JUDGMENT OF THE COURT
23 September 2015

(Action for annulment – State aid – Failure to initiate the formal investigation procedure – Admissibility – Legal interest – Status as interested party – Doubts or serious difficulties – General measures – Aid scheme)

In Case E-23/14,

Kimek Offshore AS, represented by Bjørnar Alterskjær, advokat, and Robert Lund, advokat,

applicant,

v

The EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Maria Moustakali and Øyvind Bø, Officers, and subsequently by Markus Schneider, Acting Director, Maria Moustakali and Øyvind Bø, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 225/14/COL of 18 June 2014 on the compatibility of Norway's regionally differentiated social security contributions scheme with the Agreement on the European Economic Area.

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 and the written observations of the Norwegian Government, represented by Dag Sørlie Lund, Adviser, Ministry of Foreign Affairs, and Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents, and the European Commission ("the

Commission"), represented by Antonios Bouchagiar, Katarzyna Herrmann and Paul-John Loewenthal, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Kimek Offshore AS ("Kimek" or "the applicant"), represented by Bjørnar Alterskjær, the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Markus Schneider, Maria Moustakali and Øyvind Bø, the Norwegian Government, represented by Dag Sørlie Lund and Ketil Bøe Moen, and the Commission, represented by Katarzyna Herrmann, at the hearing on 2 July 2015,

gives the following

Judgment

I Introduction

1 On 18 June 2014, the defendant adopted Decision No 225/14/COL ("the contested decision"), in which it concluded that the Norwegian aid scheme for regionally differentiated employer social security contributions for 2014 to 2020 was compatible with the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

2 By its application, Kimek seeks the annulment of the contested decision. The applicant is a service company in the oil and gas business and hires out mechanics and engineers. Its administration and management is located in Kirkenes in Finnmark and the main focus of its work is in the northern part of Norway.

3 The application is based on two pleas. By its first plea, the applicant claims that ESA has breached its obligation to initiate a formal investigation procedure on the compatibility of the aid scheme with Article 61 EEA. The proposal to grant aid to undertakings not located within the area eligible for regional aid should have led ESA to be in doubt with regard to the compatibility of the measure with the EEA Agreement.

4 By its second plea, the applicant maintains that ESA has breached its obligations under Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), as the contested decision lacks reasons for granting aid to undertakings with a location outside the area eligible for regional aid.

II Facts

Background

5 In Norway, social security contributions have been regionally differentiated since 1975. They constitute the most extensive regional policy measure in the country. The system has been the subject of a number of decisions by ESA and a judgment by the Court (Case E-6/98 *Kingdom of Norway* v *EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 74). Until 2007 the social security contribution rate depended on the zone where the employee had his registered residence. In 2006, ESA assessed the Norwegian scheme on regionally differentiated social security contributions for 2007 to 2013 and raised no objections. According to that scheme, aid would only be granted to undertakings with a registered location of business activity within the area eligible for aid.

6 By letter of 13 March 2014, the Norwegian authorities notified ESA of a scheme for regionally differentiated social security contributions for 2014 to 2020 in accordance with Article 1(3) of Part I of Protocol 3 SCA. The scheme was assessed under ESA's Guidelines on Regional State Aid for 2014 to 2020 ("the Regional Aid Guidelines") (OJ L 2014 L 166, p. 44, and EEA Supplement No 33, p. 1). These Regional Aid Guidelines correspond to those adopted by the Commission (OJ 2013 C 209, p. 1). Following a request for additional information of 2 May 2014, a final updated notification was submitted on 3 June 2014.

7 According to the notification, the legal basis for the scheme is section 23-2 of the National Insurance Act of 28 February 1997 No 19 (*lov 28 februar 1997 nr. 19 om folketrygd*), which subjects employers in Norway to compulsory contributions to the national social security scheme. Social security contributions are calculated on the basis of the gross salary paid to the employees with a general contribution rate of 14.1%.

8 The Norwegian authorities submitted that the notified scheme is designed as an operating aid scheme where aid is granted to offset employment costs in certain regions. It was stated that the aid is calculated on the basis of the total labour costs that are directly linked to employees working in the designated areas, i.e. the total amount of wages actually payable by the employer, before taxes. Accordingly, employers located in the least populated areas pay employer social security contributions at a reduced rate.

9 Under the Norwegian Insurance Act, Parliament may adopt regionally differentiated contribution rates, under which undertakings located in sparsely populated areas are subject to a lower rate. On that account, the Norwegian authorities have established five geographic zones with different social security contribution rates for employers. Aid intensities vary according to the place of business registration. The full rate of 14.1% is charged in zone 1. Eligible recipients of regional aid under the scheme are undertakings registered within

geographical zones 2-5, as set out in paragraph 26 of the contested decision and reproduced here:

Zone	Rate	Aid intensity	Number of municipalities
1	14.1	0	195
2	10.6	3.1	95
3	6.4	6.8	35
4	5.1	7.9	78
4a	7.9	5.4	2
5	0	12.4	26

10 On 5 December 2013 the Norwegian Parliament adopted Decision No 1482 on determination of the tax rates etc. under the National Insurance Act for 2014. Section 1(1) of the Decision reads as follows:

> *Social security contributions are as a main rule calculated on the basis of the rate applicable in the zone where the employer is considered to conduct business activity.*

11 According to section 1(2) of the Parliament's Decision, an undertaking is considered to conduct business activities in the municipality where it is obliged to register under Norwegian legislation (*lov 3. juni 1994 nr. 15 om enhetsregistreret and forskrift 9 februar 1995 nr. 114 om registrering av juridiske personer m.m. i Enhetsregisteret*). If an undertaking conducts its business activities in two or more geographical locations, the activity in each location may be registered as a separate entity in the register, on the basis that at least one person works permanently at that location. An undertaking can therefore have multiple business activities registered as separate entities in different locations. The entities are considered separately under the regional aid scheme.

