ORDER OF THE COURT
20 March 2015

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Local bus transport services – Decision not to open the formal investigation procedure – Decision following the formal investigation procedure – Admissibility – Measures of organization of procedure)

In Case E-19/13,

Konkurrenten.no AS, established in Evje, Norway,

represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, Maria Moustakali, Officer, and Catherine Howdle, Temporary Officer, and subsequently by Xavier Lewis, Director, Markus Schneider, Deputy Director, Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by **Sporveien Oslo AS**, established in Oslo, Norway, represented by Håkon Bleken, advokat, and subsequently by Rasmus Asbjørnsen, advokat,

intervener,

APPLICATION for annulment of EFTA Surveillance Authority Decision No 519/12/COL of 19 December 2012, OJ 2013 L 276, p. 8, closing a formal investigation concerning aid granted by Oslo Municipality to AS Oslo Sporveier and of EFTA Surveillance Authority Decision No 181/13/COL of 8 May 2013, notified in OJ 2013 C 263, p. 9, refusing to open a formal investigation into aid measures not covered by Decision No 519/12/COL.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicant, the defendant and the intervener, and the written observations of the Norwegian Government, represented by Ida Thue and Dag Sørlie Lund, acting as Agents; and the European Commission ("the Commission"), represented by Paul-John Loewenthal and Leo Flynn, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Jon Midthjell, the defendant, represented by Xavier Lewis and Maria Moustakali, the intervener, represented by Rasmus Asbjørnsen, the Norwegian Government, represented by Dag Sørlie Lund, and the Commission, represented by Paul-John Loewenthal, at the hearing on 28 January 2015,

makes the following

Order

I Introduction

1 Konkurrenten.no AS ("Konkurrenten" or "applicant") is a privately owned limited liability company which operates in the express bus market between the central and southern regions of Norway. Konkurrenten is owned by Olto Holding AS, which also owns Risdal Touring AS, a company operating in the tour bus market in Norway and several EU Member States.

2 AS Oslo Sporveier changed its name to Kollektivtransportproduksjon AS ("KTP") in 2006. KTP was renamed in April 2013 to Sporveien Oslo AS ("Sporveien" or "the intervener"). Sporveien is a company owned and controlled by Oslo Municipality. Sporveien has three wholly-owned subsidiaries: Oslo Trikken AS, Oslo T-banen AS and Unibuss AS ("Unibuss"), previously known as AS Sporveisbussene ("Sporveisbussene"). Unibuss has two wholly-owned subsidiaries operating in the commercial transport sector: Unibuss Tur AS (a tour bus company) and Unibuss Ekspress AS, previously known as Arctic Express Buss og Reisebyrå AS ("Arctic Express"), an express bus company. From June 2006 onwards, Arctic Express/Unibuss Exspress AS operated an express bus

service through the subsidiary Lavprisekspressen.no AS on the same route as Konkurrenten.

3 On 11 August 2006, Konkurrenten filed its first State aid complaint with the EFTA Surveillance Authority ("ESA" or "the defendant"), registered as ESA Case No 60510, concerning alleged State aid to the company now known as Sporveien.

4 On 21 June 2010, ESA closed Case No 60510 by Decision No 254/10/COL, without initiating the formal investigation procedure, finding that "in view of the termination of the incompatible existing state aid on 30 March, [ESA] considers that no further measures are required in this case".

5 On 2 September 2010, Konkurrenten brought an action seeking the annulment of Decision No 254/10/COL.

6 On 22 August 2011, the Court annulled Decision No 254/10/COL. The Court held that Decision No 254/10/COL was "vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008" (see Case E-14/10 *Konkurrenten.no AS* v *ESA* ("*Konkurrenten I*") [2011] EFTA Ct. Rep. 266, paragraph 92).

7 On 8 September 2011, Konkurrenten filed a second State aid complaint with ESA, registered as ESA Case No 70506, alleging that Sporveien (then KTP) had continued to receive aid from Oslo Municipality since 31 March 2008 on an ongoing basis and that it had benefited from further aid measures until 30 March 2008.

8 On 8 February 2012, Konkurrenten served a pre-litigation notice on ESA pursuant to Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") on the basis that the latter had not opened a formal investigation into State aid to Sporveien (then KTP), notwithstanding the Court's judgment in *Konkurrenten I*.

9 On 21 March 2012, Konkurrenten and Risdal Touring submitted requests to ESA pursuant to Article 2(1) of ESA's Rules on Access to Documents 2008 for access to documents in ESA Case Nos. 60510 and 70506 respectively. Subsequently, applications were brought before the Court concerning those access to documents requests which resulted in the Order in Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrrenten.no* v *ESA* [2013] EFTA Ct. Rep. 668. The present case, however, does not concern a request for access to documents.

10 On 28 March 2012, ESA opened a formal investigation into potential State aid to Sporveien (then Oslo Sporveier and Sporveisbussene) by Decision No 123/12/COL.

