *aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;*

- (b) *aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;*
- (c) *aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*
- (d) *such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.*

7 Article 62 EEA reads as follows

1. *All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:*
 - (a) *as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;*
 - (b) *as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.*
2. *With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.*

8 Article 1(1) of Protocol 3 to the EEA Agreement reads as follows:

1. *The provisions of the Agreement shall apply to the products listed in Tables I and II, subject to the provisions of this Protocol.*

9 Table I in Protocol 3 to the EEA Agreement includes, inter alia, the following:

HS heading No	Description of products
0403	Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa: 10 – Yogurt: ex 10 – – Flavoured or containing added fruit, nuts or cocoa 90 – Other: ex 90 – – Flavoured or containing added fruit, nuts or cocoa

NATIONAL LAW¹

THE PE REGULATION

10 The price equalisation system is a national system of levies and subsidies for milk products. Pursuant to Section 1 of the PE Regulation, the purpose of the system is “to regulate price differentiation for milk as a raw material for different uses and, at

¹ Translations of national provisions are unofficial.

the same time, enable milk producers to realise the Agricultural Agreement's target prices for milk regardless of what the milk is used for and where the production has taken place”.

- 11 Section 2 of the PE Regulation reads as follows:

This Regulation applies to milk and by-products that are processed and sold as milk products by dairy undertakings based in Norway ...

This Regulation does not apply to milk and by-products that are processed abroad unless the milk is produced in Norway and the milk product is sold in Norway.

- 12 Section 3(c) of the PE Regulation defines “liquid milk products” as follows:

All milk products that are placed in price category 1, 2, 3 or 8 or by-product category 1, as well as liquid products placed in price category 6, 11 or 12.

- 13 The final two paragraphs of Section 4 of the PE Regulation read as follows:

For milk sold directly from milk producers to a dairy undertaking not affiliated to Tine SA and used in the independent company's processing, the levy shall be reduced or the subsidy increased by a fixed rate as laid down by the Norwegian Agriculture Agency.

For milk used by dairy undertakings not affiliated to Tine SA for milk products settled in categories 1-6 and 8-11, the levy shall be reduced or the subsidy increased by NOK 0.27 per litre.

- 14 The special distribution subsidy for Q-Meieriene AS was introduced by Regulation of 4 December 2003 No 1453 on the price equalisation system for milk, and subsequently maintained in the third paragraph of Section 8 of the PE Regulation, which reads as follows:

Q-Meieriene AS is granted NOK 0.50 per litre for a quantity limited upwards to 100 million litres for the distribution of liquid milk products from dairy facilities belonging to the group.

Regulation of 1 July 2003 No 919 on the competence of the Sales and Marketing Council (*Omsetningsrådet*)

15 The final two subparagraphs of Section 4(4) read as follows:

For the production of liquid milk products, the market regulator shall be under an obligation to supply independent dairy undertakings in such a way that they are placed on an equal footing with the market regulator's own production dairies, though limited upwards to 15 million litres of milk per year for each facility. For additional supplies, own suppliers are required to deliver. The supply obligation for this quantity shall at all times be equal to double the quantity of milk that on a monthly basis is delivered by own suppliers.

For use other than in liquid milk products, the market regulator shall be under an obligation to supply independent dairy undertakings in such a way that they are placed on an equal footing with the market regulator's own production dairies.

III FACTS AND PROCEDURE

BACKGROUND

16 The milk sector in Norway is a highly regulated sector.

17 Tine is a cooperative undertaking, owned by milk producers from all parts of the country. As owners, these milk producers are entitled and obliged to deliver milk to Tine's dairies. It produces and sells both solid milk products (e.g. cheese) and liquid milk products (e.g. yogurt and milk for consumption). Tine also produces several milk products under licences with foreign dairies, and it imports a number

of products and ingredients for use in its activities. In 2014, Tine had a market share of 79 % in the milk for consumption segment, 71 % in semi-soft white cheese and 68 % in yogurt.

- 18 Tine is obliged to supply raw milk to independent operators within certain limits.
- 19 The plaintiff produces several solid milk products in Norway and is supplied with milk in accordance with Tine's supply obligation as market regulator. The plaintiff has production facilities in Alvdal and Namsos (both in Norway), but it has not yet produced any liquid milk products in Norway. It also imports yogurt from Greece.
- 20 The plaintiff is a Norwegian-based limited liability company. The shares in this company are owned by Scandza AS, based in Norway, which in turn, is owned by Scandza Holdings III AS, also based in Norway. Scandza Holdings III AS is controlled by Provender BV, based in the Netherlands, and parent company of the Norwegian Provender companies that are superior to Scandza Holdings III AS in the group structure.
- 21 Q-Meieriene ("Q-M") is a third player in the Norwegian milk market. QM produces and sells both solid and liquid milk products in Norway. The company receives about two thirds of the milk it uses from its own milk producers, while the rest is supplied under Tine's supply obligations.
- 22 The fourth player in the Norwegian milk market is Rørosmeieriet AS ("Rørosmeieriet"). It is also supplied with raw milk from Tine, and it produces and sells liquid milk products on a smaller scale. Tine is a minority shareholder in this company. A fifth player in the Norwegian milk market is Normilk. It obtains all its raw milk from Tine in the same way as the plaintiff.

- 23 From 1997 to date, only Tine, Q-M and Rørosmeieriet have distributed and sold liquid milk products from their own dairy facilities under the market arrangement in Norway.
- 24 When the new market arrangement for milk was introduced in 1997, an important objective was to enable competition from independent market players in areas where the cooperative undertaking Tine had previously had a monopoly on sales.
- 25 The price equalisation system is a key element in the Norwegian market arrangement for milk. The system is structured in such a way that the different milk products are placed in different price categories. Depending on the price category in which the product is placed, it will be subject either to a levy or a subsidy.
- 26 Transport subsidies, such as the subsidy laid down in Section 8 of the PE Regulation, are granted to dairy undertakings that collect milk from own milk producers for the distribution of liquid milk products in Northern Norway and for distribution to kindergartens and schools.
- 27 The price equalisation system is self-financing in that the various subsidies are financed by the levies in other areas.
- 28 Since 1997, four competition policy measures have been initiated within the framework of the price equalisation system. These measures included a general reduction in the levy or an increase in the subsidy for dairy undertaking not affiliated to Tine, a reduction in the levy or an increase in the subsidy for QM and the plaintiff from 2007 to 2011, a special capital compensation for dairy undertakings not affiliated to Tine and a special distribution subsidy for QM.
- 29 As regards the special distribution subsidy for Q-M, the authorities found that there were wide differences between Tine's and Q-M's costs of distributing liquid milk products from dairy to retail outlet

in 2003. These differences were seen to constitute a competitive disadvantage in setting up business in the milk for consumption sector. The distribution subsidy has been subject to later adjustments and revisions.

