



## ORDER OF THE PRESIDENT

3 February 2014

*(Intervention – Admissibility – Interest in the result of the case)*

In Case E-8/13,

**Abelia** (Business association of Norwegian knowledge and technology based enterprises), established in Oslo, Norway,

represented by Ingebjørg Harto, attorney at law, Ingeborg Djupvik, Advokatfullmektig and Nina Lea Gjerde, attorney at law,

*applicant,*

v

**EFTA Surveillance Authority**, represented by Xavier Lewis, Director; and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

*defendant,*

APPLICATION seeking the annulment of ESA's decision No 160/13/COL of 24 April 2013 to close the case without opening the formal investigation procedure as to whether the Norwegian provisions on VAT and VAT compensation, which have the effect of relieving lessors of premises to public schools and other public bodies of input VAT on their purchase of goods and services, is to be regarded as State aid within the meaning of Article 61(1) of the EEA Agreement.

## THE PRESIDENT

makes the following

### Order

#### I Background

- 1 Abelia (or the “applicant”) is a trade and employer association within Næringslivets Hovedorganisasjon (“NHO”), the Confederation of Norwegian Enterprises. Abelia represents 1 250 member companies within the IT, telecommunications, research and development, consultancy and educational services sectors.
- 2 Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS and Akademiet VGS Ålesund AS (collectively “Akademiet” or “applicant interveners”) are private upper secondary schools in Norway.
- 3 On 23 March 2010, Abelia filed a State aid complaint with the EFTA Surveillance Authority (“ESA”), registered as ESA Case No 551057, alleging that certain provisions of the Norwegian VAT and VAT Compensation Act favour public schools to the detriment of private ones. On 1 July 2010, ESA also received a letter on the matter from Private Barnehagers Landsforbund.
- 4 Between March 2010 and April 2013, ESA conducted its preliminary investigation.
- 5 By letter of 26 November 2012, ESA submitted its preliminary conclusion on the matter stating that the provisions of the Norwegian VAT Act and the VAT Compensation Act do not have the effect of granting State aid to public schools or the lessors of premises to public schools.
- 6 On 20 December 2012, Abelia responded to ESA’s preliminary conclusion by reiterating that ESA had not assessed the subject matter of the case. In addition, Abelia submitted that the length of the preliminary examination constituted an indication of the existence of doubt requiring the initiation of the formal investigation procedure.
- 7 On 24 April 2013, ESA issued Decision No 160/13/COL. ESA stated that following Article 3-5 of the Norwegian VAT Act, education services are exempt from the application of the VAT Act. According to Article 3-11 of the VAT Act, the letting of real estate property is equally exempt. However, according to Articles 2(b) and 3

of the VAT Act, lessors of premises to public entities can voluntarily register for VAT. Such registration would enable them to charge VAT on the rent paid by the lessee, and to deduct any input VAT they have incurred. Lessors of premises to public schools can thus register for VAT, which enables them to charge output VAT and to deduct input VAT.

- 8 ESA stated that it understood that public schools do not ultimately have to bear VAT themselves, since they are subsequently compensated for the VAT paid.
- 9 In contrast, lessors of premises to private schools cannot register for VAT in respect of their rental activities. Consequently, they cannot charge VAT on the rent and are thus unable to deduct input VAT. This means that the entire input VAT represents a normal expense for the lessors, which must be covered through the rent. ESA noted that this extra cost will most likely be passed on to the private school in the form of higher rent.
- 10 ESA stated that in principle, private school can also receive VAT compensation pursuant to Articles 2(c) and 3 of the VAT Compensation Act. However, in the case of rent payment, this compensation is not available to them because their lessors are unable to charge VAT in the first place.
- 11 ESA concluded on the basis of its assessment and in view of the information available that the provisions of the Norwegian VAT Act and VAT Compensation Act do not have the effect of constituting State aid within the meaning of Article 61(1) EEA to public schools or lessors of premises to public schools. ESA therefore closed the case without any further investigation.

## **II Facts and procedure**

- 12 On 24 June 2013, Abelia lodged an application pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”).
- 13 Abelia seeks the annulment of ESA Decision No 160/13/COL of 24 April 2013 to close the case without opening the formal investigation procedure on whether the Norwegian provisions on VAT and VAT compensation, which have the effect of relieving lessors of premises to public schools and other public bodies of input VAT on their purchase of goods and services, are to be regarded as State aid within the meaning of Article 61(1) EEA.
- 14 Second, Abelia requests the Court to order ESA to bear the costs.

