E-1/22-26

REPORT FOR THE HEARING

in Case E-1/22

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

G. Modiano Limited, established in London, England,

Standard Wool (UK) Limited, established in Dewsbury, England,

and

EFTA Surveillance Authority,

seeking the annulment of the EFTA Surveillance Authority's Decision in Case No 84045 of 9 November 2021 closing a complaint case concerning the Norwegian Wool Subsidy Scheme.

I Introduction

1. G. Modiano Limited ("Modiano") is a private limited company established in England and Wales. Modiano's principal activity is the import, export, processing and dealing in sheep's wool. Standard Wool (UK) Limited ("Standard Wool") is a private limited company incorporated in England and Wales. Standard Wool is an international wool processor and trader, with a particular focus on early-stage wool processing.

2. The case at hand concerns aid granted annually to Norwegian sheep farmers pursuant to the Norwegian Wool Subsidy Scheme ("the Scheme"), initially established in the 1950´s and adjusted to the present system through the Regulation on aid to Norwegian wool of 24 August 1993 (*forskrift av 24. august 1993 nr. 827 om tilskott til norsk ull*)(the "1993 Regulation").

3. The EFTA Surveillance Authority's decision in Case No 84045 of 9 November 2021 (the "Contested Decision") concerns alleged state aid to the Norwegian wool industry through the Scheme. In the Contested Decision, the EFTA Surveillance Authority ("ESA") concluded that the Scheme constitutes existing aid within the meaning of Article 1(b)(i) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

4. In their application, Modiano and Standard Wool ("the Applicants") seek the annulment of the Contested Decision. The application is based on four pleas. First, that ESA erred in law and erred in its assessment when concluding that the subsidy system constitutes existing aid. Second, that ESA failed to take into account all relevant information submitted by the Applicants in the complaint and their letter to ESA of 25 October 2021 and breached its duty to state reasons as the decision was not sufficiently reasoned. Third, that ESA failed to investigate and assess to what extent Fatland Ull and Norilia operating wool collecting stations received unlawful aid and, fourth, that ESA failed to investigate and assess adverse competitive effects of the Scheme.

II Legal background

EEA law

5. Article 6 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.*

6. Article 61 EEA reads, in extract:

> *1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.*
>
> ...

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

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

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

7. Article 62 EEA reads:

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

8. Article 3(2) of the SCA reads:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European

Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

9. Article 16 SCA reads:

Decision of the EFTA Surveillance Authority shall state the reasons on which they are based.

10. The second paragraph of Article 36 SCA reads:

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

11. Article 1 of Part I of Protocol 3 to the SCA reads, in extract:

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 any 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.

12. Article 1 of Part II of Protocol 3 to the SCA reads, in extract:

For the purpose of this Chapter:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(b) "existing aid" shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1(2) subparagraph 3, by the EFTA States.

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Chapter or prior to this Chapter but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15 of this Chapter;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article 1(3) in Part I;

...

13. The first paragraph of Article 1 of Protocol 9 to the SCA reads:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall, notwithstanding the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union and the EEA Agreement, for the duration of the transition period, continue to treat the United Kingdom as if it were a Member State of the European Union for the purposes of the EEA Agreement, its protocols and annexes.

14. Article 39(1) of the EFTA Court Rules of Procedure ("Rules of Procedure" or "RoP") reads, in extract:

1. Any procedural time-limit prescribed by the EEA Agreement, the SCA, the Statute, or these Rules shall be calculated as follows:

(a) where a time-limit expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes places, the day during which that event occurs or that action takes place shall not be counted as falling within the time-limit in question;

...

(c) a time-limit expressed in months ... shall end with the expiry of whichever day in the last month ... falls on the same date as the day during which the event or action from which the time-limit is to be calculated occurred or took place. ...

15. Article 39(2) RoP reads:

If the time-limit would otherwise end on a Saturday, Sunday, or an official holiday, it shall be extended until the end of the first following working day.

III Facts

Background

16. Modiano is a private limited company established in England and Wales. Its principal activity is the import, export, processing and dealing in sheep's wool.

17. Modiano is based in the United Kingdom and has wool-buying/sourcing subsidiaries in Australia, New Zealand and South Africa, where Modiano buys greasy wool, mainly at auction. Modiano also buys wool in Europe and South America. Modiano also has sales support offices in Turkey, China and Italy.

18. Modiano has wool buying/sourcing subsidiaries and sales support offices around the world, but it also processes British wool purchased at the British Wool Marketing Board auctions. Modiano also has a subsidiary in the Czech Republic with a processing mill where it processes greasy wool resulting in wool tops, which is the raw material for making worsted wool yarn to sell to spinners. Modiano does not trade in scoured wools. Most of Modiano's wools tops are sold to EU/EEA clients.

19. Standard Wool is a private limited company incorporated in England and Wales. Standard Wool is an international wool processor and trader, with a particular focus on early-stage wool processing and trading.

20. Standard Wool buys and sells raw sheep's wool, sourced primarily directly from farmers in Chile through its subsidiary in Chile. Standard Wool also has a wool collection depot in Ireland, through which it purchases and handles/grades raw wool purchased directly from farmers in Ireland. Standard Wool also purchases wool through exporters from auction houses in the United Kingdom, the rest of Europe (excluding Norway), the Middle East, Far East, New Zealand, Australia, South Africa and South America.

21. Standard Wool also owns Thomas Chadwick & Sons ("Chadwick") which operates a processing mill in Bradford, England. The only other wool scouring mill in the United Kingdom is owned by Curtis Wool, which is a sister company of Norilia AS ("Norilia"), the largest buyer and processor in Norway. Standard Wool trades in greasy wool, scoured wool and wool tops.

22. The objective of the Scheme, initially established in the 1950´s and adjusted to the present system through the Regulation on aid to Norwegian wool of 24 August 1993, is to promote sheep farming as an important part of Norwegian agriculture, and to promote the production of quality wool. According to the documents submitted to the Court, the aggregated amount of aid/subsidies for the years 1993 to 2019 is in excess of NOK 4 billion. The annual amounts granted have varied from NOK 243 million to NOK 122 million. According to the Applicants, the aid is given as direct subsidies through Fatland Ull and Norilia ("the Collecting Stations").