- 30 In 2012, the Norwegian Ministry of Agriculture and Food requested an evaluation by the Norwegian Agriculture Authority (*Statens landbruksforvaltning*, “SLF”) of the competition policy measures, including the special distribution subsidy for Q-M. The report completed by SLF served, inter alia, as a basis for an assessment by the Ministry of Agriculture and Food for the principles behind the special distribution subsidy arrangement in a consultation paper of 29 January 2013. The Ministry noted in the consultation paper that, according to SLF, the principle of equal treatment warrants that other operators, such as Rørosmeieriet, should also have the possibility to receive a distribution subsidy. However, the Ministry indicated that Rørosmeieriet’s higher distribution costs, in comparison with those of Tine and Q-M, relate to the fact that Rørosmeieriet produces a considerably lower volume than Q-M and Tine, and could not serve alone as justification for receiving a special distribution subsidy.

THE DISPUTE BEFORE THE DISTRICT COURT

- 31 The plaintiff does not come under the scope of the third paragraph of Section 8 of the PE Regulation. The reason for this is that Q-M is the only entity entitled to a subsidy under that provision.
- 32 By a letter of 25 September 2014, the plaintiff informed the Ministry of Agriculture and Food that it was planning to commence production of Norwegian yogurt and milk for consumption. The purpose of the letter was to obtain confirmation of the framework conditions for such production, and the letter mentioned in particular the special distribution subsidy granted to Q-M.

- 33 The Ministry replied in a letter of 28 October 2014. As regards the arrangement under which Q-M receives a special distribution subsidy, the Ministry stated: “This was a subsidy granted to Q-M based on the special situation that existed at the time when the dairy was established. The purpose was to compensate for the costs that the company still incurred as a consequence of that situation. It has not, therefore, been an issue to extend the circle of recipients of this subsidy.”
- 34 In the proceedings before the District Court the Norwegian Government stated that the special distribution subsidy for Q-M amounted to NOK 19.7 million in 2006, NOK 29.9 million in 2007, NOK 32.6 million in 2008, NOK 34.3 million in 2009, NOK 35.6 million in 2010, NOK 39.4 million in 2011, NOK 44.9 million in 2012, NOK 39.5 million in 2013, NOK 41.1 million in 2014 and NOK 18 million for the period January to May 2015. The Norwegian Government further stated that of those amounts NOK 154 076 in 2007, NOK 292 376 in 2008, NOK 647 396 in 2009, NOK 502 739 in 2010, NOK 481 086 in 2011, NOK 831 391 in 2012, NOK 888 316 in 2013, NOK 851 248 in 2014 and NOK 90 732 for the period January to May 2015 can be ascribed to the distribution of liquid milk products that fall under the scope of the EEA Agreement.
- 35 The Norwegian Government stated before the District Court that the reason why this figure was relatively low in 2015 is that Q-M no longer produces flavoured yogurt in Norway, which is the most important milk product under the scope of the EEA Agreement.
- 36 By an application to the referring court on 7 May 2014, the plaintiff brought an action against the Norwegian Government, claiming primarily that the third paragraph of Section 8 of the PE Regulation should be declared invalid. In the alternative, the plaintiff claims that this provision entails unlawful State aid.

IV QUESTIONS

37 The following questions have been referred to the Court:

- 1.1 Is the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation an arrangement of a nature whereby the Court, on considering its lawfulness must consider it in relation to the rules on the freedom of establishment in Article 31 of the EEA Agreement?
- 1.2 If the court is required to consider Article 31 EEA Agreement in relation to the lawfulness of the third paragraph of Section 8 of the PE Regulation, will Article 31 of the EEA Agreement only be relevant if there is a cross-border element in the case?
- 1.3 If the court is required to consider Article 31 of the EEA Agreement in relation to the lawfulness of the third paragraph of Section 8 of the PE Regulation, will Article 31 of the EEA Agreement only be relevant in relation to what are commonly referred to as 'Protocol 3 products', or will it be deemed to constitute transport aid of relevance to all product categories, even if transport is limited to the party's own products?
- 2.1 Is the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation an arrangement that requires prior notification to ESA pursuant to Article 61 of the EEA Agreement?
- 2.2 If the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation requires prior notification to ESA pursuant to Article 61, does this only concern what are commonly referred to as 'Protocol 3 products', or will it be deemed to constitute transport aid of relevance to all product categories?

V WRITTEN OBSERVATIONS

38 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Jan Magne Juuhl-Langseth, advokat;
- the Kingdom of Norway, represented by Torje Sunde, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Maria Moustakali, and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (the “Commission”), represented by Luigi Malferrari, Donatella Recchia and Markéta Šimerdová, Members of its Legal Service, acting as Agents.

VI SUMMARY OF THE ARGUMENTS SUBMITTED AND ANSWERS PROPOSED

THE PLAINTIFF

39 At the outset, the plaintiff considers that the mere fact that a national measure may be regarded as State aid cannot exempt that measure from the scrutiny of the European Courts under the fundamental freedoms.²

2 Reference is made to the judgment in *Du Pont de Nemours Italiana SpA v Unità sanitaria locale N° 2 di Carrara*, C-21/88, EU:C:1990:121, paragraph 21, and to the Opinion of Advocate General Saggio in *Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l’Economie et des Finances and Ministère de l’Agriculture, de la Pêche et de l’Alimentation*, C-254/97, EU:C:1998:580, point 19.

In this regard, the Court of Justice of the European Union (“ECJ”) has held that aspects that contravene specific provisions of the Treaty other than those on State aid may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately.³ The position is different, however, if it is possible, when a system of aid is being analysed, to separate those conditions or factors which, even though they form part of this system, may be regarded as not being necessary for the attainment of its object or for its proper functioning.⁴ According to the plaintiff, this approach has been subsequently maintained by both the Court⁵ and the ECJ.⁶

- 40 Accordingly, the plaintiff contends that the objective of the Norwegian prize equalisation scheme is to strengthen competition among industrial operators on the downstream market. However, it is not necessary for the attainment of this objective to provide distribution aid exclusively to Q-M under the third paragraph of Section 8 of the PE Regulation. This objective could be achieved in the same way by a system of distribution aid granted to all undertakings with distribution costs higher than those of Tine. As a result, in the plaintiff’s submission, it is possible to evaluate the effects of the distribution aid granted to Q-M under the third paragraph of Section 8 of the PE Regulation separately under Article 31 EEA.
- 41 On the issue whether the national measure constitutes a restriction under Article 31 EEA, the plaintiff considers the freedom of

3 Reference is made to the judgment in *Iannelli & Volpi SpA v Ditta Paolo Meroni*, 74/76, EU:C:1977:51, paragraph 14.

4 Ibid.

5 Reference is made to Case E-9/04 *The Bankers’ and Securities Dealers’ Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Ct. Rep. 42, paragraph 82.

