JUDGMENT OF THE COURT

15 December 2016*

(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,

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;

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

- 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	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

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 Q-dairies 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 Q-dairies 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 Q-dairies' 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 *Pedicel*, 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