23. In paragraphs 12 to 15 of its written observations, the Norwegian Government explains the manner in which the subsidy is distributed to the sheep farmers (and the role of the wool collection stations) as follows:

> "The wool subsidy is granted by the Norwegian Agricultural Agency, and the distribution of subsidy may be carried out in two different manners – either from the Agricultural Agency directly to the wool producers or by use of the wool collection stations acting as intermediaries.[1] When the subsidy is distributed by the wool collection stations acting as intermediaries, this is carried out when these stations collect and purchase the wool from the wool producers. This provides for a suitable and cost-efficient system.[2] In practical terms, the wool collection station would pay a price for the wool (in its capacity as a purchaser) and would also distribute the subsidy which the producer is entitled to (in its capacity as a subsidy distributor). In the settlement between the wool collection station and the wool producers, it is clearly set out in the documentation what is the compensation for the wool purchase and what is the wool subsidy. The wool producer may also apply for the subsidy to be granted directly from the Agricultural Agency. This is a consequence of the fact that the wool collection stations only act as intermediaries with regard to the subsidy. This could be practical for instance in a case where the wool producer wishes to sell wool to someone else then the wool collection stations (for instance the Applicants). Today, there are two companies running wool collection stations in Norway – namely Fatland Ull and Norilia. …"

24. Norilia is owned by the cooperative Nortura SA ("Nortura"), which also has a controlling stake in the British company Curtis Wool Direct Holdings Limited ("Curtis Wool"). Norilia has a total of eight wool stations in year-round operation which receive, classify and resell Norwegian wool.

25. Fatland Ull is owned by Fatland AS (95% share), and has three wool stations in operation which receive, classify and resell Norwegian wool.

26. At the wool stations, all wool delivered is classified according to the Norwegian wool standard (*Norsk ullstandard*). The quality of the wool delivered determines the level of the grant/payment the sheep farmers receive from the wool stations.

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[1] Reference is made to Section 3 of Circular 2021/40 ("Commentaries to the general rules on price subsidies"), which reads: "Payment of price subsidy can be carried out in two different manners; either, following an application, from the Agriculture Agency directly to the subsidy recipient or from the Agriculture Agency to the recipient via an intermediary – unofficial translation by the Norwegian Government). See https://www.landbruksdirektoratet.no/nb/industri-og-handel/pristilskudd-og-avgifter/kommentarer-til-generelle-bestemmelser-for-pristilskudd/3.soknad-rapportering-og-utbetaling

[2] Reference is made to Section 1 of the Regulation concerning distribution of subsidies in the agricultural sector (FOR-2008-12-19-1491).

27. Norwegian sheep farmers are granted aid annually pursuant to the Scheme which dates back to the 1950s when Norwegian authorities established a system of price guarantees for wool. The price guarantee system was replaced in 1992 by the current Scheme which was set out in the "1993 Regulation".

28. The 1993 Regulation was replaced by the Regulation of 12 June 1997 on grants to Norwegian wool ("1997 Regulation"). According to the Norwegian authorities, this was an amendment of a purely formal nature. It entailed certain purely linguistic amendments, and one purely formal amendment. The 1997 Regulation did not amend the system as set out in the 1993 Regulation.

29. The 1997 Regulation was amended on 18 July 2000 and again on 3 July 2002. According to the Norwegian authorities, the reasons for the amendments were fourfold. First, due to removal of an investment aid provision. Second, the Council for Wool Trade, which was responsible for the differentiation of the average rate and authorisation of wool stations as grant intermediaries, was discontinued, and its tasks transferred to the Norwegian Agricultural Agency. Third, the provisions for payments and the payment control mechanism were simplified. Fourth, linguistic changes were made to the provisions for repayment of wrongful grants.

30. On 23 August 2007, a new circular (42/07) on the Norwegian wool standard was issued by the Norwegian Agricultural Agency ("2007 Circular"). The 2007 Circular complemented the 1997 Regulation. The 2007 Circular introduced certain criteria to make the control system for wool quality less discretionary, and instead based on measurable and verifiable criteria. The adjustments did not entail any change in which wool qualities were included in the Scheme.

31. On 19 December 2008, the Norwegian authorities introduced a general regulation on agricultural subsidies in Norway ("the 2008 General Regulation") which repealed the 1997 Regulation. The 2008 General Regulation is the current legal framework for the Scheme

32. By the 2008 General Regulation, detailed requirements for intermediaries of grants were replaced by more general requirements, such as the need to hold permits and registration necessary for the business, and to have a suitable production apparatus. The Norwegian Agricultural Agency was authorised to enact more detailed provisions related to the administration of the various subsidy systems.

33. The 2008 General Regulation is supplemented by the Agricultural Agreement.[3] Further details of the system are set out in circulars issued by the Norwegian Agricultural Agency. Following the introduction of the 2008 General Regulation, most substantive regulations on wool subsidies were removed and replaced with a Circular issued by the Norwegian Agricultural Agency. As opposed to the previous system and regulations concerning wool subsidies, this current basis relies on supplementary circular letters and the outcome of annual agricultural negotiations (which result in the annual Agricultural Agreement).

34. In 2017, the five poorest wool qualities were removed from the Scheme. According to the Norwegian authorities, this change was adopted in the agricultural negotiations in 2016. The change entered into force on 1 September 2016. As a result of this change, the grants for the remaining 11 classes/grades were increased.

35. A meeting took place between the representatives of the Applicants and ESA on 30 April 2019. On 6 September 2019, the Applicants submitted a complaint to ESA concerning the Scheme, alleging that the primary aid beneficiaries of the Scheme were Norwegian sheep farmers, and that the system was incompatible with Article 61 of the EEA Agreement. Furthermore, the Applicants maintained in their complaint that the changes made to the legal framework to the Scheme – from the latest 2008 onwards – altered the legal basis for the Scheme in such a way that it constituted "new aid".