11 On 19 December 2012, ESA issued its subsequent Decision No 519/12/COL ("the first contested decision"). As regards Konkurrenten's 2006 complaint, ESA concluded that some of the contested measures did not constitute State aid, whilst the remaining contested measures constituted existing aid. ESA therefore closed its formal investigation.

12 On 8 May 2013, ESA issued Decision No 181/13/COL ("the second contested decision"). As regards Konkurrenten's 2011 complaint, ESA concluded that some of the contested measures did not constitute aid, whilst the remaining contested measures constituted existing aid. ESA therefore decided not to open a formal investigation.

13 On 16 August 2013, Konkurrenten lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of the first and second contested decisions.

II Legal background

14 Article 61(1) EEA reads:

> *1. 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.*

15 Article 16 SCA reads:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

16 Article 36 SCA reads:

> *The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.*
>
> *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.*
>
> *The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to*

the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

17 Article 1(1) of Part I of Protocol 3 SCA reads:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

18 Article 1 of Part II of Protocol 3 SCA reads:

For the purposes of this Chapter:

…

(b) 'existing aid' shall mean:

(i) 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;

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) 'aid scheme' shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) 'individual aid' shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;

…

(h) 'interested party' shall mean any State being a Contracting Party to the EEA Agreement and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

19 Article 4 of Part II of Protocol 3 SCA on the preliminary examination of the notification and decisions of the EFTA Surveillance Authority reads:

…

2. Where the EFTA Surveillance Authority, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

…

4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').

...

20 Article 13 of Part II of Protocol 3 SCA on decisions of the EFTA Surveillance Authority reads:

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 of this Chapter. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the EFTA Surveillance Authority shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7) of this Chapter.

3. Article 9 of this Chapter shall apply mutatis mutandis.

21 Article 17 of Part II of Protocol 3 SCA on cooperation pursuant to Article 1(1) in Part I reads:

> *1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.*
>
> *2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.*

The contested decisions

22 By Decision No 519/12/COL, addressed to Norway, ESA closed its formal investigation into potential aid to Sporveier and Sporveisbussene. In its decision, ESA assessed whether a group taxation measure involved State aid; the State aid nature of a commercial activities capital injection; and whether an annual compensation, including a public service capital injection, constituted State aid.

23 ESA considered that neither the group taxation measure nor the commercial activities capital injection constituted State aid within the meaning of Article 61(1) EEA. The annual compensation was considered to constitute State aid within the meaning of Article 61(1) EEA, but this aid was considered to form part of an existing aid scheme.

24 By Decision No 181/13/COL, addressed to Norway, ESA decided not to open the formal investigation procedure into the measures covered by the applicant's second complaint. In its decision, ESA assessed 15 short-term liquidity loans; the award of certain bus for metro and tram contracts; certain metro and tram guarantees, infrastructure loans and measures compensating KTP for the development of a payment and ticketing system known as "NBB".

25 ESA assessed the 15 short-term liquidity loans in accordance with the private creditor test, and concluded that they did not constitute State aid within the meaning of Article 61(1) EEA. The bus for metro and tram contracts were considered to have been concluded on a commercial basis and, consequently, were deemed not to constitute State aid within the meaning of Article 61(1) EEA. ESA found that the metro and tram guarantees, the infrastructure loans and the payment and ticketing measures constituted State aid within the meaning of Article 61(1) EEA, but this aid was considered to have been awarded on the basis of an existing aid scheme.

III Procedure and forms of order sought

26 On 16 August 2013, Konkurrenten lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of both contested decisions.

The application contained a request for measures of organization of procedure pursuant to Article 49(3)(d) of the Rules of Procedure ("RoP").

27 The applicant, Konkurrenten.no AS, requests the Court to:

> *(i) annul ESA Decision No 519/12/COL of 19 December 2012 (AS Oslo Sporveier and AS Sporveisbussene), and order the defendant and any intervener to pay the costs;*
>
> *(ii) annul ESA Decision No 181/13/COL of 8 May 2013 (Kollektivtransportproduksjon AS, Oslo Vognselskap AS and Unibuss AS), and order the defendant and any intervener to pay the costs.*

28 On 27 August 2013, ESA requested an extension of the deadline to lodge a defence. On 28 August 2013, the President, pursuant to Article 35(2) RoP, granted ESA's request and set the deadline for the defence to 5 November 2013.

29 On 30 September 2013, Sporveien AS sought leave to intervene, pursuant to Article 36 of the Statute and Article 89 RoP, in support of the form of order sought by ESA.

30 On 14 October 2013, ESA lodged its written observations on the application to intervene at the Court's Registry. On 17 October 2013, Konkurrenten lodged its written observations on the application to intervene at the Court's Registry.

