JUDGMENT OF THE COURT
19 June 2003

(Action for annulment of a decision of the EFTA Surveillance Authority State aid –Admissibility – Locus standi*)*

In Case E-2/02,

Technologien Bau- und Wirtschaftsberatung GmbH and **Bellona Foundation,** represented by Ian S. Forrester, QC, of the Scots Bar, White & Case, 62 rue de la Loi, 1040 Brussels, Belgium,

Applicants,

v

EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal and Executive Affairs and Michael Sanchez Rydelski, Senior Officer, Legal and Executive Affairs, acting as Agents, 74 Rue de Trèves, Brussels, Belgium,

Defendant,

supported by the **Kingdom of Norway,** represented by Thomas Nordby, Advokat, of the Office of the Attorney General (Civil Affairs), acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent, P.O. Box 8012 Dep., 0030 Oslo, Norway,

Intervener

APPLICATION for annulment of the Defendant's decision No. 90/02/COL of 31 May 2002 concerning the notifications of a proposal for amended depreciation rules of the Petroleum Tax Act for production equipment and pipelines for gas linked to new large-scale liquefied natural gas (LNG) facilities located in Finnmark County or the municipalities of Kåfjord, Skjervøy, Nordreisa or Kvænangen in Troms county and the application of these rules to the Snøhvit project,

THE COURT,

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

Registrar: Lucien Dedichen

having regard to the application,

having considered the written pleadings of the parties, the intervener, and the Commission of the European Communities,

having regard to the revised Report for the Hearing,

having heard oral argument of the parties, the intervener, and the Commission of the European Communities at the hearing on 29 April 2003 on the question of admissibility,

gives the following

Judgment

Facts and procedure

1 In September 2001, the Norwegian Government proposed an amendment to the Petroleum Taxation Act No 35 of 13 June 1975 (hereinafter the "PTA") designed to permit the Snøhvit liquefied natural gas project in the Barents Sea to go forward. The amendments, which involved distinctly favourable depreciation rates for large-scale liquefied natural gas projects in Norway, were later adopted by the Parliament.

2 On 11 December 2001, one of the Applicants, the Bellona Foundation brought a complaint to the Defendant claiming that the aforementioned amendments to the PTA were State aid under Article 61(1) of the Agreement on the European Economic Area (hereinafter the "EEA") and thus incompatible with it. The Bellona Foundation (hereinafter "Bellona") is a foundation, ("stiftelse"), established as a legal entity under the laws of Norway, whose main objective is to combat problems of environmental degradation, pollution-induced dangers to human health and the ecological impacts of economic development strategies.

3 In a letter to the Norwegian Government dated 18 March 2002, the Defendant stated its preliminary assessment that the depreciation rates under the amended PTA might be considered State aid within the meaning of Article 61(1) EEA. The Government was given an opportunity to present its views on whether or not the measure could fall within the derogations provided for in Article 61(2) and 61(3) EEA.

4 The Government adhered to its position that the measure did not constitute State aid, but argued in the alternative that it would fall within the derogation for regional aid under Article 61(3)(c) EEA. The Defendant, however, maintained that the contested measure was State aid under Article 61(1) and furthermore that its general nature would disqualify it from falling within the derogation for regional aid. In a meeting with the Norwegian Minister of Finance on 16 May 2002, the Defendant's President stated that unless changes were made to recently adopted amendments to the PTA, a formal examination procedure under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement would be opened, as prescribed in point 5.2(1) of the Defendant's State Aid Guidelines.

5 On 27 May 2002, on the proposal of the Ministry of Finance, the Government approved a revised bill in which the geographical scope of the tax measure was limited to Finnmark County and the municipalities of Kåfjord, Skjervøy, Nordreisa and Kvænangen in Troms County. The Defendant was notified of the submission of the new Bill on the same day. On 30 May 2002, the Defendant was notified of a decision to apply the new proposed depreciation rules of the PTA to the Snøhvit project.

6 The Defendant approved the measure as regional aid by decision of 31 May 2002. The operative part of the decision reads as follows: "(1) The EFTA Surveillance Authority has decided not to raise objections to the proposed amendments to the Norwegian Petroleum Tax Act …, as notified to the Authority by telefax dated 27 May 2002 … (2) The EFTA Surveillance Authority has decided not to raise objections to the proposed application of the depreciation rules of the Norwegian Petroleum Tax Act to the Snøhvit project, as notified to the Authority … (3) This decision is addressed to Norway." The revised bill was subsequently adopted, and entered into force on 28 June 2002.

