Case

E-1/17

Konkurrenten.no AS

=V=

EFTA Surveillance Authority

(Absolute bar to proceeding with a case – State aid – Decision to close formal investigation procedure)

Table of Contents

Summary of the Order

1 In order to challenge a decision pursuant to the second paragraph of Article 36 of the Surveillance and Court Agreement ("SCA"), the applicant must have standing, either by being the addressee of the decision, or by demonstrating that it is directly and individually concerned by the decision. A decision is of individual concern under Article 36 SCA only if the decision affects a person by reason of certain attributes that are peculiar to him or if he is differentiated by circumstances from all other persons and those circumstances distinguish him individually just as the person addressed by the decision.

2 The mere fact that a measure examined in a decision may have an impact on a competitive relationship existing on the relevant market does not in itself establish standing. It is required that a competitor is substantially affected by the aid to which the contested decision relates.

3 Demonstrating a substantial adverse effect on the applicant's position on the market may involve factors such as significant decline in turnover, appreciable financial losses, or a significant reduction in market share following the grant of the aid in question. The grant of State aid may also have an adverse effect on the competitive situation of an operator in other ways, for example by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid.

4 State aid has been granted to a competitor for the provision of local scheduled and school bus transport services. However, the aid has been restricted to transportation within the county of Aust-Agder in Norway. During the relevant period, the applicant was not active in the provision of local scheduled and school bus transport services in

the county of Aust-Agder. Instead, the applicant operated on the market for express bus services between Oslo and Kristiansand.

5 The mere granting of State aid, which was restricted to a market different from the one the applicant was competing on during the relevant period, cannot by itself support a contention that the applicant's position on the express bus market has been substantially affected by the State aid.

6 Consequently, the applicant lacks standing to challenge the contested decision. The application must thus be dismissed as inadmissible.

Order of the Court

22 December 2017

(Absolute bar to proceeding with a case – State aid – Decision to close formal investigation procedure)

In Case E-1/17,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advocate,

— applicant,

≡V≡

EFTA Surveillance Authority, represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents,

— defendant,

supported by

- **the Kingdom of Norway**, represented by Dag Sørlie Lund, senior adviser, Department of Legal Affairs, Ministry of Foreign Affairs, Elisabeth Eikeland and Ketil Bøe Moen, advocates, Attorney General's Office (Civil Affairs), acting as Agents;
- **the County of Aust-Agder** (*Aust-Agder fylkeskommune*), represented by Bjørnar Alterskjær and Robert Lund, advocates; and
- **Nettbuss AS**, established in Oslo, Norway, represented by Olav Kolstad, advocate, and Camilla Borna Fossem, associate advocate,

— interveners,

APPLICATION under the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for the annulment of EFTA Surveillance Authority Decision No 179/15/COL of 7 May 2015 closing a formal investigation concerning State aid granted to Nettbuss Sør AS, which was published in EEA Supplement no. 59/1 to the Official Journal on 27 October 2016,

The Court

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicant, the defendant and the interveners, and the written observations of the European Commission, ("the Commission") represented by Lorna Armati and Antonios Bouchagiar, members of its Legal Service, acting as Agents,

makes the following

ORDER

I LEGAL BACKGROUND

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

Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2 The second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

Any natural or legal person may ... institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

3 Protocol 3 SCA sets out the functions and powers of the EFTA Surveillance Authority ("ESA") in the field of State aid. Article 1(b)(i) of Part II of Protocol 3 defines "existing aid" as, inter alia:

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

4 Article 1(c) of Part II of Protocol 3 SCA defines "new aid" as:

... all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

5 The first paragraph of Article 19 of the Statute of the Court ("the Statute") reads:

A case shall be brought before the Court by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

6 Article 33(1) of the Rules of Procedure ("RoP") reads:

An application of the kind referred to in Article 19 of the Statute shall state:

(a) the name and address of the applicant;

(b) the designation of the party or the parties against whom the application is made;

(c) the subject-matter of the proceedings and a summary of the pleas in law on which the application is based;

(d) the form and order sought by the applicant;

(e) where appropriate, the nature of any evidence offered in support.

7 Article 88(2) RoP reads:

The Court may at any time of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with a case or declare that the action has become devoid of purpose and that there is no need to adjudicate on it; ...

II FACTS

8 Konkurrenten.no AS ("Konkurrenten") is a privately owned bus transport operator established in Evje, Norway. Since 2002, it has

operated an express bus route between Oslo and Kristiansand in Southern Norway. On that route it competes, inter alia, with Nettbuss AS (formerly Nettbuss Sør AS, hereinafter "Nettbuss"). Nettbuss provides local scheduled transport and school bus transport in the county of Aust-Agder, through which the Oslo-Kristiansand route passes, in addition to its express bus service.

9 In March 2011, Konkurrenten submitted a combined State aid and public procurement complaint to the EFTA Surveillance Authority ("ESA") against Norway. In its complaint, Konkurrenten alleged that contracts for local bus transport services in the county of Aust-Agder had been awarded since 2004 without any public tender or other form of competition, and that unlawful State aid was involved in the award of these contracts.

10 The part of the complaint concerning public procurement was followed up by ESA vis-à-vis Norway in a letter of formal notice of 12 October 2011, and in a reasoned opinion of 27 June 2012. ESA formally closed that case by Decision No 140/16/COL of 29 June 2016.

11 The part of the complaint concerning State aid was communicated to Norway in November 2011. Following correspondence, ESA decided by Decision No 60/13/COL of 6 February 2013 (OJ 2013 C 118, p. 4) to open the formal investigation procedure. During the course of the procedure, comments and information were received from, inter alia, the Norwegian authorities, Konkurrenten and Nettbuss.

12 On 7 May 2015, ESA closed the formal investigation procedure by Decision No 179/15/COL on aid to public bus transport in the County of Aust-Agder in Norway (OJ 2016 L 292, p. 12) ("the contested decision"). Articles 1 to 6 of that decision read:

Article 1

The compensation for local scheduled bus transport … and school bus transport in Aust-Agder in the period from 1994 until today constitutes

State aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute State aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. …

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. *the total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;*

2. *to the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;*

3. *a detailed report on the progress made and the measures already taken to comply with this Decision; and*

4. *documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued, etc.).*

Article 6

This Decision is addressed to the Kingdom of Norway.

13 The substantive dispute in the present proceedings concerns in particular the distinction between the aid provided to Nettbuss within and outside the existing aid scheme, according to the contested decision. That distinction is addressed, inter alia, in the following recitals of the contested decision:

(222) The existing aid scheme in place in Aust-Agder provides for local scheduled and school bus transport in Aust-Agder since before the entry into force of the EEA Agreement in Norway on 1 January 1994. The provision of these services are carried out by [inter alia Nettbuss Sør AS]. *The concession contract with Nettbuss Sør AS expired on 31 December 2014. …*

…

(225) The legal provisions under the existing aid scheme allow for compensation to cover the cost of the local scheduled and school bus transport services in Aust-Agder (minus the ticket revenues for the net contracts) plus a reasonable profit.

(226) Therefore, only compensatory payments for the provision of the said services can be part of the existing aid scheme in Aust-Agder, including payments in excess of losses actually incurred, which are within the scope of that scheme.

...

(232) For the period before 2004, the Authority has not identified, on the basis of the information provided by the Norwegian authorities, any payments that could be held to fall outside the remit of the existing aid scheme.

