ORDER OF THE COURT
22 December 2017

(Absolute bar to proceeding with a case – State aid – Decision to close formal investigation procedure)

In Case E-1/17,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advocate,

applicant,

v

EFTA Surveillance Authority, represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by

- **the Kingdom of Norway**, represented by Dag Sørlie Lund, senior adviser, Department of Legal Affairs, Ministry of Foreign Affairs, Elisabeth Eikeland and Ketil Bøe Moen, advocates, Attorney General's Office (Civil Affairs), acting as Agents;
- **the County of Aust-Agder** (*Aust-Agder fylkeskommune*), represented by Bjørnar Alterskjær and Robert Lund, advocates; and
- **Nettbuss AS**, established in Oslo, Norway, represented by Olav Kolstad, advocate, and Camilla Borna Fossem, associate advocate,

interveners,

APPLICATION under 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 for the annulment of EFTA Surveillance Authority Decision No 179/15/COL of 7 May 2015 closing a formal investigation concerning State aid

granted to Nettbuss Sør AS, which was published in EEA Supplement no. 59/1 to the Official Journal on 27 October 2016,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicant, the defendant and the interveners, and the written observations of the European Commission, ("the Commission") represented by Lorna Armati and Antonios Bouchagiar, members of its Legal Service, acting as Agents,

makes the following

ORDER

I Legal background

1 Article 61(1) of the Agreement on the European Economic Area ("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.*

2 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 ("SCA") reads:

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

3 Protocol 3 SCA sets out the functions and powers of the EFTA Surveillance Authority ("ESA") in the field of State aid. Article 1(b)(i) of Part II of Protocol 3 defines "existing aid" as, inter alia:

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

4 Article 1(c) of Part II of Protocol 3 SCA defines "new aid" as:

... all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

5 The first paragraph of Article 19 of the Statute of the Court ("the Statute") reads:

A case shall be brought before the Court by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

6 Article 33(1) of the Rules of Procedure ("RoP") reads:

An application of the kind referred to in Article 19 of the Statute shall state:

(a) the name and address of the applicant;

(b) the designation of the party or the parties against whom the application is made;

(c) the subject-matter of the proceedings and a summary of the pleas in law on which the application is based;

(d) the form and order sought by the applicant;

(e) where appropriate, the nature of any evidence offered in support.

7 Article 88(2) RoP reads:

The Court may at any time of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with a case or declare that the action has become devoid of purpose and that there is no need to adjudicate on it; ...

II Facts

8 Konkurrenten.no AS ("Konkurrenten") is a privately owned bus transport operator established in Evje, Norway. Since 2002, it has operated an express bus route between Oslo and Kristiansand in Southern Norway. On that route it competes,

inter alia, with Nettbuss AS (formerly Nettbuss Sør AS, hereinafter "Nettbuss"). Nettbuss provides local scheduled transport and school bus transport in the county of Aust-Agder, through which the Oslo-Kristiansand route passes, in addition to its express bus service.

9 In March 2011, Konkurrenten submitted a combined State aid and public procurement complaint to the EFTA Surveillance Authority ("ESA") against Norway. In its complaint, Konkurrenten alleged that contracts for local bus transport services in the county of Aust-Agder had been awarded since 2004 without any public tender or other form of competition, and that unlawful State aid was involved in the award of these contracts.

10 The part of the complaint concerning public procurement was followed up by ESA vis-à-vis Norway in a letter of formal notice of 12 October 2011, and in a reasoned opinion of 27 June 2012. ESA formally closed that case by Decision No 140/16/COL of 29 June 2016.

11 The part of the complaint concerning State aid was communicated to Norway in November 2011. Following correspondence, ESA decided by Decision No 60/13/COL of 6 February 2013 (OJ 2013 C 118, p. 4) to open the formal investigation procedure. During the course of the procedure, comments and information were received from, inter alia, the Norwegian authorities, Konkurrenten and Nettbuss.

12 On 7 May 2015, ESA closed the formal investigation procedure by Decision No 179/15/COL on aid to public bus transport in the County of Aust-Agder in Norway (OJ 2016 L 292, p. 12) ("the contested decision"). Articles 1 to 6 of that decision read:

> *Article 1*
>
> *The compensation for local scheduled bus transport … 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. …

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.