7 By an application of 30 July 2002, Technologien, Bau- und Wirtschaftsberatung GmbH (hereinafter "TBW") and Bellona jointly brought an action before the EFTA Court under Article 36 of the Surveillance and Court Agreement for annulment of the aforementioned decision. The Applicant, TBW, is, on its own statement, a limited liability company, established under the laws of Germany, engaged in environmental consulting and organizational development. Its core services cover sectors such as water resource management, liquid waste management, solid waste management, energy technologies, resource-conserving soil use and anti-desertification measures.

8 On 8 November 2002, pursuant to Article 36 of the Statute of the Court, the Kingdom of Norway lodged an application to intervene in support of the Defendant. By letter of 11 February 2003, the Court informed the Norwegian Government of its decision to allow the intervention.

9 On 8 November 2002 the Defendant lodged at the EFTA Court an application for a decision on admissibility pursuant to Article 87 of the Rules of Procedure

of the EFTA Court (hereinafter the "Rules of Procedure"). On 31 January 2003, the Applicants lodged a statement in response to that application.

10 On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87(4) of the Rules of Procedure, the Court decided that an oral hearing would be held on the request for a decision on admissibility as a preliminary issue. The Court informed the parties of this decision by a letter dated 11 February 2003.

Arguments of the parties

11 The Defendant submits that the conditions laid down in Article 36(2) of the Surveillance and Court Agreement entitle the Applicants to challenge the contested decision only in so far as it is of direct and individual concern to them.

12 The Defendant further stresses that in the context of the corresponding provision of Community law, Article 230(4) EC, it is settled case law that persons, other than those to whom a decision is addressed, may claim *locus standi* only if that decision affects them by "… reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in case of the person addressed." This is supported by reference to the case law of the Court of Justice of the European Communities, *inter alia*: Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p 107; Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, at paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, at paragraph 14; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, at paragraph 20; Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft* v *Commission* [2001] ECR II-1037, at paragraph 35; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, at paragraph 36. It is also submitted that the judgment in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365 can not in any case be said to reflect the case law of the Community.

13 The Defendant points out that Article 36(2) of the Surveillance and Court Agreement is identical in substance to Article 230(4) EC. Despite the fact that the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of the Surveillance and Court Agreement, the case law of that Court on Article 230(4) EC is relevant when interpreting Article 36(2) of the Surveillance and Court Agreement. The Defendant refers in this regard to the judgment of the EFTA Court in Case E-2/94 *Scottish Salmon Growers Association* v *EFTA Surveillance Authority* [1995] EFTA Court Report 59, at paragraphs 11-13. Furthermore, the EFTA Court held in that judgment that when interpreting Article 36(2) of the Surveillance and Court Agreement, due account shall also be taken of the

principles laid down in rulings of the Court of First Instance of the European Communities.

14 The Defendant argues that in order to establish whether the Applicants fulfil the criteria described above it is necessary to bear in mind the aim of the procedures provided by the EEA legal framework in State aid cases, in particular Article 1(2) and (3) of Protocol 3 to the Surveillance and Court Agreement on the functions and powers of the EFTA Surveillance Authority in the area of State aid.

15 The Defendant asserts that a distinction must be made between a *prima facie* opinion on compatibility of the State aid in question and an examination under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, which imposes an obligation on the EFTA Surveillance Authority to give the "parties concerned" notice to submit their comments. The relevant provisions in Article 1(2) and (3) of Protocol 3 to the Surveillance and Court Agreement correspond in substance to Article 88(2) and (3) EC.

16 According to the case law of the Court of Justice of the European Communities, a decision, whereby the Commission finds on the basis of Article 88(3) EC that State aid is compatible with the functioning of the common market, can be challenged before the Court of First Instance of the European Communities by those persons who are intended to benefit from the procedural guarantees laid down in Article 88(2) EC. Thus, it is a precondition that the party seeking annulment of a decision can be considered to be a party concerned for the purpose of Article 88(2) EC, and that the person is asking for annulment of the decision taken on the basis of Article 88(3) EC in order to safeguard his procedural rights under Article 88(2) EC. The Court of First Instance of the European Communities has clarified that when applicants do not seek the annulment of a decision on the basis of Article 88(3) EC on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 88(2) EC or on the ground that the procedural safeguards provided for by Article 88(2) EC were infringed, the mere fact that the applicants may be considered to be parties concerned within the meaning of Article 88(2) EC cannot be sufficient to render the application admissible. In such a case, the action will be admissible only if the applicants are affected by the contested decision by reason of circumstances distinguishing them individually in like manner to the person to whom the decision is addressed.

