REPORT FOR THE HEARING

in Case E-9/19

APPLICATION to the Court pursuant to Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Abelia, established in Oslo, Norway

WTW AS, established in Tiller, Norway

and

EFTA Surveillance Authority,

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

I Introduction

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

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

3. Abelia and WTW seek the annulment of the EFTA Surveillance Authority's ("ESA") Decision No 57/19/COL ("Contested Decision") by which ESA informed the Norwegian authorities that, having assessed the public financing of the eHealth and digital health infrastructure in the Norwegian healthcare system, as well as the provision

of certain support services and registers, it considered them not to constitute State aid within the meaning of Article 61 (1) of the Agreement on the European Economic Area ("EEA Agreement" or "EEA").

II Legal background

EEA law

4. Article 36(1) EEA reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

5. Article 61(1) EEA reads:

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

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

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

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

> *1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*
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> *2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

On application by an EFTA State, the EFTA States may, by common accord, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the functioning of the EEA Agreement, in derogation from the provisions of Article 61 of the EEA Agreement, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the EFTA Surveillance Authority has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the EFTA States shall have the effect of suspending that procedure until the EFTA States, by common accord, have made their attitude known.

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

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

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

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

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

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

3. Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61(1) of the EEA Agreement, it shall decide that the measure is

compatible with the functioning of the EEA Agreement (hereinafter referred to as a 'decision not to raise objections'). The decision shall specify which exception under the EEA Agreement has been applied.

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

10. Article 6 of Part II of Protocol 3 to the SCA entitled "Formal investigation procedure" reads:

1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the EFTA Surveillance Authority as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the functioning of the EEA Agreement. The decision shall call upon the EFTA State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the EFTA Surveillance Authority may extend the prescribed period.

2. The comments received shall be submitted to the EFTA State concerned. If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the EFTA State concerned. The EFTA State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one month. In duly justified cases, the EFTA Surveillance Authority may extend the prescribed period.

11. Article 13 of Part II of Protocol 3 to the SCA entitled "Decisions of the EFTA Surveillance Authority" reads:

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 of this Chapter. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the EFTA Surveillance Authority shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7) of this Chapter.

3. Article 9 of this Chapter shall apply mutatis mutandis.

III Facts and pre-litigation procedure

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

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

14. On 7 December 2018, the Norwegian authorities submitted a draft pre-notification for legal certainty. Subsequently, ESA opened a pre-notification case.

15. On 9 January 2019, a video-conference was held at the request of the Norwegian authorities during which the draft pre-notification was discussed.

16. On 11 January 2019, ESA sent an email requesting follow-up information concerning Helsenett ("Health Network") and Helsenorge.no.

17. On 19 February 2019, the Norwegian authorities sent ESA the requested information.

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

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

20. On 3 May 2019, the Norwegian authorities submitted their notification for legal certainty by letter. It addressed the public financing of health and digital health

infrastructure in the Norwegian healthcare system which had already been implemented. In particular, it concerned the public financing of NHN's activities and of a number of activities performed by the Norwegian Directorate of eHealth ("NDE"): (a) the Health Network (*Helsenetett*); (b) the national patient portal (Helsenorge.no); (c) the electronic prescription system (*e-resept*); (d) the electric patient summary care record; and (e) the provision of various support services and the operation of registers.

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

22. On 26 September 2019, the Contested Decision was published in the EEA Supplement of the Official Journal (OJ 2019 C 322, p. 4).

23. On 26 November 2019, Abelia and WTW ("the Applicants"), brought an action for annulment before the Court against the Contested Decision. The Applicants contend that by adopting the Contested Decision without initiating the formal investigation procedure, their procedural rights were infringed.

IV The Contested Decision

24. ESA has based its decision on the following considerations.

25. The Norwegian authorities submitted a notification to ESA by letter of 3 May 2019.[1] The notification was submitted for legal certainty, as the Norwegian authorities do not consider the measures at issue to constitute State aid. Since the notification concerns measures that have already been implemented the two-month deadline set out in Article 4(5) of Part II of Protocol 3 to the SCA does not apply.[2]

Background

26. The term "eHealth" stands for the use of information and communication technologies ("ICT") in the health sector. Today, public entities already provide a number of publicly financed eHealth solutions all across Norway, which can be used by all health service providers and patients. The notification submitted by Norway encompasses the public financing of the activities of NHN, a public corporation charged with the provision of nationwide eHealth solutions in Norway. It also covers the public

[1] Reference is made to ESA Document Nos 1067437, 1067441 and 1067439.
[2] Reference is made to Article 13(2) of Part II of Protocol 3 to the SCA.

financing of a number of activities that today are performed by the Norwegian Directorate of eHealth ("NDE"), but which will be transferred to NHN in the future.

27. The Norwegian healthcare system can be characterised as semi-decentralised, with responsibilities for specialist and primary health care being separated. The State is responsible for specialist care and owns the four Regional Health Authorities ("RHAs"). The municipalities are responsible for primary care. The counties are responsible for statutory dental care. The Norwegian Ministry of Health ("Ministry") is in charge of regulating and supervising the system, but many of these tasks are delegated to its various agencies, such as the Directorate of Health and the NDE. The Ministry controls the activities of its agencies and ensures that health and social services are provided in accordance with national acts and regulations.

28. The Norwegian State has the overall responsibility for providing the necessary specialised health services to the population and public financing accounts for more than 85% of total health expenditure. The organisational structure of health care in Norway is built upon the principle of equal access to services for all inhabitants, regardless of their social or economic status and geographic location and the health system itself is based on the principle of solidarity. According to the Norwegian Municipal Health and Care Act, central Government's role is to ensure the high quality of services across the municipalities through funding arrangements and legislation.[3]

29. Due to the decentralised organisation of the Norwegian health care system there is a relatively high degree of fragmentation. Several hundred legal entities are legally obliged to provide health care to the public, and there are several thousand health service providers. This fragmented landscape of health and care service providers and hierarchies presents a challenge when it comes to introducing eHealth solutions that are interoperable and alike throughout Norway.

30. Pursuant to the Norwegian Patients' and Users' Rights Act,[4] patients residing in Norway are entitled to publicly funded emergency medical care and other necessary specialist and primary health care, adapted to the individual patient's needs. The responsibility for providing and financing health care is regulated by the Norwegian Municipal Health and Care Act,[5] the Norwegian Specialised Health Services Act and the Norwegian National Insurance Act.[6]

ICT use in the Norwegian health system

31. The Norwegian health care system has used ICT for decades, primarily for recording electronic medical records ("EMR"). In 2012, the Norwegian health administration set a long-term goal to introduce a unified electronic record solution for each citizen that could be used and accessed by all Norwegian health service providers.

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[3] *Lov om kommunale helse- og omsorgstjenester*, LOV-2011-06-24-30.

[4] *Lov om pasient- og brukerrettigheter*, LOV-1999-07-02-63.

[5] *Lov om kommunale helse- og omsorgstjenester*, LOV-2011-06-24-30.

[6] *Lov om folketrygd*, LOV-1997-02-28-19.

32. Norway's central health administration has now decided that it needs to step in and take stronger control of the development and roll-out of nationwide eHealth.

33. Currently, there are two entities delivering eHealth in Norway nationwide: the first is NDE, founded in 2016 is part of the central Government administration, and is responsible for three of the notified eHealth solutions, namely the summary care record, the e-prescription system and the national patient portal; the second is NHN, a public corporation founded in 2009 and owned by the Ministry, and subject to control by the State. It was established to create a nationwide communication network called the Health Network or *Helsenett*. NHN's by-laws also provide that it has a non-economic objective and shall not generate profits.

34. NDE and NHN implement policies and instructions from the central health administration, in particular from the Ministry. They do not have commercial freedom that would allow them to simply launch the development of a new product or a new service. In some instances, their activities follow directly from legal obligations embedded in law.

35. NDE and NHN make use of the market when it is possible. A large part of the eHealth solutions in use today has been purchased following public tenders, and their operation and further development is largely provided by private suppliers. Therefore, NHN and NDE can also be described as primarily national eHealth coordinators or buyers. According to the Norwegian authorities, it is complex to determine for each and every eHealth solution and feature to what exact degree they have been purchased on the market, since NHN and NDE have not introduced separate accounting for each feature and sub-feature. This table attempts to give an estimate of the eHealth solution's current annual external expenditure as a share of their total annual expenditure:

eHealth feature	Total annual expenditure in 2018 (in NOK million)	Share of external expenditure
Health Network digital infrastructures	103	82.5%
Helsenorge.no (NDE's cost)	215	48%
E-prescription	118	56%
Summary care record (NDE's cost)	65	59%

The Health Network

36. The Health Network enables an efficient and secure electronic exchange of patient information via a network between all relevant parties within the health sector in compliance with relevant Norwegian and EEA legislation. Practically all health service providers form part of this network based on voluntary membership. The Health Network currently comprises around 6 000 members and is financed through two main sources: direct transfers from the state budget and monthly and one-time membership fees. These fees are intended to cover the Network's operating costs and are determined by the Health Network's board.

37. The health sector has put in place a code of conduct for information security, which contains rules for the sector's actors that operationalise the legal obligations stemming from various laws and regulations. The Norwegian Government decided in 2008 that electronic means should be used instead of paper solutions in order to store, process and communicate patient information. This resulted in the establishment of the nationwide Health Network through NHN in 2009.

38. The Health Network aims to deliver an appropriate and secure communications infrastructure for effective interaction between all parts of the Norwegian health care system. It comprises a "core net" of separate optical channels. The national core net connects the main Norwegian cities, while the regional net connects all hospitals and major health institutions. Other members access the network via ordinary broadband.

39. There are many ways to communicate in the Health Network, including secure email, as well as a number of features that enable and safeguard this communication. The main feature is message exchange. In order to ensure compliance with the code of conduct, there are standardised messages for certain key communications.

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

41. HelseCERT is the health and care sector's national centre for information security. It guards the Health Network against digital threats, advises the sector's members on general ICT security and provides vulnerability assessments and ICT security training.

42. An important feature of the Health Network is the test centre. Before new types of messages can be sent by a member, they must first be tested and approved by the test centre's message validator. The Health Network is not limited to enabling the written exchange of health-related information, its members can also - against payment of a monthly fee - avail themselves of a video conferencing service that NHN provides. This video conference feature is used by 129 members out of a total of approximately 6 000.

43. The Health Network is open to authorised third-party providers who provide services that the Health Network's members depend on when providing health care. Third-party providers requesting access to the Health Network must comply with the code of conduct and must undergo a data security vetting procedure by NHN. The Norwegian authorities consider that third-party providers offer services that are complementary to those provided by NHN.

The national patient portal (Helsenorge.no)

44. The national patient portal Helsenorge.no (Health Norway), which was launched in late 2011, contains information on statutory benefits and serves as a guide to the public healthcare services. It forms part of the public digital communication infrastructure enabling interaction between the health sector, including the health administration and the population. It also enables patients to exercise their right to participate in their treatment and have access to their medical records. Finally, Health Norway also offers services that allow citizens to address questions, manage appointments and receive communications from hospitals and municipal care providers, thus reducing the need for consultations in person or by telephone.

45. Since 2014, Helsenorge.no has been financed by municipalities, RHAs and the Norwegian State. While there is no mandatory user payment, public health sector organisations have decided to contribute to the development and operating costs of Helsenorge.no. The Norwegian authorities are considering whether they should make the RHAs' and municipalities' financial contributions to the management and operations of Helsenorge.no mandatory. There are no plans to introduce payments for the public.

Electronic prescription

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

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

Electronic Patient Summary Care Record

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

49. The SCR contains selected and important information about each citizen's health and gives health care professionals immediate access to this information, regardless of the previous places of treatment.

50. As of 2017, all Norwegian citizens, who have not actively opted out, have a personalised SCR, whose main purpose is to increase patient safety by contributing to rapid and secure access to structured information about the patient. Citizens can enter and amend the information saved on their SCR via Helsennorge.no and control third-party access.

The provision of various support services and operation of registers

51. NHN has been given the task of operating three different types of registers for Government agencies and RHAs: (i) administrative health registers, such as the Doctor's Staffing Register and the General Practitioner's Register, which serve administrative purposes; (ii) quality registers, whose main objective is to increase the quality of diagnosis and treatment for patients, while reducing disparities in treatment or diagnosis across Norway; and (iii) national health registers, such as the birth register and the abortion register, which aim to facilitate research and the provision of statistics and so promote health, prevent disease and support the provision of better health services in Norway.

52. Furthermore, from 1 January 2017, a number of Norwegian Government agencies have entrusted NHN with providing support services in the areas of procurement, ICT and archiving. NHN also carries out various tasks in relation to public procurement. The purpose of pooling these services within NHN is notably to enable efficient and coordinated procurement processes, good agreements and procurement deals. NHN's costs from performing these activities are covered by the Norwegian State from the state budget.

53. Having set out the comments it had received from the Norwegian authorities, who essentially considered that the notified financing did not constitute State aid within the meaning of Article 61(1) EEA, ESA set out its assessment.

Presence of State aid

54. According to Article 61(1) EEA, the qualification of a State aid measure requires four cumulative conditions, namely that the measure must: (i) be granted by the State or through State resources; (ii) confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) be liable to distort competition and affect trade.

