ORDER OF THE COURT
29 August 2014

(Action for annulment of a decision of the EFTA Surveillance Authority – Proper representation before the Court – State aid – Alleged aid granted to lessors of premises to public schools – Decision not to open the formal investigation procedure – Legal interest – Status as interested party – Competitive link)

In Case E-8/13,

Abelia, Oslo, Norway, represented by Thomas Nordby, advokat, and Ingeborg Djupvik, advokatfullmektig,

applicant,

supported by

Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS and Akademiet VGS Ålesund AS, represented, first, by Henrik Grung, advokat, and, subsequently, by Espen I. Bakken, advokat,

interveners,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Catherine Howdle, Temporary Officer, Legal and Executive Affairs, acting as Agents,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 160/13/COL of 24 April 2013 on alleged aid granted to lessors of premises to public schools,

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 interveners, and the written observations of the European Commission ("the Commission"), represented by Margarida Afonso and Lorna Armati, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Abelia ("the applicant"), represented by Thomas Nordby and Ingeborg Djupvik; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Xavier Lewis and Catherine Howdle, and the European Commission, represented by Margarida Afonso, at the hearing on 20 May 2014,

gives the following

Order

I Legal context

1 Article 61(1) EEA reads:

> *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 the Contracting Parties, be incompatible with the functioning of this Agreement.*

2 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

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

3 The second paragraph of Article 36 SCA reads:

> *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 1 of Part I of Protocol 3 to the SCA ("Protocol 3 SCA"), as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001, 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.

…

5 Article 1 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.

6 Article 4(2) to (5) of Part II of Protocol 3 SCA reads:

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.

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

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.

8 Article 10(1) of Part II of Protocol 3 SCA reads:

Where the EFTA Surveillance Authority has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

9 Article 13(1) of Part II of Protocol 3 SCA reads:

The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. ...

10 The first and second paragraphs of Article 17 of Protocol 5 SCA ("the Statute") read:

The EFTA States, the EFTA Surveillance Authority, the Community and the EC Commission shall be represented before the Court by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

Other parties must be represented by a lawyer.

II Facts

Background

11 The applicant is a trade and employers association that is part of a larger employers' organisation, Næringslivets Hovedorganisasjon ("NHO"), the Confederation of Norwegian Enterprise. According to the application, Abelia represents 1 250 member companies providing services in the fields of IT, telecommunications, research and development, consultancy and education, including a number of private schools that offer educational services.

12 Under the Norwegian VAT Act (*lov 19 juni 2009 nr. 58 om merverdiavgift*), education services, as well as the letting of real estate, are exempt from VAT, pursuant to section 3-5 and section 3-11 respectively. Under section 2-3(1), businesses that let buildings or premises for use by municipalities or county authorities for the purpose of providing public services may, on a voluntary basis, register in the VAT register (*Merverdiavgiftsregisteret*). The effect of such registration is that the lease in question is subject to VAT pursuant to section 3-11(2)(k) of the VAT Act. Lessors who are eligible to register their business pursuant to section 2-3(1), and who have chosen to do so, may deduct input VAT from the output VAT charged on rent, in accordance with the provisions of section 8 of the VAT Act.

13 Pursuant to the provisions of the Norwegian VAT Compensation Act (*lov 12 desember 2002 nr. 108 om kompensasjon av merverdiavgift for kommuner, fylkeskommuner mv.*), municipalities and county authorities, as well as private enterprises providing certain services, may receive compensation for VAT when buying goods and services from businesses registered in the VAT register. Consequently, municipalities operating public schools may be compensated for VAT charged on the lease of premises for such schools, provided that the lessor in question has chosen to register voluntarily in the VAT register. Since voluntary registration in the VAT register under section 2-3(1) of the VAT Act is limited to the letting of buildings or premises for use by municipalities or county authorities, lessors of real estate to private schools are not eligible to register their business in the VAT register under that provision.

Preliminary investigation procedure

14 By letter of 19 March 2010, the applicant lodged a complaint with ESA alleging that illegal State aid had been granted to lessors of premises to public schools and other public sector service providers. According to the complaint, the Norwegian VAT system had the effect of putting lessors of premises to private schools, as well as private schools themselves, at an economic disadvantage. Thereby competition in both the real estate market and the market for educational services was distorted.