31 On 5 November 2013, ESA submitted "preliminary objections on inadmissibility & defence", pursuant to both Articles 87 and 35 RoP. The defendant, the EFTA Surveillance Authority, requests the Court to:

> *(i) dismiss the application as inadmissible;*
>
> *(ii) order the applicant to bear the costs of the proceedings;*
>
> *In the alternative*
>
> *(i) dismiss the application as inadmissible insofar as it is directed against Decision No 519/12/COL;*
>
> *(ii) dismiss the application for the remainder;*
>
> *(iii) order the applicant to bear the costs of the proceedings.*

32 On 15 November 2013, the Court decided to regard ESA's submission of 5 November 2013 as a preliminary objection on inadmissibility pursuant to Article 87(1) RoP. The Court decided that those elements of ESA's submission that purport to constitute a defence in the present case are to be disregarded.

33 On 9 December 2013, Konkurrenten requested an extension of the deadline to submit comments on the application for inadmissibility. The same day, the President, pursuant to Article 78 RoP, granted an extension until 23 December 2013.

34 On 20 December 2013, Konkurrenten submitted its response to ESA's preliminary application concerning inadmissibility. The applicant, Konkurrenten.no AS, requests the Court to:

> *(i) dismiss the defendant's inadmissibility pleas as inadmissible, or alternatively;*
>
> *(ii) dismiss the defendant's inadmissibility pleas as unfounded, or alternatively;*
>
> *(iii) reserve the decision for the final judgment.*

35 On 8 January 2014, by an Order of the President, Sporveien Oslo AS was granted leave to intervene in Case E-19/13 in support of the form of order sought by the defendant. On 13 February 2014, Sporveien Oslo AS submitted its statement in intervention.

36 The intervener, Sporveien Oslo AS, requests the Court to:

> *(i) dismiss the application as inadmissible;*
>
> *(ii) order the applicant to bear the costs of the proceedings.*

37 On 11 March 2014, both Konkurrenten and ESA submitted comments on the statement in intervention.

38 On 2 April 2014, the Court refused to grant Konkurrenten's request for measures of organization of procedure. The same day, the Court decided, pursuant to Article 87(4) RoP, to reserve its decision upon the defendant's preliminary application concerning inadmissibility for the final judgment. A new deadline for the defence was set for 9 May 2014.

39 On 15 April 2014, ESA requested an extension of the deadline to lodge a defence.

40 On 16 April 2014, the President, pursuant to Article 35(2) RoP, granted an extension of the deadline to lodge a defence to 23 May 2014.

41 On 23 May 2014, ESA lodged its defence. The defendant, the EFTA Surveillance Authority, requests the Court to:

> *(i) dismiss the application as inadmissible;*

(ii) order the applicant to bear the costs of the proceedings;

In the alternative

(i) dismiss the application;

(ii) order the applicant to bear the costs of the proceedings.

42 On 18 July 2014, Konkurrenten submitted its reply.

43 On 23 July 2014, the President decided to disregard the reply on the basis that the applicant was not given authorisation to exceed the maximum length of the reply by 63 pages and was requested to present the Court with a shortened version of its reply by 6 August 2014.

44 On 29 July 2014, Norway submitted written observations.

45 On 30 July 2014, the European Commission submitted written observations.

46 On 6 August 2014, Konkurrenten submitted a shortened version of its reply. In the reply, further measures of organization of procedure were requested.

47 On 14 August 2014, ESA requested an extension of the time limit to submit its rejoinder.

48 On 18 August 2014, the President, pursuant to Article 36 RoP, granted an extension of the time limit for submitting a rejoinder to 6 October 2014.

49 On 6 October 2014, ESA submitted its rejoinder.

50 On 7 November 2014, Sporveien requested to be permitted to submit a statement in intervention upon the merits of the case.

51 On 10 November 2014, the Registrar wrote to Sporveien informing it that it was not possible to accommodate a second statement in intervention.

52 On 8 December 2014, the Registrar wrote to the parties inviting them to submit comments by 15 December 2014 on the further measures of organization of procedure requested in the reply.

53 On 15 December 2014, ESA and Sporveien submitted comments on those further measures of organization of procedure requested.

54 On 6 January 2015, the Court decided to deny those further measures of organization of procedure requested.

55 The parties presented oral argument and answered questions put to them by the Court at the hearing on 28 January 2015.

56 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

IV Law

Measures of organization of procedure

57 In its application, Konkurrenten asked the Court to order ESA, pursuant to Article 49(3)(d) RoP, to disclose a copy of the signed original Decision No 519/12/COL of 19 December 2012 and the signed original Decision No 181/13/COL of 8 May 2013. Additionally, in its reply, Konkurrenten asked the Court to order ESA, pursuant to Article 49 RoP, to disclose a copy of all annexes that were included in the letter of 29 May 2012 from Oslo municipality to ascertain whether the defendant has wrongfully claimed not to be in possession of the documents included in Annexes A.21 and A.22 and as well as a copy of the complete set of annexes of the letter from Oslo municipality of 16 December 2011, which was submitted into evidence at Annex B.3 to the defence.

