REPORT FOR THE HEARING
in Case E-8/13

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Abelia

supported by

Akademiet Bergen AS, Akademiet Drammen AS, Akademiet Sandnes AS, Akademiet Oslo AS, Akademiet VGS Molde AS, and Akademiet VGS Ålesund AS

and

EFTA Surveillance Authority

seeking annulment of the EFTA Surveillance Authority's Decision No 160/13/COL of 24 April 2013 on alleged State aid to lessors of premises to public schools.

I Introduction

1. On 24 April 2013, the EFTA Surveillance Authority ("ESA" or "the defendant") adopted Decision No 160/13/COL ("the contested decision"), in which it concluded, following the preliminary examination procedure under Protocol 3 to the Surveillance and Court Agreement, 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) of the EEA Agreement, to public schools or the lessors of premises to public schools.

2. In its application, Abelia ("the applicant") seeks the annulment of the contested decision. The application is based on two pleas. Firstly, the applicant contends that ESA failed to initiate the formal investigation procedure pursuant

to Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, although it was obliged to do so, thereby infringing the applicant's procedural rights. Secondly, the applicant asserts that ESA failed to fulfil its obligation to provide sufficient reasoning for its findings.

II Facts

Background

3. The applicant is a trade and employers association that is part of Næringslivets Hovedorganisasjon ("NHO"), the Confederation of Norwegian Enterprise. Abelia represents 1250 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.

4. Under the Norwegian VAT Act (*merverdiavgiftsloven*), education services, as well as the letting of real estate, are exempt from VAT. Pursuant to 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 choose to register on a voluntary basis in the VAT register (*merverdiregisteret*). The effect of such voluntary 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.

5. Pursuant to the provisions of the Norwegian VAT Compensation Act (*lov om kompensasjon for 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.

The complaint and the preliminary examination

6. On 19 March 2010, the applicant filed a State aid complaint with ESA, registered as event NO 551057, concerning alleged State aid to lessors of premises to public schools and other public sector service providers. The complaint stated that certain provisions of the Norwegian VAT Act and VAT

Compensation Act had the effect of relieving undertakings that rent premises to publicly operated schools and other public bodies of input VAT on their purchases of goods and services, while undertakings offering the same service to private schools and other private undertakings were not granted the same advantage. According to the complaint, this had the effect of putting lessors of premises to private schools, as well as the private schools themselves, at an economic disadvantage, thereby distorting competition in both the real estate market and the market for educational services.

7. By letter of 21 October 2010, ESA requested information from Norway in connection with the complaint. Norway replied to the request for information by letter of 25 November 2010. Further information was provided by the applicant at a meeting between Abelia and ESA in January 2011, as well as by the letters of 31 May 2011 and 30 November 2011. By letter of 26 November 2012, ESA communicated its preliminary view that the measure the complaint concerned did not constitute State aid. The applicant responded by letter of 20 December 2012, reaffirming its position that the measure in question constituted State aid.

The contested decision

8. On 24 April 2013, ESA adopted the contested decision, closing the case on the grounds that the provisions of the Norwegian VAT Act and the VAT Compensation Act did not involve State aid within the meaning of Article 61(1) of the EEA Agreement, without initiating the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 SCA.

9. Firstly, ESA noted that the State aid rules only apply when selective advantage is granted to undertakings. ESA stated that 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 economic activity. Consequently, ESA concluded that subsidies in favour of public schools, including under the VAT Compensation Act, fall outside the ambit of the State aid rules.

10. Secondly, ESA found that the provisions of the Norwegian VAT Act and the VAT Compensation Act provided no advantage favouring lessors of real estate to public schools.

11. 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.

12. ESA stated that it understood that the Norwegian VAT system resulted in different cost structures for lessors to public schools and lessors to private schools. However, ESA did not consider that the lessors of premises to private schools were disadvantaged compared with lessors of premises to public schools,

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.

13. ESA considered that it was irrelevant in this respect that, overall, private schools had more limited financial means at their disposal than public schools. ESA stated that, according to the information at its disposal, private schools had at least some discretion in allocating their available funds. Thus, private schools could decide – within the statutory limits – either to spend less funds on rent or to limit spending on other cost items in order to be able to afford 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.

14. As regards the alleged incentive for private schools to supply premises themselves, ESA stated its understanding 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.

15. Based on its 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.

16. The preliminary examination was concluded without initiating the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement.

III Procedure before the Court and forms of order sought by the parties

17. By application registered at the Court on 24 June 2013, the applicant lodged the present action.

18. By application registered at the Court on 30 July 2013, the defendant 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 the defendant's application for the final judgment.

19. 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 intervener") applied for leave to intervene in support of the forms of order sought by the applicant. 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.

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

21. Akademiet submitted a statement of intervention, which was registered at the Court on 27 February 2014.

22. 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.

23. The intervener, Akademiet, requests the Court to:

1. Annul ESA Decision 160/13/COL.

24. 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.

IV Legal context

25. Article 61(1) of the EEA Agreement ("EEA") 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.

26. 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.

27. 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.

28. 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.

...

29. 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.

30. Article 4 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.

...

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

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

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

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

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

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

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

34. Article 17 of Protocol 5 SCA ("the Statute") reads:

The EFTA States, the EFTA Surveillance Authority, the Union and the European 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.

V Written procedure before the Court

35. Pleadings have been received from:

- the applicant, represented by Ingebjørg Harto, attorney-at-law, and Nina Lea Gjerde, attorney-at-law;
- the intervener, represented by Espen I. Bakken, attorney-at-law;
- the defendant, represented by Xavier Lewis, Director, and Catherine Howdle, Officer, Department of Legal & Executive Affairs, acting as agents.

36. Pursuant to Article 20 of the Statute, written observations have been received from:

- the European Commission ("the Commission"), represented by Margarida Afonso and Lorna Armati, members of its Legal Service, acting as agents.

VI Summary of pleas in law and arguments submitted

Preliminary objection: whether the applicant is properly represented before the Court

Arguments of the EFTA Surveillance Authority

37. ESA contends that the present application is inadmissible on the grounds that the applicant is not properly represented before the Court within the meaning of Article 17 of the Statute.

38. ESA notes that the provision in the second paragraph of Article 17 of the Statute is worded in the same terms as the third paragraph of Article 19 of the Statute of the Court of Justice of the European Union. According to the defendant, the Court of Justice of the European Union ("ECJ") has long held that natural or legal persons who bring actions against the institutions must be represented by a lawyer who is a third party in relation to the litigant. According to the defendant, this principle has been applied rigorously and consistently. Furthermore, the ECJ has emphasised that neither the Statute of the Court of Justice nor its Rules of Procedure provide for any derogation from this rule.[1]

39. According to ESA, the ECJ held as early as 1965 that external representation is essential.[2] More recently, the ECJ has held the requirement that a party be represented by a lawyer to mean that a litigant must use the services of a third party, who must be authorised to practise as a lawyer before a court of a Member State of the EU or EEA.[3] According to the defendant, the ECJ has also made it clear that a plaintiff cannot represent himself even though he is a lawyer authorised to plead before a national court of a Member State.[4]

40. According to ESA, it has been held that an applicant could not be represented by another body, in turn represented by a lawyer, when that lawyer was also the managing director of the applicant company.[5] Moreover, the General Court has dismissed as inadmissible an application brought by an English charitable trust that had been signed by a lawyer who was a trustee of the applicant.[6] According to ESA, the General Court recalled in the latter case the importance of parties being represented before the General Court by an

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1 Reference is made to Case 131/83 *Vaupel* v *Court of Justice*, unpublished, paragraph 8.

2 Reference is made to Case 108/63 *Merlini* v *High Authority* [1965] ECR 1, paragraph 9.

3 Reference is made to Case T-79/99 *Euro-Lex* v *OHIM* [1999] ECR II-3555, paragraph 27.

4 Reference is made to Case C-174/96 P *Lopes* v *Court of Justice,* Order of 5 December 1996, [1996] ECR I-6401; reference is also made to Case T-131/99 *Shaw and Falla* v *Commission,* Order of 29 November 1999, unpublished, paragraph 11.

5 Reference is made to Case T-184/04 *Sulvida* v *Commission* [2005] ECR II-85, paragraphs 10 and 11.

6 Reference is made to Case T-452/10 *ClientEarth* v *Council*, Order of 6 September 2011, [2011] ECR II-257, paragraph 18.

independent third party,[7] and in particular the importance of the representative being "objectively perceived as being a genuine intermediary between his client and the court concerned when he is entrusted with defending his client's best interests".[8] In the same case, ESA submits, the General Court stated that "[a] legal person cannot [...] be properly represented before the Courts of the European Union by a lawyer who has, within the body which he represents, extensive administrative and financial powers".[9]

41. ESA claims that, in *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland* v *Commission*,[10] the ECJ held that the third paragraph of Article 19 of the Statute of the Court of Justice precluded employed lawyers from presenting arguments before the Court of Justice on behalf of their employer. According to ESA, the ECJ held that "the concept of independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, that is to say, by absence of an employment relationship".[11]

42. ESA argues that the judgment in *Prezes* constitutes an important application of the principles set out by the EU Courts in the interpretation of Article 19 of the Statute of the Court of Justice. According to the defendant, the judgment focuses on who is a "lawyer" within the meaning of that provision.[12] In this respect, ESA claims, the ECJ made it clear that Article 19 requires the lawyer representing the party to be independent from it and that this provision clearly excludes any relationship of employment between the lawyer and the body he purports to represent.

43. In *Prezes*, ESA argues, the ECJ emphasised that the rationale behind the exclusion of any employment relationship between the lawyer and the party to the proceedings applies with the same force in a situation such as that of the legal advisers at issue in [the] dispute, in which the 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.[13] ESA claims that the ECJ also dismissed the

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7 Reference is made to *ClientEarth* v *Council*, cited above, paragraph 20.

8 Reference is made to *ClientEarth* v *Council,* cited above.

9 Reference is made to *ClientEarth* v *Council*, paragraph 15.

10 Reference is made to Joined Cases C-422/11 P and C-423/11 P *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland* v *Commission*, judgment of 6 September 2012, not yet reported.(referred to hereafter as '*Prezes*')

11 Reference is made to *Prezes*, cited above, paragraph 24.

12 Reference is made to *Prezes,* cited above, paragraph 17.

13 Reference is made to *Prezes*, cited above, paragraph 25.

argument that Polish law [...] provided a series of guarantees of the independence of the legal advisers.[14]

44. ESA submits that the reasoning behind the case law of the ECJ and the General Court is fully compatible with the case law of the EFTA Court.[15] According to ESA, the Court has noted that the Statute requires that parties must be represented by someone who is sufficiently detached and who may be objectively perceived as being a genuine intermediary between his client and the Court when entrusted with defending his client's best interests.[16]

45. In ESA's view, a lawyer cannot be objectively 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. According to ESA, such a lawyer cannot be granted rights of audience before the European Courts. ESA argues that this conclusion 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.[17]

46. In anticipation of the argument that the lawyers representing Abelia are employed by NHO rather than by Abelia, ESA refers again to *Prezes*.[18] ESA argues that the ECJ noted the formal separation of the UKE and its Chairman but stated that their connection was likely to affect the independence of the lawyers in question, since "the interests of the UKE are largely the same as those of its Chairman".[19]

47. ESA contends that, due to the connection between Abelia and NHO, the two lawyers who have signed the present application cannot be considered sufficiently independent from Abelia to meet the requirements of Article 17 of the Statute.