12 The Norwegian authorities state that employers with registered business activity in the geographical area covered by the scheme are automatically entitled to the reduced rate. The main rule entails that an undertaking is only eligible insofar as it conducts business activity within the area covered by the scheme as long as the employee's salary is connected to that specific business activity, i.e. the undertaking needs to be economically active in the area. Therefore, as set out in paragraph 12 of the contested decision, when an employer has more than one registered business location:

> *the aid will only be granted with respect to the employees who work within the eligible area. If an employee spends half or more of their working time in a zone other than the one in which their employer is located, the rate is based on the applicable rate in the zone in which the majority of the employee's time is spent.*

13 Under the scheme, notwithstanding their place of registration, undertakings are also eligible where they hire out workers to the eligible area and where their

employees are engaged in mobile activities within the eligible area, as specified in section 1(4) of the Norwegian Parliament's Decision:

> *If the main part of the work of the employee is carried out in another zone than where the business activity is conducted,, cf. second paragraph, and the rules on registration due to the character of the business activity do not require that a sub-entity is registered in the zone where the work is carried out (ambulant activities), the rate of this other zone where the work is carried out is nevertheless applied to the part of the salary etc. connected to this work. The same applies to the hiring out of workers, if the employee carries out the main part of his work in another zone than the zone in which the employer is considered to conduct business. Here, the main part of the work means more than half the number of working days the employee has completed for the employer in the tax period.*

14 In their notification to ESA the Norwegian authorities maintained that the objective of the scheme is to prevent depopulation and stimulate settlement by promoting employment in specific regions. The share of the population within the area eligible for aid is estimated to be 19.75% of Norway's total population and further depopulation is expected. Continuing depopulation, partly due to the lack of employment opportunities, has been a problem in sparsely populated areas in Norway for decades. The Norwegian authorities contend that without the regional aid, the eligible areas for aid would have almost 50 000 fewer inhabitants.

The contested decision

15 On 18 June 2014, the defendant adopted the contested decision. It concluded that the scheme as notified on 3 June 2014 was compatible with the functioning of the EEA and authorised the implementation of the measure.

16 At the outset, ESA recognised that the notified scheme constituted State aid within the meaning of Article 61(1) EEA. Therefore, the compatibility conditions as set out in the Regional Aid Guidelines, based on common assessment principles established by the Commission, were applicable to the notified scheme. Hence, the analysis of whether the scheme was compatible with the internal market comprised an assessment of whether its objective of positive impact on the common interest exceeded the potential negative effects on trade and competition.

17 ESA considered the Norwegian authorities to have presented information showing that the category of beneficiaries was limited as required by Chapter 1.1 of the Regional Aid Guidelines. The aid, granted in the form of a reduction in social security contributions to reduce expenditure of eligible undertakings, was considered to be consistent with the Regional Aid Guidelines, as the designated areas eligible for aid were "very sparsely populated areas", with less than 8 inhabitants per km².

18 ESA assessed the measure as aiming towards an objective of common European interest, of maintaining a stable population in rural areas, by inducing employment

opportunities. It concluded that there was a need for state intervention to reduce or prevent depopulation in the eligible areas, as the Norwegian authorities had established that without the aid growth in employment in the eligible area would have been lower in the last ten years and that the area would have lost close to an additional 50 000 inhabitants.

19 The notified measure was considered appropriate to address the objective of common interest. ESA accepted the Norwegian authorities' reasoning that investment aid would be less effective for employment opportunities than operating aid, as the eligible areas primarily lacked profitable investment projects and not risk capital. Moreover, investment aid would only affect employment opportunities in the area indirectly, with the effect being more uncertain, and would not alleviate the long-term challenges faced by the industries in the area in the same way as operating aid.

20 In general, ESA also found that labour cost reductions provided an incentive to increase employment. In this connection, the Norwegian authorities submitted that subsidies linked to labour costs, expected to be maintained for a longer period of time, would prevent or reduce depopulation by stimulating employment in the eligible areas. ESA considered the scheme to have an incentive effect on undertakings in the eligible areas, encouraging them to hire more people than they would in the absence of aid.

21 ESA noted that the aid was confined to compensate for the cost of employment and considered it to be fully attributable to the problems it was intended to address. As the aid intensities differed by geographical area, it was considered to reflect the disparity of the problems in different zones. In light of this, ESA's conclusion was that the measure sought to address the problem of depopulation in a proportionate way and would not affect trade to an extent contrary to the interest of the Contracting Parties to the EEA.