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

56. Undertakings are entities engaged in economic activities, regardless of their legal status, the way in which they are financed or whether they make a profit or not.[7] In addition, any activity that involves offering goods and/or services on a given market is an economic activity.[8] Furthermore, the classification of an entity as an undertaking depends on the nature of the activities it carries out. Thus, an entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.[9]

57. When assessing whether NHN carries out economic activities, ESA underlines that Article 61(1) EEA does not apply when public entities exercise public powers or act in their capacity as public authorities.[10] An entity may be deemed to exercise public powers where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject.[11] Where states fulfil legal obligations and facilitate the fulfilment of such obligations, the activities to comply with those obligations are an exercise of public powers, or so closely connected to them, that they are not considered to be economic.[12]

58. ESA notes that when a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity acts as an undertaking in relation to this activity. However, if the economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected to the exercise of those public powers and therefore fall outside the notion of undertaking.[13]

59. Also, when the nature of an activity carried out by a public entity is assessed with regard to the state aid rules, the fact that this activity might be pursued by a private operator is irrelevant. Indeed, such an interpretation would in practice bring any activity of the State not consisting of an exercise of public authority under the notion of economic activity.[14]

60. In the present case, the Norwegian public health care system itself is founded upon the principle of solidarity and public financing accounts for more than 85% of total health care expenditure. The majority of health care services are provided to patients for free, on the basis of universal coverage, or subject to a very limited degree of cost-

[7] Reference is made to the judgments in *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 74 and *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.

[8] Reference is made to the judgment in *Commission* v *Italy*, C-118/85, EU:C:1987:283, paragraph 7.

[9] Reference is made the ESA Decision No 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area(OJ 2017 L 342, p. 35 and EEA Supplement 2017 No 82, , p. 1) ("the NoA Guidelines"), paragraph 10.

[10] Reference is made to the judgments in *Commission* v *Italy*, cited above, paragraphs 7 and 8, and *Bodson*, C-30/87, EU:C:1988:225, paragraph 18.

[11] Reference is made to the judgments in *SAT/Eurocontrol*, C-364/92, EU:C:1994:7, paragraph 30, and *Calì & Figli Srl*, C-343/95, EU:C:1997:160, paragraphs 22 and 23.

[12] Reference is made to the judgment in *TenderNed*, T-138/15, EU:T:2017:675, paragraphs 59 and 60.

[13] Reference is made to the NoA Guidelines, paragraph 18.

[14] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 80.

sharing. The EU Courts have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings.[15]

61. According to the descriptions provided, the Health Network, Helsenorge.no, the e-prescription system and the SCR form part of a national eHealth solution that is provided nationwide by public entities and are necessary to fulfil public duties towards the population and to ensure compliance with the relevant Norwegian and EEA legislation. In this respect, the activities to ensure compliance with such legal obligations are an exercise of public powers and, consequently, do not constitute economic activities. In addition, the EEA States must have some margin of discretion and can go beyond what it is required by the legal provision if this is considered necessary to fulfil the state's public duties. Therefore, it is not necessary to assess whether the state is obligated by law to provide each particular feature of the eHealth solutions and how those features correspond to specific legal obligations since the general objectives pursued is the important element to evaluate.[16]

62. As far as competition is concerned, Norway has not created a market for alternative solutions to its national eHealth, instead it is taking and maintaining control of these solutions. To the extent that competition exists, it appears to be more of a complementary nature, or a remnant from a time predating the roll-out of the respective eHealth solution. Nevertheless, competition for sub-contracts necessary for building this national infrastructure exist and many technical solutions or services relating to eHealth have been purchased from private providers following a public open tender procedure.

63. Concerning the operations of the various registers, ESA mentions that it follows from case law that the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings to disclose such data fall within the exercise of public powers and, consequently, such activity cannot constitute economic activity.[17] Since the administrative and national health registers contain sensitive personal and patient-related data, the collection of which is used for public purposes and is regulated by law, ESA considers that the operations of these registers do not constitute an economic activity.

64. Finally, with regard to the support services, ESA considers that even activities that by themselves could be considered to be of an economic nature, but which are carried out merely for the purposes of providing another non-economic service, are not of economic nature.[18] Also, ESA has previously found that genuine self-supply within the public sector does not constitute an economic activity.[19] Such a conclusion is not

[15] Reference is made to the judgments in *Fenin* v *Commission*, T-319/99, EU:T:2003:50, paragraphs 38 and 39, and *Fenin* v *Commission* , C-205/03 P, EU:C:2006:453, paragraphs 25 to 28.
[16] Reference is made to the judgments in *TenderNed*, cited above, paragraph 96 and *Aanbestedingskalender BV and Others* v *European Commission*, C-687/17 P, EU:C:2019:932.
[17] Reference is made to the judgments in *SELEX Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 72, and *Compass-Datenbank GmbH*, C-138/11, EU:C:2012:449, paragraph 40.
[18] Reference is made to the judgments in *Fenin*, T-319/99, cited above, paragraph 40, as confirmed in *Fenin*, C-205/03 P, paragraphs 26 and 27.
[19] Reference is made to Decision No 144/13/COL on alleged aid to services provided by Bergen Kirkelige Fellesråd and Akasia (OJ 2013 C 229, p. 16 and EEA Supplement 2013 No 44, p. 4), paragraph 31.

affected by whether the services in question could be provided by or purchased from private operators on the market.

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

V Procedure and forms of order sought by the parties

66. On 26 November 2019, Abelia and WTW lodged an application (the "Application") pursuant to the second paragraph of Article 36 SCA seeking the annulment of the Contested Decision, to close the case without opening the formal investigation procedure as to whether the public financing of eHealth and digital health infrastructure in the Norwegian healthcare system, as well as the provision of certain support services and registers constitutes State aid with the meaning of Article 61(1) EEA.

67. The Applicants, Abelia and WTW, request the Court to:

> *(i) annul ESA Decision No 57/19/7COL of 10 July 2019, of the EFTA Surveillance Authority*
>
> *(ii) order the EFTA Surveillance Authority to pay the costs of the proceedings.*

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

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

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

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

71. On 3 March 2020, Abelia and WTW submitted their Reply. In their reply, the Applicants requested the Court, pursuant to Article 49(3)(d) RoP, to instruct ESA to disclose certain documents referred to in the Defence to both the Court and the

Applicants. With reference to Article 49(4) RoP, the Court invited ESA to submit its observations on this request by 11 March 2020.

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

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

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

75. On 3 May 2020, the European Commission ("Commission") submitted written observations pursuant to Article 20 of the Statute.

76. On 4 May 2020, the Government of Norway submitted written observations pursuant to Article 20 of the Statute.

VI Written observations

77. Pleadings have been received from:

- the Applicants, represented by Espen Bakken, advocate; and,

- the defendant, represented by Michael Sánchez Rydelski, Ewa Gromnicka and Carsten Zatschler, Members of its Legal and Executive Affairs Department, acting as Agents.

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

- The Government of Norway, represented by Pål Wennerås, advocate at the Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, senior advisor at the Ministry of Foreign Affairs, acting as Agents;

- The European Commission, represented by Pedro Arenas, Viktor Botka, and Cvetelina Georgieva-Kecsmar, Members of its Legal Service, acting as Agents.

Abelia and WTW
Locus standi

79. The Applicants submit that pursuant to settled case law concerning the second paragraph of Article 36 SCA, an applicant will be deemed individually concerned if its market position is substantially affected by the measure, to which a decision relates, regardless of whether the applicant has participated in the administrative procedure.[20] However, the test of direct and individual concern does require an affected market position if the arguments do not go beyond substantive arguments made in support of a contention that ESA should have had doubts that should have led to the opening of the formal investigation procedure.[21]

80. The Applicants submit that they have legal standing to challenge the Contested Decision insofar as it seeks to safeguard their procedural rights and the Court may examine the Applicants' arguments regarding the merits, in order to ascertain whether these arguments are capable of establishing whether the plea is well-founded.[22]

81. In the present case, ESA found at the conclusion of the preliminary examination procedure that the public financing of the various public eHealth solutions did not constitute State aid, and thus adopted the Contested Decision based on Article 4(2) of Part II of Protocol 3 to the SCA. Applications for annulment of a decision not to open a formal investigation procedure brought by an interested party seeking to safeguard their procedural rights are admissible.[23]

82. The Applicants contend that they both have standing to challenge the Contested Decision as interested parties within the meaning of Article 1(h) of Part II of Protocol 3 to the SCA as they are competitors in the same market as the public measures at issue and are therefore sufficiently affected by the State aid. In their Reply, the Applicants note that the term "interested party" covers an indeterminate group of persons, including interest groups which seek to protect the legitimate interests of its members.[24]

83. In their Reply, the Applicants add that were an applicant was only to be considered an "interested party" in cases where the alleged State aid would adversely affect their legitimate interests by seriously jeopardising their market it would dilute the distinct separation between the procedural and substantive legal standing, by effectively requiring that an applicant must be directly and individually concerned as stated in the second paragraph of Article 36 SCA.[25] However, Article 1(h) of Part II of Protocol 3 to the SCA requires only that an interested party "might be affected by the granting of aid."

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[20] Reference is made to Case E-1/13 *Mila* v *ESA* [2014] EFTA Ct. Rep. 4, paragraph 36.
[21] Reference is made to Case E-1/13 *Mila*, cited above, paragraph 38.
[22] Reference is made to Case E-1/12 *Den norske Forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040, paragraph 69, and judgement in *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 55 to 59.
[23] Reference is made to Case E-1/13 *Mila*, cited above, paragraph 52, and Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 82.
[24] Reference is made to Case E-19/13 *Konkurrenten.no AS* v *ESA* [2015] EFTA Ct. Rep. 52, paragraphs 118 and 119 and the case law cited.
[25] Reference is made to Case E-19/13 *Konkurrenten.no AS*, cited above, paragraph 120.

84. WTW is a leading software development company in the e-health sector. It developed and provides HelseRespons, a secure IT service and platform, which offers both secure doctor-patient communications and technical solutions and must therefore be considered a direct competitor to several of NDE's services in view of their corresponding eHealth feature and similar functionalities. Both systems enable correspondence between doctors and patients, the booking of appointments, the renewal of prescriptions, messaging/notification services, patient portal etc., and share the same customer base across Norway. In their Reply, the Applicants note that HelseRespons has been on the market since 2005. HelseRespons services more patients than its main competitor the publicly-funded Helsenorge.no whose services are interchangeable. HelseRespons has a patient user activity in the range of 2-3 million people and accounts for a substantial part of WTW's annual revenue. Yet when the Norwegian authorities introduced Helsenorge.no to the general public they sought to stop WTW from offering its services on the market.[26]

85. Moreover, some of WTW's customers have switched to the competing public eHealth solutions since they were introduced. That some of the features available on the market are subject to a small fee does not alter the fact that there is a state of competition. In their Reply, the Applicants state that WTW is the largest player on the third-party supplier market today. WTW and other competitors offering eHealth solutions in the market today, such as Pasientsky, CGM-businesses, DIPS AS ("DIPS") and Norsk Helseinformatikk AS ("Helseinformatikk"), cannot effectively compete with services in the same market which are offered by the Norwegian State for free. Furthermore, there are no grounds for asserting that there is a market failure for the introduction of eHealth services and that the statements in the notification for legal certainty and in the Defence that competition is only complementary in nature or a remnant from a time predating the rollout of the respective eHealth solution are neither accurate nor factually correct.

86. In their Reply, the Applicants submit that the legal obligations and safety mechanism applicable to the handling of personal data apply to private and public players alike as does their supervision by the Norwegian Data Protection Authority. Therefore, concerns regarding the safety of patients' personal data cannot restrict the Norwegian Government from acquiring eHealth solutions in the existing and increasingly growing private market. The scheme notified by the Norwegian Government can be described as a forced co-financing by the municipalities. Genuine market alternatives exist not just on a local/regional or national scale, but also from foreign suppliers with more innovative and productive eHealth solutions.

87. The Applicants submit that they have raised a plea alleging the existence of doubts or serious difficulties. Hence, the Application should be declared admissible since it seeks to defend their procedural rights.[27] In their Reply, the Applicants submit that where the applicants have raised a plea alleging the existence of doubts, the Court may examine arguments brought by the applicants regarding the merits, in order to ascertain whether those arguments are capable of establishing that the plea is well-

[26] Reference is made to the Reply, paragraph 35.
[27] Reference is made to *Mila*, cited above, paragraph 60, and *Private Barnehagers Landsforbund*, cited above, paragraph 63.

founded.[28] It must not be confused by challenging the merits of the decision, nor must it be used as an attempt to oversimplify the pleas and arguments put forward by the applicants. ESA did not entertain doubt as to either the factual or the material facts of the case and consequently rendered a decision in the preliminary examination based upon inadequate information and evidence regarding the market.

88. In their Reply, the Applicants add that the length of the procedure, the difficult discussions between Norway and ESA concerning the case, and a pending complaint with ESA regarding the case only substantiate the claim that the Contested Decision has not removed existing doubt.

89. It is submitted that for WTW the consequences of upholding the Contested Decision are severe. In their Reply, the Applicants submit that the consequences of upholding the Contested Decision are severe also for other members of Abelia including DIPS, and Helseinformatikk. The upholding of the Contested Decision may adversely affect the legitimate interest of one or more of Abelia's members by seriously jeopardising their position on various eHealth markets.