(233) *Nevertheless, for the period after 2004 and the introduction of the ALFA-method* [a system for the calculation of compensation for bus transport services in Norway] *(and its indexation as from 2009) the Authority notes that certain payments were indeed made outside the existing aid scheme in favour of Nettbuss Sør AS.*

...

(236) As the Norwegian authorities have submitted, the ALFA-method is materially a cost-based model and has been a system based on trust. Prior to each production year, Nettbuss Sør AS submitted estimated costs and revenues connected to the public services. Aust-Agder assumed that the company has also been properly allocating the revenues between public and commercial services. As the Norwegian authorities admit, on the basis of the information they lately identified, this seems not to have been the case.

(237) As mentioned above ..., on the basis of the information submitted by the Norwegian authorities regarding the production of Nettbuss Sør AS, the production reported deviates from what should have been reported as production for public service compensation.

(238) According to the production spreadsheets submitted, Nettbuss Sør AS has been compensated also directly for the company's commercial activities. For example, the spreadsheets reveal that Nettbuss Sør AS has been receiving compensation for late night services, although these constitute part of the company's commercial activities. Nettbuss Sør AS has not objected to the fact that these commercial routes have indeed

been included in the calculations for compensation under the ALFA-method.

(239) It is also revealed from the information submitted that Aust-Agder continued to pay public service compensation for some routes (e.g. Grimstad-Heggedalen and Heggedalen-Grimstad) although these routes ceased to operate.

(240) The Authority, moreover, notes that public service compensation has been paid for routes that are not part of the public service contract (e.g. the stretch Kilsund-Kitron, Tangen Hisøy-Kitron, Tangen Hisøy-Kilsund and transportation without passengers to the first bus stop for 'Sørlandsekspressen', which is the express bus from Kristiansand to Oslo).

(241) Consequently, all the above compensatory payments for activities that have wrongly or mistakenly been included in the production spreadsheets under the ALFA-method have not been based on the legal provisions and the administrative practice of the existing aid scheme in Aust-Agder.

(242) …

(243) The Norwegian authorities have submitted production deviations also in reference to well-defined public service obligations. The Authority shall assess whether these deviations are made within or outside the scope of the existing aid scheme.

(244) … Particularly, as it has been reported by the Norwegian authorities, in reference to the transportation of schoolchildren to and from swimming lessons and for a specific bus route, it appears that Nettbuss Sør AS has been receiving compensation from two different sources at the same time, i.e. the County of Aust-Agder and the municipalities.

(245) Also, concerning the production regarding school years and 'duplication school years' as well as for school bus services, it has been reported that Nettbuss Sør AS has been receiving compensation for a longer period during the year than required, e.g. 51 school weeks (255 school days) instead of 38 (192 school days).

(246) Additionally, the Norwegian authorities have submitted that some public transport stretches (no examples of specific routes are provided) have been shortened without the County's approval and without having this reflected in the production spreadsheets for the granting of the compensation. The Authority is of the view that these production deviations refer to transport services for which compensation has been granted on the basis of the existing aid scheme. It cannot thus be submitted that this alleged overcompensation constitutes new aid granted outside the boundaries of the scheme. The mere fact that the aid scheme has been ill-designed to allow for compensation in excess of the losses actually incurred, but which are within the scope of the aid scheme, does not render this overcompensation new aid. These overcompensatory payments therefore remain within the scope of the existing aid scheme.

14 Finally, recital 280 of the decision contains the following information concerning the recovery process:

(a) by reducing the costs associated with running the public service routes 39 and 40, for Nettbuss Sør AS has been provided with direct cost-savings at the amount of NOK 1 020 000, as estimated by the Norwegian authorities. This amount, which does not represent public service compensation, must be recovered with compound interest calculated from the date the amount remained at the disposal of the company in order to benefit the airport shuttle bus service, i.e. October 2013;

(b) recovery is ordered only from production deviating from what should have been reported as production for public service compensation under the ALFA-method. That said, the following cases fall within the recovery order:

(i) direct payments for transport services that have not been defined as services of general economic interest (e.g. commercial services);

(ii) direct payments for other transport services that are not the subject of the concession contracts signed (e.g. certain routes); and

(iii) direct payments for public transport services that used to be part of the existing aid scheme but have long ceased to exist.

(c) The Authority concludes that the amounts to be recovered shall reflect the number of actual deviated kilometres over the period 1 January 2004 till the expiry of the contract on 31 December 2014, taking into account the cost calculation principle determined by the ALFA-method. Any revenue from public as well as commercial activities that was paid back to the County shall be deducted from the total recoverable amount. Compound interest shall apply from the date the aid was paid out to Nettbuss Sør AS.

15 On 7 July 2015, the Norwegian authorities notified ESA of the recovery process in accordance with Article 5 of the contested decision. The notification enclosed a letter of 29 June 2015 from the County of Aust-Agder to Nettbuss. Based on production data supplied by Nettbuss, a recovery claim of NOK 99 453 890, of which NOK 19 015 927 constituted interest and compound interest calculated until 31 August 2015, was made against Nettbuss.

16 The County and Nettbuss had diverging views on how to interpret the contested decision and Nettbuss objected to the recovery claim. In its view, a substantial part of the claim related to payments made within the existing aid scheme as set out in ESA's decision. No recovery took place at that time. On 25 September 2015, Konkurrenten filed a new complaint with ESA concerning a failure by Norway to fulfil its obligations to recover aid according to the contested decision.

17 By a letter of 6 October 2015, the Norwegian Government asked ESA to clarify how the contested decision should be understood. In its letter of response, dated 26 October 2015, ESA confirmed that the correct understanding was that overcompensatory payments outside the existing aid scheme should be recovered. However, ESA explained that certain deductions from the recovery claim should be made, in particular, as mentioned in recitals 244 to 246 of the contested decision. The Norwegian authorities entrusted the County to ensure recovery from Nettbuss and, in particular, to re-calculate the recoverable amount.

18 The compensation model for the relevant years was based on the difference between estimated annual costs and income. Routes were not compensated individually but reflected in the amount granted for the total annual production. Determining the extent to which unlawful State aid had actually been made available to Nettbuss, as a result of erroneous registration, required new assessments of Nettbuss's registered costs and income for the relevant years.

19 Based on its re-examination, the County of Aust-Agder estimated the recoverable amount under the contested decision to be NOK 4 782 613, including interest. Nettbuss agreed to pay the County of Aust-Agder an amount of NOK 5 million towards the recovery and also to allow for possible minor adjustments based on further quality checks. The agreement between the County and Nettbuss was formalised on 8 September 2016.

III PROCEDURE AND FORMS OF ORDER SOUGHT

20 By an application registered at the Court on 11 January 2017, Konkurrenten brought an action against ESA, requesting the Court to:

1. *Annul ESA decision no. 179/15/COL dated 7 May 2015; and*

2. *Order the defendant and any intervener to pay the costs.*

21 The application for annulment of the contested decision rests on three pleas in law. First, ESA should have classified all overcompensation to Nettbuss as having been granted outside the scope of the existing aid scheme. Second, ESA has failed to state reasons as required by Article 16 SCA by describing in vague and confusing terms how the contested decision classified the various aid that Nettbuss received as falling inside or outside of an existing aid scheme. Third, ESA has infringed the duty to conduct a diligent and impartial investigation into whether the existing aid scheme was altered by the State in 1994 and has become a new aid scheme.

