JUDGMENT OF THE COURT
17 November 2020

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – eHealth – Admissibility – Status as interested party – Doubts or serious difficulties – Notion of an undertaking)

In Case E-9/19,

Abelia, established in Oslo, Norway,

WTW AS, established in Tiller, Norway,

represented by Espen Bakken, advocate,

applicants,

v

EFTA Surveillance Authority, represented by Michael Sánchez Rydelski, Ewa Gromnicka and Carsten Zatschler, acting as Agents,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 57/19/COL of 10 July 2019 to close the case without opening the formal investigation procedure as to whether the public financing of eHealth and digital health infrastructure in the Norwegian healthcare system, as well as the provision of certain support services and registers, constitutes State aid within the meaning of Article 61(1) of the Agreement on the European Economic Area,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicants and the defendant, and the written observations of the Norwegian Government, represented by Pål Wennerås and Janne Tysnes Kaasin, acting as Agents; the European Commission, represented by Pedro Arenas, Viktor Bottka and Cvetelina Georgieva-Kecsmar, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Espen Bakken; the defendant, represented by Michael Sánchez Rydelski; the Norwegian Government, represented by Pål Wennerås; the European Commission, represented by Viktor Bottka and Cvetelina Georgieva-Kecsmar, at the hearing on 7 July 2020,

gives the following

Judgment

I Introduction

1 Abelia is a trade and employers association within the Confederation of Norwegian Business and Industry ("NHO"). Abelia represents over 2 300 member companies within the fields of telecommunications, R&D, education and consultancy, and, of relevance to the present case, IT and IT technology within the eHealth sector. Its members deliver e-prescription solutions, electronic health record systems, IT infrastructure, health technology in primary care and citizen-orientated health solutions.

2 WTW AS ("WTW") is a software developer and a member of Abelia. WTW is also active in the eHealth sector. WTW has developed the product "HelseRespons" for the eHealth sector. HelseRespons is an IT service and platform that enables contacts and communications between healthcare providers and patients in Norway.

3 Abelia and WTW seek the annulment of EFTA Surveillance Authority Decision No 57/19/COL ("the contested decision"), by which the EFTA Surveillance Authority ("ESA") informed the Norwegian authorities that, having assessed the public financing of the eHealth and digital health infrastructure in the Norwegian healthcare system, as well as the provision of certain support services and registers, it considered them not to constitute State aid within the meaning of Article 61(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

II Legal background

EEA law

4 Article 61(1) EEA reads:

> *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.*

5 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

6 Article 1 of Part I of Protocol 3 to the SCA entitled "GENERAL RULES" reads:

> *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.*
>
> *If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.*
>
> *On application by an EFTA State, the EFTA States may, by common accord, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the functioning of the EEA Agreement, in derogation from the provisions of Article 61 of the EEA Agreement, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the EFTA Surveillance Authority has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its*

application to the EFTA States shall have the effect of suspending that procedure until the EFTA States, by common accord, have made their attitude known.

If, however, the EFTA States have not made their attitude known within three months of the said application being made, the EFTA Surveillance Authority shall give its decision on the case.

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.

7 Article 1(h) of Part II of Protocol 3 to the SCA entitled "Definitions" reads:

(h) 'interested party' shall mean any State being a Contracting Party to the EEA Agreement and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

8 Article 4(2) to 4(4) of Part II of Protocol 3 to the SCA entitled "Preliminary examination of the notification and decisions of the EFTA Surveillance Authority" reads:

2. Where the EFTA Surveillance Authority, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61(1) of the EEA Agreement, it shall decide that the measure is compatible with the functioning of the EEA Agreement (hereinafter referred to as a 'decision not to raise objections'). The decision shall specify which exception under the EEA Agreement has been applied.

4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').

III Facts

9 On 27 September 2018, the Norwegian authorities raised the subject of the public financing of eHealth services and digital health infrastructure in the Norwegian healthcare system for the first time during a State aid meeting with ESA in Oslo.

10 On 9 October 2018, ESA sent a follow-up letter to the Norwegian authorities on the subject of "the public financing of eHealth services and digital health infrastructure in the Norwegian healthcare system", seeking some additional clarifications and information. ESA invited the Norwegian authorities both to provide a comprehensive overview of the services that were publicly financed and to indicate whether these services were in competition with services provided by the market and whether any external providers were selected pursuant to public procurement procedures. In addition, the Norwegian authorities were invited to include any services that they were planning to introduce in the near future.