90. DIPS provides eHealth solutions for administration and documentation of patient treatment in hospitals, in addition to specialist solutions within radiology and laboratories. The Norwegian Government's free electronic prescription solution (Forskrivningsmodulen which will be replaced by the central medication module) is in direct competition with DIPS' own electronic prescription module. It cannot be ruled out that the aid at issue will have negative effects to DIPS due to an increase in the price of necessary factors of production.[29]

91. Helseinformatikk is the leading Scandinavian supplier of health-related information to health care professionals. It was originally partially financed by the Norwegian Ministry of Health and Care Services to ensure that patients acquired health information from reliable sources. The service offered by Helseinformatikk competes with the notified eHealth solution Helsenorge.no, which contains information on statutory benefits and serves as a guide to the public healthcare services. Helsenorge.no has been financed by municipalities, RHAs and the Norwegian State since 2014. Helseinformatikk and Helsenorge.no are in direct competition in supplying general health information available to health personnel for all patient groups. Approximately 95% of all general practitioners still make use of Helseinformatikk. Indicative of the competitive relationship between the two systems is the fact that state resources also provide aid to populate the Google search engine with links and preferred indexing to Helsenorge.no to the detriment of Helseinformatikk. The subsidising of Helsenorge.no using taxpayer-funded resources will eventually distort competition on the market, but Helseinformatikk represents a genuine and more developed market alternative to supplying health-related information to health care professionals and patients.

92. As the services offered by NDE are non-economic in nature, it is likely that there will be a decline in demand for these services from WTW, and the market will to a large

[28] Reference is made to *Mila*, cited above, paragraph 61.
[29] Reference is made to *Abelia*, cited above, paragraph 83.

extent be foreclosed in favour of public eHealth solutions, even though a functioning market for such services exists today. Demand for these services would also be obstructed since one major player and purchaser of the services would to a large degree be self-sufficient, thus rendering the market less innovative. Consequently, WTW must be considered individually concerned since it is substantially affected by the State aid in question.

93. In conclusion, the Applicants submit that they must be considered an interested party, and hence have standing to initiate proceedings against the Contested Decision.[30]

94. In their Reply, the Applicants submit that their Application is not formally defective as asserted in the Defence. The Applicants' addresses can be accessed from other documents at the disposal of the Court and there is no failure to comply with the provisions in Article 19(1) of the Statute and Article 33(1)(a) RoP. The Application is therefore admissible.[31]

Substance

95. The Applicants seek the annulment of the Contested Decision on the basis that that ESA infringed essential procedural requirements by deciding not to raise objections, and thereby not opening formal investigation proceedings.

96. The Applicants submit that ESA infringed its obligation to open the formal investigation procedure provided for in Article 1(2) of Section I of Protocol 3 to the SCA and Article 6(1) of Section II of Protocol 3 to the SCA and Article 4(4) of Section II of Protocol 3 to the SCA. ESA ought to have had doubts regarding: the factual basis of the Contested Decision; the application of the concept of an undertaking within the meaning of Article 61(1) EEA; and the application of Article 36 EEA in a State aid procedure. ESA also infringed its obligation of proper reasoning on which a decision is made pursuant to Article 16 SCA.

97. The Applicants submit that ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all factual or legal doubts or difficulties raised that the measure under consideration does not constitute State aid for the purposes of Article 61(1) EEA, unless it also overcomes all doubts or difficulties concerning the measure's compatibility with the EEA Agreement, even if it were State aid.[32] In their Reply, the Applicants clarify that the Application does not claim that the material conclusions to the legal questions regarding the existence of aid or economic activities of public undertakings by the Authority are wrong or unfounded, but that there was sufficient doubt or serious difficulties surrounding the facts on which the Contested Decision was based.

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[30] Reference is made to the Decision of the Court in Case E-4/97 *Norwegian Bankers' Association* v *ESA* [1999] EFTA Ct. Rep. 1, and Case E-2/02 *TBW and Bellona* v *ESA* [2003] EFTA Ct. Rep. 52, paragraphs 44 and 45.

[31] Reference is made to Case E-1/17 *Konkurrenten.no AS* v *ESA* [2017] EFTA Ct. Rep. 989, paragraph 39, to the same effect.

[32] Reference is made to *Mila*, cited above, paragraph 88, and *Private Barnehagers Landsforbund*, cited above, paragraphs 75 and 80, and judgment in *Matra SA* v *Commission* C-225/91, EU:C:1993:239, paragraph 33.

98. First, the information and evidence that the ESA had at its disposal objectively should have raised doubts as to whether public financing of the eHealth and digital health infrastructure in the Norwegian healthcare system constitutes State aid within the meaning of Article 61(1) EEA. Second, ESA should have had doubts as to the compatibility of the notified scheme with Article 36 EEA in that no restrictions on the freedom to provide services within the territory of the Contracting Parties shall be accepted unless the conditions laid down in Article 33 EEA are fulfilled.

99. In their Reply, the Applicants submit that, as regards the length of the procedure, the allegedly difficult discussions between the Norwegian Government and ESA, and the pending complaint regarding this case, this information was not known or made available to them when the Application was lodged. It was only made available to them after 26 November 2019. Moreover, the pre-notification phase and the informal information exchange between ESA and the Norwegian Government is not mentioned at all in the Contested Decision. The subject of public financing of eHealth services and digital health infrastructure in the Norwegian healthcare system has been subject to ongoing discussions since 27 September 2018. During the pre-notification phase ESA requested additional information and clarifications on three occasions and organised two videoconferences. The last information was submitted by a letter dated 3 May 2019, ESA then adopted the Contested Decision on 10 July 2019.

100. In their Reply, it is additionally submitted that the duration of the pre-notification procedure and the ongoing difficult discussions between ESA and the Norwegian Government should have led to opening the formal investigation procedure. The formal investigation procedure is a means of protecting the ESA's competence to decide each case based on an informed and rudimentary amount of information stemming from independent and objective third sources. It is contended that there must be a limit to the duration of the procedure, as the Court of Justice of the European Union ("ECJ") has found, and the exchanges between ESA and a single source, before ESA has doubts and is obliged to the formal procedure that allows for participation by interested parties.[33] The Court of First Instance has found that a duration of seven months exceeds the normal timeframe.[34] Moreover, in the present case there is a pending complaint the content of which is not known to the Applicants.

101. The Applicants submit that if ESA's assessment during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of the necessary doubt,[35] and accordingly the Contested Decision is void. The notion of doubts or serious difficulties is objective and requires investigation of both the circumstances under which the contested measure was adopted and its content.[36] It

[33] Reference is made to Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraphs 60 and 83, judgments in *Portugal* v *Commission*, C-204/97, EU:C:2001:233, paragraphs 33 and 34, and *Regione autonoma della Sardegna* v *Commission*, T-171/02, EU:T:2005:219, paragraph 41.

[34] Reference is made to the judgment in *Société chimique Prayon-Rupel SA* v *Commission*, T-73/98, EU:T:2001:94.

[35] Reference is made to *Den norske Forleggerforening*, cited above, paragraph 107.

[36] Reference is made to the judgments in *Bundesverband deutscher Banken eV* v *Commission*, T-36/06, EU:T:2010:61, and *Austria* v *Scheucher-Fleisch GmbH and Others*, C-47/10 P, EU:C:2011:698.

requires the Court to conduct a judicial review of the facts of and law relied upon by ESA which goes beyond whether there was a manifest error of assessment.[37]

102. The Applicants submit that competition continues to exist on the Norwegian market. The Norwegian authorities have promoted competition and the market for parallel eHealth solutions contrary to what is stated in paragraph 133 of the Contested Decision. The Norwegian authorities' explanation that the health sector faces market failures with regard to the introduction of eHealth solutions is not well-founded. Indeed, there are genuine market alternatives to the eHealth solutions described by the Norwegian authorities in their notification for legal certainty.

103. The Applicants submit that ESA did not request all the necessary information for the proper assessment of the case, as required by Article 5(1) of Protocol 3 to the SCA. The Applicants submit that the provided information concerning the financing of the eHealth and digital health infrastructure is incomplete. The notification did not provide an accurate description of the market and its actors; nor did it include updated documentation and reports that account for the fast-growing digital developments in the healthcare sector. The grounds for the need for a national eHealth solution to overcome fragmentation and market failures, as explained in recitals 10 to 14 of the Contested Decision, do not have merit.[38] Contrary to what the Norwegian authorities asserted, there have not been any genuine attempts to overcome these challenges through less restrictive means such as standardisation, guidance or the granting of financial support for corresponding ICT-initiatives.

104. The Applicants assert that section 2.3.5.6 of the notification for legal certainty admits that private suppliers to a large degree provide the operation and further development of the eHealth solutions market. Moreover, WTW's growing customer base is evidence of a well-functioning market that continues to introduce new innovative technological solutions for the benefit of users.

105. As stated in the Contested Decision, the Norwegian authorities claim they have only identified a small number of instances where commercial providers offer services that at first sight appear to be competing with public eHealth solutions - in part because they share some similar features.[39] In the Contested Decision ESA appears to accept that these similarities always relate to a sub-feature of the national eHealth solutions, and that consequently no actual substitutes for the public services exist. This is an incorrect description of market realities. WTW provided such services to the market well before the introduction of the public eHealth solution considered by ESA. However, as a consequence of the Contested Decision the market for services and technical solutions provided by private operators will effectively no longer exist due to the integration, implementation and financing of the national eHealth solution and support services. These competitive concerns and the creation of state run-monopolies should give rise to doubts regarding both the existence of State aid and the compatibility with the

[37] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 76, and the judgment in *3F* v *Commission*, C-646/11 P, EU:C:2013:36, paragraph 31.
[38] Reference is made to the Contested Decision, paragraph 117.
[39] Reference is made to the Contested Decision, paragraph 118.

functioning of the EEA Agreement, which would require formal proceedings and investigation. To that end, it is asserted that ESA has relied upon selective explanations provided by the Norwegian Government, and not undertaken a diligent and impartial examination of the case.

106. The Applicants assert that the simplified portrayal of the eHealth market in the Contested Decision has had a decisive bearing regarding the notion of doubt in the material assessment. Moreover, it is unclear to the Applicants what the prerequisites or guidelines are regarding the precondition that the NHN and NDE are not carrying out economic activities as long "as they provide the eHealth solutions in accordance with the current organisation of the solidarity-based Norwegian health sector, and provide various support services and operate registers on behalf of the State."[40] Such preconditions must be more concise and predictable for stakeholders.

107. In conclusion on this point, the Applicants submit that ESA's assessment is insufficient, incomplete and unable to overcome all doubts that the measure under consideration does not constitute State aid and is compatible with the common market for the purpose of Article 61(1) EEA.

108. The Applicants state that ESA considered that NHN and NDE, insofar as they provide eHealth solutions in accordance with the current organisation of the solidarity-based Norwegian health sector and provide various support services and operate registers on behalf of the state, do not carry out economic activities, and are therefore not "undertakings". Thus the measures do not constitute State aid within the meaning of Article 61(1) EEA.

109. The Applicants do not contest that the majority of Norwegian health care services are provided to patients for free, on the basis of universal coverage, or subject to a very limited degree of cost-sharing.[41] However, in order to determine whether an entity is an undertaking relies on the analysis of whether it is engaged in an economic activity or not. The Applicants maintain that ESA should have doubts about the economic activities of NHN and NDE, and thus whether they were undertakings.[42] This is determinable on the basis of a functional test, although this is not an absolute filter.[43] Consequently, ESA should have opened the formal investigation procedure.

110. The Applicants assert that *Fenin*,[44] cited by ESA, is not sufficient in itself to overcome all doubts surrounding the economic activities of public bodies, within the health sector, in this case NHN. Rather, there needs to be an individual assessment of the market in which the public bodies operate. That an entity operates within the public

[40] Reference is made to the Contested Decision, paragraph 136.
[41] Reference is made to the judgments in *Fenin* v *Commission*, T-319/99, cited above, paragraphs 38 and 39, and *Fenin* v *Commission*, C-205/03 P, cited above, paragraphs 25 to 28.
[42] Reference is made to Article 1 of Protocol 22 to the EEA Agreement.
[43] Reference is made to the judgments in *Pavlov and Others*, cited above, and *Höfner and Elser* v *Macrotron GmbH*, C-41/90, EU:C:1991:161.
[44] Reference is made to the judgments in *Fenin*, T-319/99, cited above, paragraphs 38 and 39, and *Fenin*, C-205/03 P, cited above, paragraph 26.

health system does not automatically imply that it can never be an undertaking.[45] If the principle of solidarity is predominant in the health case scheme at issue, the managing bodies are generally not engaged in economic activities, which must be assessed on the facts,[46] and, as a result, are not undertakings.[47] In their Reply, the Applicants contend that ESA's reasoning is discordant in relation to reaching the conclusion that competition existed and, thereafter, citing references to the effect that it cannot matter whether the activity might, in principle, be pursued by a private operator when the nature of an activity carried out by a public entity is assessed with regard to the State aid rules.

111. The Applicants contend that the ECJ has not delivered a judgment that clearly settles disputes resulting from tensions between health care objectives and State aid. The legal ambiguity between the separation of pursuing economic and solidarity objectives by the state gives rise to doubts that ESA is unable to overcome without further examining the affected markets and initiating the formal procedure. In their Reply, the Applicants note ESA's argument regarding the judgment in T-216/15 *Dôvera zdravotná poist'ovňa* that the case is not relevant to the present case, however, they submit that Advocate General Pikamäe's opinion in the appeal pending in that case considered that "*Where the social security system under consideration is hybrid, in the sense of combining non-economic features with features indicating the existence of a market, the classification of the activity carried out within that system depends on an analysis of the various features in question and their respective importance and purpose. The classification of such activities is, in other words, 'a matter of degree'*."[48] This substantiates the Applicants' submission as to the legal complexity of the matter which remains unsettled by the case law.