17 The Defendant submits that it is settled Community case law that the alleged competitor of the beneficiary of the State aid must demonstrate that his competitive position in the market is affected by the grant of the aid. Special reference is made to *Cofaz and Others* v *Commission*, cited above.

18 The Defendant further submits that the Applicant TBW cannot be considered a direct competitor with undertakings involved in the Snøhvit project, since the Applicant TBW is a consultancy firm and not a natural gas producer, its

involvement in plant oil fuel and renewable biogas projects seems to be of an advisory nature and to be limited to development projects in Africa.

19 As to the Applicant Bellona, the Defendant submits that it is a non-profit and non membership environmental foundation, and as such, not a gas producer that itself competes with the licensees of the particular Snøhvit project. Further, the mere fact that Bellona made a complaint to the EFTA Surveillance Authority cannot constitute sufficient circumstances peculiar to the Applicant based on the case law of the Community Courts.

20 The Intervener supports the Defendant's line of argument as to the relevance of the case law of the Court of Justice of the European Communities, the legal analysis of the dispute, the relevant factors for the assessment of the terms "parties concerned" and "individual concern" and as to the nature and status of the Applicants Bellona and TBW.

21 The Intervener also submits that the PTA is not an exceptional and abnormal advantage for a single project, since it is formulated generally and applicable to prospective projects as well.

22 The Applicants Bellona and TBW consider that they are "centrally concerned" by the contested decision, and add that they fulfil the test applied by the Court of Justice of the European Communities in *Plaumann* v *Commission*, cited above.

23 The Applicants submit that Bellona is directly concerned. It is evident that the Government's sole purpose in proposing amendments to the PTA, which revise the rules adopted earlier, was to give the depreciation rules for the Snøhvit project a form that the Defendant would approve. The extremely short interval between the approval of the revised scheme by the Defendant, and the decision of the Government to apply it to Snøhvit, could suggest that the procedures were regarded as mere formalities. Thus, the Applicants submit that the process involving the Defendant and Bellona's complaint was in effect the same process as the Defendant's hasty approval of the aid. Since this whole process was a continuum, Bellona is directly concerned.

24 The Applicant Bellona argues that the Court is not bound to follow the jurisprudence of the Community Courts on the question of admissibility. The application of this case law would defeat the interest of justice in the present case, since for the Applicants there is no national remedy for their problem, neither before the national courts nor other state or European institutions.

25 The Applicant Bellona submits that it is individually concerned since it brought the original complaint that led to an investigation by the Defendant, it had been a prominent player in relation to the Snøhvit project, both at the national and the EEA level, and had a decisive impact not only on the procedure of the case but also on its outcome. This fact distinguishes this case from Case T-585/93 *Stichting Greenpeace Council and Others* v *Commission* [1995] ECR II-2205 and associates it with *Cofaz and Others* v *Commission*, cited above, as well as

the position of the applicant in Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* (not yet reported).

26 The Applicant Bellona argues that the contested decision will harm its activities, because it has shares and options in companies dealing with sustainable energy production, has investments in various environmental technologies and has approved the establishment of an affiliated commercial company, Bellona Enviroventure AS, to manage these business interests. It has an option for shares in the company Water Power Industries (WPI), a company engaged in producing renewable energy from tidewater, and has been involved in various planned wind power projects and in a series of programs that promote renewable energy sources. Furthermore, the contested decision will harm the interests of Bellona's partners and supporters in the so called B7 programme, within which Bellona invites undertakings to enter into long-term agreements in order to develop strategic solutions to environmental problems.

27 The Applicants also submit that TBW's commercial activities, the production of energy using biogas and anaerobic technologies from various sources, will negatively be affected by the Defendant's decision, since the electricity produced by TBW competes with electricity produced by gas or liquid fossil fuels.

28 The Applicants further invite the Court to adopt a flexible interpretation of standing, and to decide how best justice may be served, in the context of the EEA Agreement. The standard *Plaumann* test prevents a person from bringing a legal challenge (see Case T-13/99 *Pfizer Animal Health* v *Council*, [2002] ECR II-3305), and fails to ensure appropriate judicial control in environmental cases. A more flexible approach would also be consistent with the Aarhus Convention of 1998 and more compatible with the principles set out in Articles 6 and 13 of the European Convention on Human Rights, as well as those in Article 47 of the Charter of Fundamental Rights of the European Union.