48. ESA submits that Abelia is a national sector federation within NHO. According to ESA, the relationship between Abelia and NHO involves sharing common goals and intentions. Moreover, the defendant claims, the two organisations are composed of common members, as stated in the by-laws of NHO.

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[14] Reference is made to *Prezes*, cited above, paragraphs 29 to 36; reference is also made to Case C-535/12 P *Faet Oltra* v *European Ombudsman*, Order of 6 of June 2013, not yet reported.

[15] Reference is made to Case E-7/12 *DB Schenker* v *EFTA Surveillance Authority*, Order of the President of 21 December 2012, not yet reported.

[16] Reference is made to *DB Schenker*, cited above, paragraph 32, referring to *ClientEarth* v *Council*, cited above.

[17] Reference is made to *Prezes*, cited above, paragraph 24.

[18] Reference is made to *Prezes*, cited above.

[19] Reference is made to *Prezes*, cited above, paragraph 25.

In ESA's view, the alignment of interests between NHO and Abelia establishes a sufficiently close connection between the two as to preclude lawyers employed by NHO from representing Abelia before the Court.

49. ESA concludes that the application has not been brought in conformity with the rules of the Statute and that it should therefore be dismissed as inadmissible.

50. In its defence, ESA makes the following remarks.

51. ESA contends that there are a number of public policy reasons for the Court to dismiss the application as inadmissible rather than proceeding further with the case. It argues that, as a matter of public policy, the consequence of a party not being properly represented should be that their arguments cannot be heard.[20] Allowing further submissions to be made in the case by improperly represented parties would create a lacuna in the Court's own rules.

52. In reply to the submission that NHO comprises members other than Abelia, ESA argues that this fact has no bearing on the "connection test" set out in *Prezes*.[21] According to ESA, Abelia has conceded that it is 100% a part of NHO. In the defendant's view, this is clearly a sufficiently close connection.

53. ESA submits that the discussion of the case law in Abelia's preliminary objection to ESA demonstrates that Abelia had missed the point ESA sought to make, i.e. that the ECJ has always held that parties must be represented by a lawyer who is a third party. According to ESA, while this principle may manifest itself in a number of different ways, the approach of the ECJ has been consistent with this principle since the 1960s. In ESA's view, the present case does not constitute an extension of the principle set out in *Prezes*; rather, it falls within the general test set out by the ECJ in that case.

54. ESA contends that the ECJ would not consider Abelia to be properly represented. In ESA's view, to the extent that the provisions governing procedure before the ECJ and the Court are the same, the principle of procedural homogeneity applies.[22]

55. Responding to the claim that Ms Gjerde is in fact employed by the law firm Arntzen de Besche, ESA submits that Abelia did not disclose this status to the Court when making the application. According to ESA, Ms Gjerde represented herself in the application as part of NHO rather than being completely independent.

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[20] Reference is made to Case T-120/13 *Codacons* v *Commission*, Order of 31 May 2013, unpublished.

[21] Reference is made to *Prezes*, cited above, paragraph 25.

[22] Reference is made to Case E-13/10 *Aleris Ungplan AS* v *EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 3, paragraph 24 and case law cited.

56. In ESA's view, under the 'negative test' set out in *Prezes*, it is irrelevant whether Ms Gjerde is also answerable to her law firm.[23] According to ESA, the General Court has made it clear that, where a lawyer has two roles, one as an independent legal professional and one as a lawyer not independent of the party he represents or a body connected to it, he cannot be deemed to meet the test of independence set out in Article 19 of the Statute of the Court of Justice.[24] ESA argues that accepting a seconded lawyer working within a company as independent would create an unacceptable and highly exploitable lacuna in the case law and create a way of circumventing the rule set out in *Akzo Nobel*[25] and subsequent decisions.

57. In its rejoinder, the defendant notes the following.

58. ESA maintains that the lawyers representing the applicant do not meet the test set out in *Prezes*. According to ESA, the applicant has not put forward anything to challenge the fact that Abelia is wholly a member of NHO, that the interests of Abelia and NHO are aligned and that NHO is not a law firm, although two of its lawyers are representing the applicant before the Court. In ESA's view, the fact that NHO also has other members is irrelevant.

59. ESA contends that, under the test set out in *Prezes*, in-house lawyers working for an organisation that is sufficiently closely connected to a party to make arguments on its behalf at the complaint stage are not permitted to represent that party before the Court. In view of the fact that NHO is not a law firm, ESA submits that the choice of a lawyer employed by NHO indicates that the two bodies are closely connected and have corresponding interests.

60. ESA claims that Abelia has not addressed the arguments of principle as illustrated in the defendant's reference to case law. In ESA's view, the attempt to distinguish the case law misses the point ESA was trying to make, i.e. that the ECJ has established the principle that a party must be represented by an independent lawyer.

61. As regards the link between Abelia and NHO, ESA argues that the important point is that Abelia is wholly a member of NHO. The defendant claims that this renders irrelevant the fact that NHO also has other members.

62. Finally, as regards Ms Gjerde's contemporaneous employment by a law firm, ESA submits that this cannot amount to an exception to the rule established in *Prezes*. According to ESA, in *Prezes*, the ECJ tied the test for determining

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[23] Reference is made to *Prezes*, cited above, paragraphs 24 and 25.

[24] Reference is made to Case T-120/13 *Codacons* v *Commission*, cited above.

[25] Reference is made to Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission,* cited above.

legal representation under Article 19 of the Statute of the Court of Justice to the requirement of independence set out in *Akzo Nobel*.[26]

Arguments of Abelia

63. The applicant claims that the lawyers representing Abelia in the present case are sufficiently independent from Abelia to meet the requirements of Article 17 of the Statute. The applicant argues that it is properly represented before the Court and that the application for annulment is admissible.

64. In Abelia's view, ESA has misunderstood the relationship between Abelia and NHO.

65. The applicant emphasises that NHO is a confederation, not a corporation. According to the applicant, a confederation is generally understood to be an organisation that consolidates authority from other autonomous bodies. The applicant contends that from a legal standpoint, Abelia is, a fully independent organisation with its own statutes, finances, business registration number, board of directors and employees. In short, the applicant argues, Abelia is autonomous. While Abelia cooperates with NHO, it is not obliged to comply with decisions made by the board of NHO.

66. As regards ESA's reference to the by-laws of NHO, the applicant argues that that the provisions cited by ESA must be understood in light of the history of NHO and its central role in connection with collective wage negotiations in Norway. According to the applicant, the objective of the provisions in question is to commit the members of NHO to respect the outcome of these wage negotiations. The applicant argues that the provisions in question cannot be cited in support of ESA's contention that Abelia and NHO are closely connected.

67. The applicant rejects the claim that the relationship between Abelia and NHO involves sharing common goals and intentions. The applicant notes that Abelia is only one of a total of 21 associations within NHO. The applicant argues that Abelia is dedicated to improving business conditions for its member companies in the knowledge and technology-based sector, whereas NHO's goals and intentions cover 20 additional sectors as well. In the event of a conflict of interest between different federations within NHO, NHO will as rule support the general interests of its members as a whole, rather than the interests of a specific industry.

68. The applicant rejects the contention that Abelia and NHO are composed of common members. The applicant points out that NHO is composed of more than 22 100 member companies from 21 different sectors, whereas Abelia only has 1100 member companies, exclusively in the knowledge and technology sector. It is correct, however, that, pursuant to the by-laws of NHO, all members of Abelia

[26] Reference is made to *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, cited above.

are required to also be members of NHO, unless the board of NHO accepts a different connection.

69. Turning to the lawyers who signed the present application, Abelia observes that the lawyers who signed the application on Abelia's behalf were not employees of Abelia. According to the applicant, Abelia currently employs seven in-house lawyers. However, instead of being represented by its own in-house lawyers in the present case, Abelia is being represented by NHO. The applicant argues that the question of whether there is an employment relationship between a lawyer and his client is irrelevant to the present dispute.[27]

70. Abelia submits that lawyers employed by NHO are bound by the ethical code of conduct of the Norwegian Bar Association. According to the applicant, the lawyers in question are entitled to make representations before the courts and are protected by the same legal privilege as lawyers working in external law firms.

71. With respect to the relationship between Abelia and lawyers employed by NHO, the applicant stresses that lawyers employed by NHO have no administrative or financial powers over Abelia, and nor does Abelia have any such power over them. The applicant also claims that the lawyers employed by NHO cannot be seen as "governing" or "controlling" bodies within either Abelia or NHO.

72. According to the applicant, the relationship between Abelia and lawyers employed by NHO corresponds to the relationship between a lawyer in a law firm and his or her clients. For that reason, the applicant submits, 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.[28]

73. As regards the case law cited by ESA relating to the interpretation and application of Article 19 of the Statute of the Court of Justice and Article 17 of the Statute, Abelia argues that ESA's reliance on this case law is based on a misunderstanding of the relationship between Abelia and NHO and the functions of the lawyers employed by NHO. In Abelia's view, ESA's preliminary objections are based on case law that is fundamentally different from the case at hand.

74. Abelia identifies five distinct situations in the case law cited by ESA: (i) a document has in fact been drafted by the applicant himself rather than a lawyer, (ii) the applicant is a lawyer representing himself, (iii) a lawyer representing an applicant is a controlling or governing body of the applicant, (iv) a lawyer

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[27] Reference is made, by comparison, to *DB Schenker* v *EFTA Surveillance Authority*, cited above, paragraph 33.

[28] Reference is made to *DB Schenker* v *EFTA Surveillance Authority,* cited above.

representing an applicant has extensive administrative or financial powers over the applicant, and (v) there is an employment relationship between the applicant and the lawyer representing him.[29] In Abelia's view, none of these situations corresponds to the circumstances in the present case. Abelia argues that the case law cited by the defendant does not support the preliminary objection of inadmissibility and that it should therefore be rejected.

75. As regards *Prezes*,[30] Abelia notes that it disagrees strongly with ESA's interpretation of that judgment. According to Abelia, paragraph 13 of the judgment is of vital importance to understanding the ECJ's line of reasoning. In those sections, Abelia submits, the General Court found that the lawyers in question had a lesser degree of independence than a legal adviser or lawyer practising in a law firm external to their client, because they were employed by a body whose mission was to serve the applicant and their sole function was to assist the applicant.

76. Abelia argues that the situation in the present case differs fundamentally from the situation in *Prezes*. Firstly, NHO's mission is not solely to serve Abelia. Secondly, assisting Abelia is not the sole function of the lawyers representing the applicant. Thirdly, Abelia claims that the reasoning in *Prezes* means that legal advisers who do not work under the conditions described in the judgment, i.e. where it is not their employer's mission to serve the applicant and where they do not have the sole function of assisting the applicant, should be regarded as sufficiently independent pursuant to the Statute of the Court of Justice.