6 Reference is made to the judgment in *Niels Nygård v Svineafgiftsfonden, and Ministeriet for Fødevarer, Landbrug og Fiskeri*, C-234/99, EU:C:2002:244, paragraph 57.

establishment to encompass a general prohibition on restrictions.⁷ In particular, a national measure which deprives undertakings from other EEA States of the opportunity of gaining access to a national market under conditions of normal and effective competition, and thus renders the exercise of the freedom of establishment in that national market less attractive, constitutes a restriction under Article 31 EEA.⁸

- 42 The plaintiff submits that a preferential system set up exclusively to benefit to one single domestic operator – such as the system in place in Norway, involving exclusive distribution aid granted to domestic operator Q-M under the third paragraph of Section 8 of the PE Regulation – constitutes a restriction under Article 31 EEA.⁹ Dairy companies from other EEA States seeking to pursue their business activities through establishment in Norway cannot compete normally and effectively due to the exclusive distribution aid granted to Q-M.
- 43 Consequently, the plaintiff submits that the third paragraph of Section 8 of the PE Regulation constitutes a restriction under Article 31 EEA. The fact that domestic operators are also affected by the special distribution subsidy does not alter this conclusion.
- 44 On the issue whether a cross-border element is required for the application of Article 31 EEA, the plaintiff maintains that the rules on freedom of establishment apply to all situations that are not

7 Reference is made to judgments in *European Commission v Kingdom of Spain*, C-400/08, EU:C:2011:172, paragraphs 63 to 64, Case E-17/14 *EFTA Surveillance Authority v the Principality of Liechtenstein*, judgment of 31 March 2015, not yet reported, paragraph 38, and *European Commission v Italian Republic*, C-565/08, EU:C:2011:188, paragraphs 50 to 51.

8 Reference is made to the judgment in *Attanasio Group Srl v Comune di Carbognano*, C-384/08, EU:C:2010:133, paragraph 45.

9 Reference is made to the judgment in *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala*, C84/11, EU:C:2012:374, paragraphs 34 to 35.

purely internal.¹⁰ In this connection, the ECJ has construed narrowly the notion of purely internal situations.¹¹

- 45 The plaintiff contends that in recent years there has been an increase in imports to Norway from other EEA States of dairy products such as flavoured yogurt. Thus, it is by no means inconceivable that an undertaking from another EEA State might wish to take advantage of the freedom of establishment and set up a local subsidiary or branch in Norway for the distribution and sales of dairy products such as flavoured yogurts on the Norwegian market. Indeed, the plaintiff considers such circumstances similar to its own situation, since it established itself in Norway for distribution and sales of dairy products, but is owned by a corporation established in another EEA State. Further, the plaintiff intends to commence production and distribution of flavoured yogurt products in Norway as an add-on to its existing activities.
- 46 As a result, the plaintiff contends that the third paragraph of Section 8 of the PE Regulation is capable of producing cross-border effects by rendering it less attractive for undertakings from other EEA States to exercise their freedom of establishment by setting up a subsidiary or branch for the distribution and sales of dairy products in Norway.

10 Reference is made to the judgment in *Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervener: Union professionnelle belge des médecins spécialistes en ophtalmologie et chirurgie oculaire*, C-108/96, EU:C:2001:67, in particular paragraph 16.

11 Reference is made to the judgment in *Alessandra Venturini v ASL Varese and Others* (C-159/12), *Maria Rosa Gramegna v ASL Lodi and Others* (C-160/12) and *Anna Muzzio v ASL Pavia and Others* (C-161/12), C-159/12 to C-161/12, EU:C:2013:791, paragraphs 25 to 26; *Grupo Itevelesa SL and Others v OCA Inspección Técnica de Vehículos SA and Generalidad de Cataluña*, C168/14, EU:C:2015:685, paragraphs 35 to 37; the Opinion of Advocate General Wahl in the same case, EU:C:2015:351, point 36; and Case E-9/14 *Proceedings concerning Otto Kaufmann AG* [2014] EFTA Ct. Rep. 1048, paragraph 31.

47 Moreover, according to the plaintiff, both the ECJ¹² and ESA¹³ have applied free movement rules to products excluded from the scope of the EEA Agreement by virtue of Article 8(3) EEA. The existence of Annex VIII to the EEA Agreement strengthens further the argument for the application of Article 31 EEA to products specified in Article 8(3) EEA. In the plaintiff's view, that annex would be superfluous if Article 31 EEA could not be applied to such products.

48 Consequently, the plaintiff submits that Article 31 EEA is applicable to the third paragraph of Section 8 of the PE Regulation.

49 On the question whether the distribution aid requires prior notification in accordance with Article 61 EEA, the plaintiff submits that it follows from Article 61(1) EEA that a measure must fulfil a number of criteria to be considered State aid. First, the aid must favour certain undertakings or production processes, that is, it must create an economic advantage for the recipient. Second, the aid must be granted through State resources. Third, the aid must be granted to undertakings. Fourth, the aid must have a selective effect. Fifth, it must distort or threaten to distort competition and, finally, the aid must affect trade within the EEA. It is clear that the third and fourth conditions are fulfilled, since the aid is granted only to Q-M. Further, also the fifth criterion is fulfilled, as the inherent objective of the measure is to strengthen the competitive position of one market operator (Q-M).

12 Reference is made to the judgment in *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, C-452/01, EU:C:2003:493, paragraphs 27 to 30, and the Opinion of Advocate General Geelhoed in the same case, EU:C:2003:232, point 64.

13 Reference is made to ESA Decision No 337/01/COL of 15 November 2001 "Reasoned opinion for failure to ensure compliance with Article 31 of the EEA Agreement" and ESA Decision No 186/12/COL of 11 July 2012 "Letter of formal notice to Norway for failing to comply with its obligations under Articles 31 by maintaining restrictions in the fish farming industry".