36. On 26 May 2021, ESA sent a letter to the Applicants with its preliminary assessment that any aid granted on the basis of the Scheme would constitute *existing aid* as the Scheme had not been substantively altered to the effect of having turned into new aid. Furthermore, ESA took the view that the Norwegian sheep farmers as well as the Collecting Stations in Norway had not received unlawful state aid. This is because the subsidies, if they constitute state aid within the meaning of Article 61(1) EEA, would be granted on the basis of an existing aid scheme and constitute existing aid within the meaning of Article 1(b)(i) of Part II of Protocol 3 to the SCA.

37. On 22 October 2021, ESA informed the Applicants of the closure of the case, based on the assessment that the Scheme constituted existing aid.

The Contested Decision

38. On 25 October 2021, the Applicants provided observations on ESA's letter of 26 May 2021. In their letter of 25 October 2021, the Applicants submitted that it was their firm opinion that the Norwegian Wool Subsidy Scheme warrants a review by ESA, as the

[3] As stated in the defence by ESA, the Agricultural Agreement (Jordbruksoppgjøret) is the main framework for budgetary aid granted to Norwegian farmers, with the objectives to achieve the agricultural policy set by the Norwegian Parliament. The Agricultural Agreement is subject to annual negotiations between the Norwegian Government and the two farmers' organisations. The budget for the agreement is subject to Parliamentary approval, like other budgetary decisions made by the Parliament.

aid scheme provided the Norwegian duopoly of Norilia and Fatland a decisive, and unfair, competitive advantage, while at the same time it seemingly does not have any measurable effect on the quality of Norwegian wool.

39. By letter of 9 November 2021, ESA stated that it had decided to close the Applicants' complaint case regarding the Norwegian Wool Subsidy Scheme, based on the assessment that the Scheme constituted existing aid ("the Contested Decision").

40. In its decision, ESA noted that any aid involved would be existing aid in nature. ESA further held that the concerns raised by the Applicants had not indicated that the Scheme had changed to the point of being capable of turning an existing aid scheme into new aid.

41. In its assessment on the legislative amendments, ESA referred to its letter of 26 May 2021, and noted that purely administrative changes are not capable of turning an existing aid scheme into new aid. In ESA's view, the introduction of the 2008 General Regulation, supplemented by the Agricultural Agreement, coupled with circulars and an unchanged systematic administrative practice, had not had the effect of turning the system into new aid, as the system, its administrative practice and its substance remained unchanged.

Brexit

42. On 31 January 2020, the United Kingdom withdrew from the European Union ("the EU"), the EEA Agreement and other agreements applicable between the United Kingdom and Iceland, Liechtenstein and Norway by virtue of the United Kingdom's membership of the EU. Article 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement") provided for a transition period from 1 February 2020 to 31 December 2020.

43. Article 129(1) of the Withdrawal Agreement clarifies that during the transition period the United Kingdom was bound by the obligations stemming from the international agreements concluded by the EU, by Member States acting on its behalf, or by the EU and its Member States acting jointly, which includes the EEA Agreement. The EEA EFTA States agreed to treat the United Kingdom as an EU Member State during the transition period. The rights and obligations contained in the EEA Agreement continued to apply between the United Kingdom and the EEA EFTA States until 31 December 2020. From 1 January 2021, the EEA Agreement no longer applies to the United Kingdom.

IV Procedure and forms of order sought

44. The Applicants lodged the present action by application registered at the Court on 10 January 2022 and request that the Court:

1. *Declare the application admissible and well founded;*

2. *Annul the contested decision;*

3. *Declare that the Subsidy Scheme is new aid and that the Collecting Stations have been receiving unlawful aid at least since 2002 and ask ESA to quantify the amount of unlawful aid;*

4. *Order ESA to pay the costs of the proceedings; and*

5. *Take such other or further measures as justice may require.*

45. On 21 March 2022, ESA lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant Article 133(1) RoP.

46. ESA requests the Court to:

1. *Dismiss the Application as inadmissible, and*

2. *order the Applicants to pay the costs of the proceedings.*

47. On 22 April 2022, the Applicants submitted, pursuant to Article 133(3) RoP, a Statement on ESA's application for a decision on admissibility. The Statement was registered at the Court the same day.

48. By decision of 26 April 2022, the Court decided, pursuant to Article 133(5) RoP, to reserve its decision on the ESA's application for the final judgment.

49. On 25 May 2022, ESA submitted a Statement of defence pursuant to Article 133(6) RoP. The defence was entered in the register of the Court on that day.

50. In the defence, ESA requests the Court to:

1. *dismiss the Application as inadmissible and in the alternative unfounded;*

2. *order the Applicants to pay the costs of the proceedings.*

51. On 27 June 2022, the Applicants submitted their reply. On 26 July 2022, ESA submitted its rejoinder.

52. On 29 July 2022, the Norwegian Government submitted written observations pursuant to Article 20 of the Statute.

V Written procedure before the Court

53. Pleadings have been received from:

- the Applicants, represented by Karl O. Wallevik, Charles Whiddington and Zanda Romata;

- the Defendant, represented by Michael Sánchez Rydelski, Claire Simpson and Kyrre Isaksen, acting as Agents.

54. Pursuant to Article 20 of the Statute, written observations have been received from:

- The Norwegian Government, represented by Torje Sunde and Fredrik Bergsjø acting as Agents.

VI Summary of pleas in law and arguments submitted

Admissibility

Applicants

55. The Applicants submit that they have standing to challenge the Contested Decision under Article 36 SCA as the decision was directed at the Applicants and it is of direct and individual concern to them.

56. The Applicants first submit that the Contested Decision is of direct concern to them as it directly affects their legal situation[4] on the wool market, for example in Norway. In the absence of the Scheme being operated in the manner complained of, the Applicants would compete with the Collecting Stations for obtaining Norwegian wool at market value. The Applicants note that aid under the Scheme is distributed to sheep farmers by the Collecting Stations as part of the final price for their wool. The Collecting Stations receive grant funds for the Scheme before receiving the wool and calculating the level of aid being paid to farmers. Accordingly, the Collecting Stations are also beneficiaries of the Scheme. The Applicants thus contend that, as a direct result of the Scheme, they are prevented from competing on the upstream wool market in Norway (i.e. the Scheme acts as a barrier to entry).