77. With respect to procedural homogeneity, Abelia submits that, while the Court may take into account the reasoning of the ECJ when interpreting the Statute or Rules of Procedure, it is not obliged to do so. Secondly, Abelia submits that, were the Court to take the reasoning of the ECJ into account, it does not follow that it must adopt the same interpretation of the case law as ESA. Thirdly, according to Abelia, the case law of the EFTA Court does not *per se* exclude in-house lawyers from representing a party before the Court.[31]

78. According to the applicant, an in-house lawyer is only excluded from representing a party if he has a lesser degree of independence or rights of audience than set out in *Schenker II*.[32] In Abelia's view, the decisive factor is not whether or not an employment relationship exists or whether the lawyer is internal or external, but, rather, whether the relationship between the lawyer and

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[29] Reference is made to *Merlini* v *High Authority*, cited above; *Euro-Lex* v *OHIM*, cited above; *Lopes* v *Court of Justice*, cited above; *Sulvida* v *Commission*, cited above; *ClientEarth* v *Council*, cited above; and Case T-40/08 *EREF* v *Commission*, Order of 19 November 2009, [2009] ECR II-222.

[30] Reference is made to *Prezes* v *Commission*, cited above.

[31] Reference is made to *DB Schenker* v *EFTA Surveillance Authority*, Order of the President of 21 December 2012, cited above.

[32] Reference is made to *DB Schenker* v *EFTA Surveillance Authority*, Order of the President of 21 December 2012, cited above, paragraph 34.

the party is such as to place in doubt the independence of the lawyer as required by EEA law.[33] Abelia argues that this interpretation of the case law is consistent with earlier case law of the EFTA Court.[34]

79. Abelia further contends that, in addition to being represented by an independent lawyer from NHO, it is also represented in the present case by a lawyer from the law firm Arntzen de Besche.

80. Abelia claims that one of the lawyers who signed the application, Ms Gjerde, is not employed by NHO but by the law firm Arntzen de Besche. The applicant claims that Ms Gjerde is only assisting NHO for a limited period in accordance with an agreement between Arntzen de Besche and NHO while one of NHO's employees is on maternity leave. The applicant submits that Annex 1 to the application contains confirmation that Ms Gjerde is registered as a practising advocate at Arntzen de Besche.

81. Abelia claims that Arntzen de Besche often enters into this type of agreement and that such contracts have no effect on the terms of employment between Arntzen de Besche and the lawyer. The lawyers remain employed by Arntzen de Besche.

82. Turning to the provisions of the agreement between NHO and Arntzen de Besche, Abelia claims that Ms Gjerde does not gain any financial advantage from the contract and that she receives her normal salary from Arntzen de Besche. The applicant notes that the contract stipulates that Ms Gjerde should invoice eight hours per day for her services to NHO and shall receive no overtime from either NHO or Arntzen de Besche.

83. Abelia claims that Ms Gjerde discussed the present dispute with her superiors at Arntzen de Besche and received input from them on drafts. According to the applicant, Ms Gjerde also contacted a managing partner at Arntzen de Besche, Mr Nordby, in order to obtain his approval before signing the present application.

84. As regards the contact details provided for Ms Gjerde in the application and her being listed in NHO's organisational chart, Abelia points out that the phone number provided for Ms Gjerde in the application is owned and paid for by Arntzen de Besche. Abelia submits that the listing in NHO's organisational chart is a natural consequence of the underlying purpose of the contract. With respect to the e-mail address listed for Ms Gjerde in the application, the applicant notes that, while Ms Gjerde still checks her regular Arntzen de Besche e-mail address daily, it was considered most appropriate to provide an e-mail address at NHO in the application.

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[33] Reference is made to *DB Schenker* v *EFTA Surveillance Authority*, paragraphs 33 to 36.

[34] Reference is made to Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others*, [2002] EFTA Ct. Rep. 114.

85. In its reply to ESA's defence, Abelia maintains its position that the lawyers representing it are sufficiently independent.

86. Abelia rejects the contention that it is irrelevant to the test set out in *Prezes* whether NHO is composed of other members in addition to Abelia. In Abelia's view, this fact constitutes a highly relevant difference between the situation in *Prezes* and the situation in the present case. In Abelia's view, ESA's line of argument constitutes an extension of the principle set out in that judgment.

87. As regards the observation that correspondence and meetings with ESA were conducted by employees of NHO on behalf of Abelia, the applicant argues that it would be challenging for a lawyer to assist his client if such representation would render the lawyer in question unable to represent his client before the Court. Abelia also rejects the assertion that the fact that NHO is not a law firm constitutes evidence of a close connection between Abelia and NHO. Responding to the contention that the Court was not informed that one of the lawyers who signed the application on behalf of Abelia was employed by the law firm Arntzen de Besche, Abelia refers again to Annex 1 to the application, which contains confirmation from the Norwegian Supervisory Council for Legal Practice that Ms Gjerde is registered as a practising advocate in the law firm Arntzen de Besche.

88. Lastly, Abelia submits that ESA's reasoning concerning the circumvention of rules regarding legal privilege is hypothetical and unnecessary.

Written observations of the European Commission

89. The Commission submits that the judgment of the ECJ in *Prezes* is unequivocal as to the conception of a lawyer's role in the legal order of the European Union, on which Article 19 of the Statute of the European Court of Justice is based. A lawyer's role is that of collaborating on the administration of justice, being required to provide, in full independence and in the overriding interest of that cause, such legal assistance as the client needs.[35]

90. The Commission submits 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.[36] This rule is based on the premise that the independent lawyer is not influenced in his conduct of the proceedings by considerations such as the level of remuneration, bonus, perception of the hierarchy, career progress etc. It is also fundamentally linked to the idea that the lawyer is not dependent on that client, but free to seek work elsewhere.

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[35] Reference is made to *Prezes*, cited above.

[36] Reference is made to *Prezes*, paragraphs 23 to 25.

91. In the Commission's view, the issue is not how many sectors of industry are members of NHO or the extent of the applicant's influence in the broader management of NHO, but rather that the lawyers in NHO only serve the interests of NHO. The Commission notes that there is no suggestion that they may be able to seek work beyond that circle of membership. According to the Commission, this is the essence of the factors identified in *Prezes* as compromising the independence, for the purposes of the rules of procedure of the Union Courts, of the lawyers in question.

92. The Commission submits that the situation of a lawyer seconded to the association must, for the period of secondment, be deemed to be equivalent to that of an in-house lawyer.

93. The Commission argues that *Prezes* cannot be read as testing the actual level of independence of the lawyers in that case in relation to the Chairman of the UKE. In the Commission's view, the rule is absolute: it is not a question of whether any particular individual would actually be influenced by a link to the litigant but is based on the legal fiction that lawyers who are third parties with respect to the litigant simply do not need to ask themselves difficult questions and are free to walk away from any particular client without their livelihood being called into question.[37]

94. According to the Commission, the case law of the Union Courts provides for an absolute rule whereby the party representing a litigant must be independent of the litigant. An application that has not been signed by such a person has not been properly submitted and must be dismissed as inadmissible. The Commission submits that, in the absence of any argument to the contrary, the principle of procedural homogeneity appears to call for the application of this case law to the present case.

Admissibility: whether the applicant has legal standing

Arguments of Abelia

95. The applicant recalls that the present case concerns an action for annulment challenging a decision in which the defendant declined to open the formal investigation procedure regarding alleged State aid to lessors of premises to public schools. The applicant claims to represent 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. Abelia further notes that it lodged the complaint that led to the contested decision.

96. The applicant observes that, pursuant to Article 36(2) SCA, any natural or legal person may institute proceedings against a decision addressed to another

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[37] Reference is made to *Prezes,* cited above, paragraph 22.

person if the decision in question is of direct and individual concern to the former.

97. Abelia submits that it has legal standing to institute the present proceedings, as the contested decision, including the refusal to initiate the formal investigation procedure, is of direct and individual concern to many of the undertakings that Abelia represents.[38] According to Abelia, it is necessary to bring the present proceedings in order to safeguard the procedural rights of Abelia and the undertakings it represents.

98. Abelia observes that, pursuant to Article 1(h) of Part II of Protocol 3 SCA, an "interested party" for the purpose of Article 1(2) of Part I of Protocol 3 SCA means, *inter alia*, any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular, competing undertakings of the beneficiary of that aid. In other words, it means an indeterminate group of addressees.[39]

99. Abelia argues that the lawfulness of a decision adopted under Article 4(2) of Part II of Protocol 3 SCA depends upon whether there are doubts as to the compatibility of the measure in question with the functioning of the EEA Agreement. Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Part II of Protocol 3 SCA can participate, it must be held that such a decision is of direct and individual concern to any interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA.

100. Abelia claims to be an interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA with respect to the contested decision, since the competitive position in the market of several of the undertakings that Abelia represents is affected by the alleged State aid.[40]

101. Abelia contends 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.

102. In Abelia's view, this favourable treatment of lessors of premises to public schools also affects competition between public and private schools in the market

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[38] Reference is made to Case E-1/12 *Den norske Forleggerforening* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 1040, paragraphs 61 to 66; reference is also made to Case T-304/08 *Smurfit Kappa Group* v *Commission*, judgment of the General Court of 10 July 2012, not yet reported, paragraph 46; and Case T-188/95 *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission* [1998] ECR II-3713, paragraphs 56 to 58.

[39] Reference is made to Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441, paragraph 63; and Case C-323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16.

[40] Reference is made to *Commission* v *Kronoply and Kronotex*, cited above, paragraph 63, to *Intermills* v *Commission*, cited above, paragraphs 63 to 71; and *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission*, cited above, paragraphs 71 to 81.

in which students sign up for exams in an attempt to improve their grades and meet the requirements for studying at certain colleges and universities. Abelia claims that the VAT rules directly affect the structure of the market for the provision of educational services, such as arrangements for private candidates, and thus affect the competitive position of the applicant's member companies operating in that market.[41]

103. Abelia concludes that it must be regarded as an interested party, since the competitive position of its members is affected by the measure in question, and since the complaint that led to the contested decision was lodged by Abelia.[42]

104. In its reply to ESA's defence, the applicant makes the following remarks.

105. Abelia submits 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.[43] Abelia maintains that it meets the criteria for *locus standi* established by case law with respect to the defendant's decision to close the case without opening the formal investigation procedure.

106. In reply to the assertion that Abelia has not suggested that it represents lessors of real estate who might be affected by the alleged unlawful State aid to lessors of premises to public schools, Abelia argues that this is not a necessary condition for the applicant to be regarded as an interested party in the present dispute.[44]

107. According to Abelia, the ECJ made it clear in *Kronoply* that an undertaking that is not a direct competitor of a beneficiary of State aid can be considered an "interested party" if the undertaking in question substantiates that its interests could be adversely affected by the aid in question.[45] In Abelia's view, it follows from *Kronoply* that significant effects on competition can occur in

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41 Reference is made to *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission*, cited above, paragraph 80.

42 Reference is made to *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission* , cited above paragraphs 79 to 91; reference is also made to *Commission* v *Kronoply and Kronotex,* cited above, paragraphs 64 to 70.

43 Reference is made to Report for the Hearing in Case E-1/13 *Míla* v *EFTA Surveillance Authority*, paragraph 39; reference is also made to *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission*, cited above, paragraphs 53 and 54; Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraphs 38 to 40; *Smurfit Kappa Group* v *Commission*, cited above, paragraphs 45 to 48; and Case T-123/09 *Ryanair* v *Commission*, judgment of the General Court of 28 March 2012, not yet reported, paragraphs 66 to 68.

44 Reference is made to *Commission* v *Kronoply and Kronotex,* cited above; and to *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission*, cited above.

45 Reference is made to *Commission* v *Kronoply and Kronotex,* cited above, paragraph 16.

other markets located upstream or downstream, and, consequently, that the position of undertakings operating in these markets may be affected.[46]

108. Abelia argues that the competitive position of private schools that offer training for public exams at upper secondary level and that operate on a purely commercial basis is also affected by the Norwegian VAT rules. According to Abelia, ESA acknowledges a distortion of competition at the level of schools, although ESA does not comment on Abelia's argument that certain services offered by private schools constitute economic activity.

