



ORDER OF THE PRESIDENT
12 July 2017

*(Intervention – Application by the Government of the Kingdom of Norway –
e-EFTACourt)*

In Case E-1/17,

Konkurrenten.no AS, established in Evje (Norway),

represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski,
Members of the Legal & Executive Affairs Department, acting as Agents,

defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision No 179/15/COL of 7 May 2015, closing a formal investigation concerning State aid granted to Nettbuss Sør AS,

THE PRESIDENT

makes the following

Order

I Background

- 1 Konkurrenten.no AS (“Konkurrenten” or “the applicant”) is a privately owned company owned by Olto Holding AS, which operates an express bus service between Oslo and Kristiansand (Norway). Nettbuss Sør AS (“Nettbuss Sør”) was the applicant’s main competitor in the express bus market for the same route between 2004-2014.
- 2 Nettbuss Sør AS (formerly Aust-Agder Trafikkselskap AS) was established in 1986 and was owned jointly by the County of Aust-Agder and NSB AS, the State-owned national rail operator. On 1 September 1988, NSB AS established a new division, NSB Biltrafikk which acquired full ownership of Aust-Agder Trafikkselskap AS from the county. NSB Biltrafikk was reconstituted as a limited liability company on 29 November 1996 and was renamed Nettbuss AS on 10 February 2000. Nettbuss Sør operated as a wholly-owned subsidiary until 16 December 2015 when it merged with its parent company, Nettbuss.

II Facts and procedure

- 3 On 23 March 2011, the applicant filed a combined State aid and public procurement complaint against Norway, contending that the County of Aust-Agder had, since 2004, awarded contracts for the provision of local bus services to Nettbuss Sør in excess of NOK 1 billion (approximately EUR 125 million) without any public tender or any other form of competition. This led the EFTA Surveillance Authority (“the defendant” or “ESA”) to open two separate investigations: one on public procurement issues (ESA cases No 69548 and 69656) and another on State aid issues (ESA cases No 69694 and 73321).
- 4 The public procurement part of the complaint resulted in ESA issuing a letter of formal notice to Norway on 12 October 2011, which led to the adoption of a reasoned opinion against Norway on 27 June 2012.

- 5 On 10 November 2011, ESA sent to the Norwegian authorities the State aid complaint it had received from Konkurrenten, requesting information from them. Subsequently, there was a series of correspondence between ESA and the Norwegian authorities, requesting and receiving additional information, ending on 18 January 2013.
- 6 On 6 February 2013, by way of ESA Decision No. 60/13/COL, ESA opened a formal investigation into the State aid matter. The Norwegian authorities and Konkurrenten responded to the opening decision by way of letters dated 5 April 2013 and 23 May 2013, respectively. On 21 and 26 June 2013, ESA sent to the Norwegian authorities the comments from Konkurrenten and two other interested parties, including Nettbuss Sør. The Norwegian authorities responded by letter of 12 August 2013. There followed a series of letters between ESA and the Norwegian authorities requesting and receiving further information and clarifications from 17 December 2013 to 22 December 2014.
- 7 On 7 May 2015, ESA issued Decision No. 179/15/COL of 7 May 2015 (“the contested decision”). The operative part of the contested decision reads as follows:

Article 1

The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes state aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute state aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. The total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;
2. To the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;
3. A detailed report on the progress made and the measures already taken to comply with this Decision; and
4. Documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued etc).

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version of this Decision is authentic.”

- 8 By letter of 7 July 2015, in accordance with Article 5 of the contested decision, the Norwegian authorities informed the defendant that the total amount of unlawful aid granted to Nettbuss Sør was NOK 99 453 890. The letter set out how the sum had been calculated.
- 9 On 7 September 2015, the time limit set out in Article 4 of the contested decision for Norway to recover the unlawful aid expired. Recovery had not taken place.
- 10 On 25 September 2015, the applicant filed a new complaint with the defendant concerning the failure of the Norwegian authorities to comply with the contested decision and the recovery obligation pursuant to Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (“SCA”). Konkurrenten called on ESA to bring

Norway before the Court under the fast-track procedure in Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

- 11 On 6 October 2015, the Norwegian authorities wrote to ESA asking for a clarification of the contested decision, attaching a letter written by the County of Aust-Agder.
- 12 On 26 October 2015, ESA replied to that letter. It states:
- “In conclusion, the following overcompensatory payments shall be deducted from the recovery claim:
- i. Transportation of schoolchildren to and from swimming lessons and for a specific bus route (paragraph 244);
 - ii. Production regarding school years and ‘duplication school years’, as well as for school bus services (paragraph 245); and
 - iii. Shortening of stretches without the County’s approval (paragraph 246).”
- 13 On 12 November 2015, the Norwegian authorities wrote to ESA. They noted that “in order to comply with the Authority’s demarcation of the new aid measures, the Norwegian authorities will have to recalculate the amount to be recovered, and present a significantly reduced claim to Nettbuss”. They further noted that it would not be possible, in the circumstances, to implement the recovery order by 26 November 2015.
- 14 On 8 September 2016, the County of Aust-Agder and Nettbuss AS (“Nettbuss”) entered into a settlement agreement, whereby Nettbuss agreed to repay NOK 5 million (approximately EUR 625 000).
- 15 On 11 January 2017, the applicant lodged an application pursuant to the second paragraph of Article 36 SCA. The applicant considers that the contested decision has left intact virtually all State aid received by Nettbuss Sør from the County of Aust-Agder, during a 10-year period from 2004-2014. The applicant relies on three pleas in law and submits that the contested decision conflicts with the definitions specified in Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA, and infringes the duty to state reasons as required by Article 16 SCA and the duty to conduct a diligent and impartial investigation. Therefore, the applicant requests the Court to order as follows:

1. Annul ESA decision no. 179/15/COL dated 7 May 2015; and

2. *Order the defendant and any intervener to pay the costs.*

16 On 20 March 2017, the defendant lodged its statement of defence. The defendant asserts that the application does not meet formal requirements set out in Article 19 of the Statute of the Court (“the Statute”) and Article 33 of the Rules of Procedure (“RoP”) and opposes the three pleas in law relied on by the applicant. The defendant requests the Court to:

1. *Dismiss the Application as inadmissible.*

2. *Alternatively, to dismiss the Application as unfounded.*

3. *Order the Applicant to pay the costs of the proceedings.*

17 On 5 April 2017, the applicant requested an extension of time to submit the reply from 24 April 2017 to 8 May 2017.

18 On 11 April 2017, the Registrar wrote to the applicant company informing it that, pursuant to Article 78 RoP, the President had granted an extension of the time limit for submitting a reply to 8 May 2017.

19 On 19 April 2017, the Government of Norway submitted an application for leave to intervene.

20 Also on 19 April 2017, the County of Aust-Agder submitted an application for leave to intervene.

21 On 21 April 2017, Nettbuss AS submitted an application for leave to intervene.

22 On 25 April 2017, the present application to intervene was served on the parties in accordance with Article 89(2) RoP.

23 On 5 May 2017, ESA submitted comments on the applications for leave to intervene lodged by the Norwegian Government, the County of Aust-Agder and Nettbuss.

24 On 8 May 2017, the applicant submitted its reply.

25 On 9 May 2017, the applicant submitted comments on the applications for leave to intervene lodged by the County of Aust-Agder and Nettbuss.

26 On 24 May 2017, the European Commission (“the Commission”) submitted written observations pursuant to Article 20 of the Statute.

III Application to intervene

- 27 On 19 April 2017, the Norwegian Government sought leave to intervene pursuant to Article 36 of the Statute and Article 89 of the RoP.
- 28 The Norwegian Government submits that, as notice of the application was published in the Official Journal of the European Union on 9 March 2017, its application to intervene is timely.
- 29 The Norwegian Government wishes to support the following forms of order sought by the defendant, namely, the defendant's request for the Court to:
1. *Dismiss the Application as inadmissible.*
 2. *Alternatively, to dismiss the Application as unfounded.*
- 30 In relation to the requirement, pursuant to Article 89(1)(d) RoP, for an address for service at the place where the Court has its seat, the Norwegian Government states that it does not have an address for service in Luxembourg and requests the Court to serve documents either to the address of its Agent, Mr Dag Sørli Lund, at the Ministry of Foreign Affairs in Oslo, and/or via e-EFTA Court.

IV Observations of the parties

- 31 On 25 April 2017, the application to intervene was served on the parties in accordance with Article 89(2) RoP.
- 32 On 5 May 2017, the defendant stated that it welcomes the Kingdom of Norway's application, noting that the latter, as an EEA State, is entitled to intervene as of right in the present proceedings pursuant to the first paragraph of Article 36 of the Statute. The defendant has no specific observations on the application to intervene.
- 33 The applicant did not submit any comments on Norway's application for leave to intervene.

V Law

- 34 Pursuant to the first paragraph of Article 36 of the Statute, any EFTA State, the EFTA Surveillance Authority, the European Union and the European Commission may intervene in cases before the Court.
- 35 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 9 March 2017 in the EEA Section of the Official Journal of

the European Union. Accordingly, the time limit for submission of an application to intervene was 20 April 2017.

- 36 The present application to intervene was lodged at the Court's Registry on 19 April 2017, and is therefore timely.
- 37 Article 89(1)(d) RoP requires that an application for intervention shall contain the intervener's address for service at the place where the Court has its seat. Article 89(1) RoP specifies further that Articles 32 and 33 RoP shall apply.
- 38 Article 6 of the Decision of the Court on the lodging and service of procedural documents by means of e-EFTA Court (the "Decision") provides that procedural documents shall be served on the parties' representatives by means of e-EFTA Court where they have expressly accepted this method of service or, in the context of a case, where they have consented to this method of service by lodging a procedural document by means of e-EFTA Court (see the Order of the President of 31 March 2017 in Case E-12/16 *Marine Harvest ASA v EFTA Surveillance Authority*, not yet reported, paragraphs 16 to 19).
- 39 In the present case, the Norwegian Government is represented by three agents: Mr Dag Sørli Lund, Ms Elisabeth Eikeland and Mr Ketil Bøe Moen. It is sufficient to note that Mr Dag Sørli Lund has registered for e-EFTA Court and therefore expressly accepted this method of service, as provided for in Article 6 of the Decision. Consequently, all procedural documents, including judgment and orders, may be served via e-EFTA Court on the Norwegian Government in the present case.
- 40 In light of the above, the Kingdom of Norway is granted leave to intervene in the case in support of the first two parts of the form of order sought by the defendant.

On those grounds,

THE PRESIDENT

hereby orders:

- 1. The Kingdom of Norway is granted leave to intervene in Case E-1/17 in support of the first two parts of the form of order sought by the defendant and shall receive a copy of every document served on the parties.**
- 2. Costs are reserved.**

Luxembourg, 12 July 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President