- 50 With regard to the condition that the national measure must create an economic advantage for the recipient of the aid, the plaintiff submits that there are two ways of assessing this criterion. The first possibility, which the plaintiff considers the correct assessment of the situation at hand, is that the distribution aid is considered a grant of money from the public to Q-M. The second possibility is to assess the distribution subsidy in a wider context, as part of a national system of taxation for use of milk in various products, as set out in the national regulation. From this perspective, the distribution aid (seen in light of the general tax levy applicable to Q-M) represents a tax reduction in favour of QM. Such tax reductions clearly come within the notion of measures which favour an undertaking under Article 61(1) EEA.¹⁴
- 51 With regard to the condition that the aid must be granted through State resources, the plaintiff takes the view that the aid must be regarded as granted through State resources within the meaning of Article 61(1) EEA, notwithstanding the fact that it originates from private funds. The funds generated through taxation under the national regulation remain constantly under the State's control.¹⁵ Moreover, tax reductions constitute aid within the meaning of Article 61(1) EEA as the State foregoes (tax) revenue that it would have received in the absence of the measure.

14 Reference is made to the judgment in *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, C-143/99, EU:C:2001:598, paragraph 55, and ESA Decision No 149/04/COL of 18 March 2009 to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the taxation of investment undertakings according to the Liechtenstein Tax Act.

15 Reference is made to judgments in *Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie*, C-262/12, EU:C:2013:851, paragraph 21, and *French Republic v Commission of the European Communities*, C-482/99, EU:C:2002:294, paragraph 37.

- 52 As regards the criterion of affecting intra-Community trade, according to the plaintiff, it suffices that the measure is liable to affect intra-Community trade¹⁶ which is satisfied in the case at hand. This conclusion is not altered by the fact that Q-M's competitors may not be subject to a similar tax in their home countries and are not subject to any tax under the Norwegian price equalisation scheme.¹⁷
- 53 Consequently, the plaintiff argues that all the conditions of Article 61(1) EEA are fulfilled. Thus, the distribution aid granted to Q-M constitutes aid within the meaning of Article 61(1), which required prior notification.
- 54 On the question whether Article 61 EEA applies only to products within the scope of Protocol 3 to the EEA Agreement, the plaintiff submits that at least some liquid milk products covered by the third paragraph of Section 8 of the PE Regulation are within the scope of Protocol 3. Thus, Article 61 EEA must apply to these products.
- 55 As regards products outside the scope of the product coverage of the EEA Agreement, the plaintiff considers Article 61 EEA not to apply to State aid granted to companies for the production of products outside the scope of the product coverage of the EEA Agreement.¹⁸

16 Reference is made to judgments in *Commission of the European Communities v Italian Republic and Wam SpA*, C-494/06 P, EU:C:2009:272, paragraph 50, and Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 16, paragraphs 95 to 97.

17 Reference is made to Joined Cases E-5/04, E-6/04, and E-7/04 *Fesil ASA and Finnjord Smelteverk AS* (Case E-5/04), *Prosessindustriens Landsforening and Others* (Case E-6/04), *The Kingdom of Norway* (Case E-7/04) *v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraph 94.

18 Reference is made to ESA Decision No 166/08/COL of 12 March 2008 on alleged state aid with regard to the Norwegian reindeer slaughter industry.

- 56 However, according to the plaintiff, the aid in the case at hand is not granted for the production but for the distribution of products. In this regard, it observes that, although Article 61 EEA cannot be applied in relation to products outside the scope of the EEA Agreement where the transport service is inseparably linked to the trade in those products,¹⁹ transport services for distribution to the wholesale and retail sector cannot be regarded as inseparably linked to trade in the products transported. Such an interpretation of the product coverage rule in Article 8(3) EEA would be contrary to the very aim of the EEA Agreement.
- 57 Finally, the plaintiff stresses that there are no provisions to prevent Q-M's activities within the scope of the EEA Agreement from benefiting from the aid in question. The recipient is free to use the funds as it wishes provided that the products in question are actually distributed. Therefore, such funds may indirectly benefit other parts of the recipient's production line.
- 58 The plaintiff therefore proposes that the Court should answer the questions as follows:
1. *The aid arrangement in the third paragraph of Section 8 of the PE Regulation must be considered under the rules on the freedom of establishment in Article 31 EEA since it entails differential treatment of dairy producers that seek establishment in Norway. The exclusive nature of the aid is not necessary for the attainment of its object, the strengthening of competition on the Norwegian dairy market, and it is thus possible to evaluate the scheme and the effects of the scheme separately under Article 31 EEA. The arrangement makes it less attractive for companies in other EEA States to exercise their freedom of establishment by setting up a*

19 Case E-4/04 *Pedidel AS v Sosial- og helsedirektoratet* [2005] EFTA Ct. Rep. 1, in particular paragraph 34.

subsidiary or branch for distribution of liquid dairy products in Norway and the PE regulation Section 8 third paragraph therefore constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

2. *Article 31 EEA applies since it is not inconceivable, or at least cannot be ruled out, that companies in other EEA States are or could be interested setting up liquid milk distribution by establishing a subsidiary or branch in Norway.*
3. *The non-inclusion of a product in the product scope of the EEA Agreement, as set out by Article 8(3) EEA, does not preclude the application of establishment in Article 31 EEA. Article 31 EEA is therefore relevant in relation to all liquid milk products covered by the third paragraph of Section 8 of the PE Regulation and not only to liquid milk products which are Protocol 3 products.*
4. *The aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation constitutes aid within the meaning of Article 61 EEA and requires prior notification to the EFTA Surveillance Authority according to the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.*
5. *The requirement of prior notification of the aid arrangement mentioned in the third paragraph of Section 8 of the PE Regulation concerns transport aid for all liquid milk products covered by the third paragraph of Section 8 of the PE Regulation and not only for liquid milk products which fall under Protocol 3 products.*

THE GOVERNMENT OF THE KINGDOM OF NORWAY

ADMISSIBILITY

- 59 The Norwegian Government submits that the last part of questions 1.3 and 2.2, in which the referring court asks whether the measure constitutes “transport aid of relevance to all product categories”, appears unrelated to the actual facts of the main action or hypothetical and, thus, should be considered inadmissible.
- 60 The Norwegian Government argues that this approach of the referring court rests on a premise not found in the facts of the case. The request explicitly states that the plaintiff is engaged in the activity of producing and selling solid milk products and plans to engage in the activity of producing and selling liquid milk products. There are no indications that the plaintiff (or the beneficiary Q-M) seeks to engage in the activity of providing transport services on a market. The mere fact that the plaintiff has plans to start production of liquid milk products and in that regard needs to distribute those goods from the dairy facilities to the retail market does not lead to a situation in which it offers transport services on the market.