22 On 20 March 2017, ESA lodged its defence, requesting the Court to:

1. *Dismiss the Application as inadmissible.*

2. *Alternatively, to dismiss the Application as unfounded.*

3. *Order the Applicant to pay the costs of the proceedings.*

23 The time limit for submitting a reply was set as 24 April 2017. Upon an application from Konkurrenten, the President extended that time limit to 8 May 2017. On that date, Konkurrenten submitted its reply to ESA's defence. On 15 June 2017, ESA submitted its rejoinder. On 24 May 2017, the Commission submitted written observations.

24 On 19 April 2017, the Kingdom of Norway and the County of Aust-Agder, and on 20 April, Nettbuss, filed applications to intervene in support of ESA. On 5 and 9 May 2017, respectively, ESA and

Konkurrenten submitted written observations on the applications to intervene. By three orders of 12 July 2017, the President granted Norway, the County of Aust-Agder and Nettbuss leave to intervene.

25 On 11 August 2017, Norway, the County of Aust-Agder and Nettbuss lodged their statements in intervention. The interveners request the Court to rule in favour of the order sought by ESA. In particular, they all argue that Konkurrenten lacks standing pursuant to Article 36 SCA to challenge the contested decision.

26 The time limit for submitting a reply to the statements in intervention was set as 8 September 2017. Upon an application from Konkurrenten, the President extended that time limit to 22 September 2017. On that date, Konkurrenten submitted its reply to the statements in intervention.

27 On 16 October 2017, the Court of its own motion invited ESA to submit observations on the issue of Konkurrenten's legal standing to challenge the contested decision.

28 In a letter of 26 October 2017, ESA submitted that Konkurrenten lacks standing and has failed to demonstrate a legal interest in the case. Konkurrenten also responded to the Court's letter and submitted that it should be given an opportunity to comment on ESA's objections.

29 Subsequently, the Court invited Konkurrenten and the interveners to submit comments. The interveners submitted their comments and maintained their positions. Konkurrenten also submitted its comments, contesting ESA's view and requested the Court to grant it an opportunity to examine and comment on the final observations submitted by the interveners.

30 In a final letter, the Court invited Konkurrenten to comment. Konkurrenten submitted its comments on 21 November 2017, maintaining in essence its previous submissions on the issue.

IV ADMISSIBILITY

INTRODUCTORY REMARKS

31 In order to challenge a decision pursuant to the second paragraph of Article 36 SCA, the applicant must have standing, either by being the addressee of the decision, or by demonstrating that it is directly and individually concerned by the decision. Moreover, natural or legal persons may bring an action for annulment only insofar as they can establish that they have a legal interest in the annulment of a decision (compare the judgment in *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55).

32 Under Article 88(2) RoP, the Court may at any time of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with a case. Consequently, the requirements of an applicant's legal standing and legal interest are matters of public policy which must be examined by the Court of its own motion (compare also the judgment in *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraphs 10 to 13).

33 The Court will first address the admissibility issue raised by ESA concerning Konkurrenten's failure to state its address in the application.

THE REQUIREMENTS OF ARTICLE 33 ROP

ARGUMENTS SUBMITTED TO THE COURT

34 *ESA* submits that the application is inadmissible because it does not contain the applicant's address as required by Article 19(1) of the Statute and Article 33(1)(a) RoP. The application merely indicates that Konkurrenten is "established in Evje, Norway". ESA argues that is not sufficient that the current address may possibly be derived

from an annex to the application. Any other approach would lead to the result that also other essential elements, such as the pleas in law relied upon or the form of order sought, could be included in an annex rather than being set out in the application itself, which would clearly be undesirable. ESA notes that although the certificate of incorporation and power of attorney, as supplied to the Court, might contain Konkurrenten's address, it is noted that these documents have not been served on the defendant.

35 In further support of the plea, ESA submits, first, that there is no hierarchy between the various requirements set out in Article 33(1)(a) to (e) RoP. That list reproduces an enumeration contained in Article 19 of the Statute, which can only be amended by the Governments of the EFTA States. Second, in practice, only the indication of the address will reliably identify an individual applicant unambiguously. Third, the applicant's address will in a number of circumstances be essential to the exercise of both procedural and substantive rights of the defendant and other parties. Fourth, it is elementary for any lawyer to be aware of the address of their client. Fifth, the admissibility of cases brought before the Court is a question of public order that the Court is bound to examine of its own motion and thus does not need to be raised by the defendant.

36 ESA submits that a failure to comply with the requirements set out in Article 33(1) is fatal to the admissibility of an application and cannot be cured or rectified retroactively.

37 *Konkurrenten* submits that its permanent seat is stated in the application, in accordance with Article 33(1)(a) RoP. Moreover, the application contains a certified copy of Konkurrenten's certificate of incorporation and a power of attorney, as required by Article 33(5)(a) and (b) RoP. Finally, the application contains an address for service in accordance with Article 33(2) RoP. The application satisfies these legal requirements on the same basis as Konkurrenten's previous applications before the Court. The application is therefore clearly

admissible (reference is made to the order in *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council*, T-54/00 and T73/00, EU:T:2001:224, paragraphs 27 to 29).

FINDINGS OF THE COURT

38 Article 19 of the Statute, as implemented in Article 33(1)(a) RoP, provides that an application to the Court shall contain, inter alia, the name and address of the applicant.

39 The application in the present case states that Konkurrenten is established in Evje, Norway. The complete address is included in a certificate of incorporation attached to the application. For comparison, the Court notes that in its judgment in *Kernkraftwerke Lippe-Ems* v *Commission*, C-161/97 P, EU:C:1999:193, paragraphs 53 and 55, the Court of Justice of the European Union ("ECJ") found that the appellant's address could be derived from the General Court's judgment, which was annexed to the appeal. Thus, the irregularity was not so substantial as to make the appeal formally inadmissible. The procedural requirement in Article 33(1)(a) RoP is substantially identical to that of appeal proceedings at the ECJ. There is no reason to apply this formal requirement more strictly in the present case. Consequently, the application cannot be held inadmissible on this basis.

LEGAL STANDING PURSUANT TO ARTICLE 36 SCA

ARGUMENTS SUBMITTED TO THE COURT

40 *Konkurrenten* submits that it has legal standing to challenge the contested decision. Konkurrenten is directly concerned by the contested decision because State aid was distributed to Nettbuss in a period during which the two companies were direct competitors (reference is made, inter alia, to the judgments in *Cofaz and Others* v

Commission, C-169/84, EU:C:1986:42, paragraph 30; and *Scuola Elementare Maria Montessori* v *Commission*, T-220/13, EU:T:2016:484, paragraph 41).

41 Moreover, Konkurrenten maintains that it is individually concerned because it belongs to a closed class of operators that can no longer be expanded after the adoption of the contested decision. The aid was distributed to Nettbuss from 2004 to 2014. During this period Konkurrenten and another operator were the only competitors of Nettbuss in the market for express bus services between Kristiansand and Oslo (reference is made, inter alia, to the judgments in *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 60, and *Commission* v *Koninklijke Friesland Campina*, C519/07 P, EU:C:2009:556, paragraph 54).

42 Konkurrenten rejects the view of the Norwegian Government that the closed category test only applies to aid measures of general application. Furthermore, Konkurrenten argues that the contested decision does in fact concern an aid scheme of general application, as is apparent from Konkurrenten's third plea. Konkurrenten also rejects ESA's view that Konkurrenten does not belong to a closed class.

43 In the alternative, Konkurrenten submits that it is individually concerned because its market position has been substantially affected by the contested aid (reference is made, inter alia, to the judgments in *Spain* v *Commission*, C-525/04 P, EU:C:2007:698, paragraphs 34, 35 and 37 to 39, and *British Aggregates Association* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 53).