22 ESA considered further that the Norwegian authorities had shown that the basis of the scheme was non-discriminatory and not excessive in relation to the objective of preventing the depopulation in the designated areas. The Norwegian authorities' view was that effects on trade and competition would be minimal, as most undertakings would be offering services locally. On the basis of the information put forward, ESA concluded that the scheme avoided undue negative effects on competition and trade.

23 In light of the above, ESA found the notified measure to be compatible with Article 61(3)(c) EEA and accordingly authorised its implementation.

III Legal background

EEA law

24 Article 61 EEA provides, in extract, as follows:

> *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.*
>
> *...*
>
> *3. The following may be considered to be compatible with the functioning of this Agreement:*
>
> *...*
>
> *(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*
>
> *...*

25 According to Article 16 SCA:

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

26 The second paragraph of Article 36 SCA provides:

> *Any natural or legal person may ... 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.*

27 Article 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.*
>
> *2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or*

that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

...

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

28 Article 1(h) of Part II of Protocol 3 SCA reads:

For the purpose of this Chapter:

...

(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.

29 Article 4(3) and (4) of Part II of Protocol 3 SCA reads:

3. Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61(1) of the EEA Agreement, it shall decide that the measure is compatible with the functioning of the EEA Agreement (hereinafter referred to as a 'decision not to raise objections'). The decision shall specify which exception under the EEA Agreement has been applied.

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').

30 Article 6(1) of Part II of Protocol 3 SCA reads:

1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the EFTA Surveillance Authority as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the functioning of the EEA Agreement. The decision shall call upon the

> *EFTA State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the EFTA Surveillance Authority may extend the prescribed period.*

31 According to paragraph 3 of the Regional Aid Guidelines adopted by ESA, the primary objective of State aid control is:

> *... to allow aid for regional development while ensuring a level playing field between EEA States, in particular by preventing subsidy races that may occur when they try to attract or retain businesses in disadvantaged areas of the EEA, and to limit the effects of regional aid on trade and competition to the minimum necessary.*

32 Paragraphs 4 to 6 of the Regional Aid Guidelines state that regional aid can only play an effective role if it is used sparingly and in a proportionate manner, while being concentrated to the most disadvantaged regions of the EEA. Furthermore, the aid ceilings should reflect the seriousness of the development in the regions and the advantages of the aid must outweigh the resulting distortions of competition.

33 Moreover, according to paragraph 16 of the Regional Aid Guidelines:

> *Regional aid aimed at reducing the current expenses of an undertaking constitutes operating aid and will not be regarded as compatible with the internal market, unless it is awarded to tackle specific or permanent handicaps faced by undertakings in disadvantaged regions. Operating aid may be considered compatible if it aims to reduce certain specific difficulties faced by SMEs in particularly disadvantaged areas falling within the scope of Article 61(3)(a) of the EEA Agreement, or to prevent or reduce depopulation in very sparsely populated areas.*

34 As regards the avoidance of undue negative effects on competition, paragraph 134 of the Regional Aid Guidelines states in relation to operating aid schemes:

> *If the aid is necessary and proportional to achieve the common objective described in Subsection 3.2.3, the negative effects of the aid are likely to be compensated by positive effects. However, in some cases, the aid may result in changes to the structure of the market or to the characteristics of a sector or industry which could significantly distort competition through barriers to market entry or exit, substitution effects, or displacement of trade flows. In those cases, the identified negative effects are unlikely to be compensated by any positive effects.*

35 For the purposes of Article 61(3)(c) EEA, in accordance with paragraph 149 of the Regional Aid Guidelines, for sparsely populated areas, EFTA States should in principle designate "[s]tatistical regions at level 2 with less than 8 inhabitants per km² or statistical regions level 3 with less than 12.5 inhabitants per km²".

National law

36 It follows from paragraph 1 of section 23-2 of the National Insurance Act that all employers in Norway are subject to compulsory contributions to the national social security scheme.

37 Pursuant to paragraph 12 of section 23-2 of that Act, the rate of social security contributions is to be determined annually by Parliament. According to this provision, Parliament may adopt different rates on a geographical basis.

IV Procedure and forms of order sought

38 By letter registered at the Court on 1 December 2014, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 18 February 2015, following an extension of the period for submitting a defence granted pursuant to Article 35(2) of the Rules of Procedure ("RoP"). The reply from the applicant was registered at the Court on 25 March 2015.

39 The rejoinder from ESA was registered at the Court on 5 May 2015, one day after the expiry of the time limit for doing so, without ESA having previously either sought and obtained the extension of that time limit or stated any circumstances excusing its non-observance. Consequently, the pleading was rejected as out of time.

40 The applicant, Kimek Offshore AS, requests the Court:

1. To annul the EFTA Surveillance Authority Decision No 225/14/COL of 18 June 2014 on regionally differentiated social security contributions 2014-2020, and;

2. To order the EFTA Surveillance Authority to bear the costs of the proceedings.

41 ESA requests the Court to:

1. Dismiss the Application or, in the alternative, declare the Application inadmissible in whole or in part.

2. Order the applicant to bear the costs.

42 On 27 April 2015, the Norwegian Government and the Commission submitted written observations pursuant to Article 20 of the Statute of the Court.

43 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.