15 By letter of 21 October 2010, ESA requested information from Norway in connection with the complaint. Norway replied by letter of 25 November 2010.

Further information was provided by the applicant at a meeting with ESA in January 2011, as well as by letters of 31 May 2011 and 30 November 2011. By letter of 26 November 2012, ESA communicated its preliminary view that the measure in question did not constitute State aid. The applicant responded by letter of 20 December 2012, reaffirming its position that the measure constituted State aid.

The contested decision

16 By Decision No 160/13/COL of 24 April 2013 ("the contested decision"), ESA concluded, without initiating the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 SCA, that the contested provisions of the Norwegian VAT Act and the VAT Compensation Act did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

17 First, ESA noted that the State aid rules only apply when a selective advantage is granted to undertakings. The notion of undertaking requires that the aid recipient engages in economic activity. ESA found that the provision of schooling in Norway did not constitute an economic activity. Consequently, ESA concluded that subsidies in favour of public schools, including under the VAT Compensation Act, fell outside the ambit of the State aid rules.

18 Second, ESA found no evidence that the provisions of the Norwegian VAT Act and the VAT Compensation Act provided an advantage to lessors of real estate to public schools.

19 ESA noted that there is no *a priori* distinction or discrimination between lessors to public schools and lessors to private schools that would prevent any operator from offering to let premises to either type of school.

20 ESA stated further that, in its view, the Norwegian VAT system resulted in different cost structures for lessors to public schools and lessors to private schools. However, ESA did not consider lessors of premises to private schools to be disadvantaged, since they were likely to pass on any VAT paid in connection with their input factors to their (private) lessees in the form of higher rent.

21 ESA found it irrelevant in this respect that, overall, private schools had more limited financial means at their disposal than public schools. According to the information at ESA's disposal, private schools had at least some discretion in allocating their funds. Thus, private schools could decide – within their statutory limits – either to spend fewer funds on rent or to limit spending on other cost items in order to be able to afford a higher rent than a similar public school. In either scenario, ESA noted, interested potential lessors would be able to compete for the supply of rental premises as defined and required by the individual private school.

22 As regards the alleged incentive for private schools to supply premises themselves, ESA stated that the Norwegian VAT system might represent a

consideration when deciding whether to rent or supply premises oneself. However, ESA concluded that this would at most affect the structure of demand for rental premises. It would not result in favouring one category of lessors over another, since all potential lessors would be free to compete for business with public and private schools alike.

23 Based on this assessment, ESA concluded that the provisions of the Norwegian VAT Act and VAT Compensation Act did not have the effect of granting State aid, within the meaning of Article 61(1) of the EEA Agreement, to public schools or the lessors of premises to public schools.

III Procedure and forms of order sought by the parties

24 On 24 June 2013, the applicant brought an action under the second paragraph of Article 36 SCA for annulment of the contested decision.

25 By application registered at the Court on 30 July 2013, ESA raised a preliminary objection to the admissibility of the application on the grounds that the applicant was not properly represented before the Court. The applicant's reply to the preliminary objection was registered at the Court on 26 August 2013. By decision of 20 September 2013, the Court decided, pursuant to Article 87(4) of the Rules of Procedure, to reserve its decision on ESA's application for the final judgment.

26 ESA submitted a defence, which was registered at the Court on 18 October 2013. The reply from the applicant was registered at the Court on 26 November 2013. The rejoinder from ESA was registered at the Court on 19 December 2013.

27 By joint application registered at the Court on 13 November 2013, Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS and Akademiet VGS Ålesund AS ("Akademiet" or "the interveners") applied for leave to intervene in support of the forms of order sought by the applicant. By letter dated 25 November 2013, the application to intervene was served on the parties in accordance with Article 89(2) of the Rules of Procedure. On 27 November 2013, Abelia submitted written observations on the application to intervene. ESA lodged its written observations on the application to intervene on 26 November 2013. By Order of the President of 3 February 2014, Akademiet was granted leave to intervene in support of the forms of order sought by Abelia.

