JUDGMENT OF THE COURT
30 March 2010

(Action for failure to act – State aid – Existing aid – Admissibility)

In Case E-6/09,

Magasin- og Ukepresseforeningen, represented by advokat Peter Dyrberg and advokat Jan Magne Juuhl-Langseth, with the law firm of Schjødt, Oslo, Norway,

Applicant,

v

EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Deputy Director, and Markus Schneider, Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

Defendant,

APPLICATION for a declaration that the EFTA Surveillance Authority has failed to act on the complaint lodged with the Authority in August 2006 concerning State aid to newspapers,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges

Acting Registrar: Moritz Am Ende,

having regard to the written pleadings of the parties and the written observations of the European Commission, represented by Bernd Martenczuk and Kilian Gross, members of its Legal Service, acting as agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, the Defendant and the European Commission at the hearing on 27 January 2009,

gives the following

Judgment

I Legal background

EEA law

1 Article 61(1) of the Agreement on the European Economic Area (hereinafter "EEA" or the "EEA Agreement") reads as follows:

> *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.*

2 Article 109 EEA reads:

> *1. The fulfilment of the obligations under this Agreement shall be monitored by, on the one hand, the EFTA Surveillance Authority and, on the other, the EC Commission acting in conformity with the Treaty establishing the European Economic Community and this Agreement.*
>
> *2. In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases.*
>
> *3. The EC Commission and the EFTA Surveillance Authority shall receive any complaints concerning the application of this Agreement. They shall inform each other of complaints received.*

4. Each of these bodies shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body.

3 Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") reads as follows:

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.

4 Article 37 SCA reads:

Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established.

The action shall be admissible only if the EFTA Surveillance Authority has first been called upon to act. If, within two months of being so called upon, the EFTA Surveillance Authority has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the EFTA Court that the EFTA Surveillance Authority has failed to address to that person any decision.

5 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.

6 Under Section I of Part II of Protocol 3 SCA Implementing provisions, litra (b)(i) of Article 1 *Definitions* reads:

(b) 'existing aid' shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

7 Under Section II of Part II of Protocol 3 SCA Procedure regarding notified aid, paragraphs (2)−(6) of Article 4 Preliminary examination of the notification and decisions of the EFTA Surveillance Authority read:

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

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').

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the EFTA Surveillance Authority does not request any further information. The period

can be extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned. Where appropriate, the EFTA Surveillance Authority may fix shorter time limits.

6. Where the EFTA Surveillance Authority has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the EFTA Surveillance Authority. The EFTA State concerned may thereupon implement the measures in question after giving the EFTA Surveillance Authority prior notice thereof, unless the EFTA Surveillance Authority takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.

8 Under Section V of Part II of Protocol 3 SCA *Procedures regarding existing aid schemes,* Article 17 *Cooperation pursuant to Article 1(1) in Part I* reads:

1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.

2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.

9 Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes,* Article 18 *Proposal for appropriate measures* reads:

Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

10 Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes*, Article 19 *Legal consequences of a proposal for appropriate measures* reads:

> *1. Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.*
>
> *2. Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.*

11 Under Section VI of Part II of Protocol 3 SCA *Interested Parties,* Article 20 *Rights of interested parties* reads:

> *1. Any interested party may submit comments pursuant to Article 6 of this Chapter following an EFTA Surveillance Authority decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the EFTA Surveillance Authority pursuant to Article 7 of this Chapter.*
>
> *2. Any interested party may inform the EFTA Surveillance Authority of any alleged unlawful aid and any alleged misuse of aid. Where the EFTA Surveillance Authority considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the EFTA Surveillance Authority takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.*
>
> *3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11 of this Chapter.*

National law

12 Under Norwegian law, Act No. 66 of 19 June 1969 relating to Value Added Tax (hereinafter "the VAT Act") subjects magazines to the normal rate of Value Added Tax (hereinafter "VAT") of 25% of the taxable base. Newspapers and periodicals are, however, by virtue of section 16(7) and (8) of the VAT Act, "zero-rated", i.e. output VAT is charged at 0%.