29 In support of that argument, the Applicants submit that the *Plaumann* test has been subject to many exceptions in the interest of justice. Reference is made to *Codorniu* v *Council*, cited above, Case T-448/93 and 449/93 *Associazione Italiana Tecnico Ecnomica del Cemento* v *Commission* [1995] ECR II-1971 and *Aktionsgemeinschaft Recht und Eigentum* v *Commission*, cited above, concerning State aid (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, and Case T-188 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713), and anti-dumping (Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, Case C-358/89 *Extramet Industrie S.A.* v *Council* [1991] ECR I-2501, Case T-597/97 *Euromin* v *Council* [2000] ECR II-2419). Similar exceptions have been granted in competition law (Case 26/76 *Metro* v *Commission* [1977] ECR 1875).

30 The Commission of the European Communities submits that since a decision approving a scheme is in the nature of a regulation, it is difficult for an individual to demonstrate individual concerns.

31 The Commission argues that Bellona is not individually concerned by the contested decision insofar as that decision approves the individual aid for Snøhvit and still less as it approves the scheme, because it has not demonstrated that it is an undertaking engaged in a relevant economic activity within the meaning of Article 87(1) EC, nor that it has any competitive relationship of any kind with prospective beneficiaries of the aid scheme. Furthermore, the involvement in existing and planned energy projects is not sufficient to establish individual concern, since individual concern cannot be established on the basis of plans about future economic activity.

32 The Commission draws particular attention to the judgment in *Stichting Greenpeace Council and Others* v *Commission*, cited above, and argues that following the judgment in *Union de Pequeños Agricultures* v *Council*, cited above, the reference to the judgment in *Jegó-Quéré* v *Commission*, cited above, cannot lead to the conclusion that the application is admissible.

33 The Commission submits that there is no competitive relationship of any kind between TBW and Snøhvit. It is not clear whether TBW produces energy or only supplies it, its role in relation to the physic-nut oil in Mali does not correspond to the production of energy, the reference to renewable biogas production indicates that TBW is rather the consultant, and TBW did not participate in the administrative procedure.

34 The Commission submits that TBW would not be individually concerned because in a phase 2 decision, an applicant must show that it has an actual and particular close competitive relationship with the prospective beneficiary. Reference is made to *Cofaz and Others* v *Commission*, cited above, Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, Case T-442/93 *ACC and Others* v *Commission* [1995] ECR II-1381, and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, at paragraph 71).

Findings of the Court

General remarks

35 The Defendant's contested State aid decision is in two parts. On the one hand it authorises a general aid scheme, *i.e*. the amendment to section 3 of the PTA, and on the other hand it approves the application of the general aid scheme specifically to the Snøhvit project. The reviewability of the decision is not questioned by the parties, but the Defendant, supported by the Intervener and the Commission of the European Communities, submits that the Applicants do not have *locus standi* to bring an action for annulment of said decision before the Court.

36 Access to justice is an essential element of the EEA legal framework. The EEA Agreement contains elaborate mechanisms and procedures with a view to

ensuring homogeneous interpretation and application of EEA law. The eighth recital of the Preamble stresses the value of the judicial defence of rights conferred by the Agreement on individuals, and intended for their benefit. A Court of Justice for the EFTA pillar of the European Economic Area was established to uphold such rights, to review the surveillance procedures and to settle disputes. The Court held, on those grounds, in case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 97, at paragraph 59, that the EEA Agreement is an international agreement *sui generis*, which contains a distinct legal order of its own. Access to the Court is, however, subject to those conditions and limitations that follow from EEA Law.

37 The Court is aware of the ongoing debate with regard to the issue of the standing of natural and legal persons in actions against Community institutions. That debate has been reflected within the Community courts, *inter alia*, in the Opinion of Advocate General Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, cited above. This discussion is important at a time when the significance of the judicial function appears to be on the increase, both on the national and international level. The idea of human rights inspires this development, and reinforces calls for widening the avenues of access to justice. The Court finds nevertheless that caution is warranted, not least in view of the uncertainties inherent in the current refashioning of fundamental Community law.

The relevance of the case law of the Court of Justice of the European Communities

38 The Applicants have stressed the independence of the Court in respect of the Community case law relevant to the present case, and have argued that the Court is not bound to follow that case law on the question of admissibility of challenges to Commission decisions. The Applicants submit that the Court has been, and should be, prepared to draw different conclusions if the application of that jurisprudence would defeat the interests of justice in the present case.