57. Furthermore, the Applicants maintain that the anticompetitive advantages granted to the Collecting Stations as a result of the Scheme affect the competitive position of the Applicants in the EU/EEA and the United Kingdom downstream market. For example, the Applicants are not able to operate with the same profit margins as the Collecting Stations

[4] Reference is made to the judgment in *Commission* v *Ente per le Ville Vesuviane*, C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 45.

(including their group companies like Curtis Wool). As the Collecting Stations purchase wool from the farmers at prices close to the grants under the Scheme, their profit margins are not comparable to those of the Applicants due to this low-cost base. The low subsidised cost for Norwegian wool allows the Collecting Stations to engage in the intra-group transfers of the wool products, which the Applicants believe to be below the market price. Such anticompetitive behaviour by the beneficiaries of the Scheme substantially affects the Applicants' market position.

58. As regards the requirement for individual concern, the Applicants note that they participated in an active manner in the administrative procedure leading to the Contested Decision, which is a factor regularly taken into account by case law in competition matters in order to establish the admissibility of the action.[5] Further, the Applicants contend that case law of the EFTA Court establishes that in the event of an ESA decision on the validity of a state aid scheme without the opening of a formal investigation, individual concern can be established by showing that an applicant is a concerned party.[6] Moreover, the case law also establishes that parties "concerned" include not only the undertaking or undertakings benefitting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of an aid, in particular, competing undertakings and trade associations.[7]

59. In conclusion on this point, the Applicants submit that the Scheme prevents them from sourcing Norwegian wool directly from farmers in Norway, thus preventing them from competing with the Collecting Stations in Norway, in addition to which the Applicants face unfair competition from the Collecting Stations both in the upstream and downstream wool markets.

60. In their reply, the Applicants submit that the Contested Decision is legally binding and is "*capable of affecting the interests of the applicant by bringing about a distinct change in his legal position*".[8] Thus, the Applicants maintain that they have an interest in obtaining the relief sought, i.e. the annulment of the Contested Decision. The Applicants submit that they have provided ample evidence showing that these proceedings have not been brought just for the sake of litigation or to establish a point that is purely abstract or academic, but that this action, if successful, would lead to a change in the Applicants' legal position. An annulment would be a step toward removing unfair competition in sourcing Norwegian wool directly from Norwegian farmers and as such would eliminate its adverse effects on the Applicants' legal position.

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5 Reference is made to the judgment in *Cofaz* v *Commission*, 169/84, EU:C:1986:42.

6 Reference is made to Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation* v *EFTA Surveillance Authority* [2003] EFTA Ct. Rep. 52, paragraph 46.

7 Ibid., paragraph 52. Reference is also made to Case E-4/97 *Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 1.

8 Reference is made to the judgment in *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 9.

61. In their reply, the Applicants maintain that as the addressees of the Contested Decision their standing has been established. Further, they reject the interpretation of ESA to the effect that being an addressee of a decision does not suffice to bring an action for annulment and submit that such an interpretation goes against the clear wording of the second paragraph of Article 36 SCA.

62. In terms of how the Applicants are adversely affected by the Scheme, the Applicants add that the Scheme is also jeopardising the future of Chadwick (Standard Wool's United Kingdom scouring operation), which supplies/services many EU-based yarn spinners. If Chadwick were to close and Curtis Wool have the monopoly, it would have significant negative impact on those EU spinners. In addition, the Applicants submit that the Scheme also threatens the viability of the British wool auction system. If that system were to shut down, it would severely impact Modiano's ability to source United Kingdom wool, effectively impacting Modiano's EU clients who buy wool tops made from United Kingdom wool.

63. In relation to ESA's arguments that Article 61(1) EEA no longer applies to the Applicants, the Applicants submit in their reply that ESA's view on the scope of this dispute is unsubstantiated and lacks justification.

64. The Applicants refer to their earlier submissions on why the Scheme has an adverse impact on the Applicants and their subsidiaries as groups and submit that the EU parts of their organisational structure are integral and vital for the Applicants' respective business operations as a whole. Thus, the subject matter of this dispute is not limited to the Applicants' "*inability to buy/trade wool between the UK and Norway*", as suggested by ESA, but concerns the Applicants' inability to compete on the EU and non-EU wool market. The Applicants maintain in their reply that the centre of gravity of the Applicants' commercial interest is not limited to the "*inability to buy/trade wool between the UK and Norway*", and therefore the subject matter does not have such a limited geographical (and jurisdictional) scope.

65. In their reply, the Applicants further contend that ESA's raising of the alleged inapplicability of Article 61(1) EEA to these proceedings looks like a concealed attempt to deprive the Applicants of their fundamental right to an effective remedy. In the Applicants' view, it is clearly established from the facts of the case and legal principles that the EFTA Court is the right forum for judicial review of the Contested Decision and, moreover, the Applicants meet the required standing requirements to bring the application.

66. In their reply, the Applicants add that, at the meeting with ESA on 30 April 2019, the Applicants were in fact encouraged by ESA to file a complaint over the Scheme, and claim that it was stated by ESA that Brexit would not prevent ESA from reviewing the complaint and thereafter investigation of the Scheme. In the event that ESA had informed the Applicants that Brexit was any kind of impediment to the complaint and that the

Applicants would thereafter enjoy no rights (by way, for example of appeal) and effectively be emasculated from participating in the procedure, it would have been highly unlikely that the Applicants would have proceeded with the complaint.

67. In conclusion, the Applicants submit that their respective market positions have been affected as a result of the Scheme, and that they are seeking to defend their procedural rights arising from the fact that ESA failed to open a formal investigation. Thus, the Applicants submit that they have established their standing as interested parties and demonstrated substantial effects on their market position.

ESA

68. ESA submits that the Applicants have not demonstrated that they are substantially affected by the alleged State aid in question. Further, ESA submits that the Applicants have failed to demonstrate that the annulment of the Contested Decision would be capable of affecting their interests by bringing about a distinct change in their legal positions or that it would adversely affect their legal positions by restricting their rights.