II The administrative procedure and the contested decision

13 By letter dated 25 August 2006, the Applicant lodged a complaint with the Defendant, claiming that the preferential VAT rate for newspapers in Norway (hereinafter the "contested measure") constitutes State aid.

14 The Defendant acknowledged receipt of the complaint on 14 September 2006. On 15 December 2006, the Defendant requested comments from the Norwegian authorities. The Norwegian authorities submitted their comments on 29 January 2007.

15 In addition, the Defendant received comments from Mediebedriftenes Landsforening (the Norwegian Media Businesses' Association) on 22 March 2007 and, on 29 June 2007, the Applicant lodged observations on the comments of the Norwegian authorities.

16 On 17 July 2007, the Defendant sent a letter pursuant to Article 17(2) in Part II of Protocol 3 SCA to the Norwegian authorities in which the Defendant made its preliminary assessment of the contested measure. The Defendant stated that, based on the information provided by the Norwegian authorities, it could not exclude the possibility that the contested measure constituted State aid within the meaning of Article 61(1) EEA. Further, the Defendant doubted that the measure could be regarded as complying with Article 61(3)(c) EEA. Therefore, the Defendant's preliminary conclusion was that the contested measure could not be declared to be compatible with the functioning of the EEA Agreement.

17 The Norwegian authorities argued against the Defendant's preliminary assessment in a letter dated 18 September 2007.

18 On 7 November 2007, the Applicant presented its observations on the Norwegian authorities' response to the Defendant. The Applicant maintained and further substantiated its original complaint in this correspondence. On 13 December 2007, the Applicant and its representatives met with staff members of the Defendant in Brussels to discuss the case.

19 In the course of 2008, the Norwegian Association for Specialized Press (on 24 January 2008), the European Federation of Magazine Publishers (on 15 April 2008) and the International Federation of the Periodical Press (on 13 May 2008) sent letters to the Defendant expressing support for the Applicant's complaint. In a letter dated 10 November 2008, two university professors in the field of media supported the Applicant's contention that the measure at issue is bound to create distortions of competition. On 22 January 2009, the Applicant informed the Defendant of statements made by the Prime Minister of Norway which, in its view, contained a recognition that the VAT regime for newspapers constitutes State aid and that it results in a distortion of competition.

20 By letter dated 15 January 2009, the Applicant invited the Defendant to define its position on the complaint and gave notice of the possibility of it bringing an action under Article 37 SCA. The Defendant received this letter on 20 January 2009.

21 By letter of 10 March 2009, the Defendant declined the invitation to define its position, stating that the Applicant would not have standing to bring an action for failure to act and that the original complaint was still under consideration.

III Procedure and forms of order sought

22 By an application lodged at the Court on 14 May 2009, the Applicant brought an action under Article 37 SCA, seeking a declaration that the Defendant has failed to act on its complaint. The action is based on two pleas in law, namely that there is a breach of the right firstly to good administration and secondly to have a complaint dealt with within a reasonable time, the latter right being implied under Article 109 EEA and Article 20 in Part II of Protocol 3 SCA.

23 On 20 July 2009, the Defendant lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"). On 1 September 2009, the Applicant lodged its response to that application.

24 On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87 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 letter dated 15 October 2009.

25 In its application the Applicant claims that the Court should:

- Declare that the Defendant has failed to act on the complaint lodged with the Defendant in August 2006 concerning State aid to newspapers; and

- order the Defendant to pay the costs of the proceedings.

26 In its plea of inadmissibility, the Defendant claims that the Court should:

- Dismiss the Application as inadmissible; and

- order the Applicant to pay the costs.

27 The European Commission (hereinafter the "Commission") submitted written observations registered at the Court on 12 October 2009.

28 The Applicant, the Defendant and the European Commission presented oral argument and answered questions put to them by the Court at the hearing on 27 January 2010 in Luxembourg.