11 On 7 December 2018, the Norwegian authorities submitted a draft pre-notification for legal certainty. Subsequently, ESA opened a pre-notification case. On 9 January 2019, a video conference was held at the request of the Norwegian authorities during which the draft pre-notification was discussed. On 11 January 2019, ESA sent an email requesting follow-up information concerning *Helsenett* ("Health Network") and the national patient portal *Helsenorge.no* ("*Helsenorge.no*"). On 19 February 2019, the Norwegian authorities sent ESA the requested information.

12 On 1 March 2019, another video conference was held, where ESA discussed the pre-notification with the Norwegian authorities. In particular, ESA sought further clarifications concerning third-party providers that were granted access to the Health Network. In particular, ESA invited the Norwegian authorities to further clarify the role of these third-party providers, the rationale for granting them access to the Health Network and to provide further information on the nature of the services that they offered. In this context, the Norwegian authorities explained that the Health Network's members depend on it in providing healthcare to Norway's inhabitants. The Norwegian authorities considered that third-party providers offered services that were complementary to those provided by Norsk Helsenett SF ("NHN").

13 On 26 March 2019, the Norwegian authorities submitted additional information to ESA. Following this, ESA informed the Norwegian authorities that it had sufficient information and clarifications for a notification and agreed on the timing of a formal notification.

14 On 3 May 2019, the Norwegian authorities submitted by letter their notification for legal certainty. It addressed the public financing of health and digital health infrastructure in the Norwegian healthcare system which had already been implemented. In particular, it concerned the public financing of NHN's activities and of a number of activities performed by the Norwegian Directorate of eHealth ("NDE"): (a) the Health Network; (b) *Helsenorge.no*; (c) the electronic

prescription system (*e-resept*); (d) the electronic patient summary care record; and (e) the provision of various support services and the operation of registers.

15 On 10 July 2019, ESA adopted the contested decision, making reference to Article 4(2) of Part II of Protocol 3 to the SCA, following the preliminary examination procedure. The contested decision concerns the notified financing of a public corporation tasked with providing a national eHealth solution in Norway, consisting of the Health Network, national patient portal, electronic prescription system, electronic patient summary care record, and the provision of various support services and the operation of registers. ESA considered that the measures in question do not constitute State aid within the meaning of Article 61(1) EEA.

16 On 26 September 2019, a notice concerning the contested decision was published in the Official Journal (OJ 2019 C 322, p. 4) (EEA Supplement 2019 No 75, p. 2).

IV The contested decision

17 The contested decision states that the Norwegian authorities submitted a notification to ESA by letter of 3 May 2019. The notification was submitted for legal certainty, as the Norwegian authorities did not consider the measures at issue to constitute State aid.

18 The notification encompasses the public financing of the activities of NHN, a public corporation charged with the provision of nationwide eHealth solutions in Norway. It also covers the public financing of a number of activities that are currently performed by NDE, but which will be transferred to NHN in the future.

The Norwegian healthcare system

19 The Norwegian healthcare system can be characterised as semi-decentralised, with responsibilities for specialist and primary healthcare being separated. Several hundred entities are legally obliged to provide healthcare to the public, and there are several thousand health service providers. The organisational structure of healthcare in Norway is built upon the principle of equal access to services for all inhabitants, regardless of their social or economic status and geographic location and the health system itself is based on the principle of solidarity.

20 In 2012, the Norwegian health administration set a long-term goal to introduce a unified electronic record solution for each citizen that could be used and accessed by all Norwegian health service providers. Norway's central health administration decided to step in and take stronger control of the development and roll-out of nationwide eHealth.

21 Currently, there are two entities delivering eHealth in Norway nationwide: the first is NDE, founded in 2016, which is part of the central Government administration, and is responsible for three of the notified eHealth solutions, namely the summary care record, the e-prescription system and the national patient portal; the second is

NHN, a public corporation founded in 2009 and owned by the Norwegian Ministry of Health, and subject to control by the State. It was established to create a nationwide communication network called the Health Network. NHN's by-laws provide that it has a non-economic objective and shall not generate profits. NDE and NHN implement policies and instructions from the central health administration, in particular from the Norwegian Ministry of Health.

