



ORDER OF THE PRESIDENT

8 January 2014

(Intervention – Admissibility – Timeliness of application – Interest in the result of the case)

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, Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION seeking the annulment of ESA Decision No 519/12/COL of 19 December 2012, OJ 2013 L 276, p. 8, (“first contested decision”) closing a formal investigation concerning aid granted by Oslo municipality to AS Oslo Sporveier and of ESA Decision No 181/13/COL of 8 May 2013, not yet published in the Official Journal, (“second contested decision”) refusing to open a formal investigation into aid measures not covered by the first contested decision,

THE PRESIDENT

makes the following

Order

I Background

- 1 Konkurrenten.no AS (“applicant” or “Konkurrenten”) is a privately owned operator in the express bus market between the central and southern regions of Norway. Konkurrenten is a limited liability company, 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 “applicant intervener”). Sporveien is company owned and controlled by Oslo municipality. Sporveien has three wholly-owned subsidiaries: Oslo-trikken AS, Oslo T-banedrift 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 (an express bus company).
- 3 Sporveien is a direct competitor of Konkurrenten and Risdal Touring in the express bus and tour bus markets in Norway.
- 4 On 11 August 2006, Konkurrenten filed its first State aid complaint with ESA, registered as ESA Case No 60510, concerning alleged State aid to the company now known as Sporveien.
- 5 On 21 June 2010, ESA closed Case No 60510 by Decision No 254/10/COL, 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”.
- 6 On 2 September 2010, Konkurrenten brought an action seeking the annulment of ESA Decision No 254/10/COL (Case E-14/10 *Konkurrenten.no AS v ESA* (“*Konkurrenten I*”) [2011] EFTA Ct. Rep. 266).
- 7 On 25 March 2011, by Order of the President, Sporveien, then trading as KTP, was granted leave to intervene in support of the form of order sought by ESA in *Konkurrenten I*.

- 8 On 22 August 2011, in *Konkurrenten I*, the Court annulled ESA Decision No 254/10/COL of 21 June 2010 to close Case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveier and AS Sporveisbussene for the provision of scheduled bus services in Oslo. The Court held that Decision No 254/10/COL was “vitiating 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 *Konkurrenten I*, cited above, paragraph 92).
- 9 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 31 March 2008.
- 10 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*.
- 11 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.
- 12 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.
- 13 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.

II Facts and procedure

- 14 On 16 August 2013, Konkurrenten lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of ESA Decision No 519/12/COL of 19 December 2012, closing a formal investigation concerning aid

granted by Oslo municipality to AS Oslo Sporveier, and of ESA Decision No 181/13/COL of 8 May 2013, refusing to open a formal investigation into aid measures not covered by the first contested decision.

- 15 In relation to both decisions, Konkurrenten requests the Court to order ESA and any intervener to bear the costs.
- 16 On 30 September 2013, Sporveien AS sought leave to intervene, pursuant to Article 36 of the Statute and Article 89 of the Rules of Procedure (“RoP”), in support of the form of order sought by ESA.
- 17 On 14 October 2013, ESA lodged its written observations on the application to intervene at the Court’s Registry.
- 18 On 17 October 2013, Konkurrenten lodged its written observations on the application to intervene at the Court’s Registry.
- 19 On 5 November 2013, ESA submitted “preliminary objections on inadmissibility & defence”, pursuant to both Articles 87 and 35 RoP.
- 20 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.

III Observations of the parties

- 21 In accordance with Article 36 of the Statute and Article 89 RoP, Sporveien Oslo AS requests leave to intervene in support of the form of order sought by ESA.
- 22 Sporveien submits that it has a direct and existing interest in the result of the case since it was granted leave to intervene in *Konkurrenten I*. The present case concerns both the same aid measures as in *Konkurrenten I* and other alleged aid granted to Sporveien, its predecessors, and subsidiaries.
- 23 Moreover, Sporveien submits that, should the Court rule in favour of the applicant, it could be required to return substantial sums. Sporveien also submits that a ruling in favour of the applicant could significantly affect the general framework under which it operates with serious implications for the current organisation and business of the company.

- 24 The applicant intervener submits that, as a consequence, it should be granted leave to intervene pursuant to the second paragraph of Article 36 of the Statute and Article 89(1) RoP.
- 25 ESA submits that Sporveien has an interest in the result of the case as the beneficiary of the financial assistance which is under consideration in the present proceedings. ESA further contends that beneficiaries of State aid are routinely admitted to intervene in support of one or the other party in cases before the EU Courts. Moreover, Sporveien was granted leave to intervene in support of ESA in *Konkurrenten I* under its name at the time, Kollektivtransportproduksjon AS.
- 26 ESA notes that the application for leave to intervene is timely. At the time the application for leave to intervene was lodged on 30 September 2013 formal notice of the action had not yet appeared in the EEA Section of, and the EEA Supplement to, the Official Journal, as required by Article 14(6) RoP. Therefore, the six-week deadline set out in Article 89(1) RoP had not yet expired.
- 27 ESA submits also that the balance of convenience favours granting the application to intervene and that it knows of no circumstances that should lead the Court to reject the application to intervene in the present case.
- 28 Konkurrenten submits that, since it has intervened before the time period set out in Article 89(1) RoP has begun to run, Sporveien has not shown a direct and existing interest in the form of order sought by the party whom it intends to support, i.e. ESA. Konkurrenten contends that the Court can only consider the application or serve the pleadings of the intervener after ESA has submitted its defence and presented the form of order that it will seek.
- 29 Konkurrenten asserts that it is only when the intervener has seen the form of order sought by the party it intends to support that its interest within the meaning of the second paragraph of Article 36 of the Statute becomes vested. Moreover, it is only when the prospective intervener has received the factual and legal basis for the defence that it is in a position to make effective use of its right to be heard.
- 30 Konkurrenten further submits that were an intervention made effective prior to the lodging of ESA's defence this would jeopardise the intervener's right to make effective use of its right to be heard.
- 31 Although Konkurrenten does not object in principle to Sporveien's application to intervene and agrees that Sporveien is the beneficiary of the contested aid measures, it maintains that the application has been lodged prematurely.