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

IV Admissibility

Arguments of the parties

30 The Defendant argues that there is no obligation for it to act in cases relating to existing aid. Reference is made to Case T-152/06 *NDSHT* v *Commission*, judgment of 9 June 2009, not yet reported, at paragraphs 43–44. Under Article 17 in Part II of Protocol 3 SCA, the Defendant has two options. It can decide either not to pursue the case or to issue a recommendation proposing appropriate measures, in accordance with Article 18 in Part II of Protocol 3 SCA. It is submitted that such a recommendation does not constitute a challengeable act under Article 36 SCA and that, correspondingly, neither can the refusal to adopt such an act be challenged. Reference is made to Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, at paragraph 36.

31 The Defendant recalls that Articles 36 and 37 SCA prescribe one and the same method of recourse and it notes that, consequently, the possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act. Reference is made to *inter alia* Cases T-17/96 *TF1* v *Commission* [1999] ECR II-1757, at paragraph 27 and C-68/95 *T. Port* [1996] ECR 1-6065, at paragraph 59.

32 Moreover, the Defendant argues that a decision – and equally the failure to adopt such a measure – can only be of direct and individual concern to a third party if the decision is intended to have legal effects capable of affecting that party's interests by bringing about a distinct change in its legal position. It is submitted that intermediate measures, the purpose of which is to prepare for a final decision, do not produce such effects. Reference is made to Case C-521/06 P *Athinaïki* v *Commission* [2008] ECR I-5829, at paragraphs 29 and 42. With express regard to the existing aid procedure, the Defendant adds that the legal situation changes only once the State concerned has accepted the proposal for appropriate measures. Reference is made to Cases C-400/99 *Italy* v *Commission* [2001] ECR I-7303, at paragraph 61, and *NDSHT* v *Commission*, cited above, at paragraph 67.

33 Finally, the Defendant submits that the Applicant also lacks *locus standi* for the protection of its procedural rights. In cases concerning existing aid, such rights arise only once the State concerned has rejected a proposal for appropriate measures and a formal investigation is opened. The case law recognising *locus standi* for competitors to challenge a decision on new aid taken without a formal investigation, in order for them to

protect the procedural rights which they would derive from a formal investigation, cannot be transposed to cases concerning existing aid.

34 The Applicant maintains that the Defendant is, by reason of its exclusive competence in the field of State aid and the principle of sound administration, under an obligation to act on the complaint. Reference is made to *TF1* v *Commission*, cited above, at paragraph 73.

35 It is also submitted that in spite of none of the steps immediately following a notification under Article 17(2) in Part II of Protocol 3 SCA constituting challengeable acts, the Applicant retains the right to launch proceedings based on Article 37 SCA. Even an act which is not challengeable by an action for annulment may constitute a definition of position, thus terminating the failure of an institution to act. This is the case where the said unchallengeable act is the prerequisite for the next step in a procedure which has, in principle, to culminate in a legal act that will itself be challengeable by an action for annulment. Reference is made to Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743, at paragraph 53. The procedure would end by the Defendant exercising one of the following options: closing the file without further action, recording Norway's acceptance of a proposal for appropriate measures or issuing a decision following a formal investigation procedure should Norway reject such a proposal. These are all challengeable acts.

36 The Applicant argues that it has *locus standi* because the position of its members, 10 publishing houses responsible for producing 95% of magazines in Norway, is substantially affected by the State aid in the relevant market. The Applicant points to the sheer size of the aid, more than NOK 1000 million, and further argues that, as competitors of Norwegian newspapers, its members are more affected by this aid than certain foreign periodicals sold in Norway. Consequently, it would have *locus standi* to challenge the legality of any decision resulting from its complaint on substantive grounds.

37 The Applicant further submits that it has *locus standi* in order to protect its procedural rights as a "party concerned" under Article 1(2) of part I of Protocol 3 SCA. Where the Defendant has decided pursuant to Article 4(3) of Part II of Protocol 3 SCA not to object to a new aid scheme after a preliminary examination, competitors as "parties concerned" clearly have the right to challenge such a decision in order to protect the procedural rights which they would derive from a formal investigation. The Applicant considers that the same must apply to the procedure concerning existing aid. Consequently, competitors must also have *locus standi* to bring an action for failure to act in order to compel the Defendant to define its position.