112. In their Reply, the Applicants add that the degree to which different national healthcare system providers compete in a market environment concerning digital solutions are inherently different requiring ESA to investigate the context in which eHealth services are provided in depth. Therefore, despite ESA's arguments,[49] the Applicants consider that the General Court's reference in Case T-216/15 *Dôvera zdravotná poist'ovňa* to the following features: (i) the existence of competition as to the quality and efficiency of the purchasing process, (ii) the existence of competition as to

[45] Reference is made to Commission Decision N 543/2001 Ireland (OJ 2002 C 154, p. 4), the judgments in *Henning Veedfald* v *Århus Amtskommune*, C-203/99, EU:C:2001:258, *Ambulanz Glöckner* v *Landkreis Südwestpfalz*, C-475/99, EU:C:2001:577 paragraphs 19 to 22, *Pavlov and Others*, cited above, and *Dôvera zdravotná poist'ovňa* v *Commission*, T-216/15, EU:T:2018:64, paragraphs 50 and 51.

[46] Reference is made to the judgment in *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17, EU:T:2019:652, paragraph 56.

[47] Reference is made to the judgments in *Poucet and Pistre* v *AGF and Cancava*, C-159/91 and C-160/91, EU:C:1993:63, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, and *Fenin*, T-319/99, cited above.

[48] Reference is made to the Opinion of Advocate General Pikamäe in *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, Joined Cases C-262/18 P and C-271/18 P, EU:C:2019:1144, point 114, and the Opinion of Advocate General Jacobs in *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2003:304, point 35.

[49] Reference is made to the judgments in *Fenin*, T-319/99, cited above, paragraph 40, as confirmed in *Fenin*, C-205/03 P, cited above, paragraphs 26 and 27, and in *TenderNed*, cited above, paragraph 96.

the quality and scope of services provided, must be taken into account when assessing the nature of the activity that will be carried out by NHN and NDE.

113. The Applicants submit that it is unclear how far-reaching the scope of services that are "... only provided to enable and support the provision of public health administration tasks" is defined.[50] It is submitted that any accompanying activity, which could be conducted on a market, could effectively be taken under state control. The Applicants claim that doubts should have been entertained as to whether some of the providers in these related and connected markets offer their services for remuneration and effectively compete with the Norwegian Government's eHealth solutions. The delimitation between economic/non-economic services is unclear, which should give rise to doubts concerning the affected markets despite a margin of appreciation.

114. In any event, regardless of State supervision, the private operators on the market for enabling and supporting the provision of public eHealth administration and support service tasks pursue financial gains and, consequently, their activities in the sector fall within the economic sphere.[51] The strict conditions framing the subsequent use on a solidarity basis does not call into question the economic nature of such activities. Moreover, doctors, hospitals, and clinics are economic entities providing health services for remuneration, and can be qualified as undertakings.[52] In their Reply, the Applicants note that activities that are non-economic in nature may evolve over time to become economic activities. Competition against for-profit operators is a decisive factor in considering an entity to be engaged in an economic activity.[53]

115. Given the existence of competition in the eHealth sector, ESA should have had doubts concerning the competition elements and market forces in their assessment of whether NHN and NDE constitute undertakings engaged in economic activities. Consequently, ESA's closing of its preliminary examination by a decision under Article 4(2) of Part II of Protocol 3 to the SCA, despite its inability, on an objective basis, to surmount all doubts, infringed the rights of the applicants as an interested party within the meaning of Article 6(1) of Part II of Protocol 3 to the SCA.

116. The Applicants assert that ESA must overcome all doubts as to whether the public financing of eHealth and digital health infrastructure in the Norwegian healthcare system constitutes a prohibited restriction on the freedom to provide services pursuant to Article 36 EEA. In addition to doubts as regards the facts and application of Article 61(1) EEA, in a case pending before it, ESA must assess the compatibility of an aid measure in relation to the fundamental freedoms. It is submitted that ESA cannot render a decision without assessing the application, or at least open a formal investigation procedure in order to establish sufficiently the scope of intra-community trade as a potential effect of the notified aid measure. Article 36 EEA covers economic activities

[50] Reference is made to the Contested Decision, paragraph 135.
[51] Reference is made to the judgment in *Dôvera zdravotná poist'ovňa*, T-216/15, cited above, paragraph 64.
[52] Reference is made to the judgment in *Pavlov and Others*, cited above, paragraph 117.
[53] Reference is made to the judgments in *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 123, *MOTOE*, cited above, paragraphs 22, 24, 28 and 29, *Commission* v *Italy*, cited above, paragraph 7, and *Pavlov and Others*, cited above, paragraph 75. Further reference is made to the Opinion of Advocate General Kokott in *MOTOE*, C-49/07, EU:C:2008:142, points 41 and 42.

that are normally provided for remuneration and that are not covered by the other freedoms, especially activities of a commercial character. This consideration may be minimal and does not even have to be in money, nor is it required that the service provider seeks to make a profit.[54]

117. The Applicants submit that intra-community trade in services could be affected, as the creation of the notified national eHealth solutions will deny foreign stakeholders access to supply the eHealth market.

118. The Applicants claim that ESA has failed to comply with the obligation of proper reasoning in correspondence with Article 16 SCA and the case law of the ECJ and the Court.[55] It is contended that the interpretation of the obligation of proper reasoning must be adapted to the size and importance of the case in question, especially given the fact that no third parties have enjoyed an active role or rights of material participation in shaping ESA's findings.

119. The Applicants submit that the Contested Decision does not deal with the doubtful aspects of the case, but simply relies on the provided information from the Norwegian authorities, and that the reasoning is inadequate on several points.

120. Given the modernisation process led by national authorities, whose responses are driven by numerous factors and constraints, it is necessary that ESA investigate the nature of the activities performed by service providers on a case-by-case basis in order to determine whether they come under the scope of rules on competition and the internal market.

121. The Applicants contend that ESA did not carry out its own independent evaluations of the issues, but instead rendered the arguments presented by the Norwegian Government in the notification for legal certainty without the needed critical, diligent and impartial examination of the case.

122. In that regard, the Applicants refer to a lack of reasoning regarding the implications for trade and barriers to entry; the lack of assessment of whether the public financing of to the health sector could amount to State aid or its compatibility with the internal market. ESA should have investigated deeply the context in which eHealth services are provided. ESA did not provide any reasoning as to whether any resulting restriction of competition is proportionate to the objective pursued by the State or substantiate that the development of trade is not affected to an extent contrary to the Community interest. Even though the norms on antitrust and State aid do not apply in cases in which healthcare providers are not deemed to be undertakings, the reasoning surrounding national measures causing an excessive detriment to economic freedoms should have extensive requirements as to quality in addressing principal issues. Finally,

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[54] Reference is made to the judgments in *Belgian State* v *Humbel and Edel*, C-263/86, EU:C:1988:451, paragraph 17, *Skandia and Ramstedt*, C-422/01, EU:C:2003:380, paragraph 23, and *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 38.

[55] Reference is made to Case E-2/94 *Scottish Salmon Growers Association* v *ESA* [1994-1995] EFTA Ct. Rep. 59, paragraph 26.

ESA should have cross-examined the factual descriptions presented by the Norwegian Government before rendering a decision.

ESA
Locus standi

123. ESA submits that the Applicants lack legal standing to challenge the merits of the Contested Decision. In that respect, ESA states that the requirements of an applicant's legal standing and legal interest are matters of public policy which must be examined by the Court in any event of its own motion.[56] In the present case, the Applicants appear to lack the requisite legal standing to challenge the merits of the Contested Decision.

124. As far as the legal standard to challenge a State aid decision after a preliminary examination is concerned, it is settled case law that an application for annulment of such a decision is admissible when an "interested party", within the meaning of the formal investigation procedure, is seeking to safeguard its procedural rights under Article 1(2) of Part I and Article 6(1) of Part II of Protocol 3 to the SCA.[57] According to Article 1(h) of Part II of Protocol 3 to the SCA. An "interested party" or a "party concerned", as submitted in the Rejoinder, means, inter alia, any person, undertaking or association of undertakings whose interests might be affected by the granting of State aid, in particular competing undertakings and trade associations.[58] The mere fact that an applicant is an interested party cannot suffice for the application to be considered admissible. In this context, an applicant challenging the merits of a decision not to open the formal investigation procedure is individually concerned by that decision only if its market position is substantially affected by the alleged State aid in question.[59] With regard to the scope of judicial review, ESA states that it is up to the Applicants alone to "adduce pertinent reasons to show that the alleged aid may adversely affect" their legitimate interests "by seriously jeopardising their position on the market in question" since this burden does not rest on the Court.[60]

125. Therefore, an applicant must demonstrate that the position on the market of at least some of its members is substantially affected by the alleged aid.[61] As regards establishing such an effect, the mere fact that a measure such as the Contested Decision may exercise an influence on the competitive relationships existing on the relevant market and that the undertakings concerned were in a competitive relationship with the recipients of the alleged aid cannot in any event suffice for these undertakings to be

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[56] Reference is made to *Konkurrenten.no AS* v *ESA*, cited above, paragraph 32, which refers to the judgment in *Matra SA*, cited above, paragraphs 10 to 13.
[57] Reference is made to *Norwegian Bankers' Association*, cited above, paragraph. 26, *TBW and Bellona*, cited above, paragraphs 44 et seq., *Mila*, cited above, paragraph 53, and *Abelia*, cited above, paragraph 79.
[58] Reference is made to *Norwegian Bankers' Association*, cited above, paragraph 30, *TBW and Bellona*, cited above, paragraph 52, *Mila*, cited above, paragraph 54, and *Abelia*, cited above, paragraph 80.
[59] Reference is made to *Norwegian Bankers' Association*, cited above, paragraph 33, *TBW and Bellona*, cited above, paragraph 53, *Private Barnehagers Landsforbund*, cited above, paragraph 49, and *Mila*, cited above, paragraph 55.
[60] Reference is made to *Abelia*, cited above, paragraph 84, and the judgment in *Hamburger Hafen- und Lagerhaus Aktiengesellschaft and Others* v *Commission*, T-69/96, EU:T:2001:100, paragraph 41.
[61] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 50.

regarded as individually concerned by that measure. In this respect, undertakings cannot rely solely on their status as competitors of the recipients of the alleged aid to be regarded as individually concerned by that measure but must additionally show that their circumstances distinguish them in a similar way to the recipients of the alleged aid.[62]

126. ESA submits that, Abelia fails to identify the members allegedly active in these sectors, omits to define precise markets in which these actors provide services in alleged competition with NHN and NDE and makes no efforts to demonstrate how the alleged aid seriously jeopardises its members' positions in the respective markets. Therefore, Abelia has failed to demonstrate that the alleged aid adversely affects its members by seriously jeopardising their positions on the market in question and, consequently, lacks legal standing to challenge the merits of the Contested Decision.

127. In its Rejoinder, ESA submits that an association has standing where it represents the individual concerns of several members as plaintiffs and each of the members has standing.[63] As evidence of its role representing the individual concerns of its members, an association can, for instance, introduce its articles of association, which would explain which particular interest the association seeks to protect.[64] The association then acts in place of its members.[65] Accordingly, an applicant such as Abelia must demonstrate that the position on the market "of at least some of its members" is affected by the alleged aid.[66]

128. In its Rejoinder ESA addresses the fact that out of this vast and very diversified membership pool, Abelia is able to identify only two companies, namely DIPS and Helseinformatikk, besides WTW, which are allegedly active in the same markets as NHN and NDE and whose competitive position in those markets is allegedly being affected by the public financing of the contested activities. ESA questions whether an association can have *locus standi*, when the identified members represent a negligible number of the total and very diversified membership base and when there is no evidence before the Court, which would explain the particular interest that the association seeks to protect.

129. It is not clear from the Reply how DIPS allegedly competes with any of the contested activities. It seems that the only issue relevant to DIPS is the fact that the Norwegian Government offers prescription modules free of charge, in order to facilitate the integration of the e-prescription systems with the EMR-systems of the users.[67]

130. ESA finds it important to recall that there is a statutory monopoly for e-prescriptions in Norway. The handling of e-prescriptions requires a central register of patient care data (*behandlingsrettet helseregister*) which, according to Section 6 of the

[62] Ibid.
[63] Reference is made to the judgment in *CETM* v *Commission*, T-55/99, EU:T:2000:223, paragraph 23.
[64] Ibid, paragraph 24.
[65] Reference is made to the judgment in *ADL* v *Commission*, T-86/96, EU:T:1999:25, paragraph 57.
[66] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 50.
[67] Reference is made to the Reply, paragraphs 41 and 43.

Norwegian Act on Patients' Medical Records, must be explicitly regulated by law[68] and secondary law. No other e-prescription patient care data register is regulated in this way. Thus, there is only one such service available and DIPS does not compete with any of these e-prescription services. Based on the premise that it is accepted that a statutory monopoly for e-prescriptions exists, it must then also be incumbent on the State to facilitate the integration of such a system with the different EMR-systems of the users. In its Rejoinder ESA points out that it was not submitted by Abelia whether this would lead to a complete replacement of DIPS' modules or whether it might be feasible for DIPS to make their modules compatible. Thus the issue may simply relate to the interface of different systems, which would leave DIPS' business model, with regard to developing tailor-made software solutions for hospitals, perfectly intact.

131. ESA submits in its Rejoinder concerning Helseinformatikk and Helsenorge.no that neither website competes with the other.[69] Helsenorge.no is a patient portal and provides a platform for communication with citizens and patients, whereas Helseinformatikk provides health-related information to healthcare professionals. Helsenorge.no offers a wide range of functions, whereas Helseinfomatikk focuses solely on sharing health-related information. Since its launch in 2011, Helsenorge.no has offered free access to citizens and patients, however, this seems to have left Helseinformatikk's market position unaffected.