69. In addition, ESA submits that being the recipient of a letter from ESA, i.e. the Contested Decision, does not discharge the Applicants from the requirement to substantiate how the Contested Decision is of direct and individual concern to them, nor does it discharge any applicant of their duty properly to fulfil the procedural requirements to bring a case before the EFTA Court as applicant.

70. Further, in its preliminary objection of inadmissibility, ESA submits that Article 61(1) EEA no longer applies to the case and therefore the conditions set out in Article 36 SCA are not met. In ESA's view, the application must be declared inadmissible, because the United Kingdom is a third country in terms of the EEA Agreement and Article 61(1) EEA does not protect undistorted competition and trade between third countries and the Contracting Parties to the EEA Agreement. In light of this, ESA maintains that Article 61(1) EEA was no longer applicable to the Applicants when the Contested Decision was taken or when the application was lodged with the Court in January 2022.

71. According to ESA, the post-Brexit transition period expired on 31 December 2020, after which trade relationships between the United Kingdom and the EEA EFTA States were to be agreed in negotiations between these States and no longer governed by the EEA Agreement. Consequently, Article 61(1) EEA ceased to apply between the EEA EFTA States and the United Kingdom on 1 January 2021, and ESA and the EFTA Court are no longer empowered to apply Article 61(1) EEA in relation to the United Kingdom.

72. Further, or in the alternative, ESA submits that the application is inadmissible because it is out of time. ESA submits that the Contested Decision only informed the Applicants that ESA's position remained unchanged and that the case remained closed. In ESA's view, the contested measure, that is the letter of 9 November 2021, only affirmed

the content of the letter dated 22 October 2021 and had no separate or additional effects. Under the third paragraph of Article 36 SCA, proceedings for challenging the closure should have been instituted within two months of its notification to the Applicants. Notification took place on 22 October 2021. In ESA's view, the time-limit therefore expired on 23 December 2021, making the present application, lodged on 10 January 2022, out of time.

The Norwegian Government

73. As regards the admissibility of the application, the Norwegian Government submits that it must be declared as inadmissible.

74. First, the Norwegian Government refers to the fact that both the Applicants are companies established in the United Kingdom. Following the decision by the United Kingdom to withdraw from the EU, the United Kingdom also ceased to be a party to the EEA Agreement.

75. Protocol 9 to the SCA provided for a special arrangement ensuring that the United Kingdom, in a transition period after the withdrawal, was to be treated as if it were a Member State of the EU for the purposes of the EEA Agreement.[9] However, the transition period ended on 31 December 2020, and was not prolonged.[10] Consequently, on 1 January 2021, the special arrangement in Protocol 9 SCA no longer applied to the United Kingdom.

76. Since the United Kingdom ceased to be a contracting party to the EEA Agreement, the EEA EFTA States and United Kingdom have concluded a Free Trade Agreement ("FTA"), dated 8 July 2021. That agreement contains rules on subsidies in Chapter 9, which differ in content and structure from those under Article 61 EEA. Furthermore, Chapter 16 of the FTA provides rules on dispute settlement, which leaves no competence to the EFTA Court. The existence of the FTA and this set of rules presupposes that Article 61 EEA no longer applies to the United Kingdom.

77. Against this background, the Norwegian Government stresses the importance of establishing what is the relevant time for considering the legal interest in making an application for annulment for the purposes of the second paragraph of Article 36 SCA. The Norwegian Government agrees with ESA that it is settled case law that the legal interest in making an application for annulment is assessed on the date of the application.[11] The application in this case is dated 10 January 2022.

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[9] Reference is made to Article 1, first paragraph, of Protocol 9 to the SCA.

[10] Reference is made to Article 1, second paragraph, of Protocol 9 to the SCA. The transition period mirrors Article 126 of the Withdrawal Agreement, according to which a transition period applied until 31 December 2020. In that period, EU law continued to be applied in the UK (hereunder the participation in the European Economic Area), see Article 129 of the Withdrawal Agreement.

[11] Reference is made to the judgment in *Forges de Clabecq* v *High Authority*, 14/63, EU:C:1963:60, p. 371.

78. It thus follows that the application was made at a time when the United Kingdom was neither a contracting party to the EEA Agreement, nor did the special arrangement in Protocol 9 to the SCA apply. Hence, companies established in the United Kingdom were at the relevant time not covered by the provisions of the EEA Agreement, which includes Article 61 EEA. Since the Applicants had no rights under Article 61 EEA at the time of application, the Norwegian Government contends that they do not have a legal interest for the purposes of the second paragraph of Article 36 SCA to institute proceedings against the decision from ESA.

79. Second, when it comes to the claim that the Applicants have subsidiaries in the Czech Republic and in the Republic of Ireland, the Norwegian Government submits that this in any case is irrelevant.

80. The legal interest for the purposes of the second paragraph of Article 36 SCA is to be assessed with regard to the party instituting the legal proceedings, which in this case are the two Applicants established in the United Kingdom. In the assessment of the Norwegian Government, there is no possibility that a company established in a third country (like the United Kingdom) can attain a legal interest merely by referring to the fact that it possesses shares in a subsidiary or other business presence within the EEA. In such a case, the rule is that the subsidiary needs to be the party instituting the proceedings and needs to demonstrate that it is a legal person and that it has a sufficient legal interest for the purposes of the second paragraph of Article 36 SCA.

81. In the present case, the Norwegian Government maintains that it suffices to note that neither the Czech or Irish subsidiary are applicants or parties to these proceedings. Thus, there is no need to consider whether they have legal personality (which the Norwegian Government cannot see has in any way been documented) or a legal interest under the second paragraph of Article 36 SCA to institute proceedings against the decision by ESA.

82. Finally, with regard to the other submissions by the Applicants relating to the admissibility of their action, the Norwegian Government refers to the defence by ESA. In general, the Norwegian Government supports the submissions by ESA.