V Admissibility

Arguments of the parties and those who have submitted observations

44 The applicant submits that as a competing undertaking, affected by the grant of State aid, it is a party concerned within the meaning of EEA law, namely the second paragraph of Article 36 SCA and Articles 1(2) and 1(3) of Part I of Protocol 3 SCA, and that it has *locus standi* to bring the present action before the Court. It submits that the aid is likely to have a specific effect on its situation and, therefore, it has a legitimate interest in the implementation of the scheme. The applicant argues that it is in direct competition with a number of undertakings located in zone 1 operating in the same relevant and geographical market. Since the scheme opens up the possibility of aid to undertakings outside the regional aid area in an open and abstract manner, it impacts greatly on the applicant.

45 The applicant contends that the Norwegian authorities modified the existing State aid rules in 2010 without notifying the defendant, allowing undertakings registered outside the target zone and hiring out workers to benefit from reduced rates of social security contributions. Following the introduction of the new rules for undertakings hiring out workers, the applicant's income has dropped considerably as has the number of hours worked by the workers it hires out. It considers this representative of future effects.

46 ESA, the Norwegian Government and the Commission maintain that the applicant does not have a legal interest in the annulment of the contested decision in its entirety and considers that an advantage to the applicant could only potentially be achieved by opening a formal investigation simply in relation to the special provisions of section 1(4) of the Norwegian Parliament's Decision.

47 ESA considers that, in any event, the applicant does not have a legal interest in the annulment of the contested decision in its entirety due to its status as a beneficiary of the aid scheme and contends, therefore, that the Court should dismiss the application as inadmissible in its entirety. In this regard, ESA refers to case law, according to which an action for annulment brought by a natural or legal person is not admissible unless the applicant has a vested and present interest in seeing the contested measure annulled on the date that the action is brought. ESA contends that a beneficiary of an aid scheme has no interest in demanding the annulment of a decision insofar as it declares aid compatible with the common market.

48 ESA contends further that an interest in bringing an action presupposes that the annulment of a decision must be capable, in itself, of having legal consequences, i.e. that the action must be liable, if successful, to procure an advantage to the party who has brought it. In ESA's view, such an advantage would not be procured to the applicant by annulment of the contested decision, as the annulment would suspend aid for all beneficiaries, including the applicant itself. It alleges that the applicant has not adduced evidence of how annulment would entail an advantage nor explained how its situation differs from other beneficiaries or how the scheme distorts competition to its detriment.

49 ESA submits that the application can only be admissible insofar as it challenges the compatibility of Section 1(4) of the Parliament's Decision. Insofar as the application seeks the annulment of the remainder of the contested decision dealing with the remainder of the scheme, the application should be declared inadmissible.

Findings of the Court

50 For the purposes of considering the admissibility of this action, it must be observed that, according to settled case law, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. That interest must be vested and present (see, to that effect, Case T-413/12 *Post Invest Europe* v *Commission*, judgment of 15 May 2015, published electronically, paragraph 23 and the case law cited).

51 In order for such an interest to be present, the annulment of the measure must be capable in itself of having legal consequences or, putting it in different words, the action must be liable, if successful, to procure an advantage for the party who has brought it (compare Case C-133/12 P *Stichting Woonlinie and Others* v *Commission*, judgment of 27 February 2014, published electronically, paragraph 54 and the case law cited).

52 ESA, the Norwegian Government and the Commission have all argued that the applicant does not have a legal interest in the annulment of the contested decision in its entirety, as it is a beneficiary of the aid scheme in question.

53 In that regard, the Court notes that it cannot automatically annul the challenged act in its entirety merely because it may consider a plea put forward by the applicant in support of its action for annulment well founded. Annulment of the act in its entirety is not acceptable where it is obvious that such a plea, directed only at a specific part of the challenged act, only provides a basis for partial annulment.

54 The Court observes further that the applicant has indicated that it does not contest the main principle of the contested decision, namely that Norway may maintain a scheme of regionally differentiated social security contributions in areas eligible for regional aid to prevent or reduce depopulation in the areas included within the scheme. However, it objects to the granting of aid to undertakings located outside of the eligible areas, which are in direct competition with its operations, located within the eligible area.

55 Partial annulment of an act of EEA law is not possible unless the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement of severability is not satisfied where the partial annulment of a measure would have the effect of altering its substance (compare, to that effect, Case C-224/12 P *Commission* v *Netherlands and ING Groep*, judgment of 3 April 2014, published electronically, paragraph 57 and case law cited).

56 The operative part of the contested decision does not devote a specific separate section to the rule set out in section 1(4) of the Parliament's Decision. However,

the notifications made by the Norwegian authorities to ESA stated that there was an exemption to the main rule in section 1(1) of the Norwegian Parliament's Decision applicable to employees engaged in ambulant activities. Even though the precise implications of the rule were not described in the notifications, it was nevertheless, as part of the notification, subject to ESA's preliminary investigation.

57 As the applicant's arguments only relate to the effects of the rule in section 1(4), which must be viewed as an exemption from the main rule set out in section 1(1) of the Parliament's Decision, the contested decision may be subject to annulment to the extent that ESA should have encountered serious difficulties as regards the compatibility of this rule with the EEA Agreement, or failed to provide an adequate statement of reasons to that end.

58 Accordingly, the part of the contested decision that relates to the rule entailed in section 1(4) of the Parliament's Decision, can be severed from the remainder of the decision.