38 The European Commission essentially shares the Defendant's views. It considers that the limitations of the right to obtain judicial protection which follow from the wording as

well as from schematic considerations of Protocol 3 SCA cannot be overcome through extensive interpretation.

Findings of the Court

39 For the present action to be admissible, three requirements must be fulfilled: the Defendant must be under an obligation to act on existing aid, the action must aim at obtaining a challengeable act and the Applicant must have *locus standi* to bring the action.

40 The Court will first deal with the issue of *locus standi* and the Applicant's argument that it is entitled, as a "party concerned", to protect its procedural rights under Article 1(2) of Part I of Protocol 3 SCA. The Court does not find the comparison with the procedure concerning new aid convincing. In new aid cases, a "party concerned" challenging a decision not to raise objections under Article 4(3) of Part II of Protocol 3 SCA must base its action on the particular ground that the Defendant made a mistake in holding that there were no doubts as to the compatibility of the aid scheme with the functioning of the EEA Agreement, see *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, at paragraphs 74–76.

41 Articles 17 to 19 of Part II of Protocol 3 SCA, dealing with existing aid, do not contain a criterion of "doubts". Nor can such a criterion be inferred by way of analogy. In Article 4 concerning the preliminary examination of notified aid, the criterion of doubts is linked to the obligation for the Defendant, under paragraph 5, to make a decision on the case or initiate the formal investigation procedure within a period of two months. The consequence of exceeding that time period is that the aid shall be deemed to have been authorised, see paragraph 6.

42 In that context, the obligation to initiate the formal investigation procedure when doubts remain after the preliminary investigation as to their compatibility with the functioning of the EEA Agreement serves the purpose of preventing fast-track authorisation of new aid schemes. In cases of existing aid, there are no provisions corresponding to Article 4(5) and (6) of Part II of Protocol 3 SCA. Articles 17 to 19 of the same Protocol provide for a more complex and comprehensive procedure to be followed prior to a formal investigation procedure being initiated. Therefore, the criterion of "no doubts" is not appropriate for deciding when to progress from one step in the procedure to the next.

43 The steps taken by the Defendant under the procedure for review of existing aid are thus not challengeable in the same way as they would be if the Defendant was assessing a new aid scheme. The option to challenge a decision not to raise objections under Article 4(3) of Part II of Protocol 3 SCA is therefore not available to "parties concerned".

44 With regard to the Applicant's right to challenge any decision on substantive grounds, the Court notes that in order to establish *locus standi* as individually concerned by the

contested measure the Applicant must demonstrate that the position on the market of at least some of its members is substantially affected by that measure.

45 The mere fact that a measure may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure does not suffice for that undertaking to be regarded as being individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking receiving aid to establish that it is an undertaking concerned by the contested measure. It must show in addition that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, compare *Private Barnehagers Landsforbund*, cited above, at paragraph 50 and Case C-487/06 P *British Aggregates Association*, judgment of 22 December 2008, not yet reported, at paragraphs 33–35 and 47–48. That would in particular apply where the position of the undertaking on the market is substantially affected by the aid; compare *British Aggregates Association*, at paragraphs 30 and 55.

46 In the case at hand, the Applicant has failed to demonstrate that any of its members are affected in this sense. It cannot suffice in this respect that the Applicant represents a large part of the magazine business in Norway, that the total value of the aid may exceed NOK 1000 million and that foreign periodicals sold in Norway may be less affected than Norwegian periodicals.

47 The Court thus concludes that the Applicant does not have *locus standi* and that the action is inadmissible. Given this outcome, it is not necessary for the Court to assess whether the other requirements of admissibility referred to in paragraph 39 above are fulfilled.

V Costs

48 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 pleadings. Since the Defendant has requested that the Applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible.**

2. **Orders the Applicant to pay the costs incurred by the Defendant.**

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 30 March 2010.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President