39 In this respect, the Court refers to the findings in its judgments in Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraphs 24, 33 and 34 and *Scottish Salmon Growers* v *EFTA Surveillance Authority*, cited above, at paragraph 11. Although the Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court. As stated in *Scottish Salmon Growers* v *EFTA Surveillance Authority*, cited above, this principle must apply equally to the issue of *locus standi* to bring an action for annulment.

40 The same applies with regard to the rulings of the Court of First Instance, (see *Scottish Salmon Growers* v *EFTA Surveillance Authority,* cited above, at paragraph 13).

Locus standi

41 Under the second paragraph of Article 36 of the Surveillance and Court Agreement, any natural or legal person may institute proceedings against a decision addressed to another person only if the decision in question is of direct and individual concern to the former. 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 Applicants in the case at hand.

42 The fourth paragraph of Article 230 (ex Article 173) EC corresponds in substance to the second paragraph of Article 36 of the Surveillance and Court Agreement. As the Court held in *Scottish Salmon Growers* v *EFTA Surveillance Authority*, cited above, at paragraph 31, according to the case law of the Court of Justice of the European Communities, persons other than the addressees of a decision, can not claim to be individually concerned, unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, are distinguished individually just as in the case of the person to whom a decision is addressed. See, as far as the case law of Court of Justice of the European Communities is concerned, *Plaumann* v *Commission*, p 107, *Cofaz and Others* v *Commission*, at paragraph 22, Case T-11/95 *BP Chemicals* v *Commission*, at paragraph 7). The purpose of that provision is to ensure that legal protection is also available to a person who, whilst not the person to whom the contested measure is addressed, is in fact affected by it in the same way as is the addressee (Case 222/83 *Municipality of Differdange* v *Commission* [1984] ECR 2889, at paragraph 9).

43 When determining whether the conditions set out in Article 36(2) of the Surveillance and Court Agreement are fulfilled by the Applicants, it is necessary to recall the purpose of the procedures provided for in State aid cases, in particular by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement on the functions and powers of the EFTA Surveillance Authority in the field of State aid and Article 1(3) of the same Protocol.

44 In the context of supervision of State aid, there is a preliminary stage of procedure for reviewing aid under Article 1(3). This procedure is intended merely to enable the EFTA Surveillance Authority to form a *prima facie* opinion on whether the measure concerned may be classified as State aid and on the partial or complete compatibility of the aid in question with the EEA Agreement. For the purpose of establishing *locus standi*, this procedure must be distinguished from the examination which takes place under Article 1(2) (see Case E-4/97 *Norwegian Bankers' Association* v *EFTA Surveillance Authority*

[1999] EFTA Court Report 3, at paragraph 33). Only in connection with the latter examination, which is designed to enable the EFTA Surveillance Authority to be fully informed of all the facts of the case, is there an obligation to give the parties concerned notice to submit their comments (See *Norwegian Bankers' Association* v *EFTA Surveillance Authority - Admissibility* [1998] EFTA Court Report 40, at paragraph 25).

45 The Court has furthermore held in *Norwegian Bankers' Association* v *EFTA Surveillance Authority – Admissibility*, cited above, at paragraph 26, that where, without initiating the procedure under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, the Authority finds, on the basis of Article 1(3) of the same protocol, that a certain aid is compatible with the EEA Agreement, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision of the Authority before the Court.

46 Therefore, where, in order to make use of the procedural guarantees provided by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, an action for the annulment of a decision of the EFTA Surveillance Authority is commenced at the end of the preliminary stage, it is necessary – and sufficient – for an applicant to demonstrate that it is a "party concerned" within the meaning of that provision in order to be regarded as individually concerned for the purposes of the second paragraph of Article 36 of the Surveillance and Court Agreement. See also *Cook* v *Commission*, at paragraphs 23 to 26; *Matra* v *Commission*, at paragraphs 17 to 20; *BP Chemicals* v *Commission*, at paragraphs 89 and 90; and, *Aktionsgemeinschaft Recht und Eigentum* v *Commission*, at paragraph 44 (all cited above).

47 The contested State aid decision was made on the basis of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, without the Defendant having initiated the formal procedure provided for by Article 1(2). Therefore, the Applicants must be regarded as individually concerned by the contested decision, *firstly*, if they are seeking to safeguard the procedural rights provided by Article 1(2) and, *secondly*, if it appears that they possess the status of "party concerned" within the meaning of that paragraph.