13 The substantive dispute in the present proceedings concerns in particular the distinction between the aid provided to Nettbuss within and outside the existing aid scheme, according to the contested decision. That distinction is addressed, inter alia, in the following recitals of the contested decision:

(222) The existing aid scheme in place in Aust-Agder provides for local scheduled and school bus transport in Aust-Agder since before the entry into force of the EEA Agreement in Norway on 1 January 1994. The provision of these services are carried out by [inter alia Nettbuss Sør AS]. *The concession contract with Nettbuss Sør AS expired on 31 December 2014. …*

…

(225) The legal provisions under the existing aid scheme allow for compensation to cover the cost of the local scheduled and school bus transport services in Aust-Agder (minus the ticket revenues for the net contracts) plus a reasonable profit.

(226) Therefore, only compensatory payments for the provision of the said services can be part of the existing aid scheme in Aust-Agder, including payments in excess of losses actually incurred, which are within the scope of that scheme.

…

(232) For the period before 2004, the Authority has not identified, on the basis of the information provided by the Norwegian authorities, any payments that could be held to fall outside the remit of the existing aid scheme.

(233) Nevertheless, for the period after 2004 and the introduction of the ALFA-method [a system for the calculation of compensation for bus transport services in Norway] *(and its indexation as from 2009) the Authority notes that certain payments were indeed made outside the existing aid scheme in favour of Nettbuss Sør AS.*

…

(236) As the Norwegian authorities have submitted, the ALFA-method is materially a cost-based model and has been a system based on trust. Prior to each production year, Nettbuss Sør AS submitted estimated costs and revenues connected to the public services. Aust-Agder assumed that the company has also been properly allocating the revenues between public and commercial services. As the Norwegian authorities admit, on the basis of the information they lately identified, this seems not to have been the case.

(237) As mentioned above …, on the basis of the information submitted by the Norwegian authorities regarding the production of Nettbuss Sør AS, the production reported deviates from what should have been reported as production for public service compensation.

(238) According to the production spreadsheets submitted, Nettbuss Sør AS has been compensated also directly for the company's commercial activities. For example, the spreadsheets reveal that Nettbuss Sør AS has been receiving compensation for late night services, although these constitute part of the company's commercial activities. Nettbuss Sør AS has not objected to the fact that these commercial routes have indeed been included in the calculations for compensation under the ALFA-method.

(239) It is also revealed from the information submitted that Aust-Agder continued to pay public service compensation for some routes (e.g. Grimstad-Heggedalen and Heggedalen-Grimstad) although these routes ceased to operate.

(240) The Authority, moreover, notes that public service compensation has been paid for routes that are not part of the public service contract (e.g. the stretch Kilsund-Kitron, Tangen Hisøy-Kitron, Tangen Hisøy-Kilsund and transportation without passengers to the first bus stop for 'Sørlandsekspressen', which is the express bus from Kristiansand to Oslo).

(241) Consequently, all the above compensatory payments for activities that have wrongly or mistakenly been included in the production spreadsheets under the ALFA-method have not been based on the legal provisions and the administrative practice of the existing aid scheme in Aust-Agder.

(242) …

(243) The Norwegian authorities have submitted production deviations also in reference to well-defined public service obligations. The Authority shall assess whether these deviations are made within or outside the scope of the existing aid scheme.

(244) … Particularly, as it has been reported by the Norwegian authorities, in reference to the transportation of schoolchildren to and from swimming lessons and for a specific bus route, it appears that Nettbuss Sør AS has been receiving compensation from two different sources at the same time, i.e. the County of Aust-Agder and the municipalities.

(245) Also, concerning the production regarding school years and 'duplication school years' as well as for school bus services, it has been reported that Nettbuss Sør AS has been receiving compensation for a longer period during the year than required, e.g. 51 school weeks (255 school days) instead of 38 (192 school days).

(246) Additionally, the Norwegian authorities have submitted that some public transport stretches (no examples of specific routes are provided) have been shortened without the County's approval and without having this reflected in the production spreadsheets for the granting of the compensation. The Authority is of the view that these production deviations refer to transport services for which compensation has been granted on the basis of the existing aid scheme. It cannot thus be submitted that this alleged overcompensation constitutes new aid granted outside the boundaries of the scheme. The mere fact that the aid scheme has been ill-designed to allow for compensation in excess of the losses actually incurred, but which are within the scope of the aid scheme, does not render this overcompensation new aid. These overcompensatory payments therefore remain within the scope of the existing aid scheme.