58 Konkurrenten's first request was denied by way of a letter of 2 April 2014. Konkurrenten's second request was denied by way of a letter of 6 January 2015.

59 Pursuant to Article 49(4) RoP, each party may, at any stage of the proceedings, propose the adoption or modification of measures of organization of procedure.

60 Article 49 RoP is identical in substance to Article 64 of the Rules of Procedure of the General Court. The reasoning of the General Court is relevant to the understanding of Article 49 RoP (see Case E-14/11 *DB Schenker* v *ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 91).

61 To enable the Court to determine whether it is conducive to the proper conduct of the procedure to prescribe a measure under Article 49 RoP, an applicant must identify the documents requested and provide the Court with at least a minimum of information indicating the utility of those documents for the purposes of the proceedings. Moreover, the Court may order such a measure for the organization of procedure only if an applicant makes a plausible case that the documents are necessary and relevant for the purposes of judgment (see *DB Schenker I*, cited above, paragraph 92 and case law cited).

62 As regards its first request, Konkurrenten failed to make a plausible case that the documents were necessary and relevant to arrive at a judgment. Therefore, this request for measures of organization of procedure was denied.

63 As regards Konkurrenten's second request, the Court found that granting the request would not be conducive to the proper conduct of the procedure. ESA did not deny being in possession of the annexes to the letter of 29 May 2012 from Oslo Municipality. As a result, the point that Konkurrenten sought to make,

namely, that ESA "[had] wrongfully claimed not to be in possession of the documents" could not be made out. As regards the request for the complete set of annexes to the letter from Oslo Municipality of 16 December 2011, Konkurrenten failed to provide the Court with at least a minimum of information indicating the utility of those documents for the purposes of the proceedings, or to make a plausible case that the documents are necessary and relevant for the purposes of judgment. Therefore, this request for measures of organization of procedure was also denied.

Admissibility

Arguments of the parties

Konkurrenten

64 At the outset, Konkurrenten asserts that the Court must first decide, as a matter of public policy, on the extent to which the traditional test on standing can be applied in State aid actions following the entry into force of the Lisbon Treaty, in particular in the light of Article 6(1) of the Treaty on the European Union and the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union ("TFEU"). In its view, the traditional test must be reassessed as a matter of EEA law given the introduction of the fourth paragraph of Article 263 TFEU and the fundamental right to effective judicial protection, the principle of homogeneous interpretation and the application of Article 47 of the Charter of Fundamental Rights of the European Union in conjunction with Article 6 of the European Convention on Human Rights. Konkurrenten contends that a gap has been opened that must be closed by means of dynamic interpretation.

65 Konkurrenten submits that the two contested decisions constitute regulatory acts that do not entail implementing measures and that they are of direct concern to Konkurrenten, and therefore the company has standing. In any event, it contends, EEA law does not offer a complete system of legal remedies and procedures as provided for in the EU.

66 Konkurrenten asserts that the matter before the Court is limited to whether ESA decisions in State aid cases should be subject to the same judicial review under the second paragraph of Article 36 SCA as Commission decisions are subjected to in exactly the same type of cases under the fourth paragraph of Article 263 TFEU. In its view, there is nothing to suggest that the Contracting Parties did not intend for the Court's jurisdiction to evolve dynamically with that of the Union courts. On the contrary, were the Court's jurisdiction more limited in relation to ESA decisions, the attainment of the overall objective of the uniform application and interpretation of EEA law would be at risk.

67 In Konkurrenten's view, the traditional test for standing is also met in the present case in relation to both contested decisions as Konkurrenten's market position has been substantially affected by the aid to which each decision relates given

that Konkurrenten's earnings, both actual and potential, were substantially affected by Sporveien's additional capacity expansion into the only market in which Konkurrenten is active.

68 In its response to the inadmissibility submission, Konkurrenten contends that, as regards the second contested decision, it asserted in its application, specifically and explicitly in relation to each plea, that ESA infringed its duty to open a formal investigation and thereby infringed Konkurrenten's right to exercise its procedural guarantees and to be heard during the formal investigation.

69 Konkurrenten submits further that, for the purposes of determining whether an applicant is individually concerned in relation to State aid decisions where ESA has not opened a formal investigation, Article 1(h) of Part II of Protocol 3 SCA delineates who may be considered "individually concerned". Consequently, even if Konkurrenten is found not to be substantially affected by the aid, for the same reasons it can still demonstrate that it "might be affected" by the aid and therefore must be regarded, for the purposes of the second paragraph of Article 36 SCA, as being individually concerned in relation to the second contested decision.

70 In its reply, Konkurrenten notes that ESA has challenged Annexes A.20, A.21, A.22, A.26, A.27 and A.32. However, ESA has not challenged the fact that the documents were validly annexed to the application and submitted into evidence and are, therefore, admissible.