22 NDE and NHN make use of the market when it is possible. A large part of the eHealth solutions currently in use has been purchased following public tenders, and their operation and further development is largely provided by private suppliers. Therefore, NHN and NDE can be described as primarily national eHealth coordinators or buyers.

The Health Network

23 The Norwegian Government decided in 2008 that electronic means should be used instead of paper solutions in order to store, process and communicate patient information. This resulted in the establishment of the nationwide Health Network through NHN in 2009.

24 The Health Network enables an efficient and secure electronic exchange of patient information via a network between all relevant parties within the health sector in compliance with relevant legislation. It comprises a "core net" of separate optical channels connecting the main Norwegian cities, while the regional net connects all hospitals and major health institutions. Practically all health service providers form part of this network based on voluntary membership. The Health Network is financed through two main sources: direct transfers from the state budget and monthly and one-time membership fees. These fees are intended to cover the Health Network's operating costs.

25 There are many ways to communicate in the Health Network, including secure email, as well as a number of features that enable and safeguard this communication. The main feature is message exchange.

26 The address register (*Adresseregisteret*) is a prerequisite for message exchange and the functioning of the Health Network overall. It assigns a unique electronic ID to each of the services of the Health Network's members and is necessary to correctly encrypt and decrypt and deliver messages within the Health Network. In addition, NHN operates and makes available to its members the company register (*Bedriftsregisteret*) and citizen register (*Personregisteret*). These registers are copies of registers owned and operated by the State.

27 The Health Network is open to authorised third-party providers who offer services that the Health Network's members depend on when providing healthcare. The Norwegian authorities consider that third-party providers offer services that are complementary to those provided by NHN.

Helsenorge.no

28 *Helsenorge.no*, which was launched in late 2011, contains information on statutory benefits and serves as a guide to the public healthcare services. It also enables patients to exercise their right to participate in their treatment and have access to their medical records. Finally, *Helsenorge.no* also offers services that allow citizens to address questions, manage appointments and receive communications from hospitals and municipal care providers, thus reducing the need for consultations in person or by telephone.

29 Since 2014, *Helsenorge.no* has been financed by municipalities, Regional Health Authorities ("RHAs"), and the Norwegian State. There are no plans to introduce payments for the public.

Electronic prescription

30 Electronic prescription ("e-prescription" or "*e-resept"*) is a system completely financed by the Norwegian State that ensures that any prescription can be sent to a central prescription database accessible via *Helsenorge.no*. Patients can then pick up the prescribed medicine at any pharmacy in Norway. This system also facilitates reimbursement between pharmacies and the Norwegian Health Economics Administration.

31 The use of the system is obligatory unless the prescriber does not have access to an IT system that enables them to use e-prescription. Currently over 90 per cent of prescriptions are prescribed electronically. All pharmacies in Norway use e-prescription.

Electronic patient summary care record

32 The summary care record ("SCR"), financed by the state budget, is the first national system for directly sharing patient information between the various levels and institutions of healthcare in Norway.

33 The SCR contains selected and important information about each citizen's health and gives healthcare professionals immediate access to this information, regardless of the previous places of treatment. From 2017, all Norwegian citizens, who have not opted out, have a personalised SCR. Citizens can enter and amend the information saved on their SCR via *Helsenorge.no* and control third-party access.

The provision of various support services and operation of registers

34 NHN has been given the task of operating three different types of registers for government agencies and RHAs: (i) administrative health registers, such as the Doctor's Staffing Register and the General Practitioner's Register; (ii) quality of diagnosis and treatment registers; and (iii) national health registers, such as the birth register and the abortion register.

35 Furthermore, from 1 January 2017, a number of Norwegian Government agencies have entrusted NHN with providing support services in the areas of procurement, information and communication technologies, and archiving. NHN's costs from performing these activities are covered from the state budget.

ESA's assessment of the presence of State aid

36 In the contested decision, it is stated that the Norwegian authorities argue that NHN and NDE should not be considered to be undertakings within the meaning of Article 61(1) EEA because eHealth and its related support services do not constitute economic activities.