14 Finally, recital 280 of the decision contains the following information concerning the recovery process:

(a) by reducing the costs associated with running the public service routes 39 and 40, for Nettbuss Sør AS has been provided with direct cost-savings at the amount of NOK 1 020 000, as estimated by the Norwegian authorities. This amount, which does not represent public service compensation, must be recovered with compound interest calculated from the date the amount remained at the disposal of the company in order to benefit the airport shuttle bus service, i.e. October 2013;

(b) recovery is ordered only from production deviating from what should have been reported as production for public service compensation under the ALFA-method. That said, the following cases fall within the recovery order:

(i) direct payments for transport services that have not been defined as services of general economic interest (e.g. commercial services);

(ii) direct payments for other transport services that are not the subject of the concession contracts signed (e.g. certain routes); and

(iii) direct payments for public transport services that used to be part of the existing aid scheme but have long ceased to exist.

(c) The Authority concludes that the amounts to be recovered shall reflect the number of actual deviated kilometres over the period 1 January 2004 till the expiry of the contract on 31 December 2014, taking into account the cost calculation principle determined by the ALFA-method. Any revenue from public as well as commercial activities that was paid back

to the County shall be deducted from the total recoverable amount. Compound interest shall apply from the date the aid was paid out to Nettbuss Sør AS.

15 On 7 July 2015, the Norwegian authorities notified ESA of the recovery process in accordance with Article 5 of the contested decision. The notification enclosed a letter of 29 June 2015 from the County of Aust-Agder to Nettbuss. Based on production data supplied by Nettbuss, a recovery claim of NOK 99 453 890, of which NOK 19 015 927 constituted interest and compound interest calculated until 31 August 2015, was made against Nettbuss.

16 The County and Nettbuss had diverging views on how to interpret the contested decision and Nettbuss objected to the recovery claim. In its view, a substantial part of the claim related to payments made within the existing aid scheme as set out in ESA's decision. No recovery took place at that time. On 25 September 2015, Konkurrenten filed a new complaint with ESA concerning a failure by Norway to fulfil its obligations to recover aid according to the contested decision.

17 By a letter of 6 October 2015, the Norwegian Government asked ESA to clarify how the contested decision should be understood. In its letter of response, dated 26 October 2015, ESA confirmed that the correct understanding was that overcompensatory payments outside the existing aid scheme should be recovered. However, ESA explained that certain deductions from the recovery claim should be made, in particular, as mentioned in recitals 244 to 246 of the contested decision. The Norwegian authorities entrusted the County to ensure recovery from Nettbuss and, in particular, to re-calculate the recoverable amount.

18 The compensation model for the relevant years was based on the difference between estimated annual costs and income. Routes were not compensated individually but reflected in the amount granted for the total annual production. Determining the extent to which unlawful State aid had actually been made available to Nettbuss, as a result of erroneous registration, required new assessments of Nettbuss's registered costs and income for the relevant years.

19 Based on its re-examination, the County of Aust-Agder estimated the recoverable amount under the contested decision to be NOK 4 782 613, including interest. Nettbuss agreed to pay the County of Aust-Agder an amount of NOK 5 million towards the recovery and also to allow for possible minor adjustments based on further quality checks. The agreement between the County and Nettbuss was formalised on 8 September 2016.

III Procedure and forms of order sought

20 By an application registered at the Court on 11 January 2017, Konkurrenten brought an action against ESA, requesting the Court to:

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

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

21 The application for annulment of the contested decision rests on three pleas in law. First, ESA should have classified all overcompensation to Nettbuss as having been granted outside the scope of the existing aid scheme. Second, ESA has failed to state reasons as required by Article 16 SCA by describing in vague and confusing terms how the contested decision classified the various aid that Nettbuss received as falling inside or outside of an existing aid scheme. Third, ESA has infringed the duty to conduct a diligent and impartial investigation into whether the existing aid scheme was altered by the State in 1994 and has become a new aid scheme.