109. Abelia submits that the situation regarding VAT compensation is complex and covers more than just schools. According to the applicant, if ESA had opened the formal investigation procedure, it would have provided Abelia with a better basis for submitting information and comments, as well as giving other interested parties, such as private healthcare institutions, a better basis for submitting information and comments.[47]

110. Responding to the argument that it has not provided evidence of further information or comments that it has been precluded from submitting, Abelia claims that several components of the original complaint were not properly assessed by ESA. The applicant refers to the claim in the original complaint that a private school that builds its own premises will be able to deduct all VAT relating to the building and operating of the premises in question. According to Abelia, this claim, which was elaborated on in a supportive statement by PK Eiendom, was only briefly commented on in the contested decision. Abelia argues that, if ESA had taken the statement by PK Eiendom into account, it would have been in doubt as to whether or not the differential treatment under the VAT Compensation Act constituted State aid.

111. In conclusion, the applicant states that it seeks to challenge ESA's decision not to initiate the formal investigation procedure, thereby infringing Abelia's procedural rights. According to the applicant, the rationale behind the action is to safeguard the applicant's procedural rights.

Arguments of ESA

112. ESA contends that the applicant has not demonstrated that it passes the test for standing in connection with decisions of this type.

113. According to ESA, since the judgment of the ECJ in *Kronoply*,[48] the test for *locus standi* for actions against a Commission decision not to initiate a formal

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[46] Reference is made to *Commission* v *Kronoply and Kronotex*, cited above, paragraph 24; reference is also made to *Waterleiding Maatschappij "Noord-West Brabant"* v *Commission*, cited above, paragraphs 79 to 81.

[47] Reference is made to Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Ct. Rep. 42, paragraph 63.

[48] Reference is made to *Commission* v *Kronoply and Kronotex*, cited above.

investigation has been that the applicant must establish that it is an interested party within the meaning of Regulation 659/1999, and, in particular, that its economic interests might be affected. The defendant argues that the EFTA Court has adopted this test.[49]

114. ESA submits that the procedure set out in Protocol 3 SCA is parallel to that set out in Regulation 659/1999. In ESA's view, the same test should be applied with respect to standing before the EFTA Court in cases concerning decisions by ESA.

115. The defendant argues that, pursuant to the rules on standing for organisations representing member groups, an organisation such as the applicant is required to show that at least one of its members is an interested party.[50] However, ESA contends, the applicant has provided no evidence that any of its members would constitute an interested party in the sense that their interests might be affected by the contested decision.

116. According to ESA, the ECJ held in *Kronoply* that, if the applicant is not active in the same market as the beneficiaries, it has to show that a "relationship of rivalry" exists between them.[51] In ESA's view, Abelia has not provided any evidence to demonstrate that its members have a relationship of rivalry with lessors of real estate to public schools.

117. As regards the interests of the schools themselves, the defendant claims that Abelia has criticised ESA for looking into that aspect of the case. At any rate, ESA observes, it found in the contested decision that there was no State aid in the market downstream of the public schools.

118. The defendant concludes that, given the lack of evidence, the applicant has not passed the test for standing in cases of the present type. Accordingly, the defendant submits that the application should be dismissed as inadmissible on the basis of lack of *locus standi*.

119. In addition, ESA contends that Abelia's procedural rights could not have been infringed by a decision not to open the formal investigation procedure.

120. According to ESA, Abelia's plea depends on the notion that, if ESA were to open the formal investigation procedure Abelia would participate in the procedure by submitting comments and evidence that would lead ESA to conclude that there had been State aid.

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[49] Reference is made to *Den norske Forleggerforening* v *EFTA Surveillance Authority*, cited above.

[50] Reference is made to Case T-236/10 *Asociación Española de Banca* v *Commission*, Order of the General Court of 29 March 2012, not yet reported, paragraph 23.

[51] Reference is made to *Commission* v *Kronoply and Kronotex,* cited above, paragraph 69.

121. ESA submits that, with respect to the formal investigation procedure, the role of interested parties is to provide bodies in ESA's position with information.[52] The defendant argues that interested parties cannot lay claim to an exchange of arguments with ESA.[53]

122. The defendant argues that it has spent a considerable amount of time listening to the applicant and to its members. The defendant also claims to have given detailed consideration to the arguments and evidence put forward by Abelia and its members. According to the defendant, the applicant has not provided evidence of a single further comment or piece of information that it considers itself to have been precluded from submitting during the course of the preliminary examination procedure, and that it hopes to put forward in the formal investigation procedure.

123. The defendant concludes that the right that the applicant claims has been infringed has in fact been eviscerated. According to ESA, the exercise of this right would only have the effect of prolonging the investigation and lead to a formal procedure based on no more evidence than that given to ESA during the course of the preliminary examination.

124. In its rejoinder, ESA maintains that the applicant has not submitted any elements that show that it should be accorded *locus standi* in the present case.

125. According to ESA, where a party that is not a direct competitor of an alleged beneficiary challenges a preliminary decision on the grounds of infringement of its procedural rights, that party will have standing if its interests could be adversely affected by the aid.

126. ESA submits that the complaint concerns a State aid situation in a market in which Abelia does not compete. According to ESA, Abelia has acknowledged that there is no State aid in its own market.

127. ESA contends that Abelia has misread the *Kronoply* judgment. ESA claims that *Kronoply* did not turn on significant effects occurring in upstream or downstream markets; rather, it concerned non-competing companies on the same level, where one company was affected via an upstream market by a price rise caused by State aid provided to another company on the same level. In ESA's view, the present case can be distinguished from the situation in *Kronoply*.

128. ESA observes that it has found that there is no State aid at the level of the schools. In ESA's view, the applicant is trying to circumvent this finding by alleging that there is instead State aid at the level of those who lease premises to

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[52] Reference is made to Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19.

[53] Reference is made to Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59.

schools, a market in which Abelia is not active. ESA argues that, in making this claim, the applicant loses *locus standi*.

129. As regards the applicant's procedural rights, the defendant makes the following observations.

130. In reply to the contention that, if ESA had opened the formal investigation procedure, the applicant would have been in a better position to submit information and comments, ESA claims that Abelia was repeatedly invited to do just that. According to the defendant, the applicant made a number of submissions to ESA during the course of the preliminary investigation procedure.

131. ESA argues that the applicant has not made a single submission on the substance of the case during the proceedings before the Court that could not have been made to ESA during the preliminary examination procedure.

132. ESA accepts that, had it opened the formal investigation procedure, other parties might have participated. In ESA's view, however, it is not for the applicant to take the part of other parties. ESA submits that, where an original complainant has had ample opportunity to make a case for opening the formal investigation procedure, ESA should not be required to open such a procedure on the grounds of mere speculation that there might be other parties who might wish to participate.

Written observations of the European Commission

133. The Commission observes that, to the extent that the applicant may be considered to have challenged the conclusion concerning both the direct and indirect beneficiaries, while the pleas and arguments invoked by the applicant might be heard in relation to aid to public schools, the Commission queries whether the applicant's pleas and arguments should not be found 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.

First substantive plea: obligation to initiate the formal investigation procedure

Arguments of Abelia

134. The applicant contends that, by adopting the contested decision without initiating the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 SCA, ESA infringed Abelia's procedural rights.

135. Abelia submits that the length and circumstances of the proceedings in the preliminary examination and the content of the contested decision both constitute evidence of the existence of doubt as to the compatibility of the measure in question with the functioning of the EEA Agreement, thereby requiring the initiation of the formal investigation procedure.

A - The length and circumstances of the preliminary examination procedure

136. The applicant notes that ESA reached the contested decision 32 months after the complaint had been lodged. In the applicant's view, the duration of the preliminary examination in the present case should be regarded as exceeding the time normally required for such examinations.[54]

137. Abelia argues that there does not seem to have been extensive correspondence in the case between ESA and the interested parties that could explain the length of the preliminary examination. The applicant further notes that ESA's preliminary view in the case was communicated almost a year after the last correspondence took place between ESA and the applicant. According to Abelia, this duration cannot be justified by the circumstances and context of the procedure.

138. Based on the foregoing, Abelia concludes that the length of the preliminary proceedings constitutes an indication of the existence of doubt, thereby requiring the initiation of the formal investigation procedure.

139. In reply to ESA's defence, Abelia makes the following submissions.

140. Abelia argues that, if ESA had not been in doubt as to the compatibility of the measure, it would have been natural to adopt the decision at a much earlier stage.

141. In reply to the claim that the length of the procedure cannot in itself lead to the conclusion that the formal investigation procedure should have been initiated, Abelia submits that, while it does not consider the length of the proceedings in itself to be sufficient to conclude that the formal investigation procedure should have been initiated, it considers that the duration constitutes cogent evidence of the existence of serious difficulties.

142. Abelia claims to have assessed not only the length but also the circumstances of the preliminary examination procedure, such as factual errors in the contested decision and the rather limited correspondence during the preliminary phase. According to Abelia, these factors are not in conformity with the time that elapsed between the complaint and the adoption of the contested decision.

143. As regards ESA's claim that it has no serious doubts about the subject matter of the contested decision, Abelia claims that the criterion for the lawfulness of a decision not to open a formal investigation is whether there are "doubts" as to the compatibility of the aid with the common market, not "serious doubts".

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[54] Reference is made to paragraph 48(b) of ESA's Guidelines on Best Practice for the conduct of state aid control procedures, according to which the authority should endeavour to reach a preliminary view within 12 months of the date of the complaint.

144. Responding to the assertions that ESA conducted a diligent and impartial examination and spent a significant amount of time listening to Abelia's complaint, Abelia maintains that not all elements of the complaint were properly assessed by ESA before it adopted the contested decision.

145. In conclusion, the applicant reaffirms its view that the length and circumstances of the preliminary examination procedure constitute evidence that ESA was in doubt and should therefore have opened the formal investigation procedure.

B - The content of the contested decision

146. Abelia observes that six conditions must be satisfied in order for a measure to constitute State aid within the meaning of Article 61(1) EEA: (i) it must constitute an economic advantage for the recipient, (ii) it must be granted by the state or through state resources, (iii) the beneficiary must be an undertaking carrying out economic activity, (iv) it must favour certain undertakings or the production of certain goods, (v) it must distort or threaten to distort competition, and (vi) it must affect or be capable of affecting trade between the contracting parties to the EEA Agreement.

147. While the plaintiff is of the opinion that all the six conditions are met, the contested decision holds that the second and fifth conditions are met in the present case. As regards the remaining four conditions, Abelia claims that the contested decision is rather vague.

148. As regards the finding in the contested decision that Norwegian public schools are not undertakings, Abelia submits that ESA interpreted the scope of the complaint too narrowly and that it erred in assessing the schools as the main beneficiary of the aid. According to Abelia, the main recipients of aid are commercial undertakings that invest in real estate and are eligible for registration in the VAT register. Abelia claims that the case of Norwegian schools was merely used in the complaint in order to illustrate the general question of illegal State aid in this particular field.

