



ORDER OF THE COURT

4 April 2011

(Measures of inquiry – Summoning of a witness)

In Case E-14/10,

Konkurrenten.no AS, represented by Jon Midthjell, advokat, Oslo, Norway,

applicant,

v

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

defendant,

APPLICATION for annulment of EFTA Surveillance Authority Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene),

THE COURT

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

makes the following

Order

I Facts and Procedure

- 1 By application lodged at the Court on 14 March 2011, Konkurrenten.no AS requested the Court to summon Mr Steinar Undrum, Director of the Competition Policy Department of the Norwegian Ministry of Government Administration, as a witness to be examined about a legality review which according to the applicant was conducted from 2008 to 2010 by the Norwegian Ministry of Government Administration. According to the application, the legality review concerned the decision of the county of Aust-Agder to award, without competition, contracts to existing concession holders for the period 2008 to 2012.
- 2 The applicant requests the Court to examine the witness about:
 - (i) The contemplated transactions which led to the legality review;
 - (ii) The purpose and the scope of the legality review;
 - (iii) The measures of inquiry undertaken by the government, including whether the concessions¹ were reviewed or whether information about the concessions was requested;
 - (iv) Whether the government considered that the county could have a legal obligation to continue to pay the existing concession holders throughout their concession periods; and
 - (v) The result of the legality review, including the reasons which led the government to advise that the county could not award contracts directly to the existing operators without any form of competition.
- 3 The applicant notes further that the Competition Policy Department of the Norwegian Ministry of Government Administration has also handled the present case during the examination of its complaint by the defendant in 2006 to 2010.
- 4 On 29 March 2011, the defendant lodged observations on the application to summon and examine Mr Steinar Undrum, submitting that the application should be rejected, that the documents annexed to the request should not be placed on the file of the Court in the annulment proceedings, that the applicant should be ordered to

¹ The applicant uses the term “licenses”.

make a deposit with the Court to cover the taxed costs in accordance with Article 52(3) of the Rules of Procedure and be ordered to bear the ultimate costs of the testimony, if the Court would grant the application.

II Findings of the Court

- 5 Under Article 52 of the Rules of Procedure, the Court may summon a witness of its own motion or on application by a party in order to prove certain facts.
- 6 The Court recalls that it is not within its competence to rule on national law of the EEA/EFTA States, see Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 22. The content of national law is a matter of fact for this Court which must, where it is disputed between the parties, be proven according to the rules governing the production of evidence.
- 7 The applicant claims that the examination of the witness will support its account of the legal situation in Norway regarding the existence of discretion on the part of the Norwegian authorities to increase, reduce or abolish compensation paid for the operation of non-profitable local bus transport services.
- 8 The existence of such discretion is disputed between the parties. It ensues from the written procedure that the answer to this question may be relevant to the outcome of the case.
- 9 Next, the testimony of Mr Undrum may help in clarifying the facts which are in dispute in this case. Even when, as submitted by the defendant, the application of the Transport Act is part of the responsibility of the Ministry of Transport and not the Ministry of Government Administration, the testimony of Mr Undrum may have probative value to support the claims put forward by the applicant.
- 10 Lastly, the Court takes note of the fact that according to the application to summon the witness, Mr Undrum has confirmed that he is willing to appear before the Court.
- 11 Based on the above, the Court has decided to grant the application to summon Mr Steinar Undrum as a witness.
- 12 Furthermore, the Court considers that Mr Undrum could possibly also be in a position to testify more directly on the facts disputed among the parties, including facts which are not referred to in the application for witness examination by Konkurrenten.no AS.
- 13 The Court considers it useful to examine the witness about:

- (vi) any views held by the Ministry of Government Administration, or by the Competition Policy Department of the Ministry of Government Administration, as to the existence and scope of a county's obligation under the legislation applicable to the funding of local bus transport services in the period from 1995 to 2008 to cover losses incurred by concession-holders stemming from the operation of those services; and
- (vii) any views held by the Ministry of Government Administration, or by the Competition Policy Department of the Ministry of Government Administration, as to whether counties have a legal obligation to ensure that private-law undertakings fully owned by them are capable of fulfilling their pension obligations vis-à-vis their employees.

On those grounds,

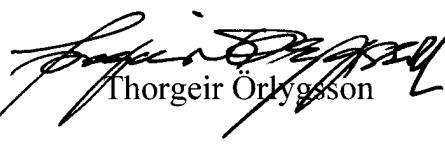
THE COURT

hereby orders:

1. **Mr Steinar Undrum, in his capacity as Director of the Competition Policy Department of the Norwegian Ministry of Government Administration, Akersgt. 59, NO-0030 Oslo, Norway, shall be heard as a witness.**
2. **The witness shall be heard on**
 - (i) **the contemplated transactions which led to the request for a legality review on the decision of the county of Aust-Agder to award, without competition, contracts to existing concession holders for the period 2008 to 2012;**
 - (ii) **the purpose and the scope of the requested legality review;**
 - (iii) **any preliminary measures of inquiry undertaken by the Ministry of Government Administration, or by the Competition Policy Department of that Ministry, including whether the concessions were reviewed or whether information about the concessions was requested;**

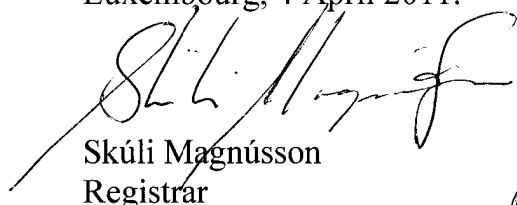
- (iv) whether the Ministry of Government Administration, or the Competition Policy Department of that Ministry, considered that the county could have a legal obligation to continue to pay the existing concession holders throughout their concession periods;
 - (v) whether a legality review was actually carried out and concluded, including the reasons which led the Ministry of Government Administration to advise that the county should not award contracts directly to the existing operators without any form of competition;
 - (vi) any views held by the Ministry of Government Administration, or by the Competition Policy Department of that Ministry, as to the existence and scope of a county's obligation under the legislation applicable to the funding of local bus transport services in the period from 1995 to 2008 to cover losses incurred by concession-holders stemming from the operation of those services; and
 - (vii) any views held by the Ministry of Government Administration, or by the Competition Policy Department of that Ministry, as to whether counties have a legal obligation to ensure that private-law undertakings fully owned by them are capable of fulfilling their pension obligations vis-à-vis their employees.
3. The summoning of the witness is made conditional upon the applicant advancing, to sufficiently cover the taxed costs thereof, a deposit of EUR 1 500 with the cashier of the Court.
4. Costs are reserved.


Carl Baudenbacher



Thorgeir Örlygsson


Per Christiansen

Luxembourg, 4 April 2011.


Skúli Magnússon
Registrar




Carl Baudenbacher
President