22 On 20 March 2017, ESA lodged its defence, requesting 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.*

23 The time limit for submitting a reply was set as 24 April 2017. Upon an application from Konkurrenten, the President extended that time limit to 8 May 2017. On that date, Konkurrenten submitted its reply to ESA's defence. On 15 June 2017, ESA submitted its rejoinder. On 24 May 2017, the Commission submitted written observations.

24 On 19 April 2017, the Kingdom of Norway and the County of Aust-Agder, and on 20 April, Nettbuss, filed applications to intervene in support of ESA. On 5 and 9 May 2017, respectively, ESA and Konkurrenten submitted written observations on the applications to intervene. By three orders of 12 July 2017, the President granted Norway, the County of Aust-Agder and Nettbuss leave to intervene.

25 On 11 August 2017, Norway, the County of Aust-Agder and Nettbuss lodged their statements in intervention. The interveners request the Court to rule in favour of the order sought by ESA. In particular, they all argue that Konkurrenten lacks standing pursuant to Article 36 SCA to challenge the contested decision.

26 The time limit for submitting a reply to the statements in intervention was set as 8 September 2017. Upon an application from Konkurrenten, the President extended that time limit to 22 September 2017. On that date, Konkurrenten submitted its reply to the statements in intervention.

27 On 16 October 2017, the Court of its own motion invited ESA to submit observations on the issue of Konkurrenten's legal standing to challenge the contested decision.

28 In a letter of 26 October 2017, ESA submitted that Konkurrenten lacks standing and has failed to demonstrate a legal interest in the case. Konkurrenten also responded to the Court's letter and submitted that it should be given an opportunity to comment on ESA's objections.

29 Subsequently, the Court invited Konkurrenten and the interveners to submit comments. The interveners submitted their comments and maintained their positions. Konkurrenten also submitted its comments, contesting ESA's view and requested the Court to grant it an opportunity to examine and comment on the final observations submitted by the interveners.

30 In a final letter, the Court invited Konkurrenten to comment. Konkurrenten submitted its comments on 21 November 2017, maintaining in essence its previous submissions on the issue.

IV Admissibility

Introductory remarks

31 In order to challenge a decision pursuant to the second paragraph of Article 36 SCA, the applicant must have standing, either by being the addressee of the decision, or by demonstrating that it is directly and individually concerned by the decision. Moreover, natural or legal persons may bring an action for annulment only insofar as they can establish that they have a legal interest in the annulment of a decision (compare the judgment in *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55).

32 Under Article 88(2) RoP, the Court may at any time of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with a case. Consequently, the requirements of an applicant's legal standing and legal interest are matters of public policy which must be examined by the Court of its own motion (compare also the judgment in *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraphs 10 to 13).

33 The Court will first address the admissibility issue raised by ESA concerning Konkurrenten's failure to state its address in the application.

The requirements of Article 33 RoP

Arguments submitted to the Court

34 *ESA* submits that the application is inadmissible because it does not contain the applicant's address as required by Article 19(1) of the Statute and Article 33(1)(a) RoP. The application merely indicates that Konkurrenten is "established in Evje, Norway". ESA argues that is not sufficient that the current address may possibly be derived from an annex to the application. Any other approach would lead to the

result that also other essential elements, such as the pleas in law relied upon or the form of order sought, could be included in an annex rather than being set out in the application itself, which would clearly be undesirable. ESA notes that although the certificate of incorporation and power of attorney, as supplied to the Court, might contain Konkurrenten's address, it is noted that these documents have not been served on the defendant.

35 In further support of the plea, ESA submits, first, that there is no hierarchy between the various requirements set out in Article 33(1)(a) to (e) RoP. That list reproduces an enumeration contained in Article 19 of the Statute, which can only be amended by the Governments of the EFTA States. Second, in practice, only the indication of the address will reliably identify an individual applicant unambiguously. Third, the applicant's address will in a number of circumstances be essential to the exercise of both procedural and substantive rights of the defendant and other parties. Fourth, it is elementary for any lawyer to be aware of the address of their client. Fifth, the admissibility of cases brought before the Court is a question of public order that the Court is bound to examine of its own motion and thus does not need to be raised by the defendant.