44 Konkurrenten maintains that in 2002 it was the first operator to challenge Nettbuss's monopoly of the Oslo-Kristiansand route. Nettbuss responded to this competition by rapidly increasing its weekly departures, which forced Konkurrenten to offer a comparable schedule on its competing route. The market now suffers from a

significant overcapacity, which has resulted in extremely low profitability. From 2004 to 2014, Konkurrenten's average profit margin was a negative 1.04 per cent. During most of that period, the contested aid was Nettbuss' main source of income. The financial hardship was made worse by the fact that Nettbuss was allowed to use local routes financed by the County as feeding buses to connect passengers with Nettbuss's departures on the express route, whereas Konkurrenten had to finance its own feeding buses to compete with Nettbuss.

45 Konkurrenten submits that it has discharged its burden of proof so as to place the onus on the opposite side to offer any rebuttal evidence and a credible alternative explanation as to how Nettbuss was able to make significant capacity increases on the express bus market as soon as its monopoly was challenged by Konkurrenten. No such evidence has been presented.

46 In any event, Konkurrenten contends that it has standing pursuant to the fundamental right to effective judicial protection under EEA law and Article 6 of the European Convention on Human Rights ("ECHR"), because it has no other venue to challenge the validity of the contested decision (reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 86).

47 Konkurrenten argues that the advisory opinion procedure in Article 34 SCA does not provide an indirect venue for a validity review of an ESA decision through a national court. Advisory opinions are not binding, there is no obligation for national courts of last resort to request an advisory opinion from the Court, and the Court has not been empowered by the SCA to annul an ESA decision in an advisory opinion. The reasons upon which the ECJ has relied to justify a restrictive test for individual concern, therefore do not apply to the EFTA pillar (reference is made, inter alia, to the judgment in *Unión de Pequeños Agricultores* v *Council*, C50/00 P, EU:C:2002:462, paragraphs 38 to 40).

48 Konkurrenten adds that there is no reason to assume that there is less need for legal scrutiny of ESA's decisions than those of the Commission in State aid cases. Consequently, denying Konkurrenten standing in this case would result in a complete denial of access to justice and also run counter to the interests of genuine reciprocity and homogeneity.

49 *ESA*, *Norway*, *the County of Aust-Agder* and *Nettbuss* submit that Konkurrenten is not individually concerned by the contested decision. Konkurrenten has not demonstrated how its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, nor has it produced any evidence to the effect that its market position has been substantially affected by the contested aid. There is nothing to suggest that there has been any cross-subsidisation between the local scheduled and school bus transport and Nettbuss's express bus operations. The allegations concerning overcapacity on the express bus market, low profit margin and Nettbuss's use of feeding buses for its express route in the relevant period, are not sufficient to demonstrate that the contested aid has had a substantial effect on Konkurrenten's market position (reference is made, inter alia, to Cases E-19/13 *Konkurrenten.no* v *ESA* [2015] EFTA Ct. Rep. 52, paragraphs 93 to 105; E-7/16 *Míla* v *ESA* [2016] EFTA Ct. Rep. 903, paragraphs 29 to 32; and the judgment in *Mory and Others* v *Commission*, cited above, paragraphs 97, 98 and 100).

50 Nettbuss further contends that Konkurrenten is not directly concerned by the contested decision, as it is not active on the market for which the aid was granted, namely the market for local scheduled and school bus transport in Aust-Agder.

51 Norway adds that the contested decision does not concern aid measures of general application. Therefore, it is not sufficient to belong to a closed class of operators that can no longer be extended (reference is made to the judgments in *Belgium and Forum 187* v

Commission, cited above, paragraph 58, and *Commission* v *Koninklijke Friesland Campina*, cited above, paragraph 52).

52 ESA argues that it is questionable whether Konkurrenten actually belongs to a closed category. Furthermore, even if Konkurrenten did belong to such a closed category this would not discharge it from its obligation to demonstrate an adverse effect on its market position.

53 Norway and Nettbuss reject the view that Konkurrenten has standing pursuant to the fundamental right to effective judicial protection in EEA law and Article 6 ECHR. The right to a fair trial does not establish an unconditional right of access to court with any claim and without any limitations. The concept of *locus standi* is a common feature of most legal systems, including the EU and the EEA legal systems, and is clearly not in breach of the right to a fair trial. Norway adds that the fact that national courts in EFTA States are not obliged to refer questions of interpretation to the Court and that Article 34 SCA only provides for advisory opinions, cannot alter this conclusion.

54 The County of Aust-Agder supports the Commission's position on standing.

55 The *Commission* submits that despite the formal differences between the EFTA and the EU systems of judicial review of State aid decisions, the two systems provide in essence an equivalent level of effective judicial protection. Therefore, the Commission submits that the Court should interpret the admissibility condition of individual concern as it is interpreted by the ECJ.

FINDINGS OF THE COURT

56 Pursuant to the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of direct and individual

concern to the former. Since the contested decision is addressed to Norway, it must be examined whether it is of direct and individual concern to Konkurrenten.

57 Case law has established that a decision is of individual concern under Article 36 SCA only if the decision affects a person by reason of certain attributes that are peculiar to him or if he is differentiated by circumstances from all other persons and those circumstances distinguish him individually just as the person addressed by the decision (see Case E-7/16 *Míla* v *ESA*, cited above, paragraph 27 and case law cited).

58 That an applicant was the originator of the complaint which led to the opening of the formal examination procedure and that its views were heard and the fact that the conduct of that procedure, was largely determined by its observations are factors which are relevant to the assessment of *locus standi* (see, *Konkurrenten.no* v *ESA,* cited above, paragraph 97).

59 However, the mere fact that a measure examined in a decision may have an impact on a competitive relationship existing on the relevant market does not in itself establish standing. It is required that a competitor is substantially affected by the aid to which the contested decision relates. That Konkurrenten is in a competitive relationship with Nettbuss does therefore not satisfy the requirement that Konkurrenten's market position is substantially affected. Konkurrenten must also demonstrate the extent of the detriment to its market position as a result of the alleged aid (see *Míla* v *ESA*, cited above, paragraphs 29 to 31 and case law cited).

60 Demonstrating a substantial adverse effect on the applicant's position on the market may involve factors such as significant decline in turnover, appreciable financial losses, or a significant reduction in market share following the grant of the aid in question. The grant of State aid may also have an adverse effect on the

competitive situation of an operator in other ways, for example by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (see *Míla* v *ESA*, cited above, paragraph 32 and case law cited, and compare the judgment in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 53).

61 In the present case, it is undisputed that State aid has been granted to Nettbuss for the provision of local scheduled and school bus transport services. However, the aid has been restricted to transportation within the county of Aust-Agder. During the relevant period, Konkurrenten was not active in the provision of local scheduled and school bus transport services in the county of Aust-Agder. Instead, Konkurrenten operated on the market for express bus services between Oslo and Kristiansand.

62 Accordingly, Konkurrenten and Nettbuss were direct competitors on this express bus route only during the relevant period of 2004 to 2014. Only part of that route passes through Aust-Agder. Nevertheless, Konkurrenten contends that it is directly and individually concerned by the contested decision because the aid enabled Nettbuss to increase its weekly departures on the express bus market, which substantially affected Konkurrenten's position in that market. In support of its contention, Konkurrenten has submitted timetables for the different operators on the Oslo-Kristiansand route for the relevant period, showing an increase in weekly departures allegedly resulting in overcapacity on that route. Moreover, Konkurrenten has submitted its annual reports for the period 2004 to 2014, showing an average negative profit margin of 1.04 per cent, allegedly as a result of that overcapacity.