28 Pursuant to Article 20 of the Statute of the Court, the Commission submitted observations registered at the Court on 6 January 2014.

29 The applicant, Abelia, requests the Court to:

> *(1) Declare that Abelia's action for annulment is admissible.*
>
> *(2) Annul EFTA Surveillance Authority Decision 160/13/COL of 24 April 2013.*

(3) Order the defendant to pay the costs of the present proceedings.

30 The defendant, ESA, requests the Court to:

(1) Dismiss the application as inadmissible.

(2) Order the applicant to bear the costs.

or, in the alternative, to:

(1) Dismiss the application.

(2) Order the applicant to bear the costs.

31 In its intervention, registered at the Court on 27 February 2014, Akademiet requested the Court to annul the contested decision.

32 The Commission submitted that the application should be dismissed as inadmissible or, in any event, as unfounded.

33 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, 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 Law

Admissibility

First plea of inadmissibility: The applicant is not properly represented before the Court

Arguments of the parties and those who have submitted observations

34 In its preliminary objection on admissibility, ESA has questioned the applicant's representation. It asserts that the application is inadmissible on the grounds that the applicant is not represented by a lawyer before the Court within the meaning of Article 17 of the Statute. ESA argues that, under the interpretation applied by the European Court of Justice ("ECJ") to the parallel provision in Article 19 of the Statute of the ECJ, which must also be applied to Article 17 of the Statute, a lawyer representing a natural or legal person must be an independent third party in relation to the litigant and that no derogation is allowed from this rule. In ESA's view, an objective test must be applied under this provision to secure that a lawyer is a genuine intermediary, capable of defending the client's best interests.

35 According to ESA, Article 17 of the Statute must be subject to an interpretation which clearly excludes any relationship of employment between the lawyer and the body he purports to represent. This exclusion also applies where lawyers are employed by an entity connected to the party they represent, and where there is a risk that the professional opinion of those advisers would be, at least partly, influenced by their working environment.

36 In ESA's view, a lawyer cannot objectively be perceived as being a genuine intermediary between his client and the Court if his independence can be compromised by the existence of an employment relationship with a body that is connected to the party he represents. A lawyer in that position cannot be granted rights of audience before the Court, a conclusion that cannot be negated by the existence of a second contract of employment with another party, even if the party in question is a law firm. ESA considers it irrelevant whether one of Abelia's representatives is also answerable to an independent law firm.

37 ESA contends that the applicant is a national sector federation within NHO and that the two organisations share common goals and intentions as well as members. This alignment of interests establishes a sufficiently close connection to preclude lawyers from NHO representing the applicant before the Court. Since a relationship of employment exists between NHO and the two lawyers who signed the present application, they cannot be considered sufficiently independent from the applicant to meet the requirements of Article 17 of the Statute.

38 The Commission agrees with ESA that the requirement of independence of a lawyer implies that there must be no employment relationship between the lawyer and his client, including a situation in which the lawyers are employed by an entity connected to the party they represent. This rule is fundamentally linked to the idea that the lawyer is not dependent on his client but free to seek work elsewhere. The Commission also submits that a lawyer seconded to an association such as NHO must, for the period of secondment, be deemed to have a status equivalent to that of an in-house lawyer. In this regard, the Commission argues that the case law of the Union Courts cannot be read as testing the actual level of independence but, instead, as providing for an absolute rule with no consideration given to whether any particular individual would actually be influenced by a link to the litigant. An application signed by a representative who is not independent of the litigant must accordingly be dismissed as inadmissible.

39 The applicant denies that the relationship between Abelia and NHO involves sharing common goals and intentions. Abelia is only one of a total of 21 associations within NHO. In the event of a conflict of interest between the different associations, NHO will, as a rule, support the general interest of its members as a whole. Thus, since the lawyers that lodged the application on behalf of the applicant are in the service of NHO and not Abelia, they cannot be considered as the applicant's in-house lawyers.