48 In light of the aforementioned, it must first be considered whether the Applicants, by way of this action, are seeking to safeguard procedural rights arising from Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

49 In the Application, the Applicants claimed that the decision of 31 May 2002 should be annulled on the grounds, *inter alia*, that the Defendant had infringed essential procedural requirements by failing to open formal proceedings provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, despite there being considerable doubt about the compatibility of the State aid in question with Article 61 EEA. The Applicants consider that it was necessary to initiate such a procedure because an initial assessment of the aid in question raised serious difficulties in evaluating its compatibility with the

EEA Agreement. The Applicants claim that the commencement of a formal procedure would have safeguarded their procedural rights.

50 The first paragraph of Article 36 of the Surveillance and Court Agreement provides that the EFTA Court shall have jurisdiction in actions brought to challenge a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the Surveillance and Court Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. In the case at hand, the Applicants have challenged the contested decision based on arguments related to the first paragraph of Article 36 of the Surveillance and Court Agreement. The Applicants' action must therefore be interpreted as claiming that the Defendant's failure to initiate the formal procedure provided by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, has deprived them of the possibility to exercise procedural rights conferred by that paragraph. In the final analysis, the Applicants must therefore be deemed to be seeking to safeguard a procedural right.

51 On that basis, it is in the second place necessary to consider whether the Applicants possess the status of "party concerned" within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

52 The Court found in *Norwegian Bankers' Association* v *EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 30, that "parties concerned" within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement include not only the undertaking or undertakings benefiting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of an aid, in particular competing undertakings and trade associations.

53 It is also settled Community case law that, in order for its application to be admissible, an undertaking other than the recipient of the aid must demonstrate that its competitive position in the market is affected by the granting of the aid. This approach has also been applied by the Court in *Norwegian Bankers' Association* v *EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 33, where the Court found that the applicant Association had standing on the ground that it had shown that the decision of the EFTA Surveillance Authority might affect the legitimate interests of the members of the Association, by affecting their position in the market. Where that is not the case, the Court of First Instance of the European Communities has held that the applicant does not have the status of a "party concerned" within the meaning of Article 88(2) of the Treaty (see cases *Hamburger Hafen- und Lagerhaus*, at paragraph 41; *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 51; *Waterleiding Maatschappij* v *Commission*, at paragraph 62, (all cited above).

54 As to the position of the Applicants, TBW and Bellona, the evaluation of their interests in challenging the contested decision must, due to differences in factual circumstances, be assessed separately.

Bellona

55 Bellona argues that the contested decision adversely affects its legitimate interests on three counts, each of which alone would enable it to challenge the decision before the Court.

56 *Firstly,* Bellona argues that its own commercial position and econo mic interests are adversely affected by the decision. In this respect, Bellona contends that it has concrete commercial interests in various aspects of the environment and the energy sectors, for instance through its shareholdings, options or investments in various energy and energy related companies and undertakings, and its involvement in various environment friendly projects.

57 *Secondly,* Bellona argues that it, in a representative way, advances the interests of its partners and supporters, including a number of companies engaged in energy production. Bellona alleges that the interests of these partners and supporters are adversely affected by the State aid measure in question, and that Bellona is entitled to pursue those interests on their behalf.

58 *Thirdly,* Bellona invokes the fact that it lodged the complaint which led to the opening of the State aid administrative procedure in question, and corresponded with the Defendant during that procedure.

59 In respect of Bellona's first contention, the Court notes that Bellona is, according to its own information, a non-profit environmental foundation. Its main objectives are apparently motivated by non-commercial concerns: to combat problems of environmental degradation, pollution-induced dangers to human health and the ecological impacts of economic development strategies. Bellona is, and has been a participant in the political and civic discourse concerning these issues in Norway and internationally. The foundation's income appears to be derived chiefly from various contributions from the general public and from cooperating enterprises, as well as from the sale of supporting advertisements and from supporters who have undertaken to pay a periodic subscription.

60 It has not been argued that Bellona itself produces or sells gas or energy, or is engaged in other major commercial activities for its own account in direct competition with the recipients of the State aid at issue. Nor has it been shown that the foundation's capital or other endowments are invested in a manner that creates a risk of financial loss arising from any competitive relationship with any prospective State aid recipients.

61 Bellona argues that the contested decision is capable of affecting its interests as a shareholder, investor or partner in energy or energy related companies and programmes. As far as the approval of the general aid scheme is concerned, it has to be borne in mind that this part of the decision concerns Bellona merely by virtue of its objective capacity in the same manner as any other person who is, or might in the future be, in the same situation. It is therefore a measure of

general application, covering situations that are determined objectively, and entails legal effects on categories of persons envisaged in a general and abstract manner, and could therefore not affect Bellona's interests in a manner that would provide a basis for *locus standi* (see, for comparison, *Kahn Scheepvaart* v *Commission*, cited above, at paragraph 41).