63 The fact that Nettbuss increased its departures on the express bus route in the relevant period does not prove that Nettbuss used State aid to finance that increase. The mere granting of State aid, which was restricted to a market different from the one Konkurrenten was

competing on during the relevant period, cannot by itself support a contention that Konkurrenten's position on the express bus market has been substantially affected by the State aid. The argument of overcapacity and Konkurrenten's negative profit margin do not alter this result. Therefore, Konkurrenten has not sufficiently demonstrated that the contested decision is of direct and individual concern to it, as required by Article 36 SCA.

64 As regards Konkurrenten's submission that it has standing in any event pursuant to its fundamental right to effective judicial protection, the Court notes that the requirements of standing are a recognised part of a judicial procedure. Konkurrenten has not presented any argument that could persuade the Court to conclude that the application of the requirements of Article 36 SCA is in the present case in breach of the fundamental right to effective judicial protection under EEA law, as interpreted in light of the ECHR.

65 Consequently, the Court concludes that Konkurrenten lacks standing to challenge the contested decision. The application must thus be dismissed as inadmissible. In light of this conclusion, there is no need to address whether Konkurrenten has a legal interest in bringing proceedings.

V COSTS

66 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Konkurrenten be ordered to pay the costs, the latter has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, Konkurrenten must be ordered to pay the costs. The County of Aust-Agder and Nettbuss have intervened in support of the successful party and have requested that Konkurrenten be ordered to pay the costs. Konkurrenten must therefore also pay the costs of these interveners. Norway, which has

also intervened, bears its own costs pursuant to Article 66(4) RoP. The costs incurred by the Commission, which has submitted written observations, are not recoverable.

On those grounds,

The Court

Hereby orders:

1. **The application is dismissed as inadmissible.**
2. **Konkurrenten.no AS is to bear its own costs, and the costs incurred by the EFTA Surveillance Authority, the County of Aust-Agder and Nettbuss AS.**
3. **The Kingdom of Norway bears its own costs.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Luxembourg,
22 December 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the President

12 July 2017

(Intervention – Application by the Government of the Kingdom of Norway – eEFTACourt)

In Case E-1/17,

Konkurrenten.no AS, established in Evje (Norway),

represented by Jon Midthjell, advokat,

— applicant,

≡V≡

EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

— defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision No 179/15/COL of 7 May 2015, closing a formal investigation concerning State aid granted to Nettbuss Sør AS,

The President

makes the following

Order

I BACKGROUND

1 Konkurrenten.no AS ("Konkurrenten" or "the applicant") is a privately owned company owned by Olto Holding AS, which operates an express bus service between Oslo and Kristiansand (Norway). Nettbuss Sør AS ("Nettbuss Sør") was the applicant's main competitor in the express bus market for the same route between 2004-2014.

2 Nettbuss Sør AS (formerly Aust-Agder Trafikkselskap AS) was established in 1986 and was owned jointly by the County of Aust-Agder and NSB AS, the State-owned national rail operator. On 1 September 1988, NSB AS established a new division, NSB Biltrafikk which acquired full ownership of Aust-Agder Trafikkselskap AS from the county. NSB Biltrafikk was reconstituted as a limited liability company on 29 November 1996 and was renamed Nettbuss AS on 10 February 2000. Nettbuss Sør operated as a wholly-owned subsidiary until 16 December 2015 when it merged with its parent company, Nettbuss.

II FACTS AND PROCEDURE

3 On 23 March 2011, the applicant filed a combined State aid and public procurement complaint against Norway, contending that the County of Aust-Agder had, since 2004, awarded contracts for the provision of local bus services to Nettbuss Sør in excess of NOK 1 billion (approximately EUR 125 million) without any public

tender or any other form of competition. This led the EFTA Surveillance Authority ("the defendant" or "ESA") to open two separate investigations: one on public procurement issues (ESA cases No 69548 and 69656) and another on State aid issues (ESA cases No 69694 and 73321).

4 The public procurement part of the complaint resulted in ESA issuing a letter of formal notice to Norway on 12 October 2011, which led to the adoption of a reasoned opinion against Norway on 27 June 2012.

5 On 10 November 2011, ESA sent to the Norwegian authorities the State aid complaint it had received from Konkurrenten, requesting information from them. Subsequently, there was a series of correspondence between ESA and the Norwegian authorities, requesting and receiving additional information, ending on 18 January 2013.

6 On 6 February 2013, by way of ESA Decision No. 60/13/COL, ESA opened a formal investigation into the State aid matter. The Norwegian authorities and Konkurrenten responded to the opening decision by way of letters dated 5 April 2013 and 23 May 2013, respectively. On 21 and 26 June 2013, ESA sent to the Norwegian authorities the comments from Konkurrenten and two other interested parties, including Nettbuss Sør. The Norwegian authorities responded by letter of 12 August 2013. There followed a series of letters between ESA and the Norwegian authorities requesting and receiving further information and clarifications from 17 December 2013 to 22 December 2014.

7 On 7 May 2015, ESA issued Decision No. 179/15/COL of 7 May 2015 ("the contested decision"). The operative part of the contested decision reads as follows:

"Article 1

The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes state aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute state aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. The total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;

2. To the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;

3. A detailed report on the progress made and the measures already taken to comply with this Decision; and

4. Documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued etc).

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version of this Decision is authentic."

8 By letter of 7 July 2015, in accordance with Article 5 of the contested decision, the Norwegian authorities informed the defendant that the total amount of unlawful aid granted to Nettbuss Sør was NOK 99 453 890. The letter set out how the sum had been calculated.

9 On 7 September 2015, the time limit set out in Article 4 of the contested decision for Norway to recover the unlawful aid expired. Recovery had not taken place.

10 On 25 September 2015, the applicant filed a new complaint with the defendant concerning the failure of the Norwegian authorities to comply with the contested decision and the recovery obligation pursuant to Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA"). Konkurrenten called on ESA to bring Norway before the Court under the fast-track procedure in Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

11 On 6 October 2015, the Norwegian authorities wrote to ESA asking for a clarification of the contested decision, attaching a letter written by the County of Aust-Agder.

12 On 26 October 2015, ESA replied to that letter. It states:

"In conclusion, the following overcompensatory payments shall be deducted from the recovery claim:

i. Transportation of schoolchildren to and from swimming lessons and for a specific bus route (paragraph 244);

ii. Production regarding school years and 'duplication school years', as well as for school bus services (paragraph 245); and

iii. Shortening of stretches without the County's approval (paragraph 246)."

13 On 12 November 2015, the Norwegian authorities wrote to ESA. They noted that "in order to comply with the Authority's demarcation of the new aid measures, the Norwegian authorities will have to recalculate the amount to be recovered, and present a significantly reduced claim to Nettbuss". They further noted that it would not be possible, in the circumstances, to implement the recovery order by 26 November 2015.

14 On 8 September 2016, the County of Aust-Agder and Nettbuss AS ("Nettbuss") entered into a settlement agreement, whereby Nettbuss agreed to repay NOK 5 million (approximately EUR 625 000).