59 The fact that the applicant is a potential beneficiary of the aid scheme in question cannot be viewed as limiting its rights to seek protection for its procedural rights as regards the defendant's decision not to open the formal investigation procedure in relation to those particular elements of the scheme provided for in section 1(4) of the Norwegian Parliament's Decision

60 Moreover, a natural or legal person may only institute proceedings against a decision addressed to another person pursuant to the second paragraph of Article 36 SCA 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-19/13 *Konkurrenten.no AS* v *ESA*, order of 20 March 2015, not yet reported, paragraph 93, and case law cited).

61 It follows from settled case law that persons other than those to whom a decision is addressed may only claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA 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 *Konkurrenten.no AS* v *ESA*, cited above, paragraph 94 and case law cited).

62 As the present action concerns an ESA decision on State aid, the Court notes that, in the context of the procedure for reviewing State aid under Article 1 of Part I of Protocol 3 SCA, the preliminary examination under Article 1(3) must be distinguished from the formal investigation under Article 1(2) (see Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 71).

63 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 (see *Konkurrenten.no AS* v *ESA*, cited above, paragraph 107, and *Abelia* v *ESA*, cited above, paragraph 72).

64 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, it shall adopt a decision under Article 4(3) of Part II of Protocol 3 SCA to raise no objections, as it did in the present case. These two types of decision are, by implication, also a refusal to initiate the formal investigation pursuant to Article 1(2) of Part I of that protocol (see *Konkurrenten.no AS* v *ESA*, cited above, paragraph 108 and case law cited).

65 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.

66 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.

67 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.

68 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 *Konkurrenten.no AS* v *ESA*, cited above, paragraph 112 and case law cited, and, for comparison Case C-487/06 P *British Aggregates Association* v *Commission* [2008] ECR I-10515, paragraph 27, and case law cited).

69 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.

70 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 that party seeks, by instituting proceedings, to safeguard the

procedural rights available. This applies both to a decision that a measure does not constitute State aid and a decision not to raise objections, as in the present case.

71 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 *Konkurrenten.no AS* v *ESA*, cited above, paragraph 116 and case law cited, and, for comparison, Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441, paragraph 63 and case law cited). In other words, that term covers an indeterminate group of persons.

72 The applicant argues that it is an "interested party" within the meaning of Article 1(h) of Part II of Protocol 3 SCA, as it is a direct competitor of the beneficiaries of the aid scheme. The aid scheme authorised by ESA in the contested decision has made the applicant, which is located in Kirkenes, Finnmark, an area with a zero rate for social security contributions, susceptible to competition from parties that are to a large extent located outside the areas eligible for regional aid, due to the exemption rule laid down in section 1(4) of the Norwegian Parliament's Decision.

73 Moreover, the applicant submits that ESA should have in been doubt with regard to the compatibility of the regional aid benefitting companies not located in areas eligible for regional aid. The applicant contends that ESA apparently did not reflect upon the effects of the exemption rule at all. By closing its preliminary examination, despite its inability, on an objective basis, to surmount the difficulties regarding the question of whether allowing regional aid to undertakings located outside the area eligible for regional aid was compatible with the EEA Agreement, ESA has infringed its rights as an interested party within the meaning of Article 6(1) of Part II of Protocol 3 SCA. Consequently, the applicant argues that in light of those considerations ESA's decision must be annulled.

74 Accordingly, the applicant does not call into question the merits of the contested decision but challenges it in order to safeguard its procedural rights under Article 1(2) of Part I of Protocol 3 SCA as an undertaking in direct competition with potential beneficiaries of the aid scheme approved by the contested decision.

75 In the contested decision, ESA found that the aid scheme introduced in Norway for regionally differentiated social security contributions covered only areas within the definition of very sparsely populated areas used in the Regional Aid Guidelines. Moreover, ESA accepted the arguments put forward by the Norwegian authorities that there was a need for State intervention and that the measures were an appropriate policy instrument. Thus, ESA also accepted that undue negative effects on competition were avoided and that the implementation of the aid scheme would be sufficiently transparent.

76 On that basis, ESA came to the conclusion that the scheme for regionally differentiated social security contributions was compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) EEA.

77 The Norwegian Government has argued that it is not possible for an applicant to invoke the procedural guarantees set out in Part II of Protocol 3 SCA, as the contested decision concerns a State aid scheme of general application and not individual aid. In that regard, it must be noted that the general scope of the contested decision, which results from the fact that it is designed to authorise an aid scheme which applies to a category of operators defined in a general and abstract manner, is not such as to constitute a barrier to the application of the case law cited in paragraphs 64 to 70 above (compare, to that effect, *British Aggregates* v *Commission*, cited above, paragraph 31).

78 Hence, an undertaking can be considered an interested party with a view to safeguarding its procedural rights if it shows that its interest might be affected by the granting of aid (compare, to that effect, Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraph 33).

79 For that purpose, it is necessary for that undertaking to establish that the aid is likely to have a specific effect on its situation. This requirement entails that the undertaking in question has a legitimate interest in the implementation or non-implementation of the 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.