62 With regard to the part of the decision that approves the application of the general aid scheme to the individual Snøhvit project, the Court must determine whether the effect on the various interests invoked are sufficient for Bellona to be a considered a party concerned. From the information that has been supplied by Bellona, the Court must conclude that the interests invoked concern business engagements or ventures that are prospective (in some instances hypothetical) or where any effect would be either indirect or remote. Under the standards established by the relevant case law, the Court finds that such effect would not be sufficient to provide a basis for *locus standi*.

63 It follows from the foregoing that Bellona has not adduced pertinent evidence to show that the contested decision may adversely affect its legitimate interests as a commercial or financial operator.

64 The Court will now examine whether Bellona may challenge the contested decision before the Court in a representative capacity for its partners and supporters.

65 Bellona submits that the State aid decision taken by the Defendant will seriously jeopardise not only the commercial position of Bellona itself, but also the economic interests of its partners and supporters. In this respect, the Court must first note that Bellona is a foundation, a legal entity representing itself, its officers or trustees. Bellona is not an association, and it has no members who play a part in the conduct of its affairs or are linked to it on the basis of any community of interest with the legal entity Bellona.

66 The Court has recognised *locus standi* for representative bodies for the purposes of challenging a decision of the EFTA Surveillance Authority under the second paragraph of Article 36 of the Surveillance and Court Agreement in relation to matters of State aid in respect of associations representing the interests of its members (see *Scottish Salmon Growers* v *EFTA Surveillance Authority*, cited above, at paragraph 22 and *Norwegian Bankers' Association* v *EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 33). Such limits follow also from the case law of the Community courts on the fourth paragraph of Article 230 EC (*Stichting Greenpeace Council and Others* v *Commission*, cited above, at paragraph 59). Even taking into account the ongoing debate concerning matters relating to *locus standi* mentioned in paragraph 37, the Court cannot follow the suggestions that have been made in the present proceedings to grant *locus standi* to a legal entity that is not an association with a defined membership on the basis of a community of interests. On that reasoning, Bellona's second argument must fail.

67 The Court now turns to Bellona's third line of argument.

68 In this context, Bellona emphasizes the role it performed in the administrative proceedings that lead to the decision taken by the Authority on the matter. It is submitted that it follows from Community case law that "individual concern" can be demonstrated by a person's participation in the administrative procedure that lead to the contested decision.

69 The Court held in *Norwegian Bankers' Association* v *EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 34, that even in the absence of provisions providing for a procedural system for complaints regarding State aid, an association's involvement in the proceedings before the EFTA Surveillance Authority may, in certain circumstances, warrant standing for that association to bring action for annulment before the Court. This would particularly be so where the association is, as a representative of its members, at the origin of a complaint to the Authority and where its views were heard during the procedure and information was gathered from the State in question regarding the complaint from the Association (see *Cofaz and Others* v *Commission*, cited above). This may equally apply at the earlier stages of the procedure (see, for comparison, C-367/95 P *Commission* v *Sytraval* [1998] ECR 1998 I-1719), and in particular where a decision effectively is a decision not to object to the State aid at issue.

70 The case law on *locus standi* shows that the relevance and significance of an applicant's participation in the administrative procedure varies according to the applicable procedural rules and the substantive rules at issue. In the context of decisions approving State aid in "phase one" investigations, participation in the administrative procedure cannot, as a general rule, serve as a substitute for the requirement that the position in the market must be affected (see paragraph 53 above, for further references to case law).

71 Nevertheless, such participation in the administrative procedure may be of relevance in very specific circumstances. It has consistently been held by the Community Courts that an association formed for the protection of the collective interests of a category of persons, cannot be considered to be individually concerned for the purposes of the fourth paragraph of Article 230 (ex 173) EC by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually (see *Stichting Greenpeace Council and Others* v *Commission*, cited above, at paragraph 59, and *Hamburger Hafen - und Lagerhaus and Others* v *Commission*, cited above, at paragraph 49). In *Stichting Greenpeace*, the Court of Justice of the European Communities further made mention of special circumstances, such as the role played by an association in a procedure that led to the adoption of an act within the meaning of Article 230 (ex 173) EC, which might justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure, citing Joined Cases 67, 38 and 70/85 *Van der Kooy and*

Others v *Commission* [1988] ECR 219, at paragraphs 21 to 23, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, at paragraphs 29 and 30. In both of these cases, which allowed an exception to the above described general rule under which the members of an association must be individually concerned in order to permit the association to bring an action for annulment based on the collective interests of its members, the decision to grant *locus standi* was based on the fact that professional organizations had been deeply involved in negotiations with the Commission and with other parties over matters related to the State aid decisions in question, and were found to have the position of negotiator that was affected by the decision in question.