37 With reference to case law, ESA underlines that Article 61(1) EEA does not apply when public entities exercise public powers or act in their capacity as public authorities. If the economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected to the exercise of those public powers and therefore fall outside the notion of an undertaking. That such activity also might be pursued by a private operator is irrelevant.

38 The Norwegian public healthcare system itself is founded upon the principle of solidarity and public financing accounts for more than 85 per cent of total healthcare expenditure. The Court of Justice of the European Union has confirmed that, where such a structure exists, the relevant organisations do not act as undertakings.

39 According to the descriptions provided by the Norwegian authorities, the Health Network, *Helsenorge.no*, the e-prescription system and the SCR form part of a national eHealth solution that is provided nationwide by public entities and are necessary to fulfil public duties towards the population and to ensure compliance with the relevant legislation. ESA considers it not necessary to assess whether the State is obliged by law to provide each particular feature of the eHealth solutions and how those features correspond to specific legal obligations since the important element is the general objectives pursued.

40 Norway has not created a market for alternative solutions to its national eHealth, instead it is taking and maintaining control of these solutions. To the extent that competition exists, it appears to be more of a complementary nature, or a remnant from a time predating the roll-out of the respective eHealth solution.

41 As regards the operations of the various registers, ESA notes that, according to case law, the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings to disclose such data falls within the exercise of public powers and, consequently, ESA considers such activity does not constitute an economic activity.

42 With regard to the support services, ESA observes that, according to case law, even activities that by themselves could be considered to be of an economic nature, but

which are carried out merely for the purposes of providing another non-economic service, are not of an economic nature.

43 In conclusion, ESA considers that NHN and NDE, insofar as they provide the eHealth solutions in accordance with the current organisation of the solidarity-based Norwegian health sector, and provide various support services and operate registers on behalf of the State do not carry out economic activities. On that basis, ESA considers that the measures do not constitute State aid within the meaning of Article 61(1) EEA.

V Procedure and forms of order sought by the parties

44 On 26 November 2019, Abelia and WTW lodged an application ("the Application") pursuant to the second paragraph of Article 36 SCA seeking the annulment of the contested decision.

45 The applicants, Abelia and WTW ("the Applicants"), request the Court to:

> *(i) annul Decision No 57/19/COL of 10 July 2019 of the EFTA Surveillance Authority;*
>
> *(ii) order the EFTA Surveillance Authority to pay the costs of the proceedings.*

46 On 3 December 2019, ESA requested a two-week extension of the deadline to lodge a statement of defence ("the Defence") from 27 January 2020 to 10 February 2020. On 4 December 2019, the President granted ESA's request for an extension and set the deadline for the Defence to 3 February 2020 pursuant to Article 35(2) of the Rules of Procedure ("RoP").

47 On 31 January 2020, ESA submitted its Defence pursuant to Article 35 RoP, which was registered at the Court on 3 February 2020. ESA requests the Court to:

> *(i) dismiss the Application as inadmissible or, in the alternative, as unfounded;*
>
> *(ii) order the Applicants to bear the costs of the proceedings.*

48 On 3 February 2020, the Applicants were served with the Defence. The President set 3 March 2020 as the deadline for the Applicants' reply ("Reply") to be submitted.

49 On 3 March 2020, Abelia and WTW submitted their Reply. In their Reply, the Applicants requested the Court, pursuant to Article 49(3)(d) RoP, to instruct ESA to disclose certain documents referred to in the Defence to both the Court and the Applicants. With reference to Article 49(4) RoP, the Court invited ESA to submit its observations on this request by 11 March 2020.

50 On 10 March 2020, ESA replied to the request for disclosure of certain documents by stating that subject to the result of an ongoing verification of confidentiality it had no objection to disclosing the documents in question. ESA stated that it would submit the documents, if necessary in non-confidential form, together with its rejoinder ("Rejoinder"), ensuring that should non-confidential versions be required, the Court would also receive the original confidential versions.

51 On 19 March 2020, the Court decided, due to the outbreak of COVID-19 and the unprecedented and extraordinary public health crisis, to extend the deadline for written observations by one month, setting a deadline of 4 May 2020.