15 On 11 January 2017, the applicant lodged an application pursuant to the second paragraph of Article 36 SCA. The applicant considers that the contested decision has left intact virtually all State aid received by Nettbuss Sør from the County of Aust-Agder, during a 10-year period from 2004-2014. The applicant relies on three pleas in law and submits that the contested decision conflicts with the definitions specified in Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA, and infringes the duty to state reasons as required by Article 16 SCA and the duty to conduct a diligent and impartial investigation. Therefore, the applicant requests the Court to order as follows:

1. Annul ESA decision no. 179/15/COL dated 7 May 2015; and

2. Order the defendant and any intervener to pay the costs.

16 On 20 March 2017, the defendant lodged its statement of defence. The defendant asserts that the application does not meet formal requirements set out in Article 19 of the Statute of the Court ("the Statute") and Article 33 of the Rules of Procedure ("RoP") and opposes the three pleas in law relied on by the applicant. The defendant requests the Court to:

1. Dismiss the Application as inadmissible.

2. Alternatively, to dismiss the Application as unfounded.

3. Order the Applicant to pay the costs of the proceedings.

17 On 5 April 2017, the applicant requested an extension of time to submit the reply from 24 April 2017 to 8 May 2017.

18 On 11 April 2017, the Registrar wrote to the applicant company informing it that, pursuant to Article 78 RoP, the President had granted an extension of the time limit for submitting a reply to 8 May 2017.

19 On 19 April 2017, the Government of Norway submitted an application for leave to intervene.

20 Also on 19 April 2017, the County of Aust-Agder submitted an application for leave to intervene.

21 On 21 April 2017, Nettbuss AS submitted an application for leave to intervene.

22 On 25 April 2017, the present application to intervene was served on the parties in accordance with Article 89(2) RoP.

23 On 5 May 2017, ESA submitted comments on the applications for leave to intervene lodged by the Norwegian Government, the County of Aust-Agder and Nettbuss.

24 On 8 May 2017, the applicant submitted its reply.

25 On 9 May 2017, the applicant submitted comments on the applications for leave to intervene lodged by the County of Aust-Agder and Nettbuss.

26 On 24 May 2017, the European Commission ("the Commission") submitted written observations pursuant to Article 20 of the Statute.

III APPLICATION TO INTERVENE

27 On 19 April 2017, the Norwegian Government sought leave to intervene pursuant to Article 36 of the Statute and Article 89 of the RoP.

28 The Norwegian Government submits that, as notice of the application was published in the Official Journal of the European Union on 9 March 2017, its application to intervene is timely.

29 The Norwegian Government wishes to support the following forms of order sought by the defendant, namely, the defendant's request for the Court to:

1. *Dismiss the Application as inadmissible.*

2. *Alternatively, to dismiss the Application as unfounded.*

30 In relation to the requirement, pursuant to Article 89(1)(d) RoP, for an address for service at the place where the Court has its seat, the Norwegian Government states that it does not have an address for service in Luxembourg and requests the Court to serve documents either to the address of its Agent, Mr Dag Sørlie Lund, at the Ministry of Foreign Affairs in Oslo, and/or via e-EFTA Court.

IV OBSERVATIONS OF THE PARTIES

31 On 25 April 2017, the application to intervene was served on the parties in accordance with Article 89(2) RoP.

32 On 5 May 2017, the defendant stated that it welcomes the Kingdom of Norway's application, noting that the latter, as an EEA State, is entitled to intervene as of right in the present proceedings pursuant to the first paragraph of Article 36 of the Statute. The defendant has no specific observations on the application to intervene.

33 The applicant did not submit any comments on Norway's application for leave to intervene.

V LAW

34 Pursuant to the first paragraph of Article 36 of the Statute, any EFTA State, the EFTA Surveillance Authority, the European Union and the European Commission may intervene in cases before the Court.

35 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 9 March 2017 in the EEA Section of the Official Journal of the European Union. Accordingly, the time limit for submission of an application to intervene was 20 April 2017.

36 The present application to intervene was lodged at the Court's Registry on 19 April 2017, and is therefore timely.

37 Article 89(1)(d) RoP requires that an application for intervention shall contain the intervener's address for service at the place where the Court has its seat. Article 89(1) RoP specifies further that Articles 32 and 33 RoP shall apply.

38 Article 6 of the Decision of the Court on the lodging and service of procedural documents by means of e-EFTA Court (the "Decision") provides that procedural documents shall be served on the parties' representatives by means of e-EFTA Court where they have expressly accepted this method of service or, in the context of a case, where they have consented to this method of service by lodging a procedural document by means of e-EFTA Court (see the Order of the President of 31 March 2017 in Case E-12/16 *Marine Harvest ASA* v *EFTA Surveillance Authority*, not yet reported, paragraphs 16 to 19).

39 In the present case, the Norwegian Government is represented by three agents: Mr Dag Sørlie Lund, Ms Elisabeth Eikeland and Mr Ketil Bøe Moen. It is sufficient to note that Mr Dag Sørlie Lund has registered for e-EFTA Court and therefore expressly accepted this method of service, as provided for in Article 6 of the Decision. Consequently, all procedural documents, including judgment and orders, may be served via eEFTA Court on the Norwegian Government in the present case.

40 In light of the above, the Kingdom of Norway is granted leave to intervene in the case in support of the first two parts of the form of order sought by the defendant.

On those grounds,

The President

hereby orders:

1. **The Kingdom of Norway is granted leave to intervene in Case E-1/17 in support of the first two parts of the form of order sought by the defendant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg,
12 July 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the President

12 July 2017

(Intervention – Interest in the result of the case – Application by the County of Aust-Agder)

In Case E-1/17,

Konkurrenten.no AS, established in Evje (Norway),

represented by Jon Midthjell, advokat,

— applicant,

≡V≡

EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

— defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision No 179/15/COL of 7 May 2015, closing a formal investigation concerning State aid granted to Nettbuss Sør AS,

The President

makes the following

Order

I BACKGROUND

1 Konkurrenten.no AS ("Konkurrenten" or "the applicant") is a privately owned company owned by Olto Holding AS, which operates an express bus service between Oslo and Kristiansand (Norway). Nettbuss Sør AS ("Nettbuss Sør") was the applicant's main competitor in the express bus market for the same route between 2004-2014.

2 Nettbuss Sør AS (formerly Aust-Agder Trafikkselskap AS) was established in 1986 and was owned jointly by the County of Aust-Agder and NSB AS, the State-owned national rail operator. On 1 September 1988, NSB AS established a new division, NSB Biltrafikk which acquired full ownership of Aust-Agder Trafikkselskap AS from the county. NSB Biltrafikk was reconstituted as a limited liability company on 29 November 1996 and was renamed Nettbuss AS on 10 February 2000. Nettbuss Sør operated as a wholly-owned subsidiary until 16 December 2015 when it merged with its parent company, Nettbuss.

II FACTS AND PROCEDURE

3 On 23 March 2011, the applicant filed a combined State aid and public procurement complaint against Norway, contending that the County of Aust-Agder had, since 2004, awarded contracts for the provision of local bus services to Nettbuss Sør in excess of NOK 1 billion (approximately EUR 125 million) without any public

tender or any other form of competition. This led the EFTA Surveillance Authority ("the defendant" or "ESA") to open two separate investigations: one on public procurement issues (ESA cases No 69548 and 69656) and another on State aid issues (ESA cases No 69694 and 73321).

4 The public procurement part of the complaint resulted in ESA issuing a letter of formal notice to Norway on 12 October 2011, which led to the adoption of a reasoned opinion against Norway on 27 June 2012.

5 On 10 November 2011, ESA sent to the Norwegian authorities the State aid complaint it had received from Konkurrenten, requesting information from them. Subsequently, there was a series of correspondence between ESA and the Norwegian authorities, requesting and receiving additional information, ending on 18 January 2013.

