ORDER OF THE COURT
24 May 2016

(Preliminary objection to admissibility – Refusal to commence infringement proceedings – Directive 2002/47/EC – Challengeable measures – Time limit – Admissibility)

In Case E-2/16,

Gerhard Spitzer, represented by Antonius Falkner, Rechtsanwalt,

applicant,

v

EFTA Surveillance Authority, represented by Carsten Zatschler and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION under Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for the annulment of EFTA Surveillance Authority Decision No 425/15/COL of 25 November 2015 on financial collateral arrangements in Liechtenstein,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

makes the following

ORDER

I Facts and procedure

1 The applicant is an Austrian citizen residing in South Africa. He held a current account and a securities deposit account with the Liechtensteinische Landesbank AG ("the bank"). He traded in shares, currencies and precious metals. In connection with these activities he took out loans from the bank on several occasions. In 2000, he concluded a "financial security collateral agreement" with the bank, granting as security for any loans from the bank all of his present and future assets held at the bank. During the financial crisis in 2008, the financial situation of the applicant deteriorated, which led the bank to take ownership of his assets at the bank under the financial security collateral agreement.

2 In January 2009, the applicant brought proceedings against the bank before the Liechtenstein courts, claiming that the bank had acted contrary to provisions laid down, *inter alia*, in Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002 L 168, p. 43) ("the Directive"). The case file does not include a copy of the judgments rendered in the applicant's case. However, he states that as a result of the proceedings he was found not to fall within the scope of the Directive. This result was later upheld by the Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*).

3 In October 2013, the applicant lodged a complaint with the State Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*), seeking the annulment of the judgment of the Supreme Court.

4 In January 2014, before the State Court delivered its decision in the applicant's case, he lodged a complaint against Liechtenstein with the EFTA Surveillance Authority ("ESA"), alleging that Liechtenstein had failed to respect and correctly apply the Directive. Following the complaint, ESA informed the applicant that it intended to await the result of the State Court proceedings. In April 2014, the State Court rejected the applicant's claim.

5 By Decision No 425/15/COL of 25 November 2015 ("the contested decision"), ESA closed the complaint case, considering that there were no grounds for pursuing the case further under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

6 By an application registered at the Court on 23 February 2016, the applicant brought an action against ESA under Article 36(2) SCA. The applicant requests the Court:

(a) to annul the EFTA Surveillance Authority Decision No 425/15/COL from 25th November 2015, to the incorrect approach of the Principality of Liechtenstein on the implementation of the Directive 2002/47/EC void and releases within the meaning of article without substitution these 36 paragraph SCA; and

(b) to order the EFTA Surveillance Authority to bear the costs of the proceedings.

7 The action is based on the contention that ESA infringed its duty to initiate the procedure laid down in Article 31 SCA.

8 On 18 March 2016, ESA lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Rules of Procedure ("RoP"). ESA claims that the Court should:

(1) dismiss the application as inadmissible; and

(2) order the applicant to pay the costs.

9 On 29 April 2016, the applicant submitted, pursuant to Article 87(2) RoP, his observations on the preliminary objection, requesting the Court:

(1) to dismiss the defendant's plea of inadmissibility; and

(2) to order the defendant to bear the costs of the proceedings.

II Legal background

10 ESA's functions are defined, *inter alia*, in Article 31 SCA, which reads:

If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.

11 Article 36 SCA concerns actions against ESA's decisions. The first three paragraphs of that provision read:

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.

12 Article 87(1) and (2) RoP reads:

1. A party applying to the Court for a decision on a preliminary objection or other preliminary plea not going to the substance of the case shall make the application by a separate document. The application must state the pleas of fact and law relied on and the form of order sought by the applicant; any supporting documents must be annexed to it.

2. As soon as the application has been lodged, the President shall prescribe a period within which the opposite party may lodge a document containing a statement of the form of order sought by that party and its pleas in law.

13 Article 88(1) RoP reads:

Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action.

III Arguments of the parties on the preliminary objection to admissibility

14 ESA submits that the application is inadmissible on three separate and independent grounds. First, established case law holds that a decision whether to initiate the procedure laid down in Article 31 SCA is not subject to judicial review (reference is made to Cases E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3 and E-2/13 *Bentzen Transport* v *ESA* [2013] EFTA Ct. Rep. 802).

15 Second, ESA argues that the application is time barred as it was registered with the Court on 23 February 2016, more than two months after the day on which the contested decision came to the applicant's knowledge. This does not satisfy the requirements of in line with Article 36(3) SCA.

16 Third, ESA contends that the application fails to set out the applicant's pleas in a coherent and intelligible manner. In this regard, ESA refers to Article 33(1)(c) RoP, which states that applications should include the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. ESA adds that it is established case law that the information given in the application must be sufficiently clear and precise to enable the defendant to prepare the defence, and the Court to rule on the application without having to request further information (reference is made, *inter alia*, to Case E-8/12 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 148, paragraph 95, and case law cited). Finally, numerous passages of the application are wholly unintelligible from a linguistic point of view.

17 The applicant submits, first, that the decision is an act reviewable under Article 36 SCA which the applicant has a legal interest in asking the Court to annul. In this regard, the applicant states that his application should be read in conjunction with Article 16 SCA, which obliges ESA to state the reasons for its decisions. According to the applicant, a lack of such reasons in the present case renders the contested decision incomprehensible.

18 Second, the applicant contends that his application was in fact submitted to the Court on 28 January 2016, and thus within the period laid down in Article 36(3) SCA.

19 Third, the applicant objects to ESA's submission that the application fails to set out the applicant's pleas in a coherent and intelligible manner. The applicant maintains that ESA has misunderstood the essential content of his application.

IV Findings of the Court

20 ESA has submitted a preliminary objection to the admissibility of the application. After considering the submissions of the parties on the preliminary objection pursuant to Article 87(1) and (2) RoP, the Court has decided to deal with the case on the basis of Article 88(1) RoP. Under that provision, the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, declare the action inadmissible.

21 The present action is brought under Article 36(2) SCA. The applicant seeks the annulment of the contested decision, by which ESA discontinued its examination of the applicant's complaint without taking further action on the alleged infringement.

22 In his pleadings, the applicant submits that Article 31 SCA obliges ESA to act. However, it is settled case law that ESA alone is competent to decide whether it is appropriate to bring proceedings under the first paragraph of that provision for failure to fulfil obligations. Consequently, a private applicant has no right to challenge a refusal by ESA to initiate infringement proceedings against an EFTA

State. That conclusion is not affected by the applicant's argument that ESA allegedly infringed his procedural rights by failing to state reasons (see *Bentzen Transport* v *ESA*, cited above, paragraphs 40 to 42, and case law cited).

23 Consequently, the contested decision does not constitute a challengeable act. The application must therefore be dismissed as manifestly inadmissible.

V Costs

24 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 ESA has requested that the applicant be ordered to pay the costs and the latter has been unsuccessful, he must be ordered to pay the costs.

On those grounds,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant is to bear the costs of the proceedings.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 24 May 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President