52 On 1 April 2020, ESA submitted its Rejoinder together with the documents it had been requested to disclose.

53 On 3 May 2020, the European Commission ("the Commission") submitted written observations pursuant to Article 20 of Protocol 5 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("the Statute"). On 4 May 2020, the Norwegian Government submitted written observations pursuant to Article 20 of the Statute. The parties presented oral argument and answered questions put to them by the Court at the remote hearing on 7 July 2020.

54 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

VI Findings of the Court

Admissibility

55 ESA submits that the Application is defective since it does not contain the Applicants' addresses.

56 Article 19 of the Statute, as implemented in Article 33(1)(a) RoP, provides that an application to the Court shall contain, inter alia, the name and address of the applicant.

57 The Application in the present case states that Abelia is established in Oslo, and that WTW is established in Tiller, Norway. The Applicants' complete addresses are included in their certificates of incorporation attached to the application. Thus, the irregularities are not so substantial as to make the application formally inadmissible (see Case E-1/17 *Konkurrenten.no AS* v *ESA* [2017] EFTA Ct. Rep. 989, paragraph 39). Consequently, the Application cannot be held inadmissible on this basis.

Legal standing pursuant to Article 36 SCA

58 The contested decision refers to Article 4(2) of Part II of Protocol 3 to the SCA. Pursuant to that provision, if ESA after a preliminary examination finds that the notified measure does not constitute aid, it shall record that finding by way of a decision. Pursuant to the second paragraph of Article 36 SCA, natural or legal persons may institute proceedings against a decision addressed to another person if the decision is of direct and individual concern to them. Since the contested decision was addressed to Norway, it must be considered whether it is of individual and direct concern to the Applicants (see Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 69, and case law cited).

59 Persons other than those to whom a decision is addressed may only claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see *Abelia* v *ESA*, cited above, paragraph 70, and case law cited).

60 The purpose of the preliminary examination is to enable ESA to form a first opinion on the existence of State aid, and if aid exists, on its partial or complete compatibility with the functioning of the EEA Agreement (see *Abelia* v *ESA*, cited above, paragraph 72). At the end of the preliminary examination, ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the measure under consideration does not constitute State aid, unless it also overcomes all doubts or difficulties concerning the measure's compatibility with the EEA Agreement, even if it were State aid (see *Abelia* v *ESA*, cited above, paragraph 75, and case law cited).

61 In addition, a decision made pursuant to Article 4(2) of Part II of Protocol 3 to the SCA is by implication also a refusal to initiate the formal investigation pursuant to Article 1(2) of Part I of Protocol 3 to the SCA (see *Abelia* v *ESA*, cited above, paragraphs 72 and 73, and case law cited).

62 The formal investigation procedure is designed to enable ESA to be fully informed about all the facts of the case. Thus, where ESA decides not to initiate the formal investigation procedure, those intended to benefit from the procedural guarantees under the formal investigation, the EFTA State concerned and other interested parties (collectively referred to in Article 1(2) of Part I of Protocol 3 to the SCA as parties concerned), may secure compliance therewith only if they are able to challenge ESA's decision before the Court (see *Abelia* v *ESA*, cited above, paragraphs 76 to 78, and case law cited).

63 An action for the annulment of a decision adopted in accordance with Article 4(2) of Part II of Protocol 3 to the SCA brought by an interested party within the meaning of the formal investigation procedure is admissible where the party seeks, by instituting proceedings, to safeguard the procedural rights available (see *Abelia* v *ESA*, cited above, paragraph 79, and case law cited).

64 Pursuant to Article 1(h) of Part II of Protocol 3 to the SCA, an "interested party" means, inter alia, any person, undertaking or association of undertakings whose interests might be affected by the granting of State aid, in particular competing undertakings and trade associations. In other words, that term covers an indeterminate group of persons (see *Abelia* v *ESA*, cited above, paragraph 80, and case law cited). In addition, an undertaking which is not a direct competitor of the beneficiary of the aid may be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid (see *Abelia* v *ESA*, cited above, paragraph 81, and case law cited).