80 The applicant has maintained that the introduction of the new rules for the hiring out of workers by undertakings registered outside the eligible zones, has led to a considerable reduction in both its income and the number of hours worked by the workers it hires out. Based upon its own calculations, the applicant has asserted, without being contradicted on that point by ESA or the Norwegian Government, that since the introduction of the aforementioned rule, its operating income has dropped from NOK 59 991 000 in 2009 to NOK 22 900 000 in 2010. Furthermore, the number of hired out personnel in Hammerfest/Melkøya in Finnmark (a station for processing gas from natural gas fields in the Barents Sea), fell from 136 200 hours in 2008, which was a peak year, to 300 hours in 2010.

81 The applicant states that since 2010 it has been very difficult to compete at the Melkøya site with companies located outside the regional aid area that receive aid when hiring out personnel.Therefore, according to the applicant, there is a direct causal link between the introduction of the rule and the harm it has suffered.

82 The applicant has not furnished the Court with documents demonstrating the extent to which the applicant’s competitive position on the market has been affected by the aid. In that regard, it should, however, be borne in mind that the aid measure entailed in section 1(4) of the Norwegian Parliament’s Decision constitutes operating aid – that is to say, aid which is intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities. As a rule, such aid distorts the conditions of competition (compare, to that effect, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30 and case law cited).

83 In light of these circumstances, the possibility cannot be precluded that the particular kind of aid provided for in section 1(4) of the Parliament's Decision has affected the structure of the market in which the applicant operates and therefore its competitive position on the market.

84 Accordingly, it must be held that the applicant has established to the requisite legal standard the existence of a relationship of rivalry, as well as the potential adverse effects on its market position, attributable to the grant of the aid at issue, and is thereby an interested party for the purposes of Article 1(h) of Part II of Protocol 3 SCA.

VI Substance

First plea: infringement of the obligation to open the formal investigation procedure

Arguments submitted

85 By its first plea, the applicant submits that the defendant breached its obligation to open the formal investigation procedure under Article 1(2) of Part I of Protocol 3 SCA. It asserts that ESA should have entertained doubts as to the compatibility of the notified scheme with the common market after the preliminary investigation, as regional aid is granted to undertakings located outside the eligible area. As those firms are in direct competition with companies located inside the eligible area, the applicant fears that undertakings inside the areas may become outcompeted, resulting in a negative effect on settlement.

86 In the applicant's view, ESA has not advanced any argument to explain how the grant of aid to undertakings located outside of the eligible zones, which do not face the same specific and permanent handicaps as undertakings within the area, would prevent or reduce depopulation in very sparsely populated areas of Norway, as required by paragraph 16 of the Regional Aid Guidelines. On the contrary the applicant contends that granting aid to such undertakings when hiring out workers is not likely to have that effect on the population within the disadvantaged areas.

87 The applicant considers that ESA was under a duty to adopt a decision initiating the formal investigation procedure in accordance with Article 1(2) of Part I of Protocol 3 SCA and Article 4(4) of Part II of Protocol 3 SCA. By closing its initial examination in accordance with Article 4(3) of Part II of Protocol 3 SCA, the defendant infringed the applicant's rights as an interested party within the meaning of Article 6(1) of Part II of Protocol 3 SCA. Consequently, the contested decision should be annulled.

88 ESA submits that the applicant's first plea is ill-founded. It maintains, first, that the rule challenged by the applicant did not give rise to any serious doubts and that it encountered no serious difficulties in its assessment in the preliminary investigation of the scheme's compatibility with the EEA.

89 The defendant submits further that the rule in section 1(4) of the Norwegian Parliament's Decision is based on the same principle as the main rule as set out in sections 1(1) and 1(2) of the Decision, as both rules ensure that the scheme targets economic activity within the eligible area and are, as such, merely different expressions of the same principle. The difference is merely due to a necessary adaptation of one of the rules to the factual circumstances and the Norwegian legislation concerning registration of economic activities. It maintains that, in terms of undertakings located outside the eligible area, aid is only granted insofar as the main part of an employee's work is carried out within the area eligible for aid.

90 Second, the defendant contends that the contested decision is compatible with Article 61(3)(c) EEA and the Regional Aid Guidelines. In this regard, it stresses that neither Article 61(3)(c) EEA nor the Regional Aid Guidelines require, as a condition for approving a regional aid scheme, that the beneficiaries of regional aid are formally registered within the eligible area. Such a condition is also not to be found in Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1 and Icelandic EEA Supplement No 23, p. 813).

91 ESA highlights paragraph 6 of the Regional Aid Guidelines, which emphasises that regional aid can be effective in promoting economic development of disadvantaged areas only if it is awarded "to induce additional investment or economic activity in those areas".

92 Third, the defendant submits that the effects on the competitive position of the applicant did not give rise to doubts. The defendant submits that it assessed the scheme as the Norwegian authorities designed and notified it applying the Regional Aid Guidelines. As any undertaking in the EEA would benefit from the rule when hiring out workers in the disadvantaged areas avoiding adverse effect on competition the scheme had been approved by the defendant, as it was not considered to have undue negative effects on competition. It contends that the interpretation advanced by the applicant could lead to discrimination against undertakings formally registered outside Norway planning to offer their services within the area.

93 Fourth, the defendant submits that the contested decision is in line with its previous practice as it targets and directly benefits economic activity in the eligible areas.