72 It follows that if Bellona were an association and had members, and those members could be considered to be individually concerned within the meaning of Article 36 of the Surveillance and Court Agreement, which in the present context hinges on the notion of parties concerned in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, then it would be possible to regard Bellona as being entitled to bring the present action to promote the collective interests of its members.

73 However, Bellona is not an association, and does not have any "members" that are economic operators who could be regarded as direct competitors of the beneficiaries of the aid at issue. In other words, there are no members who could be defined as "parties concerned" within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, and thus be entitled to bring individual actions for the annulment of the said State aid decision. Consequently, Bellona, although at the origin of the complaint to the EFTA Surveillance Authority, can not be found entitled to bring the present action for annulment on behalf of any members who could have done so individually. Therefore, Bellona does not, in this respect, meet the requirements laid down by the Court in *Scottish Salmon Growers* v *EFTA Surveillance Authority*, at paragraph 22. The further observation of the Court of Justice of the European Communities in *Stichting Greenpeace Council and Others* v *Commission*, cited above, at paragraph 59, referred to in paragraph 71 *in fine*, clearly has no bearing on the present case.

74 It follows from all the foregoing that the contested decision does not constitute a decision of individual concern to Bellona, within the meaning of the second paragraph of Article 36 of the Surveillance and Court Agreement, and Bellona's third line of argument must fail.

75 The Court does not overlook the role Bellona plays as a participant in the national and international environmental discourse. The main objective of the provisions in the EEA Agreement on State aid is, however, to protect competition in the European Economic Area. Although the significance of the protection of the environment as an area for cooperation among the Contracting Parties to the EEA Agreement has been recognized in Article 78 EEA, this does not entail that the EFTA Surveillance Authority is at liberty to take

environmental factors into account when assessing whether State aid is compatible with the EEA Agreement. That power could only flow from a specific legal basis. Consequently, although the Applicant, Bellona, is a player on the environmental scene, this cannot contribute to providing a basis for *locus standi* for Bellona in the matter at hand.

TBW

76 With regard to the difference in circumstances and interests of the two Applicants in challenging the contested decision, it has not been argued that TBW participated in formulating the complaint to the EFTA Surveillance Authority, nor otherwise took part in Bellona's exchanges with the Defendant prior to the contested decision.

77 In the Applicants' written observations, it is submitted that TBW is directly and individually concerned by the contested decision. It is asserted that TBW's commercial activity comprises, directly and in cooperation with others as consultants, the production of energy using biogas and anaerobic technologies from various sources of material. It is stated that TBW has initiated several hundred biogas plants in Europe, and considerable numbers on other continents. On this basis, it is claimed that the decision of the Defendant will adversely affect TBW's commercial activities.

78 According to the written and oral submissions of the Applicants, TBW's main field of activity is as a consultancy firm within the field of renewable energy. No sufficient information has been presented to the Court concerning TBW's involvement in actual energy production, such as production and sales volumes, market outlets, investments, or the commercial results of its energy business. Some of the commercial interests referred to appear to be quite remote from the activities of the beneficiaries of the State aid, and in some instances of a prospective or hypothetical nature. In those circumstances, the Court cannot find that TBW's market positon will be affected by any competition arising from the adoption of the contested decision. It must also be held, based on the written and oral submissions, that the Applicant TBW has not proved that it is by any other means adversely affected by the contested decision.

79 It follows that the contested decision does not constitute a decision of individual concern to TBW, within the meaning of Article 36(2) of the Surveillance and Court Agreement.

Conclusion

80 Since neither of the Applicants has shown that it is individually concerned by the contested State aid decision, the application must be declared inadmissible,

without any need to examine whether either is directly concerned by the decision.

Costs

81 Under Article 66(2) of the 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 pleading. The Defendant has asked for the Applicants to be ordered to pay the costs in the admissibility proceedings. Since the Applicant has been unsuccessful it must be ordered to pay the costs. The costs incurred by the Government of Norway as Intervener and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby

1. **Declares the application of 30 July 2002 inadmissible.**

2. **Orders the Applicants to pay the costs of the Defendant.**

Carl Baudenbacher Per Tresselt Thorgeir Örlygsson

Delivered in open court in Luxembourg on 19 June 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President