149. With respect to the finding in the contested decision that the provision of schooling in Norway does not constitute economic activity, Abelia makes two submissions. Firstly, Abelia reiterates the claim that the recipients of the alleged aid are lessors of premises to, *inter alia,* public schools, and that they should be regarded as undertakings engaged in economic activity. Secondly, Abelia argues that this finding appears to conflict with ESA's findings in Decision No 155/07/COL, where ESA stated that "[a]lthough some of the entities which receive input tax refunds do not fulfil the condition of being an undertaking, the fact that some beneficiaries of the VAT Compensation Act are undertakings, constitutes sufficient grounds to assess the scheme as such for State aid purposes".

150. Abelia claims that, as stated by ESA in Decision No 155/07/COL, the fact that some beneficiaries of the VAT Compensation Act are undertakings constitutes sufficient grounds for assessing the scheme for State aid purposes. Abelia argues that, if this factor had been taken into account, ESA would have been in doubt as to whether the measure in question was compatible with the functioning of the EEA Agreement and would thus have been under an obligation to open the formal investigation procedure.

151. With respect to the assessment carried out in the contested decision under the heading "no advantage to lessors of real estate to public schools", the applicant contends that this part of the decision is rather vague.

152. Abelia argues that ESA appears to have disregarded the supporting statements submitted by ROM Eiendom, Amfi Eiendom and PK Eiendom. In particular, Abelia claims that ESA disregarded the statement by PK Eiendom. In Abelia's view, had ESA taken this statement into account, it would have been in doubt as to whether the different treatment of lessors under the VAT Compensation Act constituted State aid and it would thus have been under an obligation to open the formal investigation procedure.

153. The applicant claims that the line of argument put forward by ESA in Decision No 155/07/COL was disregarded in the contested decision. In particular, the applicant refers to ESA's finding in the former decision that, "[t]o the extent that the Norwegian authorities compensate input tax on purchase of goods and services to undertakings falling within the scope of Section 2 of the VAT Compensation Act, they grant those undertakings an economic advantage" and the conclusion that "the VAT compensation cannot be justified by the nature and logic of the VAT system" and that it therefore constitutes a selective measure.

154. Turning to ESA's assessment of a possible advantage to lessors of real estate to public schools, Abelia submits that this is the crux of the matter. Abelia interprets ESA as arguing in the contested decision that lessors of premises to private schools are not disadvantaged, since they can cover their loss by increasing the rent. In Abelia's view, this argument is incorrect and inconsistent with the line of reasoning set out by the General Court in *Mediaset* v *Commission*.[55] Abelia contends that the reasoning set out by the General Court in that case is equally applicable to the circumstances of the present case. This also applies to the argument that lessors are free to compete for business with private and public schools alike.[56]

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[55] Reference is made to Case T-177/07 *Mediaset* v *Commission* [2010] ECR II-2341.

[56] Reference is made to *Mediaset* v *Commission*, cited above; reference is also made to Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom* v *Commission and Others*, judgment of 19 March 2013, not yet reported, paragraphs 108 and 109.

155. Abelia claims that the subject matter of the complaint has not been properly assessed in the contested decision. In Abelia's view, the conditions of State aid have not been properly examined by ESA in light of the relevant case law.

156. In conclusion, Abelia submits that the content of the contested decision constitutes an indication of the existence of doubt. In the applicant's view, the contested decision rests on an inadequate assessment of the facts and a misapplication of the relevant case law, particularly *Mediaset*. Abelia submits that ESA should have been in doubt as to whether favourable treatment of lessors to, *inter alia,* public schools constitutes State aid.

157. In its reply to ESA's defence, the applicant makes the following remarks.

158. Abelia maintains that important information provided by the applicant was not taken into account before ESA adopted the contested decision. In particular, Abelia claims that ESA did not take into account the statement by PK Eiendom concerning distortion of the real estate market. Abelia contends that ESA also neglected to take into account incentives for institutions such as private schools to build and/or own and operate their own premises, which, in Abelia's view, lead to distortion in the real estate market.

159. Abelia argues that, when private schools, kindergartens, and healthcare institutions choose to build and/or own and operate their premises, the rental market is reduced, putting pressure on the market rent. Moreover, lessees who are not able to build and/or own and operate their premises will seek compensation for the extra VAT costs. These extra costs will, as the applicant contends, normally be divided between the lessor and the lessee.

160. Furthermore, the applicant argues that the fact that lessors of premises to, *inter alia,* private schools are not able to register for VAT leads to a distortion of competition between lessors. According to Abelia, premises for schools and kindergartens are very different from premises used for offices. The applicant claims that lessors of such premises are more exposed to pressure as regards the level of rent – because they are not eligible for voluntary registration for VAT – than lessors of premises that are suitable for office use.

161. The applicant also claims that it is difficult for lessors of premises to private kindergartens to obtain a market rent from a private kindergarten, leading to less competition for projects that include the building of kindergartens, since 50% of Norwegian kindergartens are private.

162. Turning to ESA's arguments relating to the concept of choice, Abelia contends that it follows from the reasoning set out in the contested decision that aid provided to company A should not be considered State aid, as company B, which does not receive aid, could choose to focus on other products than those it offers in competition with company A.

163. Concerning the claim that public schools are not to be considered as undertakings, Abelia emphasises that it considers the provision of arrangements for external candidates to be an economic activity. In Abelia's view, the competitive position of private schools operating on a purely commercial basis, and thereby carrying out economic activity, is affected by the VAT rules in question.

164. Abelia maintains that the findings in Decision No 155/07/COL are relevant to the case at hand. Abelia also rejects the argument that the *Mediaset* case can be distinguished from the present case and maintains that the reasoning set out in that case is relevant to the present dispute. In particular, the applicant highlights the reasoning for the General Court's findings concerning the passing on of costs and the concept of choice.

165. Finally, in response to the argument that ESA could have based its conclusion merely on the finding that there was no favouring of undertakings, Abelia submits that it appears to be common ground that lessors of premises to public institutions are to be regarded as undertakings. In the applicant's view, private schools providing services for external candidates are also undertakings. Abelia argues that it would not have been correct for ESA to base its conclusion merely on the finding that there was no favouring of undertakings.

166. In conclusion, Abelia submits that the Norwegian VAT compensation regime is complex and that its effects on the market are multifaceted. Abelia claims that ESA only examined part of the problem to be addressed. In Abelia's view, if all the relevant factors had been taken into account, ESA would have been in doubt as to whether the measure was compatible with the functioning of the EEA Agreement, and would thus have been under an obligation to open the formal investigation procedure.

Arguments of Akademiet

167. Akademiet claims that the legality of the contested decision depends upon whether the assessment of the information and evidence that ESA had at its disposal during the preliminary examination should, objectively, have led to doubts as to whether the Norwegian provisions on VAT and VAT compensation conferred an economic advantage.[57]

168. In Akademiet's view, ESA should have had doubts about the Norwegian provisions on VAT and VAT compensation. Akademiet submits that the contested decision rests upon an inadequate assessment of the facts and a misapplication of the relevant case law.

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[57] Reference is made to Case E-1/13 *Míla ehf.* v *EFTA Surveillance Authority*, judgment of 27 January 2014, not yet reported, paragraphs 50 to 51 and 89 to 90.

A – The length and circumstances of the preliminary examination procedure

169. Akademiet claims that the duration of the preliminary examination exceeded the time usually required for such examinations [58] and that the correspondence in the case should be regarded as rather limited.[59] In Akademiet's view, the duration of the preliminary examination procedure constitutes a clear indication of the existence of doubt. Akademiet considers that the complexity of the case, together with the time taken to reach a decision, indicates that ESA should have been in doubt and should thus opened the formal investigation procedure.

B – The content of the contested decision

170. Akademiet claims that ESA should have been in doubt as to the application of Article 61(1) EEA.

171. The arguments set out in Akademiet's intervention focus on these two findings in the contested decision, i.e. the notion of undertaking and the issue of whether any advantage is provided to lessors of premises to public schools.

172. Akademiet argues that secondary schools should be regarded as undertakings to the extent that they provide services in a market.[60] According to Akademiet, ESA has previously found that education can be regarded as an economic activity when the service is provided for a fee.[61]

173. In Akademiet's view, the provisions on VAT and VAT compensation affect educational services provided by private schools that constitute economic activity. These provisions also affect competition between private and public schools in the market in which students sign up for new exams in order to improve their grades.

174. Akademiet claims that Norwegian public schools offer services in a market. In Akademiet's view, the fact that some beneficiaries of the VAT Compensation Act are to be regarded as undertakings constitutes sufficient grounds for assessing the compensation scheme for State aid purposes. [62]

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58 Reference is made to paragraph 48(b) of ESA's Guidelines on Best Practice for the conduct of state aid control procedures.

59 Reference is made to Case T-30/03 *RENV 3F* v *Commission*, cited above, paragraphs 58 to 67; and Case C-646/11 P *3F* v *Commission*, judgment of 24 January 2013, not yet reported.

60 Reference is made to Joined Cases C-180/98 and C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 74 and 75; Joined Cases C-209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 88; Case C-244/94 *FFSA and Others* [1995] ECR I-4013; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28; reference is also made to Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; reference is further made to ESA Decision 267/13/COL of 26 June 2013, paragraph 28.

61 Reference is made to ESA Decision 267/13/COL, cited above, paragraphs 30 to 34.

62 Reference is made to ESA Decision 155/07/COL of 3 May 2007, page 9.

Akademiet submits that this aspect was not taken into account in the contested decision.

175. Turning to the question of whether any advantage is provided to lessors of premises to public schools, Akademiet submits that the concept of aid covers any economic advantage that an undertaking would not have obtained under normal market conditions in the absence of State intervention, including an indirect advantage.[63]

176. Akademiet argues that lessors of premises to public schools receive an indirect advantage because they are able to charge VAT, which, in turn, leads to VAT compensation for the public school in question.

177. As Akademiet sees it, ESA argues that lessors of premises to private schools are not disadvantaged because they can cover their losses by increasing the rent. However, ESA does not explain why the line of argumentation set out by the General Court in *Mediaset* should not apply in the present case. Akademiet maintains that this line of argument is indeed applicable to the case at hand. In Akademiet's view, the contested decision rests on an inadequate assessment of the facts and a misapplication of the relevant case law, particularly the *Mediaset* case.

Arguments of the EFTA Surveillance Authority

178. According to ESA, Abelia's core submission is that the Norwegian provisions on VAT and VAT compensation 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 and that this constitutes State aid. In ESA's view, this submission rests on a misunderstanding of the Norwegian law at issue.

179. ESA argues that the misunderstanding is illustrated by an analysis in three steps.

180. Firstly, ESA notes that, pursuant to the Norwegian VAT Act, the provision of educational services and the letting of real estate are exempt from VAT. Under the provisions of the VAT Compensation Act, public schools are compensated in arrears for the VAT they pay. Private schools may also be compensated for VAT under Sections 2(c) and 3 of the VAT Compensation Act.

181. Secondly, ESA observes that lessors of premises to public entities can voluntarily register for VAT, allowing them to charge output VAT on the rent paid by the schools and to deduct any input VAT they have incurred. ESA notes

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[63] Reference is made to Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34; reference is also made to Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 26 and 27; Case C-403/10 P *Mediaset* v *Commission*, cited above, paragraphs 73 to 77; Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraphs 60 to 66; Case T-424/05 *Italy* v *Commission* [2009] ECR II-23, paragraphs 136 to 147.

that lessors of premises to private entities cannot register in this way. Since they cannot charge VAT on rent and then deduct input VAT, the input VAT becomes an expense that must be covered through the rent. According to ESA, it is important to note that both types of lessors pay input VAT and pass the costs incurred through input VAT on to their lessees, either as output VAT or as part of the costs covered by the rent itself.