36 ESA submits that a failure to comply with the requirements set out in Article 33(1) is fatal to the admissibility of an application and cannot be cured or rectified retroactively.

37 *Konkurrenten* submits that its permanent seat is stated in the application, in accordance with Article 33(1)(a) RoP. Moreover, the application contains a certified copy of Konkurrenten's certificate of incorporation and a power of attorney, as required by Article 33(5)(a) and (b) RoP. Finally, the application contains an address for service in accordance with Article 33(2) RoP. The application satisfies these legal requirements on the same basis as Konkurrenten's previous applications before the Court. The application is therefore clearly admissible (reference is made to the order in *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council*, T-54/00 and T-73/00, EU:T:2001:224, paragraphs 27 to 29).

Findings of the Court

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

39 The application in the present case states that Konkurrenten is established in Evje, Norway. The complete address is included in a certificate of incorporation attached to the application. For comparison, the Court notes that in its judgment in *Kernkraftwerke Lippe-Ems* v *Commission*, C-161/97 P, EU:C:1999:193, paragraphs 53 and 55, the Court of Justice of the European Union ("ECJ") found that the appellant's address could be derived from the General Court's judgment, which was annexed to the appeal. Thus, the irregularity was not so substantial as

to make the appeal formally inadmissible. The procedural requirement in Article 33(1)(a) RoP is substantially identical to that of appeal proceedings at the ECJ. There is no reason to apply this formal requirement more strictly in the present case. Consequently, the application cannot be held inadmissible on this basis.

Legal standing pursuant to Article 36 SCA

Arguments submitted to the Court

40 *Konkurrenten* submits that it has legal standing to challenge the contested decision. Konkurrenten is directly concerned by the contested decision because State aid was distributed to Nettbuss in a period during which the two companies were direct competitors (reference is made, inter alia, to the judgments in *Cofaz and Others* v *Commission*, C-169/84, EU:C:1986:42, paragraph 30; and *Scuola Elementare Maria Montessori* v *Commission*, T-220/13, EU:T:2016:484, paragraph 41).

41 Moreover, Konkurrenten maintains that it is individually concerned because it belongs to a closed class of operators that can no longer be expanded after the adoption of the contested decision. The aid was distributed to Nettbuss from 2004 to 2014. During this period Konkurrenten and another operator were the only competitors of Nettbuss in the market for express bus services between Kristiansand and Oslo (reference is made, inter alia, to the judgments in *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 60, and *Commission* v *Koninklijke Friesland Campina*, C-519/07 P, EU:C:2009:556, paragraph 54).

42 Konkurrenten rejects the view of the Norwegian Government that the closed category test only applies to aid measures of general application. Furthermore, Konkurrenten argues that the contested decision does in fact concern an aid scheme of general application, as is apparent from Konkurrenten's third plea. Konkurrenten also rejects ESA's view that Konkurrenten does not belong to a closed class.

43 In the alternative, Konkurrenten submits that it is individually concerned because its market position has been substantially affected by the contested aid (reference is made, inter alia, to the judgments in *Spain* v *Commission*, C-525/04 P, EU:C:2007:698, paragraphs 34, 35 and 37 to 39, and *British Aggregates Association* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 53).

44 Konkurrenten maintains that in 2002 it was the first operator to challenge Nettbuss's monopoly of the Oslo-Kristiansand route. Nettbuss responded to this competition by rapidly increasing its weekly departures, which forced Konkurrenten to offer a comparable schedule on its competing route. The market now suffers from a significant overcapacity, which has resulted in extremely low profitability. From 2004 to 2014, Konkurrenten's average profit margin was a negative 1.04 per cent. During most of that period, the contested aid was Nettbuss'

main source of income. The financial hardship was made worse by the fact that Nettbuss was allowed to use local routes financed by the County as feeding buses to connect passengers with Nettbuss's departures on the express route, whereas Konkurrenten had to finance its own feeding buses to compete with Nettbuss.

45 Konkurrenten submits that it has discharged its burden of proof so as to place the onus on the opposite side to offer any rebuttal evidence and a credible alternative explanation as to how Nettbuss was able to make significant capacity increases on the express bus market as soon as its monopoly was challenged by Konkurrenten. No such evidence has been presented.