132. In the light of the above, ESA submits in its Rejoinder that Abelia has failed to adduce pertinent evidence to show that the Contested Decision adversely affects DIPS' and Helseinformatikk's legitimate interests.

133. Concerning WTW, ESA submits that while "*the company has experienced growing demand for its services in recent years*",[70] it fails to demonstrate how the alleged aid will adversely affect its market position. Indeed, ESA argues that since WTW only submits that the "*position that the services offered by NDE are non-economic in nature, will likely lead to decline in the demand of those services…*"[71] does not explain what adverse effects the alleged aid might have on WTW's business.

134. In addition, ESA states that the WTW's allegation that the Contested Decision will to a large extent foreclose the market in favour of public eHealth solutions is unsubstantiated, since private operators will also be allowed to offer their services in the future.

135. ESA submits in its Rejoinder that HelseRespons' booking tool is not competing with the contested activities provided by NHN and NDE, namely: (i) the Health Network'; (ii) the national patient portal (*Helsenorge.no*); (iii) the electronic prescription system (*e-resept*); (iv) the electric patient summary care record; and (v) the provision of various support services and operation of registers. WTW has not

[68] Reference is made to Section 12 of the Norwegian Act on Patients' Medical Records and to the Prescription Agent Regulation.
[69] Reference is made to the Reply, paragraph 45.
[70] Reference is made to the Application, paragraph 58.
[71] Reference is made to the Application, paragraph 61.

substantiated that it is in competition with any of these contested activities. WTW solely claims to compete with the national patient portal.

136. Helsenorge.no's features have been accessible to citizens and patients for some years and have always been free of charge. However, WTW never lodged a complaint with ESA alleging that the State's financing of Helsenorge.no affected its position on the market. On the contrary, WTW states that the number of patients using its service is larger than that using Helsenorge.no's service,[72] and that its customer base has grown steadily since Helsenorge,no was established.[73]

137. Therefore, ESA considers that WTW failed to demonstrate that the alleged aid adversely affects its business by seriously jeopardising its position on the market in question and, therefore, lacks standing to challenge the merits of the Contested Decision. Furthermore, ESA submits in its Rejoinder that WTW has failed to demonstrate that it is in a competitive relationship with the contested activities. WTW is therefore wrong when it states that it is a competitor in the same market as the public measures at issue and sufficiently affected by the alleged aid.[74]

138. Concerning the legal standard to challenge a State aid decision after a preliminary examination, ESA submits that it is settled case law that an application for annulment of such a decision is admissible when an "interested party", within the meaning of the formal investigation procedure, is seeking to safeguard its procedural rights under Article 1(2) of Part I and Article 6(1) of Part II of Protocol 3 to the SCA.

139. In this context, ESA refers to Article 1(h) of Part II of Protocol 3 to the SCA which does not exclude the possibility that an undertaking which is not a direct competitor of the beneficiaries of the alleged aid may be categorised as an interested party provided that it demonstrates that its interests could be adversely affected by the grant of the alleged aid.[75]

140. ESA submits that the Applicants have failed to demonstrate that their interests are adversely affected by the grant of the alleged aid.

141. Nevertheless, ESA states that if the Court considers that the Applicants qualify as "interested parties" adversely affected by the grant of the alleged aid, it must be verified whether the Applicants seek to defend their procedural rights by raising a plea alleging the existence of doubts or serious difficulties.

142. In this respect, the Court held that ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the measures at stake do not constitute State aid.[76] ESA submits further that, in the present case, although the Applicants raised the plea that ESA should have had doubts

[72] Reference is made to the Reply, paragraph 29.
[73] Reference is made to the Reply, paragraph 31.
[74] Reference is made to the Reply, paragraph 36.
[75] Reference is made to *Abelia*, cited above, paragraph 81.
[76] Reference is made to *Den norske Forleggerforening*, cited above, paragraph 99, *Mila*, cited above, paragraph 50, and *Abelia*, cited above, paragraph 75.

and, therefore, opened the formal investigation, the plea is actually about the merits of the Contested Decision.

143. For example, the Applicants do not raise the plea that ESA should have had doubts regarding any of the following: the length of the procedure; the difficult discussions between Norway and ESA concerning this case; a pending complaint with ESA regarding this case; or the legal complexity of the case. Conversely, the plea revolves around a single aspect, namely the allegation that the Applicants provide services in competition with the contested activities and that because of this the contested activities constitute economic activities. ESA states that it is settled case law that the mere existence of competition does not turn a healthcare service into an economic activity. Hence, ESA at no stage of the proceedings entertained any doubts with regard to the assessment that the contested activities did not constitute economic activities.

144. Furthermore, ESA states that the Applicants' second plea which maintains that the Contested Decision lacks reasoning is not related to an argument that ESA had doubts and should have opened the formal investigation procedure.

145. Therefore, ESA submits that since the Applicants' pleas challenge the merits of the Contested Decision for which they lack the requisite standing, they must be dismissed as inadmissible even if they are qualified as interested parties.

146. ESA also submits that the Application is defective since it does not contain the Applicants' addresses as required by Article 19(1) of the Statute and Article 33(1)(a) RoP. In this regard, even if the Court has already considered that such an omission does not render an application inadmissible provided the Applicants' addresses can be found in other documents at the disposal of the Court,[77] ESA notes that it does not have all those documents in its possession and so respectfully requests the Court to verify the matter and draw the appropriate consequences.

Substance

147. ESA submits that the Applicants' plea is unfounded. The Court has held that ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the measures at stake do not constitute State aid.[78] The notion of difficulties/doubts is objective and, therefore, has to be assessed regardless of the subjective doubts that the Applicants may have.[79] Even if the Applicants submit that they provide competing services, and that the contested activities must be considered to be economic activities, ESA notes that the Application makes no reference to objective factors demonstrating "serious difficulties", such as the length of the proceedings,

[77] Reference is made to *Konkurrenten.no AS*, cited above, paragraphs 38 and 39.
[78] Reference is made to *Den norske Forleggerforening*, cited above, paragraph 99, *Mila*, cited above, paragraph 50, and *Abelia*, cited above, paragraph 75.
[79] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 76.

detailed discussions with the Norwegian authorities, a pending complaint regarding the case or the legal complexity of the case.

148. The Applicants' position in this regard appears self-contradictory. On the one hand, the Applicants state that they do not claim that ESA's material conclusions to the legal questions regarding the existence of aid or economic activities of public undertakings are wrong or unfounded.[80] On the other hand, the Applicants allege that there are apparently sufficient doubts in relation to the facts, the application of the concept of an undertaking and Article 36 EEA.[81]

149. ESA states that the pre-notification procedure in the present case was relatively short, i.e. lasted less than four months[82] and ESA's preliminary examination of the notification took only two months, without requiring any formal requests for information. The nature of the correspondence between ESA and the Norwegian authorities, as well as the swift handling of the case, is due to the fact that ESA experienced no serious difficulties in assessing the notified measures. Regarding the length of the pre-notification procedure ESA submits in its Rejoinder that the length can be influenced by a panoply of factors, including simultaneously pending competing issues, the availability of staff to deal with a particular matter, the incidence of holidays or vacation periods, and the prioritisation of a specific case. In any event, the length of the pre-notification procedure was below the average pre-notification timeline.[83]

150. Concerning the Applicants' statement in paragraph 15 of the Reply,[84] ESA clarifies in its Rejoinder that this statement is based on a misunderstanding of ESA's Defence. There is no pending complaint with ESA regarding this case and ESA has also not had difficult discussions with the Government of Norway concerning this case. The exchange with the Norwegian authorities was routine and is typical and indeed representative of a pre-notification phase. The exchange ensured that ESA received a full picture of the factual situation. As apparent from the exchange, it only related to the gathering of factual information and did not involve any legal questions in relation to Article 61(1) EEA. Regarding the Applicants' statement in paragraph 68 of the Reply, ESA submits that assessing the correspondence between the Norwegian authorities and ESA neither unveils any doubts or difficulties nor identifies a need for additional information stemming from an incomplete or imprecise pre-notification. The information provided in the pre-notification actually mirrors the description the Applicants provide themselves and can therefore only be described as absolutely accurate.

[80] Reference is made to the Reply, paragraph 51.
[81] Reference is made to the Reply paragraphs 11, 12 and 51.
[82] ESA's procedure was well within the indicative six-month time period set out in the European Commission's currently applicable Code of Best Practice for the conduct of State aid control procedures (OJ 2018 C 253, p. 14).
[83] Between 2017 and 2019, ESA handled 51 pre-notifications, the average length of the preliminary examination of those pre-notifications was 211 days. By comparison the length of the preliminary examination of the eHealth measures was 144 days, calculated from 10 December 2018 (the date the pre-notification was received via the portal) to 3 May 2019 (when ESA received the notification).
[84] Reference is made to the Reply, paragraphs 53, 55 and 67.

151. ESA reiterates that the mere existence of competition does not turn the contested activities into economic activities. ESA has at no stage of the proceedings had any doubts on this issue. In this respect, ESA submits that Article 61(1) EEA does not apply when public entities exercise public powers or where public entities act in their capacity as public authorities.[85] An entity may be deemed to exercise public powers where the activity is a part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject.[86] Thus, where EEA States fulfil legal obligations and facilitate the fulfilment of such obligations, the activities to comply with those obligations are an exercise of public powers, or so closely connected to them, that they are not considered to be economic.[87]

152. The structure of the Norwegian public healthcare system is based upon solidarity and public financing. The EU Courts have confirmed that where such a structure exists, the relevant organisations do not act as undertakings.[88] In *Fenin*,[89] the EU Courts refer to settled case law[90] which clarified that an activity is non-economic in nature if it: (i) pursues a social objective; (ii) implements the principle of solidarity; and (iii) is supervised by the State. The Norwegian healthcare system fulfils these criteria and the contested activities form an integral part of that system.[91] In ESA's view, NHN's and NDE's contested activities pursue exclusively social objectives and merely form part of the management of the healthcare system.

153. ESA concluded that Norway established eHealth solutions to both fulfil certain legal obligations and facilitate the fulfilment of such obligations.[92] As required by law, the contested activities, inter alia, enable an efficient and secure electronic exchange of patient information, ensure a safe interaction between citizens and the Norwegian health sector to enable patients to exercise their rights and handle sensitive patient data in a centralised manner.[93] When it comes to designing tools to ensure compliance with such legal obligations, EEA States must have some margin of discretion and can even go somewhat beyond what is strictly required by the legal provision if that is considered necessary to fulfil the State's public duties. It is therefore not necessary to assess whether the State is obligated by law to provide each particular feature of the eHealth solutions and how those features correspond to specific legal obligations. The general objective pursued through providing these eHealth solutions[94] such as ensuring and facilitating the

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[85] Reference is made to the Contested Decision, paragraph 126, which refers to the judgments in *Commission* v *Italy*, cited above, paragraphs 7 and 8, and *Bodson*, cited above, paragraph 18.
[86] Reference is made to the Contested Decision, paragraph 126, which refers to the judgments in *SAT/Eurocontrol*, cited above, paragraph 30, and *Calì & Figli Srl*, cited above, paragraphs 22 and 23.
[87] Reference is made to the Contested Decision, paragraph 126, which refers to the judgment in *TenderNed*, cited above, paragraphs 59 and 60. The ECJ confirmed the *TenderNed* judgment on appeal in *Aanbestedingskalender BV and Others*, cited above.
[88] Reference is made to the Contested Decision, paragraph 126, which refers to the judgments in *Fenin* T-319/99, cited above, paragraphs 38 and 39, and *Fenin*, C-205/03 P, cited above, paragraphs 25 to 28.
[89] Ibid.
[90] Reference is made to the judgment in *Poucet and Pistre*, cited above, and the judgments in *Cisal di Battistello Venanzio & C. Sas*, C-218/00, EU:C:2002:36, *AOK Bundesverband and Others*, cited above, *Kattner Stahlbau*, C-350/07, EU:C:2009:127, and *AG2R Prévoyance*, C-437/09, EU:C:2011:112.
[91] Reference is made to the Contested Decision, paragraphs 129 and 136.
[92] Reference is made to the Contested Decision, paragraphs 130 to 132.
[93] Reference is made to the Contested Decision, paragraph 131.
[94] Reference is made to the judgment in *TenderNed*, cited above, paragraph 96.

fulfilment of legal obligations[95] is the element that must be examined. In the light of this assessment, ESA submits that the contested activities are an exercise of public powers and, consequently, do not constitute economic activities.[96]

154. Concerning the operations of the various registers, ESA submits that the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data falls within the exercise of public powers.[97] The administrative health registers and the national health registers all contain sensitive personal and patient-related data, the collection of which is used for public purposes and is regulated by law, for example by the Norwegian Act on Health Registers and Treatment of Health Data. Consequently, ESA correctly concluded that the operations of those registers did not constitute an economic activity.[98]

155. As regards to the support services, ESA recalls that even activities that by themselves could be considered to be economic, but are carried out merely for the purposes of providing another non-economic service, are not of an economic nature.[99] ESA concluded that the support services constituted a genuine self-supply within the public sector and, therefore, they were of a non-economic nature.[100]

156. ESA acknowledges that it was aware of some form of competition with regard to the contested activities,[101] however this competition does not turn NHN and NDE into undertakings. When the nature of an activity carried out by a public entity is assessed having regard to the State aid rules, the fact that the activity is pursued by a private operator is irrelevant. In practice, any activity of the State not consisting in an exercise of public authority would be considered an economic activity.[102]

157. ESA considers that the reference to the judgment in T-216/15 *Dôvera zdravotná poist'ovňa* is not relevant to the present case.[103] First, the specificities of the Slovak health insurance system cannot be directly linked to the present case. Second, ESA disagrees with the General Court and notes that the *Dôvera zdravotná poist'ovňa* case is currently on appeal to the ECJ where the Advocate General's opinion concluded that it should be set aside.[104]

158. Therefore, ESA had no doubts that NHN and NDE cannot be qualified as undertakings when providing the contested activities. The public financing of NHN's

[95] Reference is made to the Contested Decision, paragraph 132.
[96] Reference is made to the Contested Decision, paragraph 132.
[97] Reference is made to the judgments in *SELEX*, cited above, paragraph 72, and *Compass-Datenbank*, cited above, paragraph 40.
[98] Reference is made to the Contested Decision, paragraph 134.
[99] Reference is made to the judgment in *Fenin*, T-319/99, cited above, paragraph 40, and the judgment in *Fenin*, C-205/03 P, cited above, paragraphs 26 and 27.
[100] Reference is made to the Contested Decision, paragraph 135.
[101] Reference is made to the Contested Decision, paragraph 133.
[102] Reference is made to the Contested Decision, paragraph 128, which refers to *Private Barnehagers Landsforbund*, cited above, paragraph 80. Further reference is made to the judgment in *AOK Bundesverband and Others*, cited above, paragraph 56.
[103] Reference is made to the Application, paragraph 95.
[104] Reference is made to the Opinion of Advocate General Pikamäe in *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, Joined Cases C-262/18 P and C-271/18 P, cited above.

and NDE's activities does not constitute a State aid within the meaning of Article 61(1) EEA. Consequently, there was no scope for ESA to assess within the same decision the compatibility of the measure with regard to Article 36 EEA since this examination is only carried out if the measure constitutes State aid.