Substance

Existing aid or new aid

83. The Applicants' application is based on four pleas. By their first plea, the Applicants argue that ESA erred in law and in its assessment when concluding that the Scheme constitutes existing aid. In the Applicants' view, the numerous changes made to the legal framework, stated purpose and administration of the Scheme since its inception have altered the Scheme's nature from existing aid to new aid at least from 2008, but potentially from 2002.

84. First, the Applicants argue that according to legal principles and established case law of the European Court of Justice ("ECJ"), an alteration to an existing aid resulting in new aid may arise where there is an alteration to the legislative basis of an aid that is of more than purely formal or administrative nature;[12] and/or there is a change in circumstances in the market at issue that might affect the compatibility of the aid.[13]

85. Second, the Applicants submit that the many changes made to the Scheme since its inception have altered its characteristics and legal framework to such an extent that it cannot be held to constitute existing aid. The Applicants consider that the most notable changes to the Scheme were in the years 2002, 2007, 2008 and 2017.

86. With respect to the year 2002, the Applicants note that several changes were made to the regulation governing the Scheme. In particular, a reference that the Scheme should cover the wool stations' operational cost was removed from the regulation.

87. With respect to the year 2007, the Applicants note that a new circular was issued, with some additional changes to the Scheme. The Applicants note further that during 2007 and 2008 Nortura acquired a substantial share in Curtis Wool. The Applicants argue that, although this event does not directly concern the regulatory framework, it nevertheless meant that Nortura from that period onwards – with a market share of 75% in the collection of wool and operation of wool stations – had a direct commercial interest in the Scheme.

88. With respect to the year 2008, the Applicants maintain that a fundamental change occurred in the legal basis of the subsidy system as most substantive regulations on wool subsidies were removed and replaced with a circular issued by the Norwegian Agricultural Agency, effectively placing the ongoing operation of the Scheme at the discretion of the Norwegian Agricultural Agency.

89. The Applicants submit that it cannot be decisive for ESA's classification of an aid scheme how the scheme has been operated, as long as the actual legal basis and framework has undergone substantial changes. In the Applicants' view, the reform of the Scheme by the introduction of the 2008 General Regulation – *de facto* transferring the competence to make decisions on the content and the scope of the aid scheme to the Norwegian Agricultural Agency and the annual agricultural negotiations – should have been notified to ESA as new aid.

90. To that end, the Applicants submit that paragraph 28 of the ECJ judgment in Case C-44/93 *Namur-Les assurances du crédit*[14] supports the conclusion that the 2008 General Regulation amounted to a change from existing aid to new aid. The Applicants argue that

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[12] Reference is made to the judgment in *Namur-Les Assurances du Crédit SA*, C-44/93, EU:C:1994:311, paragraph 28.

[13] Reference is made to the judgment in *DEI and Commission* v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraphs 48, 49 and 75.

[14] Judgment in *Namur-Les Assurances du Crédit SA*, C-44/93, EU:C:1994:311.

this submission is reinforced by the ECJ judgment in Case C-590/14 P[15], where the ECJ rejected the General Court's conclusion that "*it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme*". According to the Applicants, it follows from this that changes made to the legal and administrative basis of an aid scheme, such as those initiated with the 2008 General Regulation, should be considered new aid.

91. In their reply, the Applicants submit that ESA, in paragraph 53 of the defence, misrepresents the Applicants' arguments. The Applicants maintain that they have not claimed that the judgment in *Namur-Les assurances du crédit* establishes that *any* form of legislative amendment "*suffices to conclude that an existing aid scheme turns into new aid*", but that it follows that legal amendments to the basis of a subsidy scheme which are not purely formal have the capacity to turn existing aid into new aid, and that this has to be assessed on a case-by-case basis.

92. Lastly, with respect to the year 2017, the Applicants note that the five poorest wool qualities were removed from the Scheme, with corresponding increases in grants to the remaining 11 grades. The Applicants contend that this removal had the potential at least to affect the identity of the beneficiaries on the basis that farmers producing only or greater proportions of poorer grade wools would have ceased to benefit from the subsidy or at least suffered a reduction in benefit. In their reply, the Applicants add that this change – as stand-alone change, but in particular in combination with the other changes to the Scheme since its inception – is sufficient to change the Scheme from existing aid to new aid.

93. ESA disagrees with the Applicants' interpretation of the case law and submits that, in *Namur-Les assurances du crédit*, the ECJ merely stressed that the examination of whether the legislation has been amended is the starting point for the analysis of whether there is new aid. ESA submits that the ECJ did not establish the principle that a pure legislative amendment suffices to conclude that an existing aid scheme turns into new aid.

94. As to the specific allegations put forward by the Applicants, ESA rejects the grounds advanced by the Applicants in support of their first plea and submits that it must be dismissed as unfounded. ESA submits that the current legal framework of the Scheme is the 2008 General Regulation and that the Scheme has remained substantially unchanged since 1993.

95. First, as regards the 2002 amendment to the 1997 Regulation, ESA argues that the 2002 amendment did not substantively change the Scheme, but merely removed a reference that no longer had any practical value. ESA further submits that none of the other amendments following the 2002 amendment to the 1997 Regulation turned or was capable of turning the Scheme into a new aid scheme. In ESA's view, the discontinuation of the Council for Wool Trade and the transfer of its tasks to the Norwegian Agricultural Agency

[15] Judgment in *DEI and Commission* v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraphs 55 and 56.

was an administrative change which did not affect the nature of the Scheme. Furthermore, the simplification of the provisions for payments and the payment control mechanisms were incapable of turning the Scheme into a new aid scheme. Finally, the linguistic changes to the provisions for repayment of wrongful grants did not affect the substance of the rules of the Scheme, thus not constituting an amendment capable of rendering the Scheme a new aid scheme.

96. Second, as regards the issue of Nortura's acquisition of Curtis Wool, ESA argues that were market conditions, in and of themselves, to be capable of changing an existing aid scheme into a new aid scheme, the legal certainty provided by the rules on existing aid would be undermined. ESA submits that the acquisition is a change in market conditions, not a change in the provisions providing for the aid, and hence cannot be held to have changed the Scheme into a new aid scheme.