182. Thirdly, ESA notes that, although both public and private schools are able to claim compensation for any VAT they are charged, only public schools are compensated for VAT charged on rent, since only lessors to public entities can register for, and thus charge, VAT.

183. The defendant accepts that there is a difference between the situations in which different schools find themselves. Simply put, ESA argues, public schools receive more money than private ones, since public schools have their VAT costs reimbursed. This, in turn, leads to a difference in the situation in which lessors of premises to different schools find themselves. It is also correct, according to ESA, that the rental price will be determined in different ways for leases to public and to private schools. In the case of private schools, rent will include input VAT incurred, while, in the case of public schools, VAT will be charged on top of rent.

184. However, ESA argues, it is essential to understand that persons wishing to let their premises are entirely free to choose their lessees and set their own prices. Both public and private schools will require suitable premises. In both cases, the defendant maintains, lessors will be able to freely negotiate the rent with the school in question and try to achieve a sufficient margin.

185. ESA concludes that the difference in treatment under the VAT rules does not result in a sufficient advantage for one group of lessors over another to lead to a situation of State aid. On this ground, ESA invites the Court to dismiss the application as unfounded.

186. In the alternative, ESA raises the substantive pleas, that neither the length and circumstances of the preliminary examination procedure nor the content of the contested decision constitute evidence of the existence of serious doubts.

A - The length and circumstances of the preliminary examination procedure

187. According to ESA, Abelia argues in essence that the length of the preliminary examination, coupled with a lack of extensive correspondence, is sufficient to infer that ESA must have had serious doubts and was thus under an obligation to initiate the formal investigation procedure.

188. ESA claims that the ECJ has consistently held that the length of the preliminary examination procedure cannot in itself lead to the conclusion that the

formal investigation procedure should have been initiated.[64] According to ESA, the EFTA Court has adopted a similar approach when analysing whether the length of a preliminary examination procedure can constitute evidence of the existence of serious difficulties.[65]

189. ESA contends that, in the present case, it was able to come to a firm view as regards the measures that form the subject matter of the contested decision.

190. ESA maintains that it is aware of its duty to conduct investigations in a timely fashion. However, in ESA's view, this requirement cannot mean that an investigation must be conducted at a speed that compromises its ability to conduct a diligent and impartial examination.[66] According to ESA, the length of the examination procedure was necessary in order to conduct a diligent examination of all the issues raised by the applicant in the complaint and to reach a firm view that the measures in question could not be classified as State aid.

191. ESA argues that it could only assess the complaint once it was in full possession of the facts of the case and in a position to understand the national legal situation. In forming its preliminary view, it had to take into account all the information it had accrued during the preliminary examination.

192. ESA contends that the initial complaint did not contain sufficient information to demonstrate the alleged State aid to lessors. Thus, additional information was required for the defendant to be able to assess the substance of the complaint. According to ESA, additional information submitted by the applicant in the course of 2011 contained details of the impact of the alleged State aid on lessors that enabled the defendant to reach a conclusion on the substance of the complaint.

193. ESA notes that its preliminary assessment was concluded approximately one year after the last information was submitted by the applicant. Having received the applicant's comments on the preliminary assessment, ESA reached its final decision within four months.

194. ESA claims that it would be erroneous to infer the existence of doubts from the length of the preliminary examination procedure. In ESA's view, the time taken should not give rise to a finding that it should have had doubts and therefore should have opened a formal investigation into the matter.

195. In its rejoinder, ESA maintains that the time taken to reach a decision was not excessive.

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64 Reference is made to Case C- 646/11 P *3F* v *Commission*, cited above, paragraph 32.

65 Reference is made to *Den norske Forleggerforening* v *EFTA Surveillance Authority*, cited above, paragraph 109.

66 Reference is made to Case T-30/03 *RENV 3F* v *Commission* [2011] ECR II-6651, paragraph 57.

196. ESA claims that a preliminary investigation consists of two distinct steps. Firstly, ESA must understand the nature of the complaint and obtain all the facts necessary for it to make its decision. Secondly, once it has acquired all the necessary material, it must make its decision in a timely manner. ESA submits that the Court should concentrate on the second step of the proceedings. In the present case, Abelia submitted additional information less than a year before ESA came to its preliminary conclusions. Accordingly, ESA argues that the contested decision was made in conformity with the time frame set out in the Guidelines on Best Practice for the conduct of state aid control procedures.

197. Moreover, ESA claims that Abelia has not provided any evidence or arguments to support the contention that the duration of the preliminary examination procedure cannot be justified by the circumstances and context of the procedure.

198. In reply to the arguments of Akademiet, ESA states the following.

199. Considering Akademiet's argument that ESA should have applied the rule set out in Decision 155/07/COL, ESA points out that the case at hand can be distinguished from the situation leading to that Decision. Moreover, ESA is surprised that Akademiet considers that Decision as providing support for its case. The case at hand does not concern the direct recipients of payments made under the VAT Compensation Act (i.e. the schools), but the lessors. On the question of whether State aid exists on the level of the lessors' market, Decision 155/07/COL is thus irrelevant.

200. ESA points out that the VAT Compensation Act has been amended since Decision 155/07/COL was made. On the basis of Section 2(a), seen in conjunction with Section 4(4), of the VAT Compensation Act, VAT Compensation is not granted to public schools insofar as they carry out economic activities in competition with private undertakings.

201. According to ESA, this precludes the possibility of passing on advantages given to public schools under the VAT Compensation Act to the parts of those public schools that engage in economic activities on the market. Consequently, ESA submits that it was correct in finding that public schools are not undertakings.

202. In response to Akademiet's argument that Decision 267/13/COL implies that the public schools should have been regarded as undertakings, ESA argues that the fact that both private and public schools provide educational services in the same market does not mean that public schools are engaged in economic activities:[67] they cannot be since they are providing public services.

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[67] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 80.

203. According to ESA, the cost to the recipient and the manner of funding of the services are the significant factors to be taken into account when determining whether the services of a particular body constitute economic activities. ESA emphasises that the public schools are publicly funded and that neither the schools' pupils nor their parents pay remuneration for the services received. ESA adds that Section 4(4) of the VAT Compensation Act precludes public schools from receiving VAT compensation for their economic activities, which means that they should have separate accounts for their economic and non-economic activities for VAT compensation purposes. In order to complain about State aid on the level of public schools, a party should submit evidence for the allegation that cross-subsidisation has taken place. ESA contends that the applicant has not even alleged cross-subsidisation.

204. ESA states that Akademiet tries to infer cross-subsidisation by relying upon Decision 267/13/COL. ESA submits that this decision reflects the principle that any advantages received by public schools must not be passed on to their economic activities in such a way as to give them a competitive advantage in the marketplace for their economic activities. ESA denies, however, that this decision is evidence of a general system of cross-subsidisation between the economic and non-economic activities of schools.

205. ESA is of the opinion that the current VAT Compensation Act ensures that advantages received by public schools are not passed on to economic activities engaged in by those schools. It maintains this view since neither Abelia nor Akademiet has submitted convincing arguments to indicate that ESA should have had doubts in reaching this conclusion. Moreover, ESA points out that Abelia agreed during the preliminary investigation procedure that the schools were not undertakings.

206. As a final comment concerning Decision 267/13/COL, ESA observes that, even if it had received proof of instances of cross-subsidisation, this would not have led to the contested decision having a different outcome. The applicant complains about alleged aid to lessors of premises and not to schools.

207. With regard to Akademiet's argument that aid has been granted to lessors of premises to schools, ESA points out that Akademiet only reiterated the arguments already raised by Abelia without adding anything to refute ESA's arguments.

208. ESA maintains that there is no advantage to the lessors of premises to public bodies since the lessors of premises are free to choose the schools to which they let and to charge their lessees market rates. Lessors of premises will also have had to pay input VAT in both cases, and they will pass this on either in the form of output VAT or as part of the rent. Lastly, the measures neither give lessors an incentive to choose one particular type of school over another nor do they give an incentive for either type of school to favour one lessor over another.

209. According to ESA, Akademiet, while endeavouring to rely on *Mediaset*, has not provided arguments for why that case should be applied. ESA therefore maintains its previously stated argument that *Mediaset* is irrelevant to the case at hand, since public schools' possibility of receiving VAT compensation does not have a direct impact on the upstream market.

210. Considering the duration of the preliminary examination, ESA points out that Akademiet has not put forward other arguments than those made by Abelia. Therefore, ESA maintains that settled case law of the ECJ and the EFTA Court indicates that the length of the preliminary examination procedure cannot in itself lead to the conclusion that ESA should have had doubts and should therefore have initiated the formal investigation procedure. ESA also maintains that it has conducted its preliminary investigation procedure in a timely manner: the preliminary assessment was issued approximately one year after Abelia's last submission of information, and the contested decision was issued within four months of receipt of Abelia's comments on the preliminary assessment.

211. To Akademiet's allegation that the duty to state reasons has been infringed, ESA remarks that it has set out its reasoning in the contested decision with clarity, having stated the facts and legal considerations that are of decisive importance in the context of the decision. The mere fact that Abelia and Akademiet disagree with the reasons given does not constitute a solid basis for the argument that ESA has not provided sufficient reasons. In particular, ESA maintains that, in the contested decision, there was no need to consider *Mediaset,* since that judgment is irrelevant to the present case.

B - The content of the contested decision

212. ESA concedes that the contested decision contains small clerical errors, but it argues that these errors do not substantially affect the contested decision. According to ESA, the important facts were all present and correct. ESA notes that it does not consider these errors to be indications that the substantive analysis carried out by the authority was less than diligent in any way.

213. With respect to the methodology of the contested decision, and in response to the assertion that it erred in assessing schools to be the main beneficiaries of the aid, ESA submits that this claim rests on a misunderstanding of the contested decision. According to ESA, it is clear from the title and from section 2.1 of the contested decision that ESA understood the focus of the complaint to be the advantage to lessors of premises to public schools.

214. ESA submits that the complaint was based on the alleged consequences of a difference in the VAT provisions that apply to schools in the public and private sector. The complaint focused on indirect aid to lessors of premises to schools. The logical point of departure, ESA argues, was to examine the possibility of direct aid arising from the relevant VAT provisions. However, in ESA's view, it

does not follow from this choice of point of departure that ESA erred in assessing schools as the main beneficiaries.

215. ESA notes that, after concluding that the direct beneficiaries of the measures in question were not undertakings, the contested decision went on to examine allegations of indirect State aid to lessors of premises to public schools. ESA claims that it has always agreed that the latter issue was the focus of the complaint.

216. ESA argues that the conclusion that there was no indirect advantage to lessors of premises to public schools was well-founded for the following reasons: (i) lessors of premises can charge their lessees rent at market rates, (ii) different cost structures do not lead to a selective advantage for certain types of lessors, and (iii) lessors of premises are free to choose their lessees and set rents at market prices.

217. Turning to the alleged distortion of the real estate market, ESA claims that all information provided by market participants who submitted statements was taken into account, and it rejects the claim that it failed to take into account statements from lessors of real estate that the applicant submitted during the preliminary examination procedure.