65 For that purpose, it is necessary for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation. This requirement entails that the undertaking in question is able to show a legitimate interest in the implementation or non-implementation of the alleged aid measures at issue or, if those measures have already been granted, in their maintenance. Such a legitimate interest may consist, inter alia, in the protection of its competitive position, insofar as that position would be adversely affected by the aid measures (see *Abelia* v *ESA*, cited above, paragraph 82, and case law cited).

66 The competitive position of an undertaking may be adversely affected not only if the undertaking and the aid beneficiary are competitors on the output product market but also if they are rival purchasers of the same factors of production. That is the case where it cannot be ruled out that the aid has resulted in negative effects for the undertaking in question due, inter alia, to an increase of the price of necessary factors of production (see *Abelia* v *ESA*, cited above, paragraph 83, and case law cited).

67 As regards the scope of judicial review, it must be borne in mind that it is not for the Court, when considering whether the application is admissible, to make a definitive finding on the competitive relationship between an applicant association's members and the alleged aid recipient. It is for the applicant association alone to adduce pertinent reasons to show that the alleged aid may adversely affect the legitimate interests of one or more of its members by seriously jeopardising their position on the market in question (see *Abelia* v *ESA*, cited above, paragraph 84, and case law cited).

68 However, if an applicant calls into question the merits of the decision not to initiate the formal investigation procedure, the mere fact that it is an interested party cannot suffice for the action to be considered admissible. An applicant that challenges the merits of a decision not to open the formal investigation procedure is individually concerned by that decision only if its market position is substantially affected by the State aid in question (see Case E-1/13 *Míla* v *ESA* [2014] EFTA Ct. Rep. 4, paragraph 55).

69 There are two applicants in the present case. Abelia is a trade and employers association within NHO. Its members deliver e-prescription solutions, electronic health record systems, IT infrastructure, health technology in primary care and citizen-orientated health solutions.

70 In the Application, Abelia submits that it intends to protect the interests of its member companies, including WTW, the other applicant. In their Reply, the Applicants submit that Abelia has other members, specifically DIPS and Helseinformatikk, which are in a relationship of rivalry with the beneficiaries of the alleged aid at issue in the contested decision. In its Rejoinder, ESA questions whether an association may have standing, when the identified members represent a negligible number of the total and very diversified membership base and when there is no evidence before the Court which would explain which particular interest the association seeks to protect. ESA further submits that neither DIPS nor Helseinformatikk have standing to challenge the contested decision.

71 Pursuant to Article 37(2) RoP, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. The Applicants' pleas as regards the *locus standi* of Abelia based on the alleged interests of its members DIPS and Helseinformatikk were raised only in the Reply. Therefore, these pleas must be dismissed as inadmissible.

72 In order for Abelia to demonstrate legal standing it is sufficient that it adduce pertinent reasons to show that the alleged aid may adversely affect the legitimate interests of one or more of its members by seriously jeopardising their position on the market in question. Contrary to ESA's contention, for Abelia as an association to have standing in the present case it is sufficient if its member WTW has standing. This position is unaffected by WTW being an applicant itself; and not simply a member of Abelia, whose interests the association itself seeks to represent on WTW's behalf. In both circumstances, the nature of Abelia's interest in the proceedings as an association is the same as WTW's. It must be noted that Abelia does not seek to rely on a particular interest in acting, such as its negotiating position being affected by the measure which it seeks to have annulled (see Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 52, and compare the judgment in *CETM* v *Commission*, T-55/99, EU:T:2000:223, paragraph 23, and case law cited).

73 WTW is a software developer established in Norway. It has developed and provides the product "HelseRespons" for the eHealth sector. HelseRespons, which has been on the market since 2005, is an IT service and platform that enables contacts and secure communications between healthcare providers and patients in Norway. The Applicants have submitted that HelseRespons' main competitor is the publicly-funded *Helsenorge.no* whose services are interchangeable. Both systems enable correspondence between doctors and patients, the booking of appointments, the renewal of prescriptions, messaging/notification services, patient portal etc., and share the same customer base across Norway. HelseRespons accounts for a substantial part of WTW's annual revenue.

74 The Applicants submit that the scheme notified by the Norwegian Government can be described as a forced co-financing by the municipalities. Genuine market alternatives exist not just on a local/regional or national scale, but also from foreign

suppliers with more innovative and productive eHealth solutions. The Applicants submit that for WTW the consequences of upholding the contested decision are severe. Some of WTW's customers have switched to the competing public eHealth solutions since they were introduced. The Applicants further submit that the fact that some of the features available on the market are subject to a small fee whereas the public services are free does not alter the fact that there is a state of competition.