40 According to the applicant, the question whether there is an employment relationship between a lawyer and his client is irrelevant for the present dispute. Lawyers employed by NHO are bound by the ethical code of conduct of the Norwegian Bar Association, which has been ratified as a regulation by the Norwegian Ministry of Justice and harmonized with the European CCBE (the Council of Bar and Law Societies in Europe) code of conduct. They are also entitled to make representations before the courts and are protected by the same legal privilege as lawyers working in external law firms. Moreover, there are no

financial or administrative links between Abelia and its representatives. In the applicant's view, the relationship rather corresponds to that between a client and a lawyer in a law firm. Thus, lawyers working for NHO should be regarded as sufficiently detached and should be objectively perceived as being genuine intermediaries between their client and the Court.

41 The applicant contends that the case law cited by ESA in support differs fundamentally from the facts of the present case. It considers that an in-house lawyer is only excluded from representing a party if he has a lesser degree of independence or rights of audience than those set out in the Order of the President of the Court in Case E-7/12 *DB Schenker* v *EFTA Surveillance Authority* [2013] EFTA Ct. Rep. 407. The decisive factor is not whether an employment relationship exists or whether the lawyer is internal or external, but, instead, whether the relationship between the lawyer and the party is such as to place in doubt the independence of the lawyer, as required by EEA law.

42 Furthermore, the applicant contends that, in addition to being represented by an independent lawyer from NHO, it is also represented in the present case by Ms Nina Lea Gjerde who is registered as a practicing advocate at the law firm Arntzen de Besche. The contract under which NHO purchases Ms Gjerde's services from Arntzen de Besche on a temporary basis has not altered this employment relationship and Ms Gjerde continues to receive her normal salary from the law firm. The applicant also states that Ms Gjerde has discussed the present dispute with her supervisors at Arntzen de Besche and received input from them on drafts.

Findings of the Court

43 The first issue of admissibility concerns the situation of Abelia's counsel in light of the second paragraph of Article 17 of the Statute, according to which parties other than any EFTA State, ESA, the European Union and the Commission must be represented by a lawyer. Such a lawyer must be authorized to practice before a court of an EEA State.

44 The term "represented" in the second paragraph of Article 17 of the Statute has to be interpreted as meaning that an individual is not authorised to act in person, but must use the services of a third person authorised to practise before a court of an EEA State (see, to that effect, Order of the President in *DB Schenker* v *ESA*, cited above, paragraph 31).

45 The requirement to use a third person is based on a view of the lawyer's role as collaborating in the administration of justice and as being required to provide, in the overriding interest of full independence, such legal assistance as the client needs. That conception reflects legal traditions common to the EEA States and is also to be found in EEA law. Moreover, that notion must be interpreted objectively and is necessarily independent from the national legal order.

46 However, the requirement that a party be represented before the Court by an independent third party is not a requirement designed generally to exclude representation by employees of the principal or by those who are financially dependent upon it. The essence of the requirement imposed by EEA law is to prevent private parties from bringing actions in person without recourse to an appropriate intermediary. So far as legal persons are concerned, the requirement of representation by a third party thus seeks to ensure that they are represented by someone who is sufficiently detached from the represented legal person. Whether this is so has to be addressed by the Court on a case by case basis.

47 Therefore, financial or structural relationships that the representative has with his client cannot be such as to give rise to confusion between the client's own interests and the personal interests of its representative. On the contrary, the representative must be objectively perceived as being a genuine intermediary between his client and the Court when he is entrusted with defending his client's best interests, in accordance with the forms and limits defined by the procedural rules applicable. When interpreting the second paragraph of Article 17 of the Court's Statute, the decisive factor is whether the relationship, regardless of its type, between the lawyer and his client is such as to put into doubt the independence of that lawyer, as required by EEA law.

48 In the current proceedings, the applicant has submitted a power of attorney statement for Ms Ingebjørg Harto, Ms Nina Lea Gjerde and Ms Ingeborg Djupvik, registered at the Court on 17 September 2013. However, only Ms Harto and Ms Gjerde signed the application.

49 According to statements from the Supervisory Council for Legal Practice, dated 20 and 21 June 2013, annexed to the application, both Ms Harto and Ms Gjerde are licensed to practise as advocates in Norway before courts other than the Supreme Court, the former being registered as a "practising advocate in The Confederation of Norwegian Enterprise (NHO)" and the latter as a "practising advocate in the law firm Arntzen de Besche Advokatfirma AS".