218. According to ESA, information provided by ROM Eiendom and Amfi Eiendom showed that lessors of premises charge higher rent levels from private schools since they need to recover their input VAT through the rent. ESA submits that this information was duly reflected in the contested decision. According to ESA, the information also showed that there is distortion at the level of schools, since public schools receive more funds than private ones due to the VAT compensation system. However, ESA maintains that there can be no State aid at this level since public schools are not undertakings.

219. With respect to Decision 155/07/COL, the defendant first submits that, under the case law of the ECJ, a body in the position of ESA is not bound by previous decisions.[68]

220. Secondly, ESA argues that Decision 155/07/COL differs from the present case. According to ESA, Decision 155/07/COL concerned direct recipients of VAT compensation payments. In that decision, ESA found that VAT compensation payments made directly to undertakings constituted State aid. According to the defendant, Norway changed its legislation on VAT compensation as a result of this decision, by limiting the possibility of receiving such compensation to entities that do not qualify as undertakings, such as public schools. The defendant submits that this decision has no effect on the issue in the present case, which concerns the alleged indirect effect of the Norwegian VAT

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[68] Reference is made to Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* [2011] ECR I-11113, paragraph 136.

provisions on lessors of premises to public schools that operate in an upstream market with different characteristics.

221. Turning next to *Mediaset*, ESA argues that this case concerns the principle of technological neutrality in the public funding of digital television networks. According to ESA, under *Mediaset*, States are in principle prohibited from choosing a single technology in advance. Instead, the General Court held in *Mediaset* that this choice should be left to the market by way of an open, transparent and non-discriminatory tender process.

222. According to ESA, the General Court held that consumer subsidies for DTT decoders had the effect of indirectly favouring operators relying on that technology, since these operators would normally have had to pay for similar measures to accelerate adoption by consumers. The subsidies for consumers therefore had a direct impact on the upstream market for the transmission of television broadcasting.[69]

223. ESA submits that, in this context, the General Court held to be irrelevant the argument that any extra cost incurred by operators with proprietary technology for producing hybrid decoders could potentially be passed on to consumers. It made this finding, ESA argues, on the basis that this would still lead to a less favourable position in comparison to operators that did not need to pass on any such extra costs to consumers.[70]

224. According to ESA, the key difference between *Mediaset* and the present case is that the VAT compensation payments have no direct impact on the upstream market. In ESA's view, there is no link in the present case between the provisions of national law and the relief of costs for lessors of premises to public schools. In ESA's view, the VAT compensation payments made to public schools do not have the effect of relieving lessors of premises of costs they would otherwise have to incur themselves.

225. ESA emphasises that lessors of premises to public schools incur the same input VAT as incurred by lessors of premises to private schools. According to ESA, lessors of premises to both types of schools will then need to recover the costs of the input VAT; lessors of premises to public schools will charge rent inclusive of output VAT, while lessors of premises to private schools will reflect their input VAT costs in the overall rent.

226. ESA contends that the mere fact that, due to the operation of the VAT system, public schools have more funds at their disposal to invest in rent does not result in an economic advantage for lessors of premises that happen to conclude rental agreements with public schools. Otherwise, ESA submits, it might be argued that there could be State aid in favour of lessors to private schools that,

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[69] Reference is made to *Mediaset*, cited above, paragraphs 61 to 65.

[70] *Ibid*, paragraph 95.

due to their reduced ability to pay rent, may agree to rent premises that they would otherwise not have considered.

227. ESA rejects the claim that the contested decision is vague. According to ESA, while the decision is brief, it is sufficiently clear. ESA submits that it has clearly stated the reasons for its conclusions in the contested decision. ESA also rejects the claim that it has not assessed the subject matter of the complaint. ESA contends that the subject matter of the complaint was exhaustively examined in the contested decision.

228. ESA argues that it has not interpreted the scope of the complaint too narrowly. The defendant maintains that it is clear from the contested decision that the complaint and the correspondence dealt almost exclusively with lessors of premises to public schools. ESA submits that those circumstances were all it was in a position to assess. The defendant further submits that it considers the reasoning set out in the contested decision to be applicable in comparable situations.

229. In conclusion, ESA submits that it follows from the arguments set out above that it had no serious doubts about the subject matter of the contested decision.

230. In its rejoinder, ESA maintains that it was correct to conclude that it had no serious difficulties in holding that there was no State aid in the present situation.

231. In response to the claim that it has acknowledged that there is a difference in the situations in which public and private schools – and lessors of premises to different types of schools – find themselves, ESA maintains that this difference does not amount to State aid.

232. In ESA's view, the applicant has not attempted to address the reasoning set out by ESA. Instead, ESA claims, the applicant contends that there are elements of the case that have not been taken into account, without setting out what those elements might be.

233. In reply to the contention that ESA did not assess the part of the complaint that concerned self-builds, the defendant refers to recital 31 of the contested decision. According to ESA, it follows from the arguments set out in the contested decision that the choice to self-build cannot result in any favouring of one category of lessors over another.

234. The defendant claims that it has not made the argument that public and private schools are charged the same rent. As regards the example of a contract provided by Abelia, the defendant submits that, instead, the evidence brought by the applicant supports ESA's view that there are two separate markets for rent, i.e. one for renting to private schools and one for renting to public schools. The

rent obtained by the lessor will therefore depend on the type of school which leases the premises. Furthermore, ESA submits that the situation at issue does not constitute "less favourable treatment" for one group of lessors of premises. It is submitted that lessors of premises are in competition with each other to rent out their premises. The "market" for these premises is schools who wish to lease them, but the conditions under which a lessor rents its premises are determined by whether they lease to a public or a private school. ESA argues that, as the provisions of VAT law involved in leasing premises are determined by a school's status as public or private, that school's choice of one lessor over another will not be determined by the applicable provisions of VAT law but by other factors. The VAT provisions, ESA submits, give the schools no incentive to choose one lessor over another. Accordingly, so long as lessors are free to choose the type of school with whom they conclude a contract, lessors of premises to private schools are not put at a competitive disadvantage as compared with lessors of premises to public schools.

235. Responding to the contention that lessors of premises to private schools and kindergartens are more exposed to pressure, ESA claims that Abelia has neither provided evidence to support this contention nor explained how competition could be affected. As regards the applicant's assertions concerning large projects, ESA submits that Abelia has not provided any evidence or explanation of how this ties in with Abelia's main line of argument.

236. Concerning the concept of choice, ESA claims that Abelia's argument on this point is flawed in two significant respects.

237. Firstly, according to ESA, the scenario presented by Abelia does not correspond to the situation in the present case. Secondly, in ESA's view, the scenario does not deal with the fact that, if lessors can chose the type of schools to which they rent, then market rates are likely to be achieved for each set of premises. ESA submits that all lessors are able to compete with each other in order to conclude a contract with whichever type of school they choose.

238. Finally, in response to Abelia's submissions concerning Decision 155/07/COL and *Mediaset*, ESA argues that, although Abelia has asserted that these are relevant to the case at hand, it has brought no additional arguments as to why that may be the case, nor addressed the arguments set out in ESA's defence. ESA submits that it cannot see how this case law could apply to the present case.

239. ESA submits that there were no serious doubts or difficulties in concluding that the provisions of the Norwegian VAT Act and VAT Compensation Act at issue in the contested decision do not constitute State aid in favour of public schools or of lessors of premises to public schools within the meaning of Article 61 EEA.

Written observations of the European Commission

240. The Commission observes that, when an applicant seeks to safeguard his procedural rights pursuant to Article 108(2) TFEU, he may rely on any of the grounds set out in Article 263(2) TFEU.

241. The Commission notes that, if it is unable to conclude, following an initial examination in the context of the procedure under Article 108(3) TFEU, that the State measures in question are either not aid within the meaning of Article 107(1) TFEU or, if classified as aid, are compatible with the Treaty, or, where that procedure does not enable it to overcome all the difficulties in determining whether the aid is compatible with the internal market, the Commission is under an obligation to initiate the procedure under Article 108(2) TFEU. That obligation is, moreover, expressly confirmed by the combined provisions of Articles 4(4) and 13(1) of Regulation No 659/1999.[71]

242. In the Commission's view, it should be borne in mind that, pursuant to case law, the notion of serious difficulties is an objective one. The existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market.[72]

243. The Commission submits that it is the applicant who bears the burden of proving the existence of serious difficulties and that he may discharge that burden of proof by reference to a body of consistent evidence concerning, firstly, the circumstances and length of the preliminary examination procedure and, secondly, the content of the contested decision. The Commission further notes that it is apparent from the case law that, if the examination procedure carried out is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties.[73]

244. The Commission observes that the EFTA Court appears to have adopted the same approach to the control of State aid by ESA.[74]

245. Turning to the length of the preliminary examination, the Commission submits that it is a matter of settled case law that, while the length of the preliminary examination procedure can be an indication that doubts may have existed about either the classification of a measure as aid or its compatibility with

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[71] Reference is made to *Ryanair* v *Commission*, cited above, paragraph 76; and Case C-487/*06 British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 113.

[72] Reference is made to *Ryanair* v *Commission*, cited above, paragraph 77; Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 47; and Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 60.

[73] Reference is made to *Ryanair* v *Commission*, cited above, paragraph 79; and Case T-359/04 *British Aggregates and Others* v *Commission* [2010] ECR II-4227, paragraph 57, and case law cited.

[74] Reference is made to *Den norske Forleggerforening* v *EFTA Surveillance Authority*, cited above.

the internal market, the length of the procedure cannot in itself lead to the conclusion that the formal investigation procedure should have been initiated.[75] In the Commission's view, the applicant appears to acknowledge this, but confines itself to recounting the rather limited correspondence in the case at hand.

246. Turning next to the content of the contested decision, the Commission argues that, since the contested decision was adopted without initiating the formal investigation procedure, ESA could only adopt it legally if the preliminary examination did not uncover serious difficulties. The Commission submits that, if such difficulties existed, the decision could be annulled on that ground alone, because of the failure to initiate the formal investigation procedure. This is the case, the Commission submits, even if it is not established that the substantive assessment of ESA was wrong in law or in fact.[76]

247. The Commission observes that the various elements of the provision in Article 61(1) EEA are cumulative, so that the absence of any one element means that a measure does not fall within that Article's scope of application. It is therefore enough, the Commission argues, that the contested decision demonstrates a firm conviction that just one of the elements is absent in order for Abelia's plea to fail.

248. In the Commission's view, the contested decision is unequivocal in its conclusion that the provision of schooling in Norway does not constitute an economic activity. The Commission further notes that this point seems to be common ground between the applicant and the defendant. According to the Commission, the application cannot be interpreted as challenging the contested decision on this point. As the Commission sees it, it is not disputed that an advantage exists at the level of the direct beneficiaries, but nor is it disputed that these bodies do not engage in an economic activity.

249. The Commission notes that the State aid rules of the EEA Agreement only apply where the recipient of aid is an undertaking. According to the Commission, the case law of the Union courts defines an undertaking for the purposes of the competition and State aid rules of the TFEU as any entity, regardless of its legal status or the way in which it is financed, that carries on an economic activity, that is any activity consisting of offering goods or services on a given market.[77]

250. The Commission refers to its Communication on the application of European Union State aid rules to compensation granted for the provisions of

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[75] Reference is made to *3F* v *Commission*, cited above, paragraph 32, and case law cited.

[76] Reference is made to *Ryanair* v *Commission*, cited above, paragraph 80, and *British Aggregates and Others* v *Commission*, cited above, paragraph 58.

