ORDER OF THE COURT

31 January 2011

(*Refusal of the EFTA Surveillance Authority to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility)*

In Case E-13/10,

Aleris Ungplan AS, represented by Jon Midthjell, advokat, Advokatfirmaet Midthjell AS, Oslo, Norway,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

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 annulment of the EFTA Surveillance Authority's Decision No 248/10/COL of 21 June 2010 on procurement for youth care services in Norway,

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties,

makes the following

ORDER

I Facts and Procedure

1 The applicant is a private company which provides youth care services and is registered in Norway, with its head office in Oslo. In 2008 the company provided care for more than 250 children in Norway, employed 350 people, and had a turnover of approximately NOK 350 million. The applicant is a subsidiary of the Aleris Group, which has a turnover of approximately SEK 3 billion, employs more than 5000 people and is headquartered in Stockholm, Sweden.

2 On 20 June 2008, the Norwegian Directorate for Children, Youth and Family Affairs published a contract notice for placements in child welfare institutions. According to the contract documents, the contract was to be awarded during a two stage negotiated procedure, the first of which would be a pre-qualification stage, in which the Directorate would select only those parties which satisfied the criteria set out in the contract notice. A key criterion in this respect was that only non-commercial private institutions would be permitted to go onto the second stage. Consequently, the applicant, which is a commercial service provider, was not able to compete for a contract.

3 On 3 February 2009, the applicant lodged a complaint against Norway with the EFTA Surveillance Authority (hereinafter "ESA"), alleging that by permitting the exclusion of commercial operators from this award procedure, the Norwegian Directorate for Children, Youth and Family Affairs, Norway had failed to fulfil its obligations arising from Article 2 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and Articles 3, 31 and 36 of the Agreement on the European Economic Area (hereinafter "EEA").

4 In the complaint, the applicant submitted that the contracts covered the need for 170 to 300 places in child welfare institutions for four years (1 December 2008 to 30 November 2010) with the possibility of extensions up to six years (to 30 November 2014). The contract value was estimated to range between NOK 900 million and NOK 2.6 billion.

5 The applicant lodged a second complaint on 15 June 2009, regarding a contract awarded by the Municipality of Oslo, concerning the procurement of 35 places in child welfare institutions on four year contracts from 1 May 2009 to 30 April 2013, with the possibility of extensions up to six years in total (to 30 April 2015). The contract had been awarded following a procurement procedure initiated by a contract notice, published on 17 December 2008. Since only non-

commercial service providers were invited to submit tenders pursuant to the contract notice, the applicant was disqualified. The applicant estimates the contract value at approximately NOK 230 million and maintains that the Municipality of Oslo has violated Article 2 of Directive 2004/18/EC by excluding commercial service providers from the procurement.

6 ESA started its investigation after receiving the first complaint and requested further information from the Norwegian Government in a letter on 23 February 2009, which the Government replied to on 4 May 2009, and in a letter on 8 September 2009, which the Government answered on 28 September 2009. The complaints were discussed in meetings between ESA and the Norwegian Government in Oslo on 11 and 12 November 2009.

7 By Decision No 248/10/COL of 21 June 2010, ESA closed the cases regarding the two complaints, considering that EEA States were permitted to exclude commercial operators from the market for public social services and hence also from the market for childcare and welfare services.

8 By an application registered at the Court on 23 August 2010, the applicant brought an action 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 (hereinafter the "SCA"). By the application, the applicant requests the Court:

> *(a) to annul the EFTA Surveillance Authority Decision No 248/10/COL concerning Cases No 66111 and 66744 of 21 June 2010.*
>
> *(b) to order the EFTA Surveillance Authority to pay the costs of these proceedings.*

9 The action is based on two pleas in law, namely that ESA infringed its duty to uphold Article 2 of Directive 2004/18/EC and the fundamental rules of the EEA Agreement applicable to public procurements, and that ESA infringed its duty to state reasons.