- 15 On 30 July 2013, ESA submitted preliminary objections on inadmissibility pursuant to Article 87(1) of the Rules of Procedure (“RoP”).
- 16 On 26 August 2013, Abelia submitted its response to ESA’s inadmissibility plea.
- 17 On 20 September 2013, the Court decided, pursuant to Article 87(4) RoP, to reserve its decision upon the defendant’s application for the final judgment.
- 18 On 18 October 2013, ESA lodged its defence at the Court’s Registry.
- 19 On 13 November 2013, Akademiet sought leave to intervene, pursuant to Article 36 of the Statute and Article 89 RoP, in support of the form of order sought by Abelia.
- 20 On 27 November 2013, Abelia lodged its reply.
- 21 On 29 November 2013, both ESA and Abelia lodged their written observations on the application to intervene at the Court’s Registry.
- 22 On 19 December 2013, ESA submitted its rejoinder.
- 23 On 6 January 2014, the European Commission submitted written observations.

### **III Submissions of the applicant interveners**

- 24 Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS and Akademiet VGS Ålesund AS request leave to intervene in support of the form of order sought by the applicant, in accordance with Article 36 of the Statute and Article 89 RoP.
- 25 Akademiet submits that it has a direct and existing interest in the result of the case since it leases premises required for educational purposes as well as office space in the Norwegian cities of Oslo, Drammen, Sandnes, Bergen, Ålesund and Molde.
- 26 Akademiet submits that all the lease agreements that it has entered into are premised on the fact that the lessor is not allowed to deduct input VAT on costs related to building, maintenance and operation of the premises used by Akademiet. The basis for these leases is that Akademiet goes to the market with a request for tenders for a long-term lease agreement for premises to be used for the purposes of education.
- 27 In particular, the applicant interveners note that the premises must be specially adapted for educational purposes. Therefore, as Akademiet further submits, the possibility to obtain long-term lease agreements with schools places the lessors in competition with one another.

- 28 Moreover, Akademiet submits that potential adaption costs incurred by the lessors also include non-deductible input VAT which must be covered by the rental fee paid by Akademiet.
- 29 Unlike the situation for premises leased by private schools, the Norwegian VAT regulation allows lessors to deduct input VAT on costs related to the building and use of the premises leased by public schools. As the competitive situation between the lessors is, at least, similar to the situation for agreements with private schools, the lessors' right to deduct input VAT on all costs related to the premises, public schools will benefit from the lessors right to deduct input VAT.
- 30 Akademiet submits that the differences in the VAT regulations have an impact on the terms of the lease agreements available to itself in comparison to public schools, in that it is more expensive for a private school than a public school to lease premises for educational purposes.
- 31 Akademiet further submits that a ruling in favour of the applicant would significantly and directly influence the rents payable by Akademiet for premises leased for educational purposes.
- 32 Akademiet contends, therefore, that it should be granted leave to intervene pursuant to the second paragraph of Article 36 of the Statute and Article 89(1) RoP.

#### **IV Observations of the parties**

- 33 Abelia submits that Akademiet should be granted leave to intervene and asserts that the applicant interveners have a direct and existing interest in the outcome of the case
- 34 Abelia submits that private schools – in addition to offering upper secondary education – also offer arrangements for external candidates (*privatistskole*). In that context, Abelia submits that the market for arrangements for external candidates has to be regarded as an economic activity as such arrangements are entirely financed by the students and are offered on a purely commercial basis. In contrast, public schools also offer this form of training, usually, but not invariably, for free.
- 35 Abelia submits that, given the complexity of the VAT compensation regime and its effect on different markets, it is particularly important that the applicant interveners be allowed to intervene. Furthermore, should the Court rule in favour of the applicant, Akademiet would be in a better position to submit information and comments to ESA. Accordingly, Abelia submits that Akademiet has an interest in the result of the case.

- 36 ESA submits that the applicant interveners are all members of Abelia. ESA asserts, as stated in its defence, that Abelia has not shown that it is an interested party and, consequently, does not have *locus standi* in the case at hand. ESA contends that its arguments in support of its plea of inadmissibility for lack of *locus standi* are equally applicable to the applicant interveners. Therefore, the application to intervene will stand or fall with the Court's determination of Abelia's *locus standi* (or lack thereof).
- 37 ESA concedes that if Abelia is held to have *locus standi* to contest the decision, the balance of convenience favours granting the application to intervene. However, ESA questions what additional arguments could be raised by the applicant interveners given that they are members of Abelia.
- 38 ESA further notes that the application for leave to intervene is timely. If the Court holds that Abelia has an interest in the proceedings, and therefore *locus standi*, ESA acknowledges the discretion of the Court whether to grant the application to intervene.