71 At the hearing, in response to a question from the Bench, counsel for Konkurrenten stated that Annexes A.26 and A.27 prove that the market was suffering from considerable overcapacity prior to the entry of Sporveien and was made substantially worse by the entry of that company onto the market, which thereby substantially affected Konkurrenten's earning capacity.

ESA

First contested decision

72 In ESA's view, Konkurrenten has not established that it has sufficient standing to challenge the first contested decision.

73 According to ESA, a competitor which has participated in the pre-decision procedure may be "individually concerned" if it can show that its market position has been substantially affected by the aid and supplies the necessary evidence to that effect. ESA submits that Konkurrenten has failed to demonstrate that its market position was substantially affected by the alleged aid.

74 ESA submits that Annexes A.26 and A.27 are short and lack detail. Both refer to additional documents but provide no links or references to such further evidence. In this regard, ESA states that it is not for the Court to seek and identify in the

annexes the pleas and arguments on which the action is based, since the annexes have a purely evidential and instrumental purpose.

75 ESA invites the Court to find that that evidence is insufficient to show standing. Konkurrenten has failed to demonstrate that its market position has been substantially affected by the alleged aid measures pertaining to bus services in Oslo, a market in which it has not been active.

76 For the sake of completeness, ESA asserts that the part of Article 263 TFEU which relates to regulatory acts has no equivalent in the EEA Agreement or the SCA. It remains open to the EEA/EFTA States to amend the SCA. However, until such time, an applicant must fulfil the criteria of direct and individual concern. Nevertheless, were the Court to examine this contention, ESA argues that the first contested decision does not constitute a "regulatory act".

77 ESA contends that the application directed towards the first contested decision should be dismissed as inadmissible.

Second contested decision

78 In ESA's view, Konkurrenten has not demonstrated that it meets the test for standing. The test for *locus standi* in actions alleging a breach of procedural rights is that adopted by the Court in Case E-1/12 *Den Norske Forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040. An applicant seeking to safeguard its procedural rights must establish that it is an "interested party" by demonstrating, in particular, that its economic interests might be affected. Where an applicant seeks a declaration from the Court to the effect that the aid concerned in the decision at issue was unlawful in itself or that the aid should be given a classification other than that applied by ESA, the applicant is not making a procedural plea but a substantive plea. For Konkurrenten to take advantage of the less onerous test for standing, it must be seeking a declaration based on a procedural infringement alone. However, Konkurrenten seeks the annulment of the second contested decision on a substantive basis.

79 In relation to the first, second, third and fourth pleas, ESA submits that the Court should apply the test set out in the second paragraph of Article 36 SCA in order to establish *locus standi*. ESA contends that Konkurrenten does not have standing pursuant to the second paragraph of Article 36 SCA as it has not evidenced that its market position has been affected by the alleged aid. Nor does Konkurrenten have standing pursuant to Article 1(h) of Part II of Protocol 3 SCA as it has not shown that its market position might have been affected by the alleged aid. Konkurrenten has not demonstrated that it is in a "relationship of rivalry" with the recipient of the alleged aid.

80 ESA submits that Konkurrenten has no standing to contest either the first or second contested decisions. Therefore, pursuant to Article 87 RoP, the Court should dismiss the application as inadmissible.

Sporveien

81 Sporveien contends that Konkurrenten has not established sufficient standing to challenge the first contested decision. In its view, there are no grounds for the revision of the test for standing following the amendment to the fourth paragraph of Article 263 TFEU and, in addition, the contested decisions do not constitute regulatory acts within the meaning of that provision. Furthermore, Konkurrenten has not established that it is directly and individually concerned within the meaning of the second paragraph of Article 36 SCA.

82 Sporveien submits that Konkurrenten has not shown how its situation can be distinguished from that of all other competitors to Sporveisbussene, or at least from all other competitors to Arctic Express (acquired by Sporveisbussene) on all the bus routes operated by it. Therefore, Konkurrenten has not shown that it is individually concerned in terms of being substantially affected by the aid measures themselves.

83 Undertakings entrusted with services of general economic interest may establish and run commercial activities, as long as those activities are separated to ensure that there is no cross-subsidisation. Sporveien avers that this is what Sporveisbussene did. In Sporveien's view, it is not possible to establish links between the measures at issue and Konkurrenten's market position.

84 In relation to the second contested decision, Sporveien submits that Konkurrenten does not meet the test for standing. In particular, Konkurrenten has not shown that it is an "interested party".

Norwegian Government

85 The Norwegian Government submits that Konkurrenten does not meet the criteria necessary to establish standing to challenge the two contested decisions and supports ESA's preliminary objections on inadmissibility.