94 Consequently, ESA contends that the obligation to open a formal investigation procedure has not been breached.

95 The Norwegian Government contends that the main rule of the notified scheme, under sections 1(1) and 1(2) of the Parliament's Decision, is in line with the scheme's objective to reduce or prevent depopulation. The rule is based on the premise that only undertakings performing economic activities in the eligible area

should receive aid, corresponding to the obligation to register a unit or sub-unit in that area.

96 In the Norwegian Government's view, the rule in section 1(4) of the Parliament's Decision, which was first introduced on 1 January 2010, is only an expression of the principle that the scheme should cover economic activity within the eligible area. It is framed differently to sections 1(1) and 1(2) due to specific features of the Norwegian legislation concerning the registration of economic activities.

97 Moreover, the Norwegian Government contends that the special criterion for undertakings hiring out workers is necessary, first, to prevent undertakings registered in an eligible area but not performing any work there from receiving aid under the scheme. Second, basing the right to reduced social security contributions on actual activity rather than on the registration of a sub-unit of the undertaking will ensure fair competition and access to the labour market in the eligible areas, also for undertakings from other EEA States. Third, the scheme ensures the same treatment for all undertakings hiring out employees to the area, whether or not they have a registered sub-unit.

98 In addition, the Norwegian Government, supported by ESA, asserts that the special rule on hiring out workers will benefit the regions eligible for regional aid in three ways, all contributing to the prevention or reduction of depopulation. First, labour contracting offers a more specialised labour that would not otherwise be available to local undertakings at a lower cost than would be possible without the aid. Second, lower labour costs when hiring out workers makes it more economically beneficial and attractive to run a business in the designated areas. Third, although these employees are only in the region on a temporary basis, they nevertheless have a positive effect on the community, as they purchase goods and services from local businesses, thereby contributing to increased employment and population in an indirect way.

99 Finally, the Norwegian Government supports ESA's submission that it had no objective reasons for experiencing doubts or serious difficulties at the end of the preliminary investigatory phase and refers to the burden of proof on the applicant.

100 The Commission takes the view that the application of the scheme under both sections 1(1) and 1(4) of the Norwegian Parliament's Decision ensures that economic activities are encouraged within the eligible areas. It observes that although the reasoning in the contested decision is succinct, it is sufficient to enable the applicant to ascertain the reasons for the measure and to enable the Court to exercise its power of review.

101 The Commission shares ESA's view that it did not face serious difficulties that mandated the opening of the formal investigation procedure on account of the scheme's application to the hiring out of workers to the eligible areas. The Commission contends that the applicant bears the burden of proving the existence of serious difficulties requiring the submission of a body of consistent evidence concerning the circumstances in which the contested decision was adopted and its

content, comparing the assessments on which ESA relied with the information available to it at the time.

102 In the Commission's view, the applicant has not demonstrated that the defendant was obliged to open the formal investigation procedure into the scheme. Therefore, the applicant's first plea should be dismissed as unfounded.

Findings of the Court

103 As noted in paragraph 65 above, 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 for the purposes of Article 61(1) EEA, unless it also overcomes all doubts or difficulties concerning the measure's compatibility with the EEA Agreement, even if it were State aid.

104 The notion of doubts or serious difficulties is an objective one. Their existence may appear in the circumstances in which the contested measure was adopted and in its content. The Court must compare the assessments that ESA relied on, with regard to facts and law, when the decision not to raise objection was adopted with the information available to ESA when it took the decision on the compatibility of the aid scheme in question with the EEA Agreement (see, *inter alia*, *Míla* v *ESA*, cited above, paragraph 89 and case law cited).

105 In this regard, judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond consideration of whether or not there has been a manifest error of assessment (see *Míla* v *ESA*, cited above, paragraph 90 and case law cited).

106 Thus, if the assessment carried out by ESA during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see *Míla* v *ESA*, cited above, paragraph 91 and case law cited).

107 Accordingly, the legality of the contested decision depends on whether the assessment of the information and evidence ESA had at its disposal during the preliminary examination should objectively have led to doubts as to whether the aid scheme was in accordance with the EEA Agreement.

108 The applicant bears the burden of proving the existence of doubts or serious difficulties. It may discharge that burden of proof by reference to a body of consistent evidence concerning the circumstances and the length of the preliminary examination procedure and the content of the contested decision (see *Míla* v *ESA*, cited above, paragraph 93 and case law cited).

109 The applicant has pleaded that ESA should have had doubts as to whether the notified scheme was compatible with the EEA Agreement, as it provides that regional aid is granted to undertakings located outside the eligible area when hiring out workers within the area. In that regard it contends that ESA did not adduce any arguments or evidence as to how the grant of aid to undertakings located outside

of the eligible zones would prevent or reduce depopulation in very sparsely populated areas of Norway, as required by paragraph 16 of the Regional Aid Guidelines.

110 In the applicant's view, it appears as if ESA did not reflect upon the effects of this rule during the preliminary examination phase. Furthermore, the applicant submits that no calculation of the amount of aid resulting from the rule regarding hiring out of workers was presented by the Norwegian authorities in their notification or by the defendant in its decision.

111 In its notification to the defendant, the Norwegian Government submits the information that special rules apply to employers with employees engaged in ambulant activities. In the circumstances where 50% or more of an employee's working hours are in a zone other than the zone where the employer is located, the contributions are based on the rate applicable in the former zone.