THE QUESTIONS REFERRED TO THE COURT

- 61 As a preliminary remark, the Norwegian Government maintains that the aim of the price equalisation system is threefold. First, the system aims at regulating the price paid for milk as a raw material, so that the price does not vary depending on its use. Second, the system aims at compensating costs that result from the geographically disadvantageous location of milk producers. Third, it also implements certain competition policy measures aimed at improving the competitive conditions for independent operators, by reducing the competitive advantages of Tine, the dominant operator in the milk market in Norway. In this regard, the Norwegian

Government underlines the fact that the plaintiff is among the beneficiaries of such measures.

- 62 Moreover, according to the Norwegian Government, the third paragraph of Section 8 of the PE Regulation mentions Q-M as the only beneficiary because there are few milk producers in the Norwegian market and Q-M was found to be the only producer of liquid milk products in that market that experienced higher distribution costs due to structural problems.
- 63 Turning to the questions submitted by the District Court, the Norwegian Government contends that the questions concerning the product coverage of Articles 31 and 61 EEA (Questions 1.3 and 2.2 of the request) constitute the main reason for this request. The Norwegian Government considers it appropriate to assess those questions together.
- 64 The Norwegian Government submits that it follows from Article 8(3) EEA that the EEA Agreement does not apply to liquid milk products, save for those listed in Protocol 3 to the EEA Agreement. In this regard, the Court found in *Pedicel* that any service that is inseparably linked to the trade in goods not covered by the Agreement is excluded from the scope of Article 36 EEA.²⁰ Further, the EEA Agreement takes the approach of excluding the bulk of agricultural products from its product coverage.²¹
- 65 The Norwegian Government submits that, in the case at hand, the distribution activity is carried out with the sole aim of bringing liquid milk products from the dairy facilities to the retail market. The distribution activity is also designed to take account of the

20 Reference is made to *Pedicel*, cited above, paragraph 38.

21 Reference is made to *Pedicel*, cited above, paragraph 24, and Case E-17/15 *Ferskar kjötvörur ehf. v the Icelandic State*, judgment of 1 February 2016, not yet reported, paragraph 42.

special characteristics of the liquid milk products transported (temperatures, time of transport, durability of products, etc.). Accordingly, the distribution activity is inseparably linked to the trade in products not covered by the scope of the EEA Agreement and the measure at hand falls outside the scope of Article 31 EEA in so far as it relates to products not covered by the scope of the Agreement.

- 66 With regard to Article 61 EEA, the Norwegian Government considers Article 8(3) EEA also to limit the material scope of this provision. The Norwegian Government submits that this accords with the established practice of ESA²² and academic analysis of the EEA Agreement.²³ Moreover, the arguments advanced on the product coverage of Article 31 EEA are equally valid with regard to Article 61 EEA. Thus, Article 61 EEA does not apply to aid granted to undertakings for an activity that is inseparably linked to the trade in products not covered by the Agreement, such as the distribution of liquid milk products from dairy facilities to the retail market.
- 67 Further, the Norwegian Government submits that a cross-border element is required for the application of Article 31 EEA.²⁴ Accordingly, it is necessary, within the context of Articles 31 and 34 EEA, that the company in question has exercised its right to move

22 Reference is made to ESA Decision No 218/03/COL of 12 November 2003 with regard to State aid in the form of regionally differentiated social security contributions (Norway); ESA Decision No 176/05/COL of 15 July 2005 concerning alleged State aid to the fisheries sector; ESA Decision No 166/08/COL, cited above; and ESA Decision No 341/09/COL of 23 July 2009 on the notified scheme concerning tax benefits for certain cooperatives.

23 Reference is made to Norberg et. al., *EEA Law, A Commentary on the EEA Agreement* (1993), p. 318.

24 Reference is made, inter alia, to the judgment in *Eric Libert and Others v Gouvernement flamand* (C197/11) and *All Projects & Developments NV and Others v Vlaamse Regering* (C-203/11), C197/11 and C-203/11, EU:C:2013:288, paragraph 33, and Barnard, *The Substantive Law of the EU – The four freedoms* (2013), p. 233.

from one EEA State to another in order to establish itself in the latter by means of primary or secondary establishment. This requirement cannot be satisfied by claiming that companies from other EEA States could, in theory, be affected by the national measure at hand. Nothing in the request suggests that the plaintiff has exercised its right to move. In this regard, it is not sufficient that the plaintiff's parent company is owned by a parent-parent company established in the Netherlands, since the plaintiff is relying on Article 31 EEA and not the parent-parent company.

68 Based on the above submission, the Norwegian Government maintains that Article 31 EEA does not apply to the case at hand and contends that Question 1.1 appears hypothetical. Moreover, in its view, Question 1.1 appears ambiguous, it is unclear what the District Court wishes to ascertain by that question. However, the Norwegian Government proceeds on the basis that Question 1.1 seeks clarification on the relationship between Article 31 and Article 61 EEA and requiring, if necessary, an interpretation of Article 31 EEA.

69 With regard to the relationship between Article 31 and Article 61 EEA, the Norwegian Government submits that Article 31 EEA does not apply to a measure if that measure constitutes aid within the meaning of Article 61 EEA.²⁵ Only if certain aspects of the aid scheme can be evaluated separately is an assessment of those aspects possible in the light of other provisions, such as Article 31 EEA. This is the case where conditions or factors, although forming part of the system of aid in question, are not necessary for the attainment of its object or for its functioning.

25 Reference is made to judgments in *Iannelli & Volpi*, cited above, paragraph 17, and *Nygård*, cited above, paragraphs 57 to 58.

- 70 If it is necessary to interpret Article 31 EEA, on this point, the Government of Norway contends that the measure at issue bears a factual resemblance to a tax benefit. In such cases, a discrimination approach has been adopted.²⁶ Although it is for the referring court to assess whether the plaintiff in the case at hand is subject to discrimination on grounds of nationality, the Norwegian Government emphasises that in a situation where the plaintiff is a company established in Norway and the beneficiary of that measure (Q-M) is also a company established in Norway no discrimination on grounds of nationality appears to be taking place.
- 71 In the alternative – if the Court rejects the discrimination approach – the Norwegian Government submits that the measure at issue does not appear to deprive the plaintiff of the opportunity of gaining access to the market under conditions of normal and effective competition.²⁷ In any event, the effects produced by the measure appear too uncertain and indirect to be regarded as capable of hindering the freedom of establishment.²⁸

26 Reference is made to the judgment in *Federal Republic of Germany v Commission of the European Communities*, C156/98, EU:C:2000:467, in particular paragraph 85.