IV Law

- 32 Under the second paragraph of Article 36 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.

- 33 The Court has recognised the principle of procedural homogeneity and held that homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see, *inter alia*, Case E-14/11 *DB Schenker v ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 78). The need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent with regard to rules concerning the modalities of the procedure when they mainly relate to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, it is also in such cases appropriate, as a rule, to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure that are identical in substance to expressions in the equivalent provisions of Union law (see, *inter alia*, *DB Schenker I*, paragraph 78).

- 34 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, the principle of procedural homogeneity must also apply to the assessment of whether an applicant for intervention has established an interest in the result of the case (see, *inter alia*, Order of the President of 1 July 2013 in Case E-5/13 *DB Schenker v ESA* ("*DB Schenker V*"), paragraph 39).

- 35 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, *inter alia*, Order of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA* ("*DB Schenker IV*"), paragraph 19).

- 36 The subject matter of the first contested decision and *Konkurrenten I* is the same: aid granted by the Norwegian authorities to Sporveien's legal forebears and its subsidiary. The subject of the second contested decision concerns alleged aid to Sporveien and its legal forebears granted since September 2008. Consequently, Sporveien has established a direct and existing interest in supporting the defendant in the case as required by the second paragraph of Article 36 of the Statute.

- 37 Pursuant to Article 89(1)(e) RoP, the application for leave to intervene shall contain the form of order sought by one or more of the parties in support of which the intervener is applying for leave to intervene.
- 38 Sporveien contends that “it will support the form of order sought by ESA. The form of order sought by Sporveien will thus be dependent on the form of order sought by ESA. [At the date of Sporveien’s application for leave to intervene], ESA’s form of order sought has not yet been communicated. Sporveien therefore reserves the right to amend the form of order sought, based on the form of order sought by ESA.”
- 39 Sporveien has, as noted by Konkurrenten, applied for leave to intervene prior to ESA’s lodging of its defence. Consequently, Sporveien could not state the form of order sought by the party it wishes to support by its intervention. Nevertheless, although the wording of Sporveien’s request remains general, it is clear that it will support the form of order sought by ESA.
- 40 It is recalled in this respect that Articles 115 and 116 of the General Court’s Rules of Procedure are similar to Article 89 RoP, but they are not identical in substance. In particular, the period within which an application to intervene must be made is not identical (see Order of the President of 25 March 2011 in *Konkurrenten I*, paragraph 16).
- 41 Notice in the present case was published in the EEA Section of, and the EEA Supplement to, the Official Journal on 28 November 2013. Consequently the application for leave to intervene is timely. It is not however required, pursuant to Article 89(1)(e) RoP, that an application for leave to intervene be lodged subsequent to a certain event or a certain point in time of the proceedings. It should be noted that, in any event, to await the lodging of the defence before submitting an application for leave to intervene would not provide the applicant intervener with additional information because the parties’ pleadings are not communicated to him until the application for leave to intervene has been granted (compare the Order of the Court of First Instance of 11 December 2000 in Case T-158/00 *ARD v Commission*, not reported, paragraph 7).
- 42 Konkurrenten has submitted that if an intervention were made effective prior to the lodging of ESA’s defence the intervener would not be in a position to make effective use of its right to be heard and that this would jeopardize the intervener’s entitlement to make effective use of this right.
- 43 Article 115(2)(e) of the General Court’s Rules of Procedure is identical to Article 89(1)(e) RoP.

- 44 When lodging an application for leave to intervene, an applicant intervener is not required to submit its detailed submissions but only to indicate the party whom it wishes to support. Moreover, pursuant to the third paragraph of Article 36 of the Statute, an application to intervene shall be limited to supporting the form of order sought by one of the parties. However, if an applicant intervener chooses to lodge his request for leave to intervene at such an early stage in the proceedings, as in the present case, then he must bear the risk of supporting pleas which remain at present unknown to him (compare the Order of the Court of First Instance in *ARD v Commission*, cited above, paragraph 8).
- 45 In light of the above, Sporveien Oslo 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. Sporveien Oslo AS is granted leave to intervene in Case E-19/13 in support of the form of order sought by the defendant.**
- 2. Costs are reserved.**

Luxembourg, 8 January 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President