46 In any event, Konkurrenten contends that it has standing pursuant to the fundamental right to effective judicial protection under EEA law and Article 6 of the European Convention on Human Rights ("ECHR"), because it has no other venue to challenge the validity of the contested decision (reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 86).

47 Konkurrenten argues that the advisory opinion procedure in Article 34 SCA does not provide an indirect venue for a validity review of an ESA decision through a national court. Advisory opinions are not binding, there is no obligation for national courts of last resort to request an advisory opinion from the Court, and the Court has not been empowered by the SCA to annul an ESA decision in an advisory opinion. The reasons upon which the ECJ has relied to justify a restrictive test for individual concern, therefore do not apply to the EFTA pillar (reference is made, inter alia, to the judgment in *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraphs 38 to 40).

48 Konkurrenten adds that there is no reason to assume that there is less need for legal scrutiny of ESA's decisions than those of the Commission in State aid cases. Consequently, denying Konkurrenten standing in this case would result in a complete denial of access to justice and also run counter to the interests of genuine reciprocity and homogeneity.

49 *ESA*, *Norway*, *the County of Aust-Agder* and *Nettbuss* submit that Konkurrenten is not individually concerned by the contested decision. Konkurrenten has not demonstrated how its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, nor has it produced any evidence to the effect that its market position has been substantially affected by the contested aid. There is nothing to suggest that there has been any cross-subsidisation between the local scheduled and school bus transport and Nettbuss's express bus operations. The allegations concerning overcapacity on the express bus market, low profit margin and Nettbuss's use of feeding buses for its express route in the relevant period, are not sufficient to demonstrate that the contested aid has had a substantial effect on Konkurrenten's market position (reference is made, inter alia, to Cases E-19/13 *Konkurrenten.no* v *ESA* [2015] EFTA Ct. Rep. 52, paragraphs 93 to 105; E-7/16 *Míla* v *ESA* [2016] EFTA Ct. Rep. 903, paragraphs 29 to 32; and the judgment in *Mory and Others* v *Commission*, cited above, paragraphs 97, 98 and 100).

50 Nettbuss further contends that Konkurrenten is not directly concerned by the contested decision, as it is not active on the market for which the aid was granted, namely the market for local scheduled and school bus transport in Aust-Agder.

51 Norway adds that the contested decision does not concern aid measures of general application. Therefore, it is not sufficient to belong to a closed class of operators that can no longer be extended (reference is made to the judgments in *Belgium and Forum 187* v *Commission*, cited above, paragraph 58, and *Commission* v *Koninklijke Friesland Campina*, cited above, paragraph 52).

52 ESA argues that it is questionable whether Konkurrenten actually belongs to a closed category. Furthermore, even if Konkurrenten did belong to such a closed category this would not discharge it from its obligation to demonstrate an adverse effect on its market position.

53 Norway and Nettbuss reject the view that Konkurrenten has standing pursuant to the fundamental right to effective judicial protection in EEA law and Article 6 ECHR. The right to a fair trial does not establish an unconditional right of access to court with any claim and without any limitations. The concept of *locus standi* is a common feature of most legal systems, including the EU and the EEA legal systems, and is clearly not in breach of the right to a fair trial. Norway adds that the fact that national courts in EFTA States are not obliged to refer questions of interpretation to the Court and that Article 34 SCA only provides for advisory opinions, cannot alter this conclusion.

54 The County of Aust-Agder supports the Commission's position on standing.

55 The *Commission* submits that despite the formal differences between the EFTA and the EU systems of judicial review of State aid decisions, the two systems provide in essence an equivalent level of effective judicial protection. Therefore, the Commission submits that the Court should interpret the admissibility condition of individual concern as it is interpreted by the ECJ.

Findings of the Court

56 Pursuant to the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of direct and individual concern to the former. Since the contested decision is addressed to Norway, it must be examined whether it is of direct and individual concern to Konkurrenten.

57 Case law has established that a decision is of individual concern under Article 36 SCA only if the decision affects a person by reason of certain attributes that are peculiar to him or if he is differentiated by circumstances from all other persons and those circumstances distinguish him individually just as the person addressed

by the decision (see Case E-7/16 *Míla* v *ESA*, cited above, paragraph 27 and case law cited).