27 Reference is made to the judgment in *Commission v Italy*, cited above.

28 Reference is made to judgments in *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* (C418/93), *Semeraro Mobili SpA v Sindaco del Comune di Erbusco* (C-419/93), *RB Arredamento Srl v Sindaco del Comune di Stezzano* (C-420/93), *Città Convenienza Milano Srl v Sindaco del Comune di Trezzano sul Naviglio* (C-421/93), *Città Convenienza Bergamo Srl v Sindaco del Comune di Stezzano* (C460/93), *Centro Italiano Mobili Srl v Sindaco del Comune di Pineto* (C-461/93), *Il 3C Centro Convenienza Casa Srl v Sindaco del Comune di Roveredo in Piano* (C-462/93), *Benelli Confezioni SNC v Sindaco del Comune di Capena* (C-464/93), *M. Quattordici Srl v Commissario straordinario del Comune di Terlizzi* (C-9/94), *Società Italiana Elettronica Srl (SIEL) v Sindaco del Comune di Dozza* (C10/94), *Modaffari Srl v Sindaco del Comune di Trezzano sul Naviglio* (C-11/94), *Modaffari Srl v Comune di Cinisello Balsamo* (C14/94), *Cologno Srl v Sindaco del Comune di Cologno Monzese* (C-15/94), *Modaffari Srl v Sindaco del Comune di Osio Sopra* (C23/94), *M. Dieci Srl v Sindaco del Comune di Madignano* (C-24/94) and *Consorzio Centro Commerciale "Il Porto" v Sindaco del Comune di Adria* (C-332/94), C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C9/94 to C-11/94, C-14/94, C-15/94, C23/94, C24/94 and C-332/94, EU:C:1996:242, paragraph 32, and Case E-16/10 *Philip Morris Norway AS v Staten v/ Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330.

- 72 With regard to the requirements of Article 61 EEA, the Norwegian Government contends that the aid is fully financed through the levies imposed on and collected from private companies. Thus, the compensation could be seen as granted from private resources, and not those of the State.
- 73 Finally, the Norwegian Government submits that the amounts granted indicate that trade between Member States is not affected. This is particularly the case as these amounts are close to the *de minimis* ceiling of EUR 200 000, below which aid is generally considered not to affect trade between Contracting Parties. In addition, there are no indications in the request that trade is indeed affected. Lastly, the Norwegian Government observes that “foreign” liquid milk products are not subject to the levy of the PE Regulation. In its view, all of this suggests that the PE Regulation does not affect trade between the Contracting Parties in a negative way. However, ultimately, this is for the referring court to determine.
- 74 Therefore, the Government of the Kingdom of Norway proposes that the Court should answer the questions as follows:

Questions 1.3 and 2.2

Article 31 EEA is to be understood as not applying to a measure, like the third paragraph of Section 8 of the PE Regulation, in so far as that measure relates to products not covered by the scope of the EEA Agreement.

Article 61 EEA is to be understood as not applying to a measure, like the third paragraph of Section 8 of the PE Regulation, in so far that measure compensates for the distribution of products not covered by the Agreement.

Question 1.2

Article 31 EEA will only be applicable if there is a cross-border element in the case under consideration. If a company with its seat in an EEA State wishes to expand its activities within that same State, and in that context challenges a measure of that same State on the basis of Article 31 of the Agreement, no cross-border element is present.

Question 1.1

On the relationship between Article 31 and 61 EEA:

Aid referred to in Article 61 EEA does not as such fall within the field of application of Article 31 EEA, save for those aspects of the aid which can be evaluated separately, and are thus conditions or factors which, though forming part of the system of aid in question, are not necessary for the attainment of its object or for its functioning.

On the interpretation of Article 31 EEA, if relevant:

A measure which provides compensation for certain distribution costs, like the third paragraph of Section 8 of the PE Regulation, will not be in breach of Article 31 EEA, if it does not constitute direct or indirect discrimination by reason of nationality, which is for the referring court to ascertain.

Question 2.1

It is for the referring court to determine whether the conditions relating to the existence of state aid within the meaning of Article 61(1) EEA are met in the case at hand, inter alia that the compensation constitutes an advantage, that state resources are at hand, and that trade between the Contracting Parties is affected.

ESA

- 75 As a preliminary remark, ESA submits that the question whether the measure constitutes State aid should be assessed not in terms of “transport aid” within the meaning of Article 49 EEA but on the basis of the general State aid provision of Article 61(1) EEA.
- 76 In the case at hand, ESA considers that some of the requirements of Article 61(1) EEA, namely the conferral of a selective advantage and the distortion of competition, are clearly met. The measure at issue confers a selective advantage on Q-M, it being the only dairy undertaking in the Norwegian market receiving the special distribution subsidy. Thus, it favours that dairy undertaking over all other dairy undertakings active in the Norwegian milk market. For this very reason, the measure is also liable to distort competition. Therefore, only the conditions relating to an intervention by the State or through State resources and the effect on trade between EEA States need to be addressed further.
- 77 On the question whether the measure constitutes an intervention by the State or through State resources, ESA submits that the special distribution subsidy for Q-M is a State measure. It was introduced by Regulation of 4 December 2003 No 1453 on the price equalisation system for milk, which entered into force on 1 January 2004. The subsidy is provided for in the third paragraph of Section 8 of the PE Regulation.
- 78 On the question whether the advantage is granted directly or indirectly through State resources, ESA notes that this concept also includes advantages granted through a public or private body appointed or established by the State to administer the aid.²⁹

29 Reference is made to judgments in *Vent de Colère and Others*, cited above, paragraph 20, and *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, C72/91 and C-73/91, EU:C:1993:97, paragraph 19.

Moreover, according to case law, Article 61 EEA covers all financial means by which the public authorities may support undertakings, irrespective of whether those means are permanent assets of the public sector and whether those means are permanently held by the Treasury.³⁰

- 79 In the case at hand, ESA submits that the special distribution subsidy is granted through the Norwegian Agriculture Agency, a public body under the Ministry of Agriculture and Food, established and appointed by the State to administer the fund out of which the subsidy is paid. Depending on the price category, as foreseen in Section 4 of the PE Regulation, a product is placed in, this product will either be subject to a levy or obtain a subsidy. The rates of subsidies and levies are decided by the Agency on an annual basis. Even though the amounts that constitute the special distribution subsidy may not be permanently held by the Treasury, they remain constantly under public control and are available to the competent authority. Moreover, the levies are compulsory and the Ministry of Agriculture and Food can impose administrative penalties on a dairy farm that fails to pay the levy. The Agriculture Agency administers the fund by centralising the sums collected in a special account and thereby acts as an intermediary.³¹ The Agency does not make any profit and the costs of administering the fund are covered by the collected levies. This shows that the amounts managed by the public authority remain under public control and, thus, that the special distribution subsidy is granted through State resources.