6 On 6 February 2013, by way of ESA Decision No 60/13/COL, ESA opened a formal investigation into the State aid matter. The Norwegian authorities and Konkurrenten responded to the opening decision by way of letters dated 5 April 2013 and 23 May 2013, respectively. On 21 and 26 June 2013, ESA sent to the Norwegian authorities the comments from Konkurrenten and two other interested parties, including Nettbuss Sør. The Norwegian authorities responded by letter of 12 August 2013. There followed a series of letters between ESA and the Norwegian authorities requesting and receiving further information and clarifications from 17 December 2013 to 22 December 2014.

7 On 7 May 2015, ESA issued Decision No 179/15/COL of 7 May 2015 ("the contested decision"). The operative part of the contested decision reads as follows:

"Article 1

The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes state aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute state aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. The total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;

2. To the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;

3. A detailed report on the progress made and the measures already taken to comply with this Decision; and

4. Documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued etc).

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version of this Decision is authentic."

8 By letter of 7 July 2015, in accordance with Article 5 of the contested decision, the Norwegian authorities informed the defendant that the total amount of unlawful aid granted to Nettbuss Sør was NOK 99 453 890. The letter set out how the sum had been calculated.

9 On 7 September 2015, the time limit set out in Article 4 of the contested decision for Norway to recover the unlawful aid expired. Recovery had not taken place.

10 On 25 September 2015, the applicant filed a new complaint with the defendant concerning the failure of the Norwegian authorities to comply with the contested decision and the recovery obligation pursuant to Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA"). Konkurrenten called on ESA to bring Norway before the Court under the fast-track procedure in Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

11 On 6 October 2015, the Norwegian authorities wrote to ESA asking for a clarification of the contested decision, attaching a letter written by the County of Aust-Agder.

12 On 26 October 2015, ESA replied to that letter. It states:

"In conclusion, the following overcompensatory payments shall be deducted from the recovery claim:

i. Transportation of schoolchildren to and from swimming lessons and for a specific bus route (paragraph 244);

ii. Production regarding school years and 'duplication school years', as well as for school bus services (paragraph 245); and

iii. Shortening of stretches without the County's approval (paragraph 246)."

13 On 12 November 2015, the Norwegian authorities wrote to ESA. They noted that "in order to comply with the Authority's demarcation of the new aid measures, the Norwegian authorities will have to recalculate the amount to be recovered, and present a significantly reduced claim to Nettbuss". They further noted that it would not be possible, in the circumstances, to implement the recovery order by 26 November 2015.

14 On 8 September 2016, the County of Aust-Agder and Nettbuss AS ("Nettbuss") entered into a settlement agreement, whereby Nettbuss agreed to repay NOK 5 million (approximately EUR 625 000).

15 On 11 January 2017, the applicant lodged an application pursuant to the second paragraph of Article 36 SCA. The applicant considers that the contested decision has left intact virtually all State aid received by Nettbuss Sør from the County of Aust-Agder, during a 10-year period from 2004-2014. The applicant relies on three pleas in law and submits that the contested decision conflicts with the definitions specified in Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA, and infringes the duty to state reasons as required by Article 16 SCA and the duty to conduct a diligent and impartial investigation. Therefore, the applicant requests the Court to order as follows:

1. Annul ESA decision no. 179/15/COL dated 7 May 2015; and

2. Order the defendant and any intervener to pay the costs.

16 On 20 March 2017, the defendant lodged its statement of defence. The defendant asserts that the application does not meet formal requirements set out in Article 19 of the Statute of the Court ("the Statute") and Article 33 of the Rules of Procedure ("RoP") and opposes the three pleas in law relied on by the applicant. The defendant requests the Court to:

1. Dismiss the Application as inadmissible.

2. Alternatively, to dismiss the Application as unfounded.

3. Order the Applicant to pay the costs of the proceedings.

17 On 5 April 2017, the applicant requested an extension of time to submit the reply from 24 April 2017 to 8 May 2017.

18 On 11 April 2017, the Registrar wrote to the applicant company informing it that, pursuant to Article 78 RoP, the President had

granted an extension of the time limit for submitting a reply to 8 May 2017.

19 On 19 April 2017, the Government of Norway submitted an application for leave to intervene.

20 Also on 19 April 2017, the County of Aust-Agder ("the County") submitted an application for leave to intervene in support of the form of order sought by the defendant, pursuant to the second paragraph of Article 36 of the Statute.

21 On 21 April 2017, Nettbuss AS submitted an application for leave to intervene.

22 On 25 April 2017, the present application to intervene was served on the parties in accordance with Article 89(2) RoP.

23 On 5 May 2017, ESA submitted comments on the applications for leave to intervene lodged by the Norwegian Government, the County and Nettbuss.

24 On 8 May 2017, the applicant submitted its reply.

25 On 9 May 2017, the applicant submitted comments on the applications for leave to intervene lodged by the County and Nettbuss.

26 On 24 May 2017, the European Commission ("the Commission") submitted written observations pursuant to Article 20 of the Statute.

III APPLICATION TO INTERVENE

27 The County submits that, as the grantor of the State aid at issue, and as a body separate from the Norwegian state, with financial and legal autonomy, it has a direct and existing interest in the outcome of the case, particularly in the form of order sought by the defendant.

28 The County notes that, in addition to being the administrative body responsible for the public service transport in its territory, it is an entity separate from the State as such, which may not be given instructions by the Norwegian Government. With regard to the contracts with bus operators eligible for public service compensation, the County was acting in full regional autonomy and bore the budgetary consequences. In this respect, the County refers to the judgment in *Het Vlaamse Gewest (Flemish Region)* v *Commission*, T-214/95, EU:T:1998:77, paragraphs 29 and 30.

29 The County submits further that it was directly and individually concerned by ESA Decision No 179/15/COL as it affected the compensation paid under contracts entered into by the County when exercising its own discretionary powers. Similarly, it will be directly and individually concerned by an order annulling the contested decision on the grounds submitted by the applicant, as this will lead to ESA making a new decision which will affect the contracts entered into by the County when exercising its own powers. In that regard, the County refers to the judgment in *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH* v *Commission*, T132/96 and T-143/96, EU:T:1999:326, paragraph 84 .

30 In addition, the central Norwegian authorities ordered the County to implement the defendant's decision by letter of 29 October 2015, formally obliging it, as aid grantor, to ensure recovery. As such, the County submits, as both the grantor of aid and entity legally responsible for implementing the recovery order, it has a direct and existing interest in intervening.

31 With regard to the recovery process itself, the County notes that the nature of the compensation mechanism and challenges pertaining to uncovering and assessing the available evidence rendered it labour intensive and complex. The calculation of the unlawful aid element entailed the analysis of different mechanisms, input factors and

effects, reason for which it relied on independent advisors and expert opinions.

32 The County notes that the annulment of the contested decision may lead to different decisions in the future, including with regard to recoverable amounts and methods of recovery, which could jeopardize the validity of the settlement agreement achieved between the County and Nettbuss, and render pointless the substantial financial investment made by the County in implementing the recovery order.

33 The County submits moreover that the form of order sought by the applicant impacts on its legal position with regard to parts of the measures classified as existing aid by the Decision, which were not covered by the recovery order. This could lead to a new decision reclassifying the existing aid measures as new aid, and hence call into question the validity of a legally binding settlement to which the County is a party.

34 In addition, the County has provided financial support for other four bus operators under similar regimes as Nettbuss, and the annulment of the contested decision would affect its position under contracts entered into in its capacity as independent regional authority.