58 That an applicant was the originator of the complaint which led to the opening of the formal examination procedure and that its views were heard and the fact that the conduct of that procedure, was largely determined by its observations are factors which are relevant to the assessment of *locus standi* (see, *Konkurrenten.no* v *ESA*, cited above, paragraph 97).

59 However, the mere fact that a measure examined in a decision may have an impact on a competitive relationship existing on the relevant market does not in itself establish standing. It is required that a competitor is substantially affected by the aid to which the contested decision relates. That Konkurrenten is in a competitive relationship with Nettbuss does therefore not satisfy the requirement that Konkurrenten's market position is substantially affected. Konkurrenten must also demonstrate the extent of the detriment to its market position as a result of the alleged aid (see *Míla* v *ESA*, cited above, paragraphs 29 to 31 and case law cited).

60 Demonstrating a substantial adverse effect on the applicant's position on the market may involve factors such as significant decline in turnover, appreciable financial losses, or a significant reduction in market share following the grant of the aid in question. The grant of State aid may also have an adverse effect on the competitive situation of an operator in other ways, for example by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (see *Míla* v *ESA*, cited above, paragraph 32 and case law cited, and compare the judgment in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 53).

61 In the present case, it is undisputed that State aid has been granted to Nettbuss for the provision of local scheduled and school bus transport services. However, the aid has been restricted to transportation within the county of Aust-Agder. During the relevant period, Konkurrenten was not active in the provision of local scheduled and school bus transport services in the county of Aust-Agder. Instead, Konkurrenten operated on the market for express bus services between Oslo and Kristiansand.

62 Accordingly, Konkurrenten and Nettbuss were direct competitors on this express bus route only during the relevant period of 2004 to 2014. Only part of that route passes through Aust-Agder. Nevertheless, Konkurrenten contends that it is directly and individually concerned by the contested decision because the aid enabled Nettbuss to increase its weekly departures on the express bus market, which substantially affected Konkurrenten's position in that market. In support of its contention, Konkurrenten has submitted timetables for the different operators on the Oslo-Kristiansand route for the relevant period, showing an increase in weekly departures allegedly resulting in overcapacity on that route. Moreover, Konkurrenten has submitted its annual reports for the period 2004 to 2014,

showing an average negative profit margin of 1.04 per cent, allegedly as a result of that overcapacity.

63 The fact that Nettbuss increased its departures on the express bus route in the relevant period does not prove that Nettbuss used State aid to finance that increase. The mere granting of State aid, which was restricted to a market different from the one Konkurrenten was competing on during the relevant period, cannot by itself support a contention that Konkurrenten's position on the express bus market has been substantially affected by the State aid. The argument of overcapacity and Konkurrenten's negative profit margin do not alter this result. Therefore, Konkurrenten has not sufficiently demonstrated that the contested decision is of direct and individual concern to it, as required by Article 36 SCA.

64 As regards Konkurrenten's submission that it has standing in any event pursuant to its fundamental right to effective judicial protection, the Court notes that the requirements of standing are a recognised part of a judicial procedure. Konkurrenten has not presented any argument that could persuade the Court to conclude that the application of the requirements of Article 36 SCA is in the present case in breach of the fundamental right to effective judicial protection under EEA law, as interpreted in light of the ECHR.

65 Consequently, the Court concludes that Konkurrenten lacks standing to challenge the contested decision. The application must thus be dismissed as inadmissible. In light of this conclusion, there is no need to address whether Konkurrenten has a legal interest in bringing proceedings.

V Costs

66 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Konkurrenten be ordered to pay the costs, the latter has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, Konkurrenten must be ordered to pay the costs. The County of Aust-Agder and Nettbuss have intervened in support of the successful party and have requested that Konkurrenten be ordered to pay the costs. Konkurrenten must therefore also pay the costs of these interveners. Norway, which has also intervened, bears its own costs pursuant to Article 66(4) RoP. The costs incurred by the Commission, which has submitted written observations, are not recoverable.

On those grounds,

THE COURT

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **Konkurrenten.no AS is to bear its own costs, and the costs incurred by the EFTA Surveillance Authority, the County of Aust-Agder and Nettbuss AS.**

3. **The Kingdom of Norway bears its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 22 December 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President