159. ESA submits in its Rejoinder that the notion of undertaking is an objective one, defined by law, where the very notion of "doubt" for the purposes of applying the State aid rules is not applicable and betrays a fundamental misunderstanding of the regime laid down by Protocol 3 to the SCA. A formal investigation, even if opened, would never serve the purposes of ascertaining a legal interpretation, which is not a matter of information or the views of interested parties, but a pure question of law.

160. In addition, ESA mentions that the Applicants only refer to the public funding as a possible restriction to the provision of services. Since the alleged effect of the public funding cannot be dissociate from the object of the public funding, there was no scope for ESA to assess the alleged effects separately because no State aid within the meaning of Article 61(1) EEA was involved.[105]

161. ESA submits in its Rejoinder, regarding the Applicants' argument[106] based on *Cassa di Risparmio* that the case, which concerned Italian banking foundations that managed banks and for that reason qualified as undertakings,[107] had totally different circumstances and considerations and adds no value to the present case. The only aspect of relevance in *Cassa di Risparmio* is the well-known fact that a profit motive is not decisive in classifying an activity as economic.[108] The fact that there is no profit motive will not change the nature of an activity, when this activity, such as managing shares in banks, is by its very nature an economic activity. Such a conclusion is of course fundamentally different, when the very nature of the activity is not economic, because it is part of an activity which falls within the exercise of public powers, as in the present case. In the same vein, the Applicants' reference to *MOTOE*[109] is also not relevant.[110] The case revolved around the question of whether the Automobile and Touring Club of Greece ("ELPA") qualified as an undertaking. ELPA, a non-profit-making association, organised motorcycling competitions in Greece and entered into sponsorship, advertising and insurance contracts. The ECJ concluded that the non-profit-making aspect was not decisive for the classification of an activity as non-economic, when the very nature of the activity, here the organisation of motorcycling competitions, is economic. This is an aspect that has no bearing on the present case, because the contested activities form part of an activity which falls within the exercise of public powers.

162. ESA considers that the Applicants should have lodged a complaint with ESA's Internal Market Directorate, if they believed that the system breached Article 36 EEA.

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[105] Reference is made to the judgments in *Iannelli* v *Meroni*, C-74/76, EU:C:1977:51 and *Matra SA*, cited above, paragraph 41.
[106] Reference is made to the Reply, paragraph 77.
[107] Reference is made to the judgment in *Cassa di Risparmio di Firenze and Others*, cited above, paragraph 124.
[108] Reference is made to the Reply, paragraph 77.
[109] Reference is made to the judgment in *MOTOE*, cited above.
[110] Reference is made to the Reply, paragraphs 78 to 80.

Finally, the public financing of NHN and NDE does not prohibit the provision of similar services by competitors across borders in other EEA States.

163. ESA submits in its Rejoinder that the Applicants have not submitted further arguments in the Reply with regard to a violation of Article 36 EEA. ESA therefore assumes that the Applicants no longer pursue this limb of their plea.

164. ESA submits that the second plea, that ESA failed to provide adequate reasoning as required by Article 16 SCA, must be rejected as manifestly unfounded. For this purpose, ESA refers to the Contested Decision for detailed explanations of why NHN and NDE did not qualify as undertakings with regard to the activities.

165. ESA submits in its Rejoinder that the Applicants have not submitted further arguments in the Reply concerning the second plea. ESA therefore assumes that the Applicants no longer maintain the second plea.

Government of Norway
Locus standi

166. Regarding the admissibility of the Application the Government of Norway submits, that the requirements differ depending on the grounds upon which a decision not to initiate a formal investigation procedure is challenged. If a challenge is limited to safeguarding the applicant's procedural rights under Article 1(2) of Part I and Article 6(1) of Part II of Protocol 3 to the SCA, it suffices that the applicant is an "interested party". This means, in accordance with Article 1(h) of Part II of Protocol 3 to the SCA, any person, undertaking or association of undertakings whose interests might be affected by the granting of State aid, in particular competing undertakings and trade associations.[111]

167. Where an applicant instead challenges the merits of the Contested Decision, the standing requirements are stricter, and the plaintiff must be directly and individually concerned by the decision,[112] in other words "substantially affected" by the financing in question.[113] It neither suffices that the decision may influence competitive relationships on the relevant market nor that the undertaking concerned is in a competitive relationship with the addressee of the contested measure.[114] Rather, in addition to demonstrating a competitive relationship, the applicant must show that its circumstances distinguish it in a similar way to the aid recipients.[115]

168. The Applicants in this case have not attempted to demonstrate that they are substantially affected by the decision, but instead rely on the standing requirement applicable to challenges limited to the protection of procedural rights.

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[111] Reference is made to *Mila*, cited above, paragraph 55 and case law cited.
[112] Ibid.
[113] Ibid.
[114] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 50.
[115] Ibid.

169. The Government of Norway agrees with ESA's observations, that while recognising that the Applicants formally plead that ESA should have had doubts warranting the opening of a formal investigation, the Application in substance concerns the merits of the decision[116] and that the second plea concerns lack of reasoning and therefore does not relate to whether ESA should have opened a formal investigation.[117]

170. Although the Applicants assert their standing to challenge the decision in order to safeguard their procedural rights, they seem to recognise that their challenge of ESA's factual and legal assessments concern the merits of the decision. This is presumably why they invoke case law stating that insofar as an applicant has raised a plea alleging the existence of doubts, the Court may examine arguments on the merits in order to ascertain whether the procedural pleas regarding those doubts are well-founded.[118]

171. The basic tenets of this case law are not in dispute, however the application of the principles are key in the present case. The essence of the reasoning in *Kronoply and Kronotex* and other judgments is that it would be unduly formalistic not to be able to take into account substantive pleas insofar as they "could be linked to the plea alleging disregard for procedural guarantees."[119] Therefore, the pertinent question is drawing a line between taking into account substantive arguments as part of the assessment of whether ESA has breached the Applicants' procedural rights, and judicial review of the merits of the Contested Decision.

172. While enforcing the limits is a strictly legal issue, it is important to keep in mind the significant policy reasons underpinning the distinction between procedural and substantive pleas. The smooth and effective processing of notifications which ESA deems to provide no doubts would be jeopardised if any interested party could essentially challenge the merits of such a decision and require the Court to review those merits. This would entail a premature and uncalled for use of scarce judicial resources. It would also unduly prolong uncertainty concerning the implementation of often very important public policy measures. Finally, it runs the risk that the Court, almost inevitably, thereby fetters the legal assessment to be carried out in the formal investigation, if the outcome is that such an examination must be carried out.

173. The Government of Norway is of the opinion, that the Application in this case challenges the merits of the Contested Decision. The Applicants' detailed challenges of ESA's factual and legal assessments cannot be distinguished from an ordinary challenge of the merits. If the distinction between procedural pleas and pleas on the merits are to have any genuine meaning, it cannot be defeated or circumvented by the addition of certain words ("in doubt"). Judicial review of admissibility must rather, in common with how the Court approaches all issues of law, be made having regard to the genuine substance of the application.

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[116] Reference is made to the Defence, paragraph 44.
[117] Ibid, paragraph 47.
[118] Reference is made to *Mila*, cited above, paragraph 61 and the case law cited.
[119] Reference is made to the judgement in *Kronoply and Kronotex*, cited above, paragraphs 57 and 58.

174. The Government of Norway submits that the Court should hold the Application inadmissible due to lack of standing.

175. If the Court nevertheless considers that the Application genuinely concerns the defence of the Applicants' procedural rights, and that the pleas concerning the merits are merely ancillary,[120] then the claims concerning factual and legal errors should only be considered to the extent necessary to review the alleged disregard of the Applicants' procedural guarantees. Although judicial review of "serious doubt" goes beyond considering manifest errors of assessment,[121] it cannot amount to a regular in-depth review of the merits of the Contested Decision.

Substance

176. According to settled case law, ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the national measure does not constitute State aid within the meaning of Article 61 EEA.[122] The notion of doubts or serious difficulties is objective.[123] Judicial review of ESA's assessments is based on the facts and law available to ESA when it adopted the Contested Decision.[124]

177. As for the circumstances in which the Contested Decision was adopted, the Government of Norway notes that the notification process was swift and straightforward in this case,[125] as is clear from the description set out in ESA's Defence.[126]

178. The Government of Norway observes that judicial review cannot be based on sweeping and unsubstantiated allegations of "more" competition in the market than that described in the notification and the Contested Decision. What is required is that the Applicants identify and explain how ESA's factual assessments fail to give a correct description measured against the facts available to it.[127]

179. As for the issues that are more concretely identified, reference is made to the notification for legal certainty and its explanation as to why certain private services should neither be regarded as genuine alternatives nor directly competing.[128] More generally, however, it appears that there is little disagreement as to the basic facts. The notification for legal certainty as well as the Contested Decision acknowledge that that private operators offer goods and services to NHN and NDE as input to the eHealth

[120] Reference is made to *Mila*, cited above, paragraphs 59 to 61.
[121] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 76.
[122] Reference is made to *Mila*, cited above, paragraphs 50 and 88.
[123] Reference is made to *Mila*, cited above, paragraph 89.
[124] Ibid.
[125] It may be added that a notification made for legal certainty with regard to implemented measures is usually not, in relative terms, processed as quickly as a regular notification, reference to this effect is made to the judgment in *Tempus*, T-793/14, EU:T:2018:790.
[126] Reference is made to the Defence, paragraphs 15 to 24 and 54 to 56.
[127] Reference is made to this effect to *Private Barnehagers Landsforbund*, cited above, paragraph 76.
[128] Reference is made to the notification for legal certainty, Section 3.3.6.

scheme as well as some supplementary services.[129] However, these issues are legally immaterial.

180. Secondly, the Government of Norway finds the Applicants' assertions regarding market fragmentation surprising, since in the Government's view the challenges posed by the fragmented provision of eHealth can be seriously disputed.[130] Moreover, none of these factual issues are decisive for the legal analysis. The question is not what prompted the EEA States to organise their social security system as they have done, but whether the result of that organisation is that the activities concerned are not economic in nature.

181. Thirdly, the Government of Norway observes that it is common ground that national eHealth solutions resemble natural monopolies, which makes it less meaningful and profitable to establish rival systems.[131] But this does not alter the analysis of whether their administration entails economic activity.[132] It rather explains – contrary to the first claim made by the Applicants – why the field occupied by such a scheme does not resemble an ordinary market characterised by economic activity.