10 On 14 October 2010, the defendant lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Court's Rules of Procedure (hereinafter "RoP"). The defendant claims that the Court should:

> *(1) dismiss the application as inadmissible; and*
>
> *(2) order the applicant to pay the costs.*

11 On 26 November 2010, the applicant submitted, pursuant to Article 87(2) RoP, its observations to the preliminary objection, requesting the Court to:

> *[...] declare the application admissible.*

II Legal Background

12 According to Article 65(1) EEA, Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified. The provisions on procurement are also subject to the monitoring by ESA under Article 109 EEA.

13 Under the first paragraph of Article 36 SCA, the Court shall have jurisdiction in actions brought by an EFTA State against a decision of ESA on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of that Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. Challenging ESA's decisions under this Article is, however, subject to the conditions laid out in the second paragraph, which reads:

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

14 ESA's functions are defined *inter alia* in Article 31 SCA which reads:

> *If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.*

15 Article 23 SCA contains a special provision on procurement which reads:

> *The EFTA Surveillance Authority shall, in accordance with Articles 22 and 37 of this Agreement and Articles 65(1) and 109 of, and Annex XVI to, the EEA Agreement as well as subject to the provisions contained in Protocol 2 to the present Agreement, ensure that the provisions of the EEA Agreement concerning procurement are applied by the EFTA States.*

16 Article 1(1), (2) and (3) of Protocol 2 to the SCA on the Functions and Powers of the EFTA Surveillance Authority in the Field of Procurement reads:

> *1. Without prejudice to Article 31 and 32 of this Agreement, the EFTA Surveillance Authority may invoke the procedure for which the present Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in points 2 and 3 of Annex XVI to the EEA Agreement.*
>
> *2. The EFTA Surveillance Authority shall notify the EFTA State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.*
>
> *3. Within 21 days of receipt of the notification referred to in paragraph 2, the EFTA State concerned shall communicate to the EFTA Surveillance Authority:*
>
> *(a) its confirmation that the infringement has been corrected; or*
>
> *(b) a reasoned submission as to why no correction has been made; or*
>
> *(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5 of Annex XVI to the EEA Agreement.*

17 Concerning the European Commission, Article 3 of Council Directive 89/665 of December 21 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter "Directive 89/665"), referred to at point 5 of Annex XVI to the EEA Agreement, prescribes procedures which are similar in substance to the procedures regarding the powers and functions of the EFTA Surveillance Authority in the field of public procurement under Protocol 2 to the SCA.

III Arguments of the parties with respect to admissibility

18 ESA submits that long established case-law holds that a decision to initiate or not to initiate the procedure laid down in Article 31 SCA is not subject to judicial review. In this regard, ESA refers to the judgments of the Court of Justice of the European Union (hereinafter "the ECJ") in Cases 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19 and 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraphs 10 to 12. Reference is also made to the order of the ECJ in Case C-29/92 *Asia Motor France and Others* v *Commission* [1992] ECR I-3935.

19 ESA argues that the special rules in Protocol 2 to the SCA, cited by the applicant, are first and foremost concerned with the special powers conferred on ESA when it considers, prior to the conclusion of a contract, that a clear and manifest infringement of the procurement rules has taken place. Furthermore, it follows from the provisions of the SCA that to the extent that public procurement is not regulated by Protocol 2 to the SCA, ESA's surveillance in the field of public procurement is governed by the general provisions of the SCA, including Article 31.

20 The applicant contends that the contested decision is binding on it and brings about a distinct change in its legal position to tender its services freely. It submits that the decision is an act reviewable under Article 36 SCA which the applicant has a legal interest in asking the Court to annul. In this regard, the applicant refers to Cases 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9. Moreover, the applicant argues that the application does not concern Article 31 SCA, but Article 23 SCA, which includes a specific duty for ESA to ensure that the provisions of the EEA Agreement concerning procurement are complied with by the EFTA States.