86 Annexes A.26 and A.27 do not demonstrate any more than a decline in Konkurrenten's commercial and financial performance, without establishing any causality between the aid to Sporveien and the impact on its market position. Neither of the contested decisions would constitute a "regulatory act" for the purposes of the fourth paragraph of Article 263 TFEU, an amended provision not to be found in the EEA Agreement or SCA. Therefore, according to the Norwegian Government, the Court should reject Konkurrenten's argument by which it seeks to establish standing by analogy with the TFEU provisions as well as its argument that the traditional test should be reassessed in light of the general principle of EEA law concerning the right to effective judicial protection.

87 At the hearing, the Norwegian Government fully supported the arguments of both ESA and Sporveien. In its view, Annexes A.26 and A.27 contain insufficient information to demonstrate standing and lack any analysis of cross-

subsidisation by Sporveien. Further, the Norwegian Government notes that EEA law is a *sui generis* legal system and submits that the system of standing in EEA law at present is both adequate and effective. Finally, neither contested decision constitutes a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.

European Commission

88 The Commission contends that Konkurrenten, not being the addressee of the first contested decision, can only establish standing under the second paragraph of Article 36 SCA. It notes that under the SCA there is currently no equivalent to the third limb of the fourth paragraph of Article 263 TFEU.

89 According to the Commission, to demonstrate individual concern for the purposes of challenging a decision taken at the end of a formal investigation procedure, it is not enough for an applicant to be an actual or potential competitor of the beneficiary. Rather, there must be a real competitive relationship between the applicant and the beneficiary and the market position of the applicant must be substantially affected by a given measure. Accordingly, an applicant must demonstrate the magnitude of the prejudice to its market position. That test must be conducted by reference to the beneficiary of the aid measure (or alleged aid measure) at issue. That obligation has not been discharged in relation to the first contested decision and, consequently, the application should be dismissed as inadmissible.

90 At the hearing, the Commission submitted that Konkurrenten had not alleged nor made out that Sporveien cross-subsidised its express bus subsidiary. Moreover, in its view, cross-subsidisation was impossible in this case as regards the measures examined in the first contested decision because the compensation for the public service obligation and the capital injection were found not to give rise to overcompensation. Therefore, there were no funds from which to cross-subsidise.

Findings of the Court

91 The Court finds no reason to address the applicant's submissions concerning the possible relevance of the third limb of the fourth paragraph of Article 263 TFEU. It follows from the origin of this provision that its objective consists in preventing an individual from being obliged to infringe the law in order to have access to a court (see Case C-274/12 P *Telefónica* v *Commission*, judgment of 19 December 2013, published electronically, paragraph 27). Such a consideration does not apply in this case. Furthermore, only certain acts of general application, other than legislative acts, may constitute a regulatory act for the purposes of this provision (see Case C-583/11 *Inuit Tapiirit Kanatami and Others* v *Parliament and Council*, judgment of 3 October 2013, published electronically, paragraph 60). The contested decisions address particular measures in favour of Sporveien and/or its subsidiaries, and are therefore not of general application.

Consequently, neither of the contested decisions would constitute a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU.

First contested decision

92 The action brought against the first contested decision seeks the annulment of ESA Decision No 519/12/COL of 19 December 2013 which closed a formal State aid investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene having regard to Article 1(2) of Part I and Article 7(2) of Part II of Protocol 3 SCA.

93 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 them. Since the contested decision was addressed to the Kingdom of Norway, it must be considered whether it is of individual and direct concern to the applicant (see Case E-1/13 *Míla* v *ESA*, judgment of 27 January 2014, not yet reported, paragraph 43 and case law cited).

94 Pursuant to settled case law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see, *inter alia*, *Míla* v *ESA*, cited above, paragraph 44 and case law cited).

95 In State aid law, an applicant who challenges the merits of a decision appraising aid taken on the basis of Article 1(3) of Part I of Protocol 3 SCA or at the end of the formal investigation procedure is considered to be individually concerned by that decision if its market position is substantially affected by the aid to which the contested decision relates (see *Míla* v *ESA*, cited above, paragraph 55 and case law cited).

96 Accordingly, Konkurrenten must demonstrate that its position on the market is substantially affected. The mere fact that a measure such as those considered in the contested decision may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure cannot in any event suffice for that undertaking to be regarded as individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 50 and case law cited).

97 The fact that an applicant was the originator of the complaint which led to the opening of the formal examination procedure, the fact 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 its *locus standi* (compare Case 169/84 *COFAZ and Others* v *Commission* [1986] ECR 391, paragraphs 24 and 25, and Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 63).

98 In the present case, the applicant played an active role during the procedure before ESA. It filed the initial complaint with ESA on 11 August 2006, sought the annulment of ESA Decision No 254/10/COL, which was annulled by the Court in *Konkurrenten I*, and submitted observations during the procedure referred to in Article 1(2) of Part I of Protocol 3 SCA.