112 In paragraph 11 of the contested decision, ESA identifies the eligible recipients of the scheme as those employers that have their business activity registered in the geographical area covered by the scheme, unless they are active in a sector that is not covered by the scheme. In addition, paragraph 12 of the decision states the following:

> *The employer is automatically entitled to the reduced rate, and does not have to apply for it. If an employer has more than one registered business location, the aid will only be granted with respect to the employees who work within the eligible area. If an employee spends half or more of their working time in a zone other than the one in which their employer is located, the rate is based on the applicable rate in the zone in which the majority of the employee's time is spent.*

113 Even though both the Norwegian authorities' notification to ESA and the contested decision mention that there is an exemption from the main rule laid down in section 1(1) of the Norwegian Parliament's Decision as regards employees in ambulant activities, neither elaborates further on the fact that this "special" rule applies to undertakings located outside the eligible areas when hiring out workers within the eligible area. Moreover, neither the notification nor the decision make any mention of the Parliament's Decision of 5 December 2013 which is the basis for the granting of aid to the undertakings in question.

114 In light of the above, the Court invited ESA to clarify what information in the case-file formed the basis of its evaluation as regards the impact of the rule in section 1(4) of the Norwegian Parliament's Decision on competition and trade, and its compatibility with paragraph 16 of the Regional Aid Guidelines. The Norwegian Government was also invited to indicate to the Court any information it might have provided to ESA to allow for the evaluation of the impact of the rule in section 1(4) on competition and trade and its compatibility with the Regional Aid Guidelines.

115 At the hearing, the Court was informed that the Norwegian authorities did not provide ESA with special documentation regarding the rule in section 1(4) of the Norwegian Parliament's Decision but only for the aid scheme as a whole and that no separate assessment of the rule was carried out by ESA. The Norwegian Government maintained that it had had discussions with ESA regarding the rule in 2010. Thus, in the Norwegian Government's view, ESA was aware of the rule and its substance.

116 It is apparent from the contested decision and the information provided at the hearing that ESA did not assess these circumstances and their consequences with regard to the compatibility of the rule set out in section 1(4) of the Parliament's Decision with the functioning of the EEA Agreement within the meaning of Article 61(3) EEA, especially as regards the impact of the contested rule on competition and trade and its compatibility with paragraph 16 of the Regional Aid Guidelines.

117 Without this assessment, the defendant was unable to make a complete evaluation of section 1(4) of the Norwegian Parliament's Decision, which introduced a new rule that was not a part of the scheme on regionally differentiated social security contribution for 2007 to 2013 and entailed an exemption from the main rule highlighted in the contested decision that eligible recipients of the scheme were employers with registered business activity within the eligible area. However, a specific evaluation of the new rule was essential for ESA's assessment of the notified scheme. In that regard, it should be noted that the Norwegian Parliament's Decision is one of the main elements both ESA and the Norwegian Government have relied on in the proceedings before the Court, pleading that section 1(1) and 1(4) of the Decision are based on the same principle.

118 It must thus be held that ESA's examination of the rule set out in section 1(4) of the Parliament's Decision was insufficient. ESA adopted the contested decision notwithstanding the fact that the information and evidence it had at its disposal during the preliminary examination phase should, objectively, have raised doubts or serious difficulties as regards the compatibility of the rule with the EEA Agreement.

119 The Court notes that this finding relates to ESA's procedure and does not entail a finding on the substantive legality of Section 1(4) of the Norwegian Parliament's decision.

120 In view of these circumstances, there exists a body of consistent and objective evidence, deriving from the partially incomplete and insufficient content of the contested decision, which shows that ESA, in closing its preliminary examination by a decision under Article 4(2) of Part II of Protocol 3 SCA, despite its inability, on an objective basis, to surmount the difficulties that should have arisen during the examination of whether the rule provided for in section 1(4) of the Norwegian Parliament's Decision was compatible with the EEA Agreement, infringed the rights of the applicant as an interested party within the meaning of Article 6(1) of Part II of Protocol 3 SCA (see *Míla* v *ESA*, cited above, paragraph 104). Consequently, the contested decision must be annulled to the extent that it closed

the preliminary investigation as regards section 1(4) of the Norwegian Parliament's Decision No 1482 of 5 December 2013 on determination of the tax rates etc. under the National Insurance Act for 2014.

121 There is therefore no need to assess the applicant's second plea regarding the reasoning of the contested decision.

VII Costs

122 Under Article 66(2) RoP, the unsuccessful party is to be ordered to bear the costs of the proceedings if this has been applied for in the successful party's pleadings. The applicant has asked for ESA to be ordered to pay the costs. However, under the first paragraph of Article 66(3) RoP, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Even though the applicant has only been partially successful in its application, the Court finds it appropriate that ESA be ordered to bear its own costs and the costs incurred by the applicant. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Annuls ESA Decision No 225/14/COL of 18 June 2014 on the compatibility of Norway's regionally differentiated social security contributions scheme with the Agreement on the European Economic Area, in so far as it closed the preliminary investigation as regards section 1(4) of the Norwegian Parliament's Decision No 1482 of 5 December 2013 on determination of the tax rates etc. under the National Insurance Act for 2014.**

2. **Orders ESA to bear its own costs and the costs incurred by the applicant.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 23 September 2015.

Philipp Speitler
Acting Registrar

Páll Hreinsson
Acting President