## V Law

- 39 Under the second paragraph of Article 36 of the Court's Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case.
- 40 The Court has recognised the principle of procedural homogeneity (see, *inter alia*, Case E-14/11 *DB Schenker v ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 78). Article 36 of the Statute is essentially identical in substance to Article 40 of the Statute of the Court of Justice of the European Union. Accordingly, the principle of procedural homogeneity must also apply to the assessment of whether an applicant for intervention has established an interest in the result of the case (see, *inter alia*, Order of the President of 1 July 2013 in Case E-5/13 *DB Schenker v ESA* ("*DB Schenker V*"), paragraph 39).
- 41 An interest in the result of a case within the sense of the Statute is to be understood as meaning that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and, thus, in the ruling on the specific act whose annulment is sought (see, *inter alia*, Order of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA* ("*DB Schenker IV*"), paragraph 19).

- 42 As a preliminary point, it should be observed that there is no particular link between the right to intervene and the possibility of bringing an action. According to the second paragraph of Article 36 of the Statute, the right of individuals to intervene is conditional merely upon “an interest in the result of any case” before the Court, whereas the admissibility of an action for annulment brought by individuals is subject to the condition that they must be the addressees of the measure which they seek to have annulled or at least that the measure should be of direct and individual concern to them (see Case 302/87 *Parliament v Council* [1988] ECR 5615, paragraph 18). Therefore, ESA is wrong to argue, in essence, that insofar as the action brought by the applicant should be declared inadmissible by virtue of a lack of *locus standi*, the applicant interveners should, for the same reason, be declared not to have standing to intervene (compare the order of the President of the Second Chamber of the Court of First Instance of 6 March 2008 in Case T-208/07 *BOT Elektrownia Bełchatów and Others v Commission* [2008] ECR II-225\*, paragraph 6).
- 43 The Court decided on 20 September 2013, pursuant to Article 87(4) RoP, to reserve its decision on the defendant’s application on inadmissibility for the final judgment. Consequently, a third party may be in a position to establish an interest in the result of the case or intervene in support of the form of order sought by one of the parties (see, by way of comparison, Case C-341/00 P *Conseil national des professions de l’automobile and Others v Commission* [2001] ECR I-5363, paragraph 36).
- 44 It must thus be determined whether the applicant interveners have sufficient interest, as defined in the abovementioned case law, to intervene in support of the form of order sought by Abelia.
- 45 In the present case Abelia seeks the annulment of ESA Decision No 160/131/COL of 24 April 2013. In that decision, ESA concluded, following the preliminary examination procedure under Protocol 3 to the SCA, that the provisions of the Norwegian VAT Act and the VAT Compensation Act do not have the effect of granting State aid within the meaning of Article 61(1) EEA to public schools or the lessors of premises to public schools.
- 46 In essence, Abelia alleges that comparable undertakings letting premises to private actors operating public services, such as schools, are in the exact same situation as those letting premises to public authorities providing the same service, but do not benefit from the right to register for VAT. Thus, it is alleged that lessors of premises to private schools find themselves in a less favourable position than lessors of premises to public schools, which do not have to pass on the additional cost of non-deductible input VAT in the rent.

- 47 The applicant interveners are private schools which are registered as limited liability companies in Norway and which offer upper secondary education as well as offering services for external candidates (*privatistskole*). They lease premises for their schools as do Norwegian public schools.
- 48 Consequently, Akademiet has established a direct and existing interest in supporting the applicant in the case as required by the second paragraph of Article 36 of the Statute.
- 49 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice in the present case was published in the EEA Section of, and the EEA Supplement to, the Official Journal on 3 October 2013. Consequently the present application for leave to intervene, which was lodged at the Court's Registry on 13 November 2013, is timely.
- 50 In light of the above, the applicant interveners are granted leave to intervene in the case in support of the form of order sought by the applicant.



On those grounds,

THE PRESIDENT

hereby orders:

- 1. Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS and Akademiet VGS Ålesund AS are granted leave to intervene in Case E-8/13 in support of the form of order sought by the applicant.**
- 2. Costs are reserved.**

Luxembourg, 3 February 2014

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President