99 However, the mere fact that the contested decision may have some impact on the competitive relationships existing on the relevant market and that Konkurrenten was in a competitive relationship with Sporveien's subsidiary does not mean that the applicant's competitive position is substantially affected. The applicant must also demonstrate the extent of the detriment to its market position (compare Case T-198/09 *UOP* v *Commission*, order of 7 March 2013, published electronically, paragraph 35).

100 To that end, Konkurrenten must establish a link between the measure which is the subject of the contested decision and the alleged substantial effect on its position on the market concerned. However, demonstrating a substantial adverse effect on its position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance, but may be made by demonstrating the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (compare Case C-525/04 P *Spain* v *Commission and Lenzing* [2007] ECR I-9947, paragraph 35, and Case T-182/10 *ASICAT* v *Commission*, judgment of 15 January 2013, published electronically, paragraph 66).

101 In that regard, Konkurrenten has submitted that its market position has been substantially affected by the aid, asserting that "Sporveien adopted a strategy to expand into the express bus market in order to have more legs to stand on when its home market came under pressure with the impending market liberalization." Without the contested aid, Sporveien would not have been able to pursue its expansion strategy and, indeed, Sporveien's bus subsidiary would in all likelihood have had to cease operations or be divested. Furthermore, Konkurrenten contends that the extent of the negative effect on the company is also evident from the applicant's resolve over the past seven years, before this Court and as a complainant in two State aid complaints before ESA, to restore a level playing field under Article 61 EEA.

102 In the absence of publicly available market data, Konkurrenten submits two annexes, A.26 and A.27 to the application, concerning the company's

commercial and financial performance as evidence. Annex A.26 is a report dated 12 August 2013 prepared by the applicant's external accountants. The document contends that Konkurrenten would have had significantly increased income if it had not had to adapt to a lower income level as a consequence of competition from Lavprisekspressen.no AS. Annex A.27 is a report prepared by the bank of Konkurrenten dated 12 August 2013. This document states that Konkurrenten's situation became very difficult when Oslo Sporveier (by way of Arctic Express, through its subsidiary Lavprisekspressen.no AS) entered the express bus market between Kristiansand/Arendal and Oslo in June 2006 as the company was "still in its initial phase" and the market already had considerable overcapacity.

103 The Court notes that, although Sporveien's subsidiary is a competitor of the applicant on the express bus route between the central and southern regions of Norway, Konkurrenten has not asserted at the very least that Arctic Express operations were cross-subsidised by its parent undertaking.

104 It is not for the Court to seek and identify in the annexes the pleas and arguments on which the action is based, since the annexes have a purely evidential and instrumental purpose (see Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 112 and case law cited). While Arctic Express entered the particular express bus route market in June 2006, the statements made in Annex A.26 regarding Konkurrenten's financial position refer at the very latest to the period between June and August 2006. Given that prior to the entry of Arctic Express onto the particular bus route market there was no relationship of rivalry between the applicant and the Sporveien group as a whole, the information presented in Annex A.26 is manifestly deficient in demonstrating a detrimental impact upon the applicant's market position. Annex A.27 lacks any information of a probative value. More specifically, the document makes reference to undated assessments and evaluations.

105 It follows from the foregoing that the applicant has not established that its market position was substantially affected by the aid which is the subject of the first contested decision. Consequently, the applicant lacks standing to challenge the first contested decision pursuant to the second paragraph of Article 36 SCA. The action against the first contested decision is therefore inadmissible.

Second contested decision

106 This action concerns an ESA decision on State aid taken at the end of the preliminary investigation having regard to Article 1(1) of Part I and Articles 4(2) and 13(1) of Part II of Protocol 3 SCA. The reasoning in paragraphs 93 and 94 above applies *mutatis mutandis*.

107 The purpose of the preliminary examination is to enable ESA to form a first opinion on the existence of State aid and, if aid exists, on its partial or complete compatibility with the functioning of the EEA Agreement. If ESA finds, at the conclusion of the preliminary examination, that the measure does not constitute

State aid within the scope of Article 61(1) EEA, it shall record that finding by way of a decision under Article 4(2) of Part II of Protocol 3 SCA, as it did in the present case.

108 If ESA finds that the measure must be considered as State aid within the scope of Article 61(1) EEA, but that no doubts can be raised as to its compatibility with the functioning of the EEA Agreement, ESA shall adopt a decision under Article 4(3) of Part II of Protocol 3 SCA to raise no objections. These two types of decision are, by implication, also a refusal to initiate the formal investigation procedure pursuant to Article 1(2) of Part I of that Protocol (see Case E-8/13 *Abelia* v *ESA*, order of 29 August 2014, not yet reported, paragraph 73 and case law cited).

109 However, if ESA finds, after the preliminary examination, that State aid exists and that it has doubts or serious difficulties in establishing whether the aid is compatible with the functioning of the EEA Agreement, it shall adopt a decision to initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 SCA and Article 6(1) of Part II of that Protocol (see *Abelia* v *ESA*, cited above, paragraph 74 and case law cited).