IV Findings of the Court

21 Article 88(1) RoP provides that the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, declare the action inadmissible. After considering the submissions of the parties pursuant to Article 87(1) and (2) RoP, the Court has decided to base its assessment of the case on Article 88(1) RoP.

22 With the present action, brought under the second paragraph of Article 36 SCA, the applicant seeks the annulment of Decision No 248/10/COL of 21 June 2010 by which ESA discontinued its examination of the two complaints submitted by the applicant without taking further action on the breaches alleged therein.

23 In its pleadings, the applicant submits that Article 23 SCA obliges ESA to act and that the application does not concern Article 31 SCA, but the special procedures relating to public procurement contracts under Article 23 SCA. In this regard, the Court notes that according to Article 23 SCA, the process entailed in the special procedures for public procurement is subject to the provisions of Protocol 2 to the SCA. Under Article 1(1) of the Protocol, ESA may, without prejudice to Article 31 and 32 SCA, invoke the procedure for which the Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in Annex XVI to the EEA Agreement.

24 The Court has repeatedly held, for the sake of procedural homogeneity, that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, *inter alia*, Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 39, and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep 117, paragraph 53). This principle also applies to the issue of *locus standi* to bring an action for annulment (see Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 47, and the case-law cited).

25 The procedure for direct intervention, defined in Article 23 SCA and Protocol 2 thereto, corresponds in substance to the special procedures relating to public procurement contracts in Article 3 of Directive 89/665 and Article 8 of Council Directive 92/13/EEC. In this respect, the Court notes that there is consistent case-law of the ECJ to the effect that the procedure entailed in these legislative provisions is a preventive measure which can neither derogate nor replace the powers of the Commission under Article 258 of the Treaty on the functioning of the European Union (hereinafter "TFEU"), previously Article 226 of the EC Treaty (see, in the context of Council Directive 92/13/EEC, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 25 to 28, and the case-law cited).

26 According to this case-law, it is irrelevant when deciding on the admissibility of infringement proceedings, whether the Commission did or did not invoke the special procedure in relation to public procurement contracts. In this regard the ECJ has held that the Commission alone is competent to decide whether it is appropriate to bring proceedings under Article 258 TFEU for failure to fulfil obligation. Furthermore, the choice between that procedure and the special procedure in matters of public procurement is within its discretion (see Case C-394/02 *Commission* v *Greece*, cited above, paragraphs 25 to 28).

27 Article 31 SCA corresponds in substance to Article 258 TFEU. It is clear from settled case-law of the Courts of the European Union, that private applicants do not have the right to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations under the EU Treaties (see order of the ECJ in Case C-29/92 *Asia Motor France* [1992], cited above, paragraphs 19 to 21, and the case-law cited, and the orders of the General Court in Case T-29/93 *Calvo Alonso-Cortès* v *Commission* [1993] ECR II-1389, paragraph 55, and Case T-58/09 *Schemaventotto* v *Commission*, order of 2 September 2010, not yet reported, paragraphs 125 and 126).

28 Contrary to what is alleged by the Applicant, the findings contained in ESA's decision to close the case do not have the effect of resolving the dispute between Aleris Ungplan and the Norwegian authorities as to the legality of the

procurement procedures undertaken by the latter. The opinion notified in that decision is a factual element which a national court called upon to rule on the dispute may certainly take into account in the course of its examination of the case. However, findings resulting from an examination under Article 31 SCA are not binding on national courts (see, for comparison, with regard to Article 226 EC (now Article 258 TFEU) the order of the General Court in Case T-83/97 *Sateba* v *Commission* [1997] ECR II-1523, paragraph 41, and see further the order of the ECJ in Case C-422/97 P *Sateba* v *Commission* [1998] ECR I-4913, paragraphs 38 and 39).

29 Based on the above considerations, the Court finds that the application is manifestly inadmissible.

V Costs

30 Under Article 66(2) Rules of Procedure, 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 the applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On the grounds stated above,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant bears the costs of the proceedings.

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Luxembourg, 31 January 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President