182. The concept of an undertaking in competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed.[133] The State itself or a State entity may act as an undertaking.[134] It is the activity of offering goods and services on a given market that is the characteristic feature of an economic activity.[135]

183. As concerns the areas of public health care and social security, it should be recalled that the organisation of health care and social security systems falls within the exclusive competence of the EEA States. The EEA States are in principle free to organise these systems as they wish.[136] Depending on how the States choose to do so, the outcome may be that the entities operating within that system do not offer goods or services on a regular market, but rather carry out services of a non-economic nature.[137]

184. In some EEA States, the national health service is almost entirely based on the principle of solidarity (funded by State resources) and essentially provide their services for free, based on universal coverage.[138] Public entities forming an integral part of such a structure are not deemed to carry out an economic activity.[139] Where such a structure exists, even activities which, when viewed in isolation, might be regarded as being of

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[129] Reference is made to the Defence, paragraph 63 and the Contested Decision, paragraph 133.
[130] Reference is made to the Contested Decision, paragraphs 14 and 19 to 25 and the Application, paragraphs 75 and 77.
[131] Reference is made to the Contested Decision, paragraph 117.
[132] Reference is made, to this effect, to the judgment in *Fenin*, T-319/99, cited above, paragraph 37, and also the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraphs 101 and 102.
[133] Reference is made to the judgment in *Höfner and Elser*, cited above, paragraph 21.
[134] Reference is made to the judgment in *Italy* v *Commission* C-41/83, EU:C:1985:120, paragraphs 16 to 20.
[135] Reference is made to the judgment in *Fenin*, C-205/03 P, cited above, paragraph 25.
[136] Reference is made to the judgment in *Commission* v *Belgium*, C-75/97, EU:C:1999:311, paragraph 37.
[137] Reference is made to the Opinion of Advocate General Pikamäe in *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, Joined Cases C-262/18 P and C-271/18 P, cited above, paragraph 113.
[138] Reference is made to the NoA Guidelines, paragraph 24.
[139] Reference is made to the judgment in *Fenin*, T-319/99, cited above, paragraphs 36 to 40, as upheld in the judgment in *Fenin*, C-205/03 P, cited above, paragraphs 25 to 27.

an economic nature, are still deemed to be non-economic insofar as they are carried out merely for the purpose of providing another non-economic service.[140]

185. Similarly, the ECJ has held that certain bodies entrusted with the management of statutory health insurance pursue an exclusively social objective and do not engage in economic activity.[141] According to this case law, an activity is deemed non-economic in nature where it implements a system based on: (i) a social objective; (ii) the principle of solidarity; and (iii) supervision by the State.[142]

186. The fact that a body is non-profit making is a relevant factor in determining whether an activity is of an economic nature or not – as it will often be an indicator of a social objective based on a principle of solidary[143] – but it is not sufficient of itself.[144]

187. Furthermore, activities involving the exercise of public powers are not of an economic nature.[145] This refers to activities that are connected, by their nature, aim and the rules to which they are subject, with the exercise of public powers.[146] Hence, it is not required that the activity is essential or indispensable, it being sufficient that the activity is connected to matters involving the exercise of public powers.[147]

188. An entity may be regarded as an undertaking in relation to only part of its activities, if those activities must be deemed as economic in nature.[148] However, if that economic activity cannot be separated from the exercise of a non-economic activity, the activities exercised by that entity as a whole remain activities connected with non-economic activities.[149] Two activities cannot be separated when one would be rendered "largely useless" without the other or even where those two activities are "closely linked".[150]

189. The Applicants do not contest, that services offered within the Norwegian health care system are in *general* not an economic activity.[151] However, it is appropriate to set out the reasons why these activities are not economic in nature.

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[140] Ibid, paragraph 25.
[141] Reference is made to the judgments in *Poucet and Pistre*, cited above, paragraphs 15 and 18, and *AOK Bundesverband and Others*, cited above, paragraph 47.
[142] Reference is made to the judgments in *Poucet and Pistre*, cited above, in *Cisal di Battistello Venanzio & C. Sas*, cited above, in *AOK Bundesverband and Others*, cited above, in *Kattner Stahlbau*, cited above, and in *AG2R Prévoyance*, cited above.
[143] Reference is made, to this effect, to the judgment in *AOK Bundesverband and Others*, cited above, paragraph 51.
[144] Reference is made to the judgment in *SELEX*, cited above, paragraph 116 and the case law cited, and the judgment in *Aanbestedingskalender BV and Othe*rs, cited above, paragraph 58.
[145] Reference is made to the judgment in *MOTOE*, cited above, paragraph 25.
[146] Reference is made to the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraphs 16 and 17 and the case law cited.
[147] Reference is made to the judgments in *SELEX*, cited above, paragraph 79, and in *Aanbestedingskalender BV and Others*, cited above, paragraph 103.
[148] Reference is made to the judgment in *Compass-Datenbank*, cited above, paragraph 37.
[149] Ibid, paragraph 38.
[150] Reference is made to the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraph 44.
[151] Reference is made to the Application, paragraph 88 first sentence.

190. A statutory public health care system providing for health protection for the general population, such as the Norwegian scheme, pursues *a social objective*. It fulfils a function which is exclusively social and entirely non-profit making, consisting in the provision of medical care to all residents in Norway, irrespective of their financial position and their state of health.[152]

191. It remains to be examined, however, whether that system applies the principle of solidarity and the extent to which it is subject to supervision by the State, as these factors are likely to preclude a given activity from being regarded as economic.[153]

192. The principle of solidarity is inherent in the Norwegian health care system.[154] This principle rests on the fact that the whole of the population is entitled by law to health care and finds expression in the financial equalisation of risk undertaken by the State.[155] Hence, over 85% of the health care system's financing comes from tax revenue. Visit fees – for those services that require them – are modest and annually capped, above this cap services are provided entirely free of charge.[156] Consequently, there is no direct link between contributions and benefits, and the same applies for disparities in risks and the benefits granted.[157] Furthermore, the provision of health care services depends solely on the medical need of the patient concerned.

193. Finally, the provision of health care is predominantly regulated by law and entails statutory obligations on the public entities tasked with administering the system.[158] It will be apparent that the organisation of the Norwegian healthcare system has several of the characteristics emphasised in *Private Barnehagers Landsforbund*.[159] Those features included that about 80% of the costs were borne by the public purse, no connection between the actual costs of the service provided and the applicable fees, and that the municipalities had a statutory duty to provide the services in question.[160] The Court's conclusion is therefore also apt in this case:

> *"It is therefore clear that the Norwegian State, when establishing and maintaining a system where every child increases the costs incurred, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and education fields."*[161]

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[152] Reference is made, to this effect, to the judgments in *Poucet and Pistre*, cited above, paragraphs 8 and 9, *Fenin* T-319/99, cited above, paragraphs 38 and 39, and *AOK Bundesverband and Others*, cited above, paragraph 35.
[153] Reference is made to judgment in *Kattner Stahlbau*, cited above, paragraph 43 and the case law cited.
[154] Reference is made to the judgment in *Fenin*, T-319/99, cited above, paragraphs 38 and 39.
[155] Reference is made, to this effect, the judgments in *Poucet and Pistre*, cited above, paragraphs 10 and 11, *Fenin*, T-319/99, cited above, paragraphs 38 and 39, and *AOK Bundesverband and Others*, cited above, paragraph 36.
[156] Reference is made in this regard, to the judgment in *Kattner Stahlbau*, cited above, paragraph 51.
[157] Reference is made in this regard, to the judgments in *AOK Bundesverband and Others*, cited above, paragraph 36, and *Kattner Stahlbau*, cited above, paragraph 59.
[158] Reference is made to the judgments in *Poucet and Pistre*, cited above, paragraphs 14 and 15, *AOK Bundesverband and Others*, cited above, paragraph 37, and *Kattner Stahlbau*, cited above, paragraph 63.
[159] Reference is made to *Private Barnehagers Landsforbund*, cited above.
[160] Ibid, paragraph 82.
[161] Ibid, paragraph 83.

194. Since the system of health care pursues a social objective in accordance with the principle of solidarity and subject to state supervision, it follows that the health care services provided do not constitute an economic activity.

195. What remains to be assessed is whether the notified eHealth measures nevertheless constitute economic activity which, in addition, can be separated from the general system of health care.

196. The activities carried out by NHN and NDE may be divided into three categories. The first category concerns the provision of eHealth solutions. These activities are by nature non-economic for two reasons. First, it will be recalled that the notified eHealth solutions involve exchange of patient health information between actors within the health care system with a view to optimising medical treatment. Safe and expedient digital exchange of patient health information is vital for determining what treatment patients should receive and is also decisive for concluding on a specific treatment's efficacy. Furthermore, it improves the quality of health care by reducing errors based on incomplete information and makes repeated tests or examinations redundant. The notified eHealth solutions also provide patients with information about ongoing treatment and more generally on how to participate in their own treatment. Hence, it will be apparent that the public provision of these digital services forms an integral and important part of the provision of health care with the Norwegian system.

197. It follows that these activities, similarly to the general activity of providing health care, must be deemed non-economic in nature for the reasons described above. They are services offered within a system pursuing a social objective based on the principle of solidarity and subject to state supervision.[162] Furthermore, the notified measures are, in any event, "closely linked" to the task of providing health care services within the Norwegian system and are thus connected with that non-economic activity.[163]

198. Secondly, the corollary of the fact that the provision of eHealth solutions facilitates and optimises medical treatment in several respects, is that the notified measures are means of ensuring that patients receive the services which they are entitled to by law from the municipal health and care service and the specialist health service. This principally concerns the basic right to necessary health and care services enshrined in the Norwegian Patients' and Users' Rights Act. Another aspect is that the notified measures, such as Helsenorge.no, enable patients to exercise distinct rights pursuant to the Norwegian Patients' and Users' Rights Act. This includes rights such as participation in treatment, access to medical records and reimbursement of patient transports. It should also not be forgotten that the exchange and transfer of health information concerns sensitive personal data and is therefore specifically regulated by law. NHN and NDE are entrusted with ensuring the safe and expedient transfer of such information in conformity with the legal framework. Hence, the Health Network enables providers to employ digital means of information exchange in compliance with various law and regulations, including the Norwegian Patient Medical Records Act and the Norwegian

[162] Ibid. See also the NoA Guidelines, paragraphs 24 and 25.
[163] Reference is made, to this effect, to the judgments in *Selex*, cited above, paragraphs 76 and 77, and *Aanbestedingskalender BV and Others*, cited above, paragraphs 59 and 60.

Health Register Act and Regulation (EU) 2016/679,[164] in particular Article 32 thereof. The HelseCERT, which is part of the Health Network, ensures compliance with Article 9 of Directive (EU) 2016/1148.[165] Furthermore, the e-prescription system and the electronic Patient Summary Care Record constitute statutory monopolies pursuant to Sections 12 and 13 of the Norwegian Patient Medical Records Act, in accordance with Section 6 of that act.

199. It follows that NHN and NDE in several respects facilitate and implement statutory obligations as well as their objectives, which in accordance with settled case law are deemed to be connected with the exercise of public powers.[166] It may also be recalled that it is sufficient that the activity in question is *connected* with the exercise of public powers and that it is not required that the linked activity is essential or indispensable.[167] Hence, the contested activity need not be specifically required in order to fulfil legal obligations as long as it constitutes a means of attaining the objectives of the statutory requirements.[168]

200. The second category concerns the operation of various health registers. Operating health registers for exclusive use within the Norwegian public health care system is, like the system of which it forms part, an activity pursing a social objective based on the principle of solidarity and subject to state supervision. Furthermore, this activity is regulated by the Norwegian Act on Health Registers and Treatment of Health Data and constitute for the reasons given above exercise of public powers. It follows explicitly from case law that public entities collecting and storing information pursuant to a statutory framework constitute an activity connected with exercise of public powers.[169]

201. The third category consists of support services concerning procurement, ICT and archiving to government agencies subordinate to the Norwegian Ministry of Health and Care Services. These tasks were previously carried out in-house by each government agency, but were consolidated within NHN as a consequence of its expertise.[170] It should be underscored that the support services are exclusively provided to government

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[164] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 958/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).
[165] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ 2016 L 194, p. 1).
[166] Reference is made, to this effect, to the judgments in *Selex*, cited above, paragraphs 71, 72 and 79, in *Compass-Datenbank*, cited above, paragraphs 36 to 41, in *TenderNed*, cited above, paragraphs 59, 60 and 103, as upheld on appeal in *Aanbestedingskalender BV and Others*, cited above, paragraphs 15, 16, 43 and 44.
[167] Reference is made to the judgments in *Selex*, cited above, paragraph 79, and *TenderNed*, cited above, paragraph 104.
[168] Reference is made, to this effect to the judgments in *Selex*, cited above, paragraphs 72 and 79, *Compass-Datenbank*, cited above, paragraph 41, and *TenderNed*, cited above, paragraphs 63, 65, 73 to 76 and 94– to 96, as upheld on appeal in *Aanbestedingskalender BV and Others*, cited above, paragraphs 43 and 44.
[169] Reference is made to the judgment in *Compass-Datenbank*, cited above, paragraphs 40 and 41.
[170] Reference is made to the Contested Decision, paragraphs 110 to 114.

agencies subordinate to the Norwegian Ministry of Health and Care Services and are thus not offered on the market in competition with private companies.

202. In this regard, it should be recalled that even activities which, when viewed in isolation, might be regarded as being of an economic nature, are still deemed to be non-economic insofar as they are carried out merely for the purpose of providing another non-economic service.[171] These support services are only provided to enable the provision of public health administrative tasks.[172] Furthermore, some of these services, such as archiving and public procurement, are more specifically connected with the exercise of public powers by the government agencies.[173] It may be added that it is not required that the linked activity is essential or indispensable, as it may for instance include assistance concerning tendering procedures.[174]

203. The Applicants' assertions regarding previous and existing pockets of competition do not alter the conclusions reached above. These assertions are, first of all, factually inaccurate. Closer inspection reveals that the examples given are in fact not competing services. Second, the claims are in any in event legally immaterial as they do not affect the nature of the activity pursued by the notified measures.

204. First, the Application takes issue with the fact, as indeed the "notification admits", that private suppliers provide services concerning the operation and further development of eHealth solutions.[175] While this indicates the existence of competition between undertakings in the market of offering goods and services to NHN and NDE, it follows from *Fenin* that such competition is immaterial as the relevant inquiry is whether the subsequent use of the purchased goods and services by NHN and NDE amounts to an economic activity.[176]

205. The Government of Norway does not think, however, that the rule laid down in *Fenin* turns on whether the purchase concerns hardware or software to be used for health care purposes.