110 Therefore, at the end of the preliminary examination, ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties raised that the measure under consideration does not constitute State aid, unless it also overcomes all doubts or difficulties concerning the measure's compatibility with the EEA Agreement, even if it were State aid (see *Abelia* v *ESA*, cited above, paragraph 75 and case law cited).

111 The formal investigation procedure is designed to enable ESA to be fully informed about all the facts of the case. Thus, pursuant to Article 6(1) of Part II of Protocol 3 SCA, a decision to open the formal investigation procedure involves calling upon the EFTA State concerned and upon other interested parties (collectively referred to in Article 1(2) of Part I of Protocol 3 SCA as parties concerned) to submit comments within a prescribed period which must not as a rule exceed one month (see *Abelia* v *ESA*, cited above, paragraph 76 and case law cited).

112 It is only in connection with the formal investigation procedure that Part II of Protocol 3 SCA imposes an obligation on ESA to give the parties concerned notice to submit their comments (see *Abelia* v *ESA*, cited above, paragraph 77 and case law cited).

113 Where ESA decides not to initiate the formal investigation procedure, the persons intended to benefit from the procedural guarantees under that investigation may secure compliance therewith only if they are able to challenge ESA's decision before the Court (see *Abelia* v *ESA*, cited above, paragraph 78 and case law cited).

114 On this basis, an action for the annulment of such a decision brought by an interested party within the meaning of the formal investigation procedure is admissible where the party seeks, by instituting proceedings, to safeguard the procedural rights available. This applies both to a decision under Article 4(2) of Part II of Protocol 3 SCA that a measure does not constitute State aid and a decision not to raise objections under Article 4(3) of Part II of that Protocol (see *Abelia* v *ESA*, cited above, paragraph 79 and case law cited).

115 In the second contested decision, ESA found that the fifteen short-term liquidity loans and the bus for metro and tram contracts for ad hoc interruptions did not involve State aid. While ESA found that the metro and tram guarantees, infrastructure loans and the NBB measures involved State aid, those measures were granted on the basis of an existing aid scheme compatible with the EEA Agreement.

116 Pursuant to Article 1(h) of Part II of Protocol 3 SCA, an "interested party" means, *inter alia*, any person, undertaking or association of undertakings whose interests might be affected by the granting of State aid, in particular competing undertakings and trade associations (see *Abelia* v *ESA*, cited above, paragraph 80 and case law cited, and, for comparison, Case C-83/09 P *Commission* v *Kronoply and Kronotex* ("*Kronoply*") [2011] ECR I-4441, paragraph 63 and case law cited). In other words, that term covers an indeterminate group of persons.

117 Article 1(h) of Part II of Protocol 3 SCA does not rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid (see *Abelia* v *ESA*, cited above, paragraph 81, and compare, to that effect, *Kronoply*, cited above, paragraph 64).

118 For this purpose, it is necessary for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation. This requirement entails that the undertaking in question is able to show a legitimate interest in the implementation or non-implementation of the alleged aid measures at issue or, if those measures have already been granted, in their maintenance. Such a legitimate interest may consist, *inter alia*, in the protection of its competitive position, in so far as that position would be adversely affected by the aid measures (see *Abelia* v *ESA*, cited above, paragraph 82, and compare, to that effect, *Kronoply*, cited above, paragraphs 65 and 66 and case law cited).

119 As regards the extent to which the applicant's position on the market was affected, it should be borne in mind, that it is not for the Court, when it is considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant and the recipient of the aid. In that context, it is for the applicant alone to adduce pertinent reasons to show that ESA's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question (compare *COFAZ and Others*

v *Commission*, cited above, paragraph 28, and Case T-36/99 *Lenzing* v *Commission* [2004] ECR II-3597, paragraph 80).

120 However, if an applicant calls into question the merits of the decision not to initiate the formal investigation procedure, the mere fact that it is an interested party cannot suffice for the action to be considered admissible. An applicant that challenges the merits of a decision not to open the formal investigation procedure is individually concerned by that decision only if its market position is substantially affected by the State aid in question (see *Míla* v *ESA*, cited above, paragraph 55 and case law cited).

121 As regards the second contested decision, on the basis of its submissions described in paragraphs 101 and 102 above, Konkurrenten has not established that its position on the market may have been significantly affected by the State aid. Nor has Konkurrenten established to the requisite legal standard that it is an interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA, having failed to demonstrate that the aid was likely to have a specific effect on its situation. Therefore, the applicant lacks the legal standing to challenge the second contested decision.

122 Consequently, it must be held that the action brought against the second contested decision is inadmissible.

V Costs

123 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 the defendant has requested that the applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay its costs and those of the defendant. The intervener shall bear its own costs. The costs incurred by the Norwegian Government and the Commission 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;**

3. **Sporveien Oslo AS is to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 20 March 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President