50 In the present case, the reference made by the applicant to the obligations of independence flowing from the rules regulating the profession of legal adviser is not enough in itself to demonstrate that Ms Harto was entitled to represent the applicant before the Court. Indeed, the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, that is to say, by the absence of an employment relationship liable to affect the independence of the lawyer. That reasoning applies with the same force in a situation in which a lawyer is employed by an entity connected to the party he represents.

51 In the present case it is not contested that Ms Harto, one of the two lawyers signing the application on behalf of Abelia, is head of the Business Legislation Department of NHO. It appears that Ms Harto does not have administrative or financial powers over Abelia and, conversely, also that Abelia does not have any

administrative or financial powers over her. It also seems that this Department assists companies that are members of NHO in relation to their legal problems.

52 Moreover, it is common ground that NHO is a confederation that includes 21 different federations, covering different industries such as transport, food and agriculture. The applicant's assertions that, in the event of a conflict of interest between any of the federations, NHO is not in a position to instruct the federations to overcome the disagreement and that different federations are not obliged to follow decisions made by the board of NHO, except when collective wage negotiations are concerned, have not been contested by ESA.

53 The Court has not been provided with any information that demonstrates that the interests of NHO are largely the same as those of the applicant, and thus liable to affect the independence of Ms Harto as its lawyer.

54 Furthermore, Ms Gjerde is employed neither by the applicant nor by NHO, but by Arntzen de Besche, an independent law firm. This follows from the confirmation of the Supervisory Council for Legal Practice submitted by the applicant and the contract between NHO and Arntzen de Besche for the temporary provision of Ms Gjerde's services. The contract was attached to the reply to the preliminary objection of inadmissibility.

55 This contract provides for Ms Gjerde to be in the service of NHO for the period 2 April 2013 to 31 January 2014, with a possibility of extension. Article 4 of the contract specifies that NHO should pay Arntzen de Besche for these services and not pay Ms Gjerde her salary directly.

56 Accordingly, it is clear that Ms Gjerde is employed by an independent law firm and is therefore not economically dependent on providing her legal services to the applicant. This is not altered by the fact that she is located at NHO's head office in Oslo and supervised by Ms Harto or by the fact that the contract between Arntzen de Besche and NHO states that the firm is neither responsible for the work done by Ms Gjerde nor for reviewing her work.

57 In the light of this, Ms Gjerde must be considered to possess the necessary independence for the purposes of the second paragraph of Article 17 of the Statute to represent the applicant in the present case.

58 Accordingly, ESA's plea of inadmissibility on account of the fact that the applicant is not properly represented before the Court must be rejected.

Second plea of inadmissibility: The applicant lacks sufficient legal interest

Arguments of the parties and those who have submitted observations

59 ESA argues that the judgment in *Kronoply* (Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441) has set out that an applicant must establish that it is an interested party within the meaning of Regulation (EC) No 659/1999, and, in particular, that its economic interests are affected in order to

meet the test for *locus standi* for actions against a Commission decision not to initiate a formal investigation. The procedure set out in Protocol 3 SCA is parallel to that set out in Regulation No 659/1999 and, consequently, the same test should be applied with respect to standing before the Court in cases concerning decisions by ESA.

60 ESA notes that it has not found State aid at the level of public schools and contends that the applicant is trying to circumvent this finding by alleging instead that there is State aid at the level of those that lease premises to schools, a market in which the applicant is not active. The applicant has not provided evidence to demonstrate that any of its members have a relationship of rivalry with lessors of real estate to public schools. However, following *Kronoply*, cited above, this is a requirement when an applicant is not active in the same market as the beneficiaries. Given the lack of evidence, in ESA's view, the applicant has not passed the test for standing and the application should be dismissed as inadmissible.

61 With regard to the applicant's procedural rights, ESA observes that the applicant had ample opportunity to submit information and comments during the preliminary investigation procedure and that it did just that. In the proceedings before the Court, no submissions have been made that could not have been made during that procedure.

62 The Commission proposes tentatively that the applicant's pleas and arguments should be held inadmissible as regards the part of the contested decision that concerns aid to the lessors of real estate, on the grounds that the applicant is not an interested party in relation to those beneficiaries, while the pleas and arguments invoked by the applicant may be heard in relation to aid to public schools.

