



ORDER OF THE PRESIDENT

25 March 2011

(Intervention – Interest in the result of the case – Application after the expiry of the time-limit for written intervention)

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 PRESIDENT

makes the following

Order

I Facts and Procedure

- 1 The applicant in Case E-14/10, Konkurrenten.no AS (hereinafter “Konkurrenten”), is a privately owned operator in the Norwegian express bus market.
- 2 On 11 August 2006, Konkurrenten lodged a complaint with the EFTA Surveillance Authority (hereinafter “ESA”) alleging that the City of Oslo had granted aid to AS Oslo Sporveier and its subsidiary, AS Sporveisbussene, contrary to Article 61 of the EEA Agreement.
- 3 By decision of 21 June 2010, ESA closed the examination of the case without opening the formal investigation procedure. In the decision, ESA concluded that the contested measures, although being aid incompatible with the EEA Agreement, constituted existing aid and it considered that in view of the termination of the aid measures, no further measures were required.
- 4 On 2 September 2010, Konkurrenten 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”), seeking the annulment of the decision of ESA, and ordering the defendant to pay costs. The defendant requests the Court to dismiss the application and to order the applicant to bear the costs of the proceedings.
- 5 By document lodged at the Registry of the Court on 8 March 2011, Kollektivtransportproduksjon AS (hereinafter: “KTP”) sought leave to intervene in support of the form of order sought by the defendant. The applicant intervener is the successor of AS Oslo Sporveier and the owner of Unibuss AS, which is the successor of AS Sporveisbussene.
- 6 The application to intervene was served on the parties in accordance with Article 89(2) of the Court’s Rules of Procedure.
- 7 Written observations on the application to intervene were received from both the applicant and defendant on 21 March 2011. Konkurrenten suggests that the application for intervention should be rejected in so far as it seeks to submit a written statement of intervention, but does not object to the application in so far as it concerns an oral intervention, even though it considers that KTP did not show good cause for its application being late. ESA submits that KTP should be permitted to intervene in the oral hearing, but should not be permitted to do more than make oral observations.

II Law

- 8 Under Article 36(2) of the Court's Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority may intervene in that case. Article 36(3) provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.
- 9 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 Court of Justice of the European Union when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in European 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 v EFTA Surveillance Authority* [2003] EFTA Ct. Rep. 52, paragraph 39, and order of the Court of 31 January 2011 in Case E-13/10 *Aleris Ungplan v EFTA Surveillance Authority*, paragraph 24). Article 36 of the Statute is essentially identical in substance to Article 40 of the Statute of the Court of Justice of the European Union. Accordingly, this principle must also apply to the assessment of whether an applicant for intervention has established an interest in the result of the case (see the order of the President of 14 February 2011 in Case E-15/10 *Posten Norge v EFTA Surveillance Authority*, paragraph 9).
- 10 An interest in the result of a case within the sense of the Statute is to be understood as meaning that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and thus, in the ruling on the specific act whose annulment is sought (see order of the President of 14 February 2011 in Case E-15/10 *Posten Norge v EFTA Surveillance Authority*, paragraph 9).
- 11 The subject of the contested decision is aid granted by the Norwegian authorities to KTP's legal forebear and its subsidiary. Consequently, KTP has established a direct and existing interest in supporting the defendant in the case according to Article 36(2) SCA.
- 12 Article 89(1) of the Rules of Procedure provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) of the Rules of Procedure. In accordance with Article 14(6) of the Court's Rules of Procedure, notice of the action was given in the EEA Section of the *Official Journal of the European Union* on 25 November 2010. The time-limit for submission of an application to intervene was 7 January 2011.
- 13 The present application to intervene was lodged at the Court's Registry on 8 March 2011, nine weeks after the expiry of the six week time-limit.

- 14 However, it also follows from Article 89(1) of the Rules of Procedure that consideration may be given to an application to intervene which is made after the expiry of that period, but before the decision to open the oral procedure. In that event, if the intervention is allowed, the intervener may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure (see, for comparison, also Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission* [2009] ECR I-2207, paragraph 38).
- 15 KTP submits that in cases before the General Court, the right to intervene at the oral hearing after the expiry of the General Court's six week procedural time-limit is 'absolute' provided that the conditions to intervene are otherwise fulfilled. Reference is made to Case T-139/01 *Comafrika and Dole Fresh Fruit Europe v Commission* [2002] ECR II-799.
- 16 Articles 115 and 116 of the General Court's Rules of Procedure are similar to Article 89 of the Rules of Procedure, but they are not identical in substance. In particular, it follows from the wording of Article 89(1) of the Rules of Procedure that to allow applications to intervene lodged after the expiry of the six week time-limit, but before the decision to open the oral procedure, is subject to the discretion of the President.
- 17 The decision to open the oral procedure is not the declaration made by the President at the start of the hearing itself to formally open the hearing. It is the Court which decides whether to open the oral procedure pursuant to Articles 40 and 41 of the Rules of Procedure.
- 18 In the case at hand, the decision to open the oral procedure had not been taken at the time when KTP's application to intervene was lodged. Consequently, it is a matter of discretion whether to allow the intervention.
- 19 KTP asserts that the discretion to allow the intervention should be exercised despite its significant delay in making its application. It is noted that neither the applicant nor the defendant object to KTP's intervention in the oral procedure. It is also noted that KTP is in a position, as the beneficiary of the contested aid, to make pertinent observations during the oral procedure.
- 20 In light of the above, Kollektivtransportproduksjon AS is granted leave to intervene in the case in support of the form of order sought by the defendant.

On those grounds,

THE PRESIDENT

hereby orders:

- 1. Kollektivtransportproduksjon AS is granted leave to intervene in Case E-14/10 in support of the form of order sought by the defendant. Pursuant to Article 89(1) of the Rules of Procedure, the Registrar shall furnish to it in due course the Report for the Hearing, on the basis of which it may submit observations in the oral hearing.**
- 2. Costs are reserved.**

Luxembourg, 25 March 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President