75 WTW has not established that its position on the market may be significantly affected by the alleged State aid to which the contested decision relates. Consequently, it lacks legal standing to challenge the merits of the contested decision. However, in its capacity as a competitor of *Helsenorge.no* on the relevant market, WTW has the status of an interested party. Accordingly, WTW and hence Abelia have legal standing to challenge the contested decision insofar as WTW seeks to safeguard its procedural rights.

76 It must therefore be verified whether the Applicants, in bringing the action, are in fact seeking to defend their procedural rights, that is, whether they have raised a plea alleging the existence of doubts or serious difficulties.

77 It is clear from the submissions that the Applicants have raised a plea alleging the existence of doubts or serious difficulties. Thus, the Application is admissible since it seeks to defend their procedural rights.

78 It is settled case law that where an applicant has raised a plea alleging the existence of doubts, the Court may examine arguments that the applicant has put forward regarding the merits, in order to ascertain whether those arguments are capable of establishing that the plea is well founded. The use of such arguments does not change the subject matter of the action or the conditions for its admissibility (see *Míla* v *ESA*, cited above, paragraph 61, and case law cited).

Substance

79 ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the measure under consideration does not constitute State aid for the purposes of Article 61(1) EEA, unless it also overcomes all doubts or difficulties concerning the measure's compatibility with the EEA Agreement, even if it were State aid.

80 In the contested decision, ESA concluded that NHN and NDE, when providing the eHealth solutions, support services and operating registers, do not carry out economic activities and are thus not considered "undertakings" within the meaning of Article 61(1) EEA. On that basis, ESA considered that the measures at issue do not constitute State aid within the meaning of Article 61(1) EEA.

81 The notion of doubts or serious difficulties is an objective one. Their existence may appear in the circumstances in which the contested measure was adopted and its content. The Court must compare the assessments that ESA relied on in the decision to close the preliminary investigation procedure with regard to facts and

law with the information available to ESA when it took the decision that the alleged unlawful aid did not constitute State aid (see, inter alia, *Míla* v *ESA*, cited above, paragraph 89, and case law cited).

82 Judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond consideration of whether or not there has been a manifest error of assessment (see *Míla* v *ESA*, cited above, paragraph 90, and case law cited). Thus, if the assessment carried out by ESA during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see *Míla* v *ESA*, cited above, paragraph 91, and case law cited).

83 The applicant bears the burden of proving the existence of doubts or serious difficulties. It may discharge that burden of proof by reference to a body of consistent evidence concerning the circumstances and the length of the preliminary examination procedure and the content of the contested decision (see *Míla* v *ESA*, cited above, paragraph 93, and case law cited).

84 The Applicants have submitted, inter alia, that the length of the proceedings and comprehensive discussions in this matter indicated the existence of doubts which should have prompted ESA to initiate the formal investigation procedure. In response, ESA has submitted that the pre-notification procedure in the case at hand was relatively short, lasting less than four months from the time of receiving the first draft pre-notification on 7 December 2018.

85 However, as the Court has previously held, as to the duration of the preliminary examination by ESA, in conjunction with requests for additional information, this may be evidence, but not proof, that the conditions are not fulfilled for basing a decision on the basis of the preliminary examination (see Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraph 83).

86 The legality of the contested decision depends on whether the assessment of the information and evidence ESA had at its disposal during the preliminary examination should objectively have led to doubts as to whether NHN and NDE when providing the eHealth solutions, support services and operating registers, do not carry out economic activities and are thus not to be considered "undertakings" within the meaning of Article 61(1) EEA, and consequently that the measures at issue do not constitute State aid within the meaning of the same provision.

87 Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed (see *Private Barnehagers Landsforbund* v *ESA*, cited above, paragraph 78, and Case E-8/00 *Landsorganisasjonen i Norge* v *Kommunenes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 62, and case law cited).