63 The applicant submits that it has legal standing since the competitive position of its members is affected by the measure in question and since it lodged the complaint that led to the contested decision. The applicant makes reference to the second paragraph of Article 36 SCA and submits that the contested decision is of direct and individual concern to many of the undertakings it represents. The present proceedings are necessary to safeguard the procedural rights of both the applicant and those undertakings.

64 The applicant claims to be an interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA, arguing that a decision by ESA not to initiate a formal investigation procedure in which such interested parties may participate is of direct and individual concern to it.

65 The applicant argues that lessors of premises to municipalities and counties are granted more favourable treatment under the Norwegian VAT rules than lessors of premises to private entities. This in turn affects competition between public and private schools in the market in which students enrol for exams in an attempt

to improve their grades such as to meet the requirements for studying at certain colleges and universities.

66 Moreover, the applicant states that, pursuant to consistent case law, a distinction is drawn between, on the one hand, a situation where an applicant claims that ESA should have opened the formal investigation procedure and, on the other, a situation where an applicant seeks to challenge the merits of a decision. The applicant maintains that it meets the criteria for *locus standi* established by case law with respect to ESA's decision to close the case without opening the formal investigation procedure.

67 The applicant argues that it does not need to represent lessors of real estate who might be affected by alleged unlawful State aid to be considered an interested party. It follows from *Kronoply*, cited above, that significant effects on competition can occur in other markets located upstream or downstream, and, consequently, that the position of undertakings operating in these markets might be affected. The applicant contends that ESA has not commented on its submission that certain activities of schools constitute economic activity.

68 The applicant submits that ESA failed to sufficiently assess several components of the original complaint and, in addition, it seeks to challenge ESA's decision not to initiate the formal investigation procedure, thereby infringing Abelia's procedural rights. The rationale behind the action is to safeguard those rights.

Findings of the Court

69 Pursuant to the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person if the decision is of direct and individual concern to them. Since the contested decision was addressed to Norway, it must be considered whether it is of individual and direct concern to the applicant (see Case E-1/13 *Míla* v *ESA*, judgment of 27 January 2014, not yet reported, paragraph 43, and case law cited).

70 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 *Míla* v *ESA*, cited above, paragraph 44, and case law cited).

71 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).

72 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, as it did in the present case.

73 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, ESA shall adopt a decision under Article 4(3) of Part II of Protocol 3 SCA to raise no objections. 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 *Míla* v *ESA*, cited above, paragraph 48, and case law cited).

74 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 (Article 4(4) of Part II of Protocol 3 SCA).

75 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 (see Case E-1/12 *Den norske forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040, paragraph 99, and *Míla* v *ESA*, cited above, paragraph 50).

76 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 which must not as a rule exceed one month (see *Den norske forleggerforening* v *ESA*, cited above, paragraph 65, and *Míla* v *ESA*, cited above, paragraph 51, and case law cited).

77 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, to that effect, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 27, and case law cited).

78 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 (see *Míla* v *ESA*, cited above, paragraph 52).

79 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 the party seeks, by instituting proceedings, to safeguard the procedural rights available. This applies both to a decision under Article 4(2) of Part II of Protocol 3 SCA that a measure does not constitute State aid, as in the present case, and a decision not to raise objections under Article 4(3) of Part II of that protocol (see *Míla* v *ESA*, cited above, paragraph 53, and case law cited).

80 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 *Míla* v *ESA*, cited above, paragraph 54, and, for comparison, *Kronoply*, cited above, paragraph 63, and case law cited). In other words, that term covers an indeterminate group of persons.

81 Article 1(h) of Part II of Protocol 3 SCA does not rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid (compare, to that effect, *Kronoply*, cited above, paragraph 64).

82 For that purpose, it is necessary for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation. This requirement entails that the undertaking in question is able to show a legitimate interest in the implementation or non-implementation of the alleged 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 (compare, to that effect, *Kronoply*, cited above, paragraphs 65 and 66, and case law cited).