[77] Reference is made to *Pavlov and Others,* cited above, paragraphs 74 and 75; reference is also made to *Commission* v *Italy*, cited above, paragraph 7; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.

services of general economic interest.[78] According to the Commission, the classification of educational services as an economic activity depends on an analysis of the specific circumstances under which the services are provided.

251. The Commission observes that the ECJ has not yet ruled on the precise question of whether the provision of educational services constitutes an economic activity for the purposes of the State aid and competition rules of the TFEU. It has, however, examined a number of cases that deal with the question of whether the provision of such services falls within the scope of the rules on the freedom to provide services in Articles 56 to 62 TFEU. According to this case law, the decisive factor that brings an activity within the ambit of these Treaty provisions is its economic character.[79] This flows from the requirement that the service must be provided for remuneration. The essential characteristic of remuneration pursuant to this case law, the Commission submits, lies in the fact that it constitutes a consideration for the service in question.[80]

252. The Commission submits further that the ECJ has excluded from the rules on freedom to provide services courses offered by certain establishments forming part of a system of public education financed, entirely or mainly, by public funds. The ECJ has made it clear, the Commission argues, that by establishing and maintaining such a system of public education, funded as a general rule from the public purse and not by pupils or their parents, the State does not intend to become involved in activities for remuneration, but carries out its tasks on behalf of its population in the social, cultural and educational fields.[81]

253. The Commission argues that the sole fact that a similar service is also provided by competing private organisations does not automatically transform that activity into an economic activity. In the Commission's view, such an interpretation would bring any activity of the State that does not consist of the exercise of public authority under the notion of economic activity.[82]

254. The Commission submits that, on the basis of the information contained in the contested decision concerning the funding mechanism for schools in Norway, it is evident that there was no doubt about the conclusion reached in the decision that the provision of schooling in Norway does not constitute an economic activity. According to the Commission, the consequence of such a finding is that

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[78] Reference is made to Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, points 26 to 30.

[79] Reference is made to Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 32.

[80] Reference is made to Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58.

[81] Reference is made to Case 263/86 *Belgian State* v *Humbel and Edel* [1988] ECR 5365, paragraphs 17 and 18; Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 15 and 16; and Case C-56/09 *Zanotti* [2010] ECR I-4517, paragraph 31.

[82] Reference, by way of analogy, is made to *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority,* [cited above, paragraph 80.

any other advantage that may accrue to schools does not fall foul of the prohibitions on State aid contained in Article 61 of the EEA Agreement.

255. As regards the market for educational services for external candidates, the Commission notes, firstly, that the applicant did not raise this issue during the administrative procedure. The Commission argues that this element cannot be used to demonstrate that ESA ought to have had doubts about whether direct beneficiaries fall outside the scope of Article 61 EEA.

256. In the Commission's view, while it is for the Court to check whether the facts relied on by ESA are substantively accurate and whether they establish that the conditions justifying the classification of aid within the meaning of Article 61(1) EEA are fulfilled,[83] the legality of a decision concerning State aid must be assessed in light of the information available when the decision was adopted.[84] In addition, since the concept of State aid must be applied to an objective situation appraised on the date on which the decision was taken, it is the appraisal carried out on that date that must be taken into account.[85] According to the Commission, it cannot be complained that ESA did not take into account matters of fact or of law that could have been submitted during the administrative procedure but which were not.[86]

257. Secondly, the Commission notes that, in any event, the provision of educational services to external candidates continues to be free of charge in public schools. In the Commission's view, the fact that a similar service is provided by competing private organisations does not automatically transform that activity into an economic activity. Consequently, the fact that private schools operate in a market for educational services and charge a fee that is not merely symbolic does not alter the conclusion that any advantage at the level of the direct beneficiaries of the measure in question (public schools) falls outside the ambit of the State aid rules.

258. Turning to ESA's assessment of the claim that lessors of premises to public schools receive an indirect advantage as a result of the combination of the provisions of the Norwegian VAT Act and the VAT Compensation Act, the Commission submits that it will be sufficient for the contested decision to withstand this part of the applicant's first plea if it is demonstrated that ESA

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83 Reference is made to Joined Cases C-341/06 and C-342/06 P *La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 142.

84 Reference is made to Case T-243/09 *Fedecom* v *Commission,* judgment of 27 September 2012, not yet reported, paragraph 39; Case C-197/99 *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 34; and Case C-74/00 *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 168.

85 Reference is made to *Fedecom* v *Commission*, cited above, paragraph 39; and Joined Cases C-341/06 P and C-342/06 P *La Poste* v *UFEX and Others*, cited above, paragraph 144.

86 Reference is made to Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 49; reference is also made to *Commission* v *Sytraval and Brink's France* cited above, paragraph 60; and *Ryanair* v *Commission*, cited above, paragraph 104.

reached a firm conviction as regards any one of the constituent elements of Article 61(1) EEA.

259. The Commission notes that recital 32 of the contested decision records the absence of any evidence of an advantage in favour of lessors of premises to public schools. The Commission argues that it appears to be a matter of common ground between the parties that the result of the provisions under examination is an increase in the funds available to public schools. What is more, the Commission claims, the fact that a measure increases the spending capacity of its beneficiaries cannot in itself be taken as having more than an incidental effect on suppliers of goods or services to those beneficiaries.

260. With respect to the question of indirect beneficiaries, the Commission notes that, in determining whether a measure constitutes an advantage for certain undertakings in comparison with others in a comparable factual and legal situation, the conditions relating to the selectivity of a State aid measure and the creation of an economic advantage for a recipient are not always entirely independent of each other.

261. The Commission argues that recital 29 of the contested decision should be read in view of the fact that, until a property is actually rented and the identity of the tenant is known, there is no such thing as lessors of premises to public schools. Rather, there are simply property owners with suitable property available for rent to whomever they choose, any one of whom may end up being able to register for VAT with a view to charging VAT to a public tenant.

262. What is more, the Commission argues, the applicant has not cast doubt on the clear conviction expressed in recital 30 of the contested decision that lessors of premises to private schools do not suffer any disadvantage. Since all lessors of property pay input VAT, they all have the same cost item to cover. In the Commission's view, whether that objective is achieved out of the pocket of the private tenant or from the State via the public tenant does not alter the fact that the net result for the property owners is the same in both cases.

263. In the Commission's view, the judgment in the *Mediaset* case referred to by the applicant cannot alter this conclusion. According to the Commission, contrary to the situation in *Mediaset*, the VAT rules in the present case are not designed to generate any extra demand in the upstream property rental market, and, more importantly, they are not designed to channel any increase in the ability to pay to one group of undertakings over another.[87]

264. Based on the foregoing, the Commission submits that the applicant has failed to demonstrate the existence of serious difficulties as regards the contents of the contested decisions.

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[87] Reference is made to *Mediaset* v *Commission*, cited above, paragraphs 55 to 68.

Second substantive plea: duty to state reasons

Arguments of Abelia

265. Abelia contends that the contested decision should be annulled on the grounds that the statement of reasons is inadequate.

266. Abelia argues that ESA failed to provide adequate reasons for its decision as required by Article 16 SCA. According to the applicant, the statement of reasons does not disclose in a clear and unequivocal manner the reasoning followed by ESA in a manner that enables the applicant to ascertain the reasons for the decision and thus to defend its rights.[88]

267. Abelia claims that the arguments relied on by ESA in the contested decision are inconsistent with the reasoning of the General Court in the *Mediaset* case. The applicant takes the view that ESA should have stated its reasons for not applying the reasoning in that case to the circumstances of the present case.

268. Abelia refers, in particular, to the arguments set out by ESA in recitals 30 and 31 of the contested decision to the effect that lessors of premises to private schools are not disadvantaged compared with lessors of premises to public schools, since they are likely to pass on any VAT paid in connection with their input factors to their lessees in the form of higher rent, and that the measure in question does not result in any favouring of one category of lessors over another, since all potential lessors are free to compete for business with private and public schools alike.

269. In its reply to ESA's defence, the applicant states that the reason for bringing up *Mediaset* is that the judgment seems to contradict ESA's key submission, i.e. that lessors are free to choose their lessees and to set their own prices, and that lessors can pass on input VAT in the form of higher rent. Abelia argues that, in *Mediaset,* the General Court rejected the notion that the possibility of passing on additional costs to customers constitutes an argument against considering a measure as State aid. In Abelia's view, ESA should have explained in the contested decision why it relied on arguments that appear to be in defiance of the case law of the EU Courts.

Arguments of Akademiet

270. Akademiet submits in its intervention that ESA failed to provide sufficient reasoning for its findings in the contested decision. Accordingly, Akademiet claims that the contested decision must be annulled on the grounds that the statement of reasons is inadequate. In Akademiet's view, the statement of reasons does not disclose in a clear and unequivocal fashion the reasoning followed by

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[88] Reference is made to Case E-14/10 *Konkurrenten.no AS* v *EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 266, paragraphs 41 and 42.

ESA in a manner that enables Abelia to ascertain the reasons for the decision and defend its rights.[89]

Arguments of the EFTA Surveillance Authority

271. ESA submits that, when closing a case at the end of a preliminary examination on the grounds that there is no State aid, it has a duty to explain why the factual and legal material relied on in the complaint does not demonstrate the existence of State aid. According to ESA, the duty to state reasons does not require ESA to go into all relevant facts and points of law when setting out its reasoning, and nor is it obliged to adopt a position on all arguments put forward by the parties concerned. It is sufficient to set out the facts and the legal considerations that are of decisive importance in the context of the decision.

272. ESA maintains that the *Mediaset* judgment was not mentioned by the applicant in the complaint. ESA further submits that it is under no duty to define its position on matters that are manifestly irrelevant. In ESA's view, *Mediaset* is not relevant to the contested decision.

273. In its rejoinder, ESA claims that the applicant has not made its case that ESA failed in its obligation to state reasons. In ESA's view, the applicant's line of argument is based on the substance of the *Mediaset* judgment and does not constitute an autonomous argument in relation to the infringement of the obligation to state reasons.

Written observations of the European Commission

274. The Commission notes that, during the preliminary examination procedure, it is required to examine all the facts and points of law brought to its notice. It is in the light of both the information notified by the State concerned and the information provided by any complainant that the institution should form its assessment in the context the preliminary examination pursuant to Article 108(3) TFEU.[90]

275. The Commission observes that the lawfulness of a decision concerning State aid should be assessed in light of the information available to the Commission at the time when the decision was taken.[91] The Commission submits that it is not obliged to examine of its own motion what matters might have been brought before it during the administrative procedure.[92]

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89 Reference is made to *Konkurrenten.no AS* v *EFTA Surveillance Authority*, cited above, paragraphs 41 and 42.

90 Reference is made to *Ryanair* v *Commission*, cited above, paragraph 102, and case law cited.

91 Reference is made to *Ryanair* v *Commission*, cited above, paragraph 103; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54; and Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 91.

92 Reference is made to *Ryanair* v *Commission*, cited above, paragraph 104.

276. According to the Commission, by its second plea, the applicant argues that ESA should have explained in the contested decision the reasons for not applying the *Mediaset* judgment.

277. In the Commission's view, the applicant's second plea does not appear to be well-founded. The Commission observes that the *Mediaset* judgment and its relevance to the case at hand were not referred to in any of the correspondence with ESA. Furthermore, the Commission submits that the *Mediaset* judgment can be distinguished on the facts and that it is of no relevance to the assessment in the present case.

Páll Hreinsson
Judge-Rapporteur