88 When the nature of an activity carried out by a public entity is assessed with regard to the State aid rules, it cannot matter whether the activity might, in principle, be

pursued by a private operator. Such an interpretation would basically bring any activity of the state not consisting in an exercise of public authority under the notion of economic activity. It follows that the specific circumstances under which the activity is performed have to be taken into account in order to assess whether NHN and NDE when providing the eHealth solutions, support services and operating registers, are providing a service as an economic activity or whether they are exercising their powers in order to fulfil their duties towards their population (see *Private Barnehagers Landsforbund* v *ESA*, cited above, paragraph 80).

89 In that regard, it must be verified whether those activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of public powers or whether they have an economic character which justifies the application of the EEA competition rules (compare the judgment in *Aanbestedingskalender and Others* v *Commission*, C-687/17 P, EU:C:2019:932, paragraphs 15 and 16).

90 Insofar as a public entity carries on an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking. However, if that same economic activity cannot be separated from other activities connected with the exercise of public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers (compare the judgment in *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 38).

91 In the contested decision, ESA found that public financing, including, in particular, block grants from the state budget, account for more than 85 per cent of total health expenditure, and comprise financing from the central and local governments and the National Insurance Scheme. ESA further found that the Norwegian health system is founded upon the principle of solidarity, entailing that the individual patient’s use of public healthcare services has only a negligible bearing on that patient’s contribution to the system's financing, which is ensured through general tax revenue.

92 It is evident that the Health Network, *Helsenorge.no*, e-prescription and the SCR form part of a national eHealth solution provided by NHN, a public corporation charged with the provision of nationwide eHealth solutions in Norway, and NDE as a developing part of the Norwegian healthcare system. These different activities are based on, and are intended to further the objectives of the relevant Norwegian and EEA legislation referred to in the contested decision. In so doing, NHN and NDE are exercising their powers in order to fulfil their duties towards the population of Norway in the field of public health.

93 As regards the operation of different health registers by NHN, these may be broadly grouped into three types: administrative health registers, quality of diagnosis and treatment registers, and national health registers. The collection of data by an entity from undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and powers of enforcement related thereto, falls within the exercise of public powers. As a result, such activity does not constitute

an economic activity (compare the judgment in *Compass-Datenbank*, cited above, paragraph 40).

94 In the contested decision ESA states that NHN operates these three types of registers for Norwegian Government agencies and regional health authorities. NHN's costs stemming from the operation of these registers are covered from the state budget. Consequently, the Court finds that NHN is exercising its powers in order to fulfil its duties towards the population of Norway in the field of public health and public administration.

95 As regards the support services provided by NHN in the areas of procurement, information and communication technologies, and archiving, the contested decision states that NHN cannot and does not offer these services on the market. These services are provided by NHN only within the Norwegian state healthcare system.

96 The Court observes that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (compare the judgment in *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 36). However, where an organisation provides services not for the purpose of offering goods and services as part of an economic activity, but in order for them to be used in the context of a different activity, such as for example one of a purely social nature, it does not act as an undertaking. The nature of the provision of services must be determined according to whether or not the subsequent use of the services provided amounts to an economic activity (compare the judgments in *FENIN*, T-319/99, EU:T:2003:50, paragraphs 36 and 37, and *FENIN*, C-205/03, EU:C:2006:453, paragraphs 25 and 26).

97 Consequently, these support services offered by NHN which are not provided on the market, but only within the Norwegian state healthcare system, do not amount to an economic activity.

98 Accordingly, ESA did not need to entertain doubts as to whether NHN and NDE might constitute undertakings within the meaning of Article 61(1) EEA when providing these eHealth solutions, support services and operating registers. This finding was sufficient to exclude the existence of State aid in the measures at stake. Therefore, the pleas as to whether ESA should have entertained doubts in relation to facts on which the contested decision is based, to the application of Article 36 EEA in a case pending before ESA in a State aid procedure, and to ESA's obligation, pursuant to Article 16 SCA, to properly reason a decision cannot be material for the outcome of this case. Consequently, the Application must be dismissed as unfounded.

VII Costs

99 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has

requested that the Applicants be ordered to pay the costs and the latter have been unsuccessful, they must be ordered to pay the costs. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as unfounded.**

2. **Orders the applicants to pay the costs incurred by the EFTA Surveillance Authority.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 17 November 2020.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President