30 Reference is made to the judgment in *Vent de Colère and Others*, cited above, paragraph 21 and the case law cited.

31 Reference is made to the judgment in *Vent de Colère and Others*, cited above.

- 80 On the question whether the measure is liable to affect trade between EEA States, ESA submits that intra-Community trade must be regarded as affected by the aid when it strengthens the position of an undertaking compared to other undertakings competing in intra-Community trade.³² In this respect, it is not necessary that the beneficiaries are undertakings involved in intra-Community trade.³³ In the present case, the third paragraph of Section 8 of the PE Regulation is liable to discourage undertakings from other EEA States from entering the milk market in Norway. Therefore, the measure in question constitutes State aid and is subject to the notification requirement.
- 81 In addition, ESA submits that there is no basis in the EEA Agreement for an exception from the rules on State aid as regards aid for the distribution of products outside the product scope of the EEA Agreement.
- 82 ESA contends that the judgment in *PediceI*³⁴ solely concerned the fundamental freedoms. The autonomous character of the procedure relating to State aid control precludes any spillover effects from the principles governing the scope of application or enforcement of the fundamental freedoms. The procedure laid down in Article 62 EEA is not conditional on the existence of an infringement of other provisions of EEA law given the principle of autonomy of the administrative procedures and remedies in the field of State aid.³⁵ In any event, when considering aid favouring certain undertakings – as opposed to the production of certain goods – within the meaning of Article 61 EEA, the State aid rules of the EEA Agreement apply

32 Reference is made to the judgment in *The Queen, on the application of Eventech Ltd v Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 66 and the case law cited.

33 *Ibid.*, paragraph 67.

34 Reference is made to *PediceI*, cited above.

35 Reference is made to the judgment in *Castelnou Energía, SL v European Commission*, T-57/11, EU:T:2014:1021, paragraph 183 and the case law cited.

irrespective of the products the undertaking in question deals with and, thus, irrespective of whether those products fall within or outside the product scope of the EEA Agreement. Any other approach would interfere with the system adopted in the EEA Agreement for the division of powers by means of the procedure for keeping aids under constant review.³⁶

- 83 Consequently, ESA takes the view that the special distribution subsidy falls within the application of the rules of the EEA Agreement on State aid and requires prior notification to ESA, irrespective of whether the dairy products fall within the product scope of the EEA Agreement.
- 84 With regard to the questions submitted on the freedom of establishment, ESA submits that the effects that the special distribution subsidy has on the freedom of establishment are inherent in the State support elements of the scheme and therefore indissolubly linked to the object of the aid such that it is impossible to evaluate it separately.³⁷
- 85 Were the Court to consider that there are elements in the special distribution subsidy that are not inextricably linked to the object of the aid and that can be evaluated separately, ESA submits further observations on the compatibility of the special distribution subsidy and the freedom of establishment.
- 86 In this regard, ESA maintains that the non-inclusion of a product in the product scope of the EEA Agreement, as specified in Article 8(3) EEA, does not preclude the application of other freedoms. In ESA's view, the legal context to the *Pedice*³⁸ case is narrow. It concerned an

36 Reference is made to the judgment in *Iannelli & Volpi*, cited above, paragraph 12.

37 Reference is made to *The Bankers' and Securities Dealers' Association of Iceland v ESA*, cited above, paragraph 82.

38 Reference is made to *Pedice*, cited above.

exceptional situation relating to the advertising of wine, which could, in principle, have been examined under both Articles 11 and 36 EEA.³⁹ Thus, the *Pedicel* case law is limited to factual situations that, in principle, could be assessed both under the free movement of goods and another fundamental freedom. *Pedicel* should not limit the application of fundamental freedoms other than the free movement of goods when those freedoms are applicable on their own merits. In such cases, the provisions of the EEA Agreement on fundamental freedoms are applicable without constraints resulting from the product scope of the EEA Agreement.⁴⁰

87 Moreover, ESA argues that the exclusion from the scope of Article 36 EEA is limited to services that are inseparably linked to the trade in goods not covered by the EEA Agreement.⁴¹ ESA deduces that it follows *a contrario* from the judgment in *Pedicel* that the non-inclusion of a product in the product scope of Article 8(3) EEA in and by itself does not preclude the application of other fundamental freedoms. These considerations are reflected in ESA's decision-making practice.⁴² In this regard, Norway has already removed contested rules by adopting new regulations.⁴³

88 Hence, ESA argues that, as a matter of principle, the non-inclusion of a product in the product scope of the EEA Agreement, specified in Article 8(3) EEA, should not preclude the application of the other fundamental freedoms. Thus, if, for instance, a situation falls within the scope of the freedom of establishment, the rules on the right to establishment should be fully applicable, whether or not the rules on

39 Reference is made to the judgment in *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, C-405/98, EU:C:2001:135.

40 Reference is made to the judgment in *Ospelt*, cited above.

41 Reference is made to *Pedicel*, cited above, paragraphs 35 and 38.

42 Reference is made to ESA Decision No 186/12/COL, cited above, and ESA Case No 2229 (document number 259607).

43 ESA Decision No 421/13/COL of 6 November 2013 closing a complaint against Norway concerning ownership restrictions in the Norwegian fish farming industry.

the movement of goods in the EEA Agreement are applicable pursuant to Article 8(3) EEA to a product produced or traded by the natural or legal person established or that has invested. This general rule should only be departed from if a sectoral adaptation laid down in Annex VIII exists covering the specific situation.

- 89 Moreover, ESA submits that the purpose of the EEA Agreement would be jeopardised if the EEA/EFTA States could impose restrictions on other fundamental freedoms of economic operators based on the principle set out in Part II of the EEA Agreement on the free movement of goods. Furthermore, the practical difficulties involved in assessing whether a business opportunity with a cross-border element is restricted by the limited product scope of Article 8(3) EEA could jeopardise legal certainty, which constitutes a general principle of EEA law.⁴⁴
- 90 ESA maintains that, in the present case, a cross-border element is present, as the plaintiff is controlled, ultimately, by a company established in the Netherlands. In this regard, the ECJ has already accepted that, even in a situation where the undertakings concerned all have their seat in one Member State and that the applicability of the legislation at issue in the proceedings is limited to that Member State, the fact that the parent company is established in another Member State makes it possible to identify a cross-border element and, consequently, also the necessary prerequisite for invoking the freedom of movement guaranteed by the Treaty.⁴⁵
- 91 Likewise, ESA considers that the special distribution subsidy is liable to make it more difficult for undertakings from other EEA States to

44 Reference is made to *Philip Morris*, cited above.

45 Reference is made to the judgment in *Impacto Azul Lda v BPSA 9 – Promoção e Desenvolvimento de Investimentos Imobiliários SA and Others*, C186/12, EU:C:2013:412, paragraph 20.

become established and compete effectively in this market, as such undertakings, when establishing themselves in Norway, will be required to take part in the price equalisation system and thus pay levies without any possibility of receiving the special distribution subsidy awarded to their competitor Q-M.