83 The competitive position of an undertaking may be adversely affected not only if the undertaking and the aid beneficiary are competitors on the output product market but also if they are rival purchasers of the same factors of production. That is the case where it cannot be ruled out that the aid has resulted in negative effects for the undertaking in question due, *inter alia*, to an increase of the price of necessary factors of production (compare *Kronoply*, cited above, paragraphs 67 to 69, and the Opinion of Advocate General Jääskinen in that case, points 126 to 138).

84 As regards the scope of judicial review, it must be borne in mind that it is not for the Court, when considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant's members and the alleged aid recipient. It is for the applicant alone to adduce pertinent reasons to show that the alleged aid may adversely affect the legitimate interests of one or more of its members by seriously jeopardising their position on the market in question (compare Case T-182/10 *Aiscat* v *Commission*,

judgment of 15 January 2013, published electronically, paragraph 60 and case law cited).

85 The applicant in the present case is a trade and employers association that is part of NHO, the Confederation of Norwegian Enterprise. Abelia represents 1 250 member companies providing services in the fields of IT, telecommunications, research and development, consultancy and education. Among the member companies represented by the applicant are a number of private schools that offer educational services.

86 By the present action, the applicant intends to protect the individual interests of certain of its members. The applicant claims to have standing on the basis of representing undertakings that are active in the same markets as public schools and whose competitive position in those markets is being affected by the Norwegian VAT rules. It does not contend that it represents lessors of real estate who might be affected by the alleged unlawful State aid to lessors of premises to public schools. By reference to *Kronoply*, cited above, the applicant argues that significant effects on competition can occur in other markets located upstream or downstream, and, consequently, that the position of undertakings operating in those markets may be affected. Therefore, the refusal to open the formal investigation procedure is of direct and individual concern to members of Abelia.

87 As regards the effect on the competitive position of its members, the applicant argues that, as a result of section 2-3 and section 3-11 of the VAT Act, lessors of premises to private schools are not able to add output VAT on the rent they charge, for which the school could subsequently receive compensation. Thus, input VAT becomes an expense that falls on the lessor, which entails that lessors of premises to private schools have to compensate by passing on this additional cost in the rent. In contrast, if a lessor decided to let premises to a municipality operating the same service to the public, the lessor would be treated differently, as he would be able to deduct input VAT from his income and the municipality would receive compensation for the VAT on the rent.

88 However, the present case must be distinguished from *Kronoply*, cited above. In that case, the applicant and the aid beneficiary were rival buyers of the same factors of production. In its application in the case at hand, the applicant did not point to any specific instances where its members, for whom it is substituting itself, find themselves in a relationship of rivalry with the beneficiaries of the alleged aid, that is, lessors of premises to public schools. On the contrary, the applicant's members operate on the downstream market, where they claim to be in competition with public schools.

89 At the oral hearing, the applicant took issue with that part of ESA's decision which concerns its assessment of possible State aid to public schools. This plea is a new plea in law which must be distinguished from the applicant's plea that ESA should have opened the formal investigation procedure in relation to alleged aid to lessors of premises to municipalities, since only the latter is mentioned in the application. According to Article 19 of the Statute of the Court and Article

33(1)(c) of the Court's Rules of Procedure, the application must set out, *inter alia*, a summary of the pleas on which the application is based. Moreover, pursuant to Article 37(2) of the Rules of Procedure, the applicant may not introduce any new plea in law in the reply, or during the oral procedure, unless it is based on matters of law or of fact which have come to light in the course of the procedure. It follows that the applicant's plea which relates to ESA's alleged failure to open the formal investigation procedure as regards possible aid to public schools is inadmissible.

90 The applicant has failed to demonstrate that any of its members are sufficiently affected by the State aid to which the contested decision relates. Consequently, the applicant lacks legal standing to challenge the contested decision by its plea alleging the existence of doubts or serious difficulties concerning the alleged aid.

91 The Court thus concludes that the applicant does not have standing and that the action is inadmissible.

V Costs

92 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 ESA 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. Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS, and Akademiet VGS Ålesund AS who have intervened in the case must bear their own 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 Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 29 August 2014.

Philipp Speitler
Acting Registrar

Carl Baudenbacher
President