206. Secondly, the Government of Norway cannot see that the Application substantiates genuinely competing services for providing eHealth to health care providers operating within the Norwegian health care system.[177] Furthermore, the notification thoroughly explains why these services are not real alternatives to the

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[171] Reference is made to the NoA Guidelines, paragraph 25, and the judgment in *Fenin*, C-205/03 P, cited above, paragraphs 25 to 27.
[172] The fact that commercial operators could potentially carry out such tasks is not decisive, see, to this effect, *Private Barnehagers Landsforbund*, cited above, paragraph 80.
[173] The Archives Act § 6 obliges the State administration, including the Ministry of Health and Care Services and the subordinate administrative agencies, to keep archives.
[174] Reference is made to the judgments in *Selex*, cited above, paragraphs 70, 71 and 79, and *TenderNed*, cited above, paragraph 104.
[175] Reference is made to the Application, paragraph 76.
[176] Reference is made to the judgments in *Fenin*, T-319/99, cited above, paragraphs 36 to 40, as upheld in *Fenin*, C-205/03 P, cited above, paragraphs 25 to 27.
[177] Reference is made to the Application, paragraphs 73, 78 and 79, see also the Contested Decision, paragraph 54.

notified measures and thus not genuinely in competition.[178] A common distinguishing feature is that the private service typically only provides a distinct feature, compared to the holistic provision of services provided by the notified measures. For example, WTW and its HelseRespons platform, which is highlighted in the Application,[179] is in essence a message exchange, which allows the booking of appointments, renewal of prescriptions and patients' letters. Helsenorge.no, on the other hand, provides a more comprehensive solution for information exchange with the patients and inhabitants.[180] It also enables patients to access an overview of all their appointments, prescriptions, exchanges with health service providers and medical history across different health care providers.

207. Hence, while there may be private operators providing sub-features of the notified solutions or supplementary services, that does not affect the nature of the main services provided by the public entities within the system. A contrary conclusion would render it almost impossible for public entities within the health care service to offer essential digital services to the public and other entities that they are obliged to serve. A parallel can be drawn with case law concerning social security funds, which has regularly held that the main services provided within the system are non-economic activity, while supplementary services offered outside of the scheme have been deemed to be an economic activity.[181]

208. Similar to the underlying policy at issue in the *TenderNed* case, the introduction of the Norwegian eHealth scheme is not meant to eliminate commercial initiatives, but will, or should, lead them to adapt.[182] For example, private operators are competing for the subcontracts necessary for building the national eHealth infrastructure controlled by the Norwegian State.[183] However, neither some level of coexistence with commercial services nor the optional use of the contested measures can alter the non-economic nature of the notified eHealth activities or their connection with the exercise of public powers.[184] The General Court held in *TenderNed*, upheld on appeal that:

> *"In any event, the coexistence, alongside TenderNed, of commercial platforms on which contracting authorities may publish their notices, as indicated in recital 69 of the contested decision, does not automatically mean that the activities pursued by TenderNed are economic.*
> *[…]*
> *In addition, the Netherlands authorities stated, as indicated in recital 35 of the contested decision, that the existing commercial platforms did not offer the conditions relating to price, objective quality characteristics, continuity and*

[178] Reference is made to the notification for legal certainty, Section 3.3.6.
[179] Reference is made to the Application, paragraphs 78 and 79.
[180] Reference is made to the notification for legal certainty, Section 3.3.6.
[181] Reference is made to the judgment in *AOK Bundesverband and Others*, cited above, paragraph 50 and the case law cited.
[182] Reference is made, to this effect, to the judgment in *TenderNed*, cited above, paragraph 101.
[183] Reference is made to the Contested Decision, paragraph 133.
[184] Reference is made, to this effect, ibid, paragraphs 103 and 104, and to the judgment in *SELEX*, cited above, paragraph 79.

access to the services provided that would be necessary to fulfil the general interest objectives established by those authorities.
Thus, in the light of those developments in public procurement rules, driven by public interest considerations, the Commission was entitled to state, in recital 68 of the contested decision, that e-procurement was a service of general interest, and not an inherent economic activity, which could be commercially exploited so long as the State did not offer that service itself".[185]

209. Hence, even if there were some coexistence of the commercial provision of eHealth, it would not call into question the nature of NHN's and NDE's activities. Insofar as the system pursues a social objective in accordance with the principle of solidary and subject to State supervision, and in addition involves – as in this case – the exercise of public powers, neither the Court nor the ECJ has considered elements of competition capable of altering the non-economic nature of such a system.

210. In *Private Barnehagers Landsforbund*, the applicants argued that the services in question had traditionally been provided by private actors, that the Norwegian State had never established an entirely public system and that there remained competition in the market.[186] The Court observed, however, that it could not matter whether the activity in question could in principle be pursued by a private operator, as this would essentially render any State activity not involving the exercise of public powers as being economic in nature.[187] The relevant inquiry was rather to assess the nature of the activities pursued by the public entities, having regard to "the specific circumstances under which the activity is performed", and on that basis to determine whether the public entities provided services as an economic activity or exercise their powers in order to fulfil duties towards their population.[188]

211. The ECJ reasoned along similar lines in *AOK-Bundesverband*.[189] This case concerned whether sickness funds administering the German statutory health insurance scheme were involved in economic activities. After initially noting that the funds were involved in the management of a social security system, thereby fulfilling an exclusively social function, founded on the principle of solidarity and entirely non-profit making,[190] the ECJ acknowledged that the system allowed for certain elements of competition. This provided incentives, according to the ECJ, for the sickness funds to operate in a more effective and less costly manner in the interest of the proper functioning of the German social security system.[191] Most importantly, the ECJ emphasised that this did "not in any way change the nature of the sickness funds' activity".[192]

212. In other words, if the activities carried out by the entities concerned pursue a social objective based on the principle of solidary and are subject to state supervision,

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[185] Reference is made to the judgment in *TenderNed*, cited above, paragraphs 103, 107 and 108.
[186] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 68.
[187] Ibid, paragraph 80.
[188] Ibid.
[189] Reference is made to the judgment in *AOK Bundesverband and Others*, cited above.
[190] Ibid, paragraph 51.
[191] Ibid, paragraph 56.
[192] Ibid.

let alone where they are also connected to the exercise of public powers, the non-economic nature of such activities are not altered by the fact that the system affords elements of competition. This applies *a fortiori* to a scheme which does not promote competition within the system, i.e. provision of public eHealth solutions (infrastructure), as opposed to technical input.

213. Finally, the Government of Norway adds that it agrees with ESA that the Applicants' reference to the Slovak health insurance case is not apt.[193] First of all, that case is pending before the ECJ and the General Court's decision sits uneasily with the case law of the Court as well as that of the ECJ, as the Advocate General has observed.[194] Furthermore, the Slovak health insurance system is designed differently from the Norwegian health care scheme, the former being more of a hybrid scheme featuring competition within the system, thus the outcome in the Slovak proceedings would in any event not be transposable to the present case.[195]

214. Drawing the lines together, it follows from the foregoing that the task of managing and administering the provision of eHealth and related services within the Norwegian health care system is not an economic activity. Therefore, ESA did not need to entertain doubts as to whether the public entities entrusted with administering such services might constitute undertakings within the meaning of Article 61 EEA.

215. The Government of Norway respectfully invites the Court to dismiss the Application as inadmissible or, in the alternative, as unfounded, and to order the Applicants to bear the costs of the proceedings.

European Commission

216. The Commission states that it will only take a position on the substantive legal question in the case, on the basis of the facts as described in recitals 4 to 120 of the Contested Decision, paragraphs 29 to 45 of the Application and paragraphs 7 to 24 of the Defence. The Commission notes that the Applicants "subscribe in general to the factual description in the Contested Decision,"[196] and do not contest any of the facts of the Contested Decision.

217. In the Commission's view, ESA has correctly concluded in its Contested Decision that in providing the contested activities, NHN and NDE do not carry out economic activities and are thus not considered "undertakings" within the meaning of Article 61(1) EEA.

218. The Contested Decision adequately applies the relevant test[197] which is "whether the activities at issue are connected, by their nature, their aim and the rules to which they

[193] Reference is made to the Defence, paragraph 64, which refers to the judgment in *Dôvera zdravotná poist'ovňa*, T-216/15, cited above.
[194] Reference is made to the Opinion of Advocate General Pikamäe in *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, Joined Cases C-262/18 P and C-271/18 P, cited above.
[195] Reference is made to the Notification, page 45.
[196] Reference is made to the Application, paragraph 31.
[197] Reference is made to the Contested Decision, paragraph 126.

are subject, with the exercise of public powers."[198] The Commission understands that this test is applied to all of the contested activities.[199] The Contested Decision first recalls, for the Health Network, Helsenorge.no, the e-prescription system and the SCR, that "in fact, the Norwegian authorities have confirmed that the eHealth solutions are necessary to fulfil public duties towards the population" and that "the aforementioned eHealth solutions all help ensure compliance with relevant Norwegian and EEA legislation."[200] Second, as regards the operation of the various registers, the Contested Decision recalls that these eHealth solutions meet the same legal test of exercising public powers and fulfilling statutory obligations.[201] Third, with regard to the support services described in Section 3.8.3 of the Contested Decision, it is recalled that they are carried out merely for the purposes of providing another non-economic service.[202]

219. Furthermore, the Commission submits that the Contested Decision[203] correctly analyses the second aspect of the case law, which relates to whether certain activities can be separated from the exercise of public powers.[204] The Contested Decision states that "according to the Norwegian authorities, it is appropriate to assess all the eHealth solutions and services described in Sections 3.4 to 3.8 above as one interconnected service, namely national eHealth".[205] The Commission understands that ESA agrees with this assessment and applies the same legal test of fulfilling a statutory obligation to all of these activities.[206]

220. The Commission notes that the Contested Decision additionally states that the eHealth solutions and services are provided in the context of the solidarity-based Norwegian health care system, to which the legislation listed in recital 131 applies.[207] The Commission understands that this contextual information is used to illustrate and underline the main point that these services are related to the exercise of public power.[208]

221. The Commission observes that the Applicants agree that State aid rules do not apply to the exercise of public power and further concede that "the definition of health policy and the provision of health services and medical care fall within the competence of the state."[209] The Application does not call into question the Contested Decision's principal finding that the services in question are related to the exercise of public power. Nor do the Applicants claim that certain parts of the services in question could be separated from the rest, without interfering with the activities of the eHealth solutions and services or undermining their objectives.

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[198] Reference is made to the judgments in *Aanbestedingskalender BV and Others*, cited above, paragraphs 15 to 20, in *Selex*, cited above, paragraphs 78 et seq., and in *Compass-Datenbank*, cited above, paragraph 36.
[199] Reference is made to the Contested Decision, paragraphs 27 and 130 to 135.
[200] Reference is made to the Contested Decision, paragraphs130 and 131.
[201] Reference is made to the Contested Decision, paragraph 134.
[202] Reference is made to the Contested Decision, paragraph 135.
[203] Reference is made to the Contested Decision, paragraph 127.
[204] Reference is made to the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraph 18.
[205] Reference is made to the Contested Decision, paragraph 116.
[206] Reference is made to the Contested Decision, paragraphs 130 to 135.
[207] Reference is made to the Contested Decision, paragraphs 129 and 130.
[208] Reference is made to the Contested Decision, paragraph 132.
[209] Reference is made to the Application, paragraph 88.

222. The Commission observes that the main arguments brought by the Applicants to contest the non-economic nature of the services in question are that: (a) there are existing commercial providers who offer competing services and provide "genuine market alternatives to the eHealth solutions";[210] (b) the related claim that as a consequence of the Contested Decision the market for services and technical solutions provided by private operators, which were offered on the market in competition with NHN and NDE, will effectively no longer exist;[211] and (c) the public health system as such has not been excluded from the scope of this concept of an undertaking. The fact that an entity operates within the public health system does not automatically imply that it can never be an undertaking.[212]

223. As to the first claim, the Commission notes that the existence of commercial providers, who offer competing services, does not call into question the qualification as a non-economic activity as the Contested Decision rightly states.[213] A similar argument was recently rejected as immaterial.[214] Whether the contested activities are of a non-economic nature does not depend on whether other means or private providers exist, which could meet the same objective, but the nature of the activities in question, namely whether they are connected with the exercise of public powers. The relevant question is the fulfilment of statutory obligations through these services, not whether the eHealth solutions are the best means to ensure such compliance.[215]

224. As regards the second claim, the Commission submits that it is irrelevant that the services in question take over and render inexistent a previously existing market for services and technical solutions. This does not call into question the qualification as non-economic of these activities in the exercise of public powers.[216]

225. Finally, the Commission submits that the claims related to the qualification of the Norwegian public healthcare system as such are irrelevant. ESA did not simply state that the contested services were provided in the context of the healthcare system but specifically found that Norway has established these eHealth solutions to fulfil certain legal obligations and facilitate the fulfilment of such obligations. This finding rests on the exercise of public powers, which is a separate question from whether the entire Norwegian public healthcare system is economic in nature or not.

226. In conclusion, the Commission invites the Court to dismiss the Application as unfounded.

Bernd Hammermann
Judge-Rapporteur

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[210] Reference is made to the Application, paragraph 73.
[211] Reference is made to the Application, paragraph 80.
[212] Reference is made to the Application, paragraphs 93 and 94.
[213] Reference is made to the Contested Decision, paragraph 128.
[214] Reference is made to the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraphs 46 and 47.
[215] Reference is made to the judgment in *Aanbestedingskalender BV and Others*, cited above, paragraph 114.
[216] Reference is made to the judgment in *Compass-Datenbank*, cited above, paragraphs 18 to 21, and 40.