- 92 ESA also contends that the plaintiff's exercise of its freedom of establishment does not relate to a potential future or hypothetical situation. It forms part of the specific case, initiated by the plaintiff's letter to the Ministry stating that the undertaking was planning to commence production of Norwegian yogurt and milk for consumption and to which the Ministry replied stating that it had not been an issue to extend the circle of recipients of the special distribution subsidy.
- 93 ESA submits that the right of establishment cannot be limited to cases where an undertaking has already exercised that freedom and started pursuing activities in a certain market. A restriction on Article 31 EEA already exists where a national measure is liable to discourage or hinder the freedom of establishment. Thus, the special distribution subsidy constitutes a restriction on the freedom of establishment as enshrined in Article 31.
- 94 Therefore, ESA proposes that the Court should answer the questions as follows:
1. *The special distribution subsidy as set out in the third paragraph of Section 8 of the Norwegian regulation on a price equalisation system for milk constitutes unlawful state aid as regards all product categories.*
 2. *The effects that the special distribution subsidy may have on the right of establishment are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately. It is therefore not necessary to consider the aid in relation to the rules on the freedom of establishment in Article 31 EEA.*

THE COMMISSION

- 95 The Commission considers it appropriate first to clarify the scope of the measure at stake. In this regard, the special distribution subsidy appears to be more product related than service related. The measure is designed to benefit the undertaking that distributes liquid milk products. However, it is granted for liquid milk products and not for providing transport services. Thus, the measure at stake should be seen as linked to the products and not as a measure covering transport services. Moreover, as the Commission understands it, the products at stake are among those listed in Protocol 3 to the EEA Agreement.
- 96 The Commission then considers if the measure at issue qualifies as State aid. On its analysis, it does not appear to be disputed that the measure is imputable to the Norwegian State.
- 97 As regards the criterion concerning the use of State resources, it appears to the Commission that the private funds are administered by the Norwegian Agricultural Agency. Even if the money collected from the different operators is not permanently held by the Treasury, it remains under the public control of the Norwegian Agricultural Agency. Further, the fact that the special distribution subsidy is financed through the price equalisation system to which the private operators on the milk market contribute is not sufficient to conclude that the criterion concerning the use of State resources is not met.⁴⁶
- 98 The Commission argues that, in the main proceedings, the special distribution subsidy granted to Q-M clearly originates with the public authorities, it is enshrined in a legal act and aims at increasing competition in the milk sector, which is a public policy

46 Reference is made to the judgment in *Steinike & Weinlig v Federal Republic of Germany*, 78/76, EU:C:1977:52, in particular paragraphs 21 and 22.

objective. The fact that, in order to benefit from the special distribution subsidy, the plaintiff had to make a request to the Government, combined with the fact that the Government continually reviews the scheme and its rates, shows that the criterion concerning the use of State resources is fulfilled. Further, the criterion on the use of State resources is met when the measure has its origin in a charge and can be used for no other purpose than that provided for by law and the payment of the advantage to the designated company has been the subject of a decision by the legislature.⁴⁷

- 99 As regards the presence of a selective advantage, the Commission contends that the selective nature of any advantage granted to Q-M as a result of the PE Regulation does not appear to be disputed between the parties. Moreover, the special distribution subsidy consists of a grant given to an identified undertaking, for each litre of distributed liquid milk. That amount of money, transferred to the undertaking, would not have been available to the undertaking without the intervention of the State. In any event, even if the measure at stake had to be considered as an offsetting of levies and subsidies, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 61(1) EEA.⁴⁸ Therefore, the criterion of selective advantage is met.

47 Reference is made to judgments in *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV*, and in the indemnification proceedings *Aluminium Delfzijl BV v Staat der Nederlanden* and in the indemnification proceedings *Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV*, C-206/06 EU:C:2008:413, paragraphs 72 to 73, and *Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF)*, C-677/11, EU:C:2013:348, paragraphs 38 to 40.

48 Reference is made to the judgment in *France v Commission*, cited above.

- 100 As regards the criterion of distortion of competition and effects on intra-EEA trade, the Commission stresses that these two elements of the definition of State aid are, as a general rule, inextricably linked.⁴⁹
- 101 Further, the Commission contends that the measure at stake is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.⁵⁰ Public support is liable to distort competition even if it does not help the beneficiary to expand and gain market shares. It is sufficient that the public support helps in maintaining the competitive position of the undertaking in question. In that respect, the very fact of relieving the recipient of the aid of a burden that it should have paid absent the aid is enough to distort competition.
- 102 As far as intra-EEA trade is concerned, the Commission submits that public support is capable of having an effect on intra-EU/EEA trade, even if the recipient of the aid is not directly involved in cross-border trade.
- 103 According to the Commission, the simple fact that undertakings from other Member States could provide the same services, unless that possibility is merely hypothetical, generates an effect on cross-border trade. In the case at hand, it is not disputed that several other undertakings, including those from other Member States, are able to provide the same product as the one benefiting from the subsidy.
- 104 Therefore, the Commission takes the view that Article 61 EEA must be interpreted as meaning that a special distribution subsidy, such as the one at issue in the main proceedings, constitutes State aid. It is for the national court to draw the appropriate consequences of this

49 Reference is made to the judgment in *Regione Friuli Venezia Giulia v Commission of the European Communities*, T288/97, EU:T:2001:115, paragraph 41.

50 Reference is made to the judgment in *Alzetta Mauro and Others v Commission of the European Communities*, T298/97, EU:T:2000:151.

qualification. In particular, according to established case law, the national court must, in principle, order the Member State to stop implementing the aid and order repayment of the aid granted to the beneficiary.⁵¹

105 As a consequence, given the alternative nature of the pleas raised by the plaintiff, the Commission considers it unnecessary to reply to the questions on the freedom of establishment provided for in Article 31 EEA.

106 The Commission does not propose any specific answers to the questions referred.

Carl Baudenbacher
Judge-Rapporteur

51 Reference is made to the judgment in *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, C-199/06, EU:C:2008:79, paragraphs 39 to 55, and "Enforcement of State Aid Law by national Courts" <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.