97. Third, ESA submits that the 2008 General Regulation, coupled with circulars and an unchanged systematic administrative practice, has not had the effect of turning the Scheme into a new aid scheme. This consolidation of several regulations concerning several subsidy systems constitutes a purely formal amendment to the legal basis of the Scheme. ESA submits that the mere fact that the Norwegian Agricultural Agency has been given the power to control the framework for the Scheme by issuing circulars cannot constitute an amendment of the Scheme if that power has not been used to implement substantial changes to the Scheme. In ESA's view, the conferral of such powers is rather a purely administrative change that does not turn the existing aid scheme into new aid.

98. Fourth, as regards the removal of the five poorest wool qualities from the Scheme in 2016, ESA submits that the intended effect was to support the production of wool of a higher quality, in line with the Scheme's overarching goal since its inception and before the entry into force of the EEA Agreement. Accordingly, the exclusion is in line with the objective of the Scheme, which remains unchanged. ESA submits that the change did not change the actual beneficiaries, as the same wool-producing farmers remain beneficiaries of the Scheme, both before and after this change. Further, ESA submits that an existing aid scheme can be subject to certain modernisation efforts without that leading to the finding of new aid.

99. The Norwegian Government maintains that, in this case, it seems undisputed that the Scheme existed prior to the entry into force of the EEA Agreement and thus constituted existing aid within the meaning of Article 1(b) of Part II of Protocol 3 SCA. The main submission by the Applicants seems to be that there have been subsequent alterations to the existing aid, which leads the aid to become "new aid".

100. The Norwegian Government disagrees with the submissions by the Applicants. In the Norwegian Government's assessment, the modifications which have been made to the Scheme since 1993 have been of a purely formal or administrative nature which has not

affected the evaluation of the compatibility of the aid measure with the common market. As regards the concrete details of this evaluation, the Norwegian Government fully subscribes to the assessment carried out by ESA in Section 4.1 of the defence. In the opinion of the Norwegian Government, this assessment is both thorough and correct.

101. The Norwegian Government wishes, however, to provide an additional comment on the Applicants' claim relating to the 2002 amendment of the 1997 Regulation. The Applicants claim that "*prior to 2002, it followed from the applicable regulation that the subsidy should cover the wool stations operational costs. In 2002, this reference was removed from the regulation*."[16]

102. The Norwegian Government maintains that this is not correct. The Norwegian Government contends that the wool collection stations have never been entitled to any subsidy under the Scheme (post 1993). Section 2 of the 1993 and 1997 Regulations merely described the relationship between the wool producers and the wool collection stations, and their settlement practice relating to the counterclaim by the stations of certain costs. The provision did not entitle the stations to any subsidy under the Scheme. Accordingly, the Norwegian Government also repealed this provision since it considered it to relate to a private law issue between the stations and the wool producers and did not belong in a regulatory provision. Thus, its repeal in 2002 was of a purely formal nature.

Second plea – the Contested Decision lacks reasoning and therefore fails to satisfy Article 16 SCA

103. By their second plea, the Applicants submit that ESA failed to take into account all relevant information submitted by the Applicants in the complaint and their letter to ESA of 25 October 2021, and that ESA breached its duty to state reasons pursuant to Article 16 SCA.

104. The Applicants submit that in 2002 the Scheme was altered when wool stations' operational costs were formally removed from the Scheme. In particular, the Applicants submit that the Contested Decision contained no real analysis of why ESA is of the opinion that the changes made to the legal framework since its inception are "*purely formal legislative amendments*", nor any real analysis of the arguments put forward by the Applicants, for example, with regard to the scope of beneficiaries or the precise effect on competition. In their reply, the Applicants reiterate that the removal of the wool stations' operational costs from the subsidies in 2002 was a substantive change to the legislative provisions underpinning the subsidies. This changed not only the identity of the beneficiaries – henceforth wool stations were not formally entitled to receive any subsidy for their operational cost – but also could have affected the compatibility assessment of the aid.

[16] Reference is made to paragraph 41 of the application.

105. Second, the Applicants submit that the pricing structure arranged by the wool stations and the opacity of their costs structure, including as to handling, has enabled the Norwegian duopoly to mask the portion of the subsidies they retain. The Applicants maintain that ESA should investigate this aspect of the Scheme.

106. Third, the Applicants submit that ESA has not sufficiently investigated or assessed the administration of the Scheme. In particular, whether, as a result of the reforms implemented subsequent to its original introduction, the aid has become new aid. The Applicants maintain that ESA limited its analysis to a superficial and acritical description of various amendments, without critically analysing the actual effects of the amendments. In the Applicants' view, ESA should have collected information on how the Norwegian Agricultural Agency administered the aid.

107. Fourth, the Applicants submit that the payment of the funds to the Collecting Stations to disperse in their discretion under the Scheme acts as a barrier to competition. The Applicants assert that ESA has not examined or addressed this real and problematic aspect of the Scheme.

108. ESA submits that the Applicants' second plea must be dismissed as unfounded. ESA submits that it has thoroughly outlined the reasons as to why the Scheme constitutes existing aid. This explanation also related to the change in public bodies that administered the Scheme. ESA contends that the detailed reasoning was outlined in its letters of 26 May 2021, 22 October 2021 and 9 November 2021. Furthermore, ESA observes that, in its letter of 9 November 2021, the pricing structure of the wool stations and whether they have received aid was addressed.

109. Further, as regards the administration of the Scheme and the Applicants' claim that ESA should have collected concrete information on how the Scheme was administered, ESA submits that sufficient reasoning was provided and that there was nothing to indicate that the information ESA received from the Norwegian authorities on this issue was not accurate.

110. Finally, as regards the Applicants' claim that ESA insufficiently addressed the allegation that the Scheme was a barrier to market entry, ESA submits that there was no need to address this as ESA concluded that the Scheme constitutes existing aid. In light of ESA's wide discretion as to the handling of existing aid cases[17], ESA submits that it was under no obligation to investigate the precise effect on competition.

[17] Reference is made to Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 1, paragraph 32 et seq.; Case E-6/09 *Magasin- og Ukepresseforeningen* v *EFTA Surveillance Authority* [2009-2010] EFTA Ct. Rep. 145, paragraphs 42 and 43.

Third plea – ESA failed to investigate and to assess to what extent the Collecting Stations received unlawful aid

111. By their third plea, the Applicants claim that ESA failed to investigate and to assess to what extent the Collecting Stations received unlawful and incompatible aid.

112. The Applicants submit that the primary beneficiaries of the aid are Norwegian sheep farmers, but the aid also benefits the two companies, Norilia and Fatland, which own the wool stations where Norwegian wool is delivered, classified and ultimately resold to national and foreign customers. The Applicants further submit that the wool subsidies are designed in such a way that grants are not paid directly to the primary producers (sheep farmers) but are provided as a price subsidy to the wool producers through the wool stations.

113. ESA submits that this plea must be dismissed as unfounded. ESA maintains that, upon assessment of the Scheme, it concluded that the Scheme qualified as an existing aid scheme and that consequently no unlawful aid was involved. Thus, ESA decided that the wool stations have not received unlawful aid. On that basis, ESA decided to close the case, given its current workload and prioritisation of cases.

114. The Norwegian Government maintains that the wool collection stations have not been entitled to subsidy under the Scheme (post 1993). They only act as intermediaries between the granting authority (the Norwegian Agricultural Agency) and the wool producers. There is no provision in the Scheme which entitles the wool collection stations to any subsidy.[18] Only the wool producers are entitled to subsidy. The Norwegian Government maintains that this is *inter alia* clear from Section 6 of the 2008 General Regulation, which limits the scope of the subsidy to a producer of Norwegian wool.[19] The Norwegian Government states that this is also clear from the fact that the wool producer may apply to the Agricultural Agency to have the aid granted directly from them.

115. Consequently, the Norwegian Government claims that the third plea in law, together with the other pleas in law, must be dismissed as unfounded.

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[18] In relation to the provision set out in Section 2, second paragraph, of the 1993 and 1997 Regulations (before amendment in 2002), the Norwegian Government refers to the description provided in paragraphs 18 to 25 and 46 of its written observations.

[19] Reference is made to Section 6 of the 2008 General Regulation (FOR-2008-12-19-1490).

Fourth plea – ESA failed to investigate and assess adverse competitive effects of the Scheme

116. By their fourth plea, the Applicants claim that ESA failed to investigate and to assess adverse competitive effects of the Scheme.

117. The Applicants underscore that the Scheme is creating a distortive effect on the EEA market for coarse crossbred sheep's wool. Furthermore, the Applicants argue that the competitive advantage which Norilia and Fatland enjoy due to the Scheme does not just affect British wool, but EU and EEA wool producers/processors as well. The reason for this *inter alia* is that a significant share of the United Kingdom wool clip, approximately 45%, is processed in the EU, either as greasy wool or as sourced wool that has been washed either at Curtis Wool or Standard Wool and is spun in the EU, or as wool tops which Curtis Wool exports to EU spinning companies.

118. In addition, the Applicants submit that the Scheme is having a damaging effect on their commercial interest. On this point, the Applicants submit four arguments.

119. First, the Applicants argue that they are unable to buy Norwegian wool, even at market value, and as a result are at an unfair competitive disadvantage to Norilia and Fatland in the market for coarse crossbred wool and wool tops in the EEA, as they are effectively excluded from certain markets and customers.

120. Second, the Applicants argue that they buy British and Irish wool at market value (comparable to Norwegian wool) and are unable to operate with the same profit margin for these wool grades as Norilia and Fatland, or Curtis Wool.

121. Third, the Applicants argue that it is their belief, from observed market prices, that Norwegian wool acquired at subsidised prices by Norilia is transferred at below market value to its sister company in the United Kingdom, Curtis Wool, for processing. This allows Curtis Wool to undercut the prices of the Applicants, in particular Standard Wool, which competes directly with Curtis Wool in the United Kingdom for the scouring and processing of raw wool, while maintaining its market share for coarse crossbred wool tops in the EEA and continuing to make a profit.

122. Fourth, the Applicants argue that the ability of Norilia and Curtis Wool to obtain Norwegian wool at little to no cost has further strengthened their purchasing power in relation to British and Irish wool in comparison with their competitors, which has harmed the commercial interest of the Applicants.

123. ESA notes that any examination of existing aid would commence with a dialogue between ESA and the EEA EFTA State concerned,[20] which may result in a proposal from

[20] Reference is made to Article 17 in Part II of Protocol 3 SCA.

ESA for appropriate measures.[21] If the EEA EFTA State concerned accepts the proposal for appropriate measures, the examination would stop and ESA would record the finding of the EEA EFTA State's acceptance.[22] The EEA EFTA State concerned is bound by its acceptance to implement the appropriate measures.[23] Where the EEA EFTA State concerned does not accept the proposal for appropriate measures and ESA, having taken into account the arguments of the EEA EFTA State concerned, still considers that those measures are necessary, it then initiates a formal investigation.[24]

124. Thus, ESA submits that the Applicants' fourth plea must be dismissed as unfounded, as under no circumstances, and most certainly not as long as the EEA EFTA State concerned cooperates, can ESA immediately initiate a formal investigation. ESA submits that it had already concluded that the Scheme constituted an existing aid scheme and that no unlawful aid was involved and that in light of ESA's wide discretion as to the handling of existing aid scheme cases,[25] it was under no obligation to open a formal investigation to assess the adverse competitive effects of the Scheme.

Páll Hreinsson
Judge-Rapporteur

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[21] Reference is made to Article 18 in Part II of Protocol 3 SCA.
[22] Reference is made to Article 19(1) in Part II of Protocol 3 SCA.
[23] Reference is made to Article 19(1) in Part II of Protocol 3 SCA.
[24] Reference is made to Article 19(2) in Part II of Protocol 3 SCA.
[25] Reference is made to Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 1, paragraph 32 et seq.; Case E-6/09 *Magasin- og Ukepresseforeningen* v *EFTA Surveillance Authority* [2009-2010] EFTA Ct. Rep. 145, paragraphs 42 and 43.