35 As regards the fact that the defendant's decision was formally addressed to the Kingdom of Norway, the County submits this does not deprive it from having interest in the matter of its own. This is particularly so since it implemented aid measures which were initiated under the financial and legislative autonomy it enjoys according to Norwegian law. Its interest to intervene in the case is thus distinct from that of the Norwegian State, and reference is made to the judgment in *Freistaat Sachsen* v *Commission*, cited above, paragraphs 89 to 92.

36 The County is represented by advokat Bjørnar Alterskjær and advokat Robert Lund of Kluge Law Firm, Norway. Pursuant to Article 33(2) RoP, the applicant agrees to accept service by electronic mail at the e-mail address specified in the application for leave to intervene.

37 The County submits that, as notice of the application was published in the Official Journal of the European Union on 9 March 2017, the time limit for the application to intervene was thus 20 April 2017 and its application to intervene is therefore timely.

IV OBSERVATIONS OF THE PARTIES

38 The applicant contends that the County will only have a right to intervene if it is both directly affected by the contested decision and its interest in the result of the case is certain, which will be the case if it shows that its interests are distinct from those of the State. Accepting the contrary would undermine the institutional balance provided in the SCA and the Statute, by allowing any public entity to intervene in court proceedings simply by pleading the interests of the State (reference is made to the Order of the Vice President in *SNCM* v *Commission*, C-418/15 P(I), EU:C:2015:671, paragraph 6 and case law cited, and the Order of the President in *1. garantovaná a.s.* v *Commission*, T-392/09 R, EU:T:2011:63, paragraph 12).

39 In the case at hand, the applicant submits that the County has not provided evidence to show that its interest is distinct from that of the State. In fact, the contested decision was addressed to Norway, the operative part of that decision did not impose any rights or duties on the County and the contested aid measures concern a national aid scheme established by national law, subject to powers delegated to the Government.

40 The applicant further submits that the County has not presented any evidence that it enjoys full regional autonomy over the national aid scheme and the contested aid measures, other than to implement that aid scheme in accordance with national law and subject to the regulatory powers and monitoring of the Government. Moreover, all aid measures had ceased by the end of the period 2014-2016, having expired on their own terms, meaning that the contested decision does not concern any existing responsibility for the County to dispense aid in relation to these measures (reference is made to the order in *Castelnou Energía* v *Commission*, T-57/11, EU:T:2012:582, paragraph 11).

41 The applicant further submits that the County cannot be compared to Freistaat Sachsen and Het Vlaamse Gewest, which had standing in the cases cited. The first entity is one of the German Länder, with its own parliament and government and powers originating in the German Constitution, while the second entity is one of the three autonomous regions in Belgium, also with its own parliament and government and powers originating in the Belgian Constitution. Here, the County has not demonstrated the alleged full regional autonomy, nor financial autonomy, in that it seems not to have any other financial means than those provided for by the government and through the State budget, which remain subject to the control and discretion of the State. Moreover, its decisions are subject to legality reviews of the Government. In this regard, the applicant refers to Case E-14/10 *Konkurrenten* v *ESA* [2011] EFTA Ct. Rep. 266. As such, the County has not shown that its interest is distinct from that of the State in the results of the case (reference is made to the judgments in *Landesanstalt für Medien Nordrhein-Westfalen* v *Commission*, T2/08, EU:T:2009:384, paragraph 43, and *DEFI* v *Commission*, 282/85, EU:C:1986:316, paragraphs 18 and 19).

42 The applicant argues further that the implementation of any future recovery would be responsibility of the State and not the County (reference is made to the judgment in *Commission* v *France*, C-63/14, EU:C:2015:458, paragraph 44). The letter from the Government of 29 October 2015 is strictly limited to the decision at issue, and it is for the State to decide how to implement any future recovery obligation. The settlement agreement makes it equally clear that it merely implements the recovery obligation in the contested decision. Therefore, the County could only have a mere indirect interest in the result of the case.

43 Therefore, the applicant requests the Court to:

1. *Dismiss the application for leave to intervene from the County of Aust-Agder.*

2. *Order the County of Aust-Agder to bear costs of Konkurrenten.no AS.*

44 The defendant argues, making reference to the Order of the President in Case E14/10 *Konkurrenten* v *ESA*, cited above, paragraph 11, that where the subject matter of a contested decision concerns State aid, the recipients of such aid have a direct and existing interest in the case. In the defendant's view, a similar reasoning should apply to the authority granting State aid. Here, the County granted the State aid in full autonomy and would be obliged to initiate administrative proceedings for the recovery of the said aid if the Court were to decide that the contested payments must be classified as new aid. As a consequence, the outcome will have a direct effect on the County's obligation, concerning the scope and amount of State aid unlawfully received to be recovered from Nettbuss Sør.

45 Accordingly, the defendant submits that the Court should grant the County leave to intervene in the case.

V LAW

46 Pursuant to the second paragraph of Article 36 of the Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case. The third paragraph of Article 36 of the Statute provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.

47 The assessment of whether an applicant for intervention has established an interest in the result of the case within the meaning of the Statute requires that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and, thus, in the ruling on the specific act whose annulment is sought (see the Order of the President of 1 July 2013 in Case E5/13 *DB Schenker V*, paragraph 40).

48 The subject of the contested decision is aid granted by the applicant intervener to Nettbuss Sør. In providing such aid, the County exercised its own discretionary powers through its contracts with Nettbuss Sør for certain local bus services. Additionally, the applicant intervener was formally ordered by the Norwegian central government authorities, pursuant to national law, to recover the State aid at issue. As such, the outcome of the challenge to the defendant's decision is likely to have an impact on the financial resources and economy of the County. Consequently, the County has established a direct and existing interest in supporting the defendant in the case as required by the second paragraph of Article 36 of the Statute (compare the judgments in *Het Vlaamse Gewest (Flemish Region)* v *Commission*, cited above, paragraphs 29 and 30; and *Freistaat Sachsen* v *Commission*, cited above, paragraph 84; and the Order of the President of the Fifth Chamber in *Bayerische Motoren*

Werke AG v *Commission*, T671/14, EU:T:2015:322, paragraphs 19 and 20).

49 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 9 March 2017 in the EEA Section of the Official Journal of the European Union. Accordingly, the time limit for submission of an application to intervene was 20 April 2017.

50 The present application to intervene was lodged at the Court's Registry on 19 April 2017, and is therefore timely.

51 In light of the above, the County of Aust-Agder is granted leave to intervene in the case in support of the form of order sought by the defendant.

On those grounds,

The President

hereby orders:

1. **The County of Aust-Agder is granted leave to intervene in Case E-1/17 in support of the form of order sought by the defendant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg,
12 July 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the President

12 July 2017

(Intervention – Interest in the result of the case – Aid recipient)

In Case E-1/17,

Konkurrenten.no AS, established in Evje (Norway),

represented by Jon Midthjell, advokat,

— applicant,

≡V≡

EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

— defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision No 179/15/COL of 7 May 2015, closing a formal investigation concerning State aid granted to Nettbuss Sør AS,

The President

makes the following

Order

I BACKGROUND

1 Konkurrenten.no AS ("Konkurrenten" or "the applicant") is a privately owned company owned by Olto Holding AS, which operates an express bus service between Oslo and Kristiansand (Norway). Nettbuss Sør AS ("Nettbuss Sør") was the applicant's main competitor in the express bus market for the same route between 2004-2014.

2 Nettbuss Sør AS (formerly Aust-Agder Trafikkselskap AS) was established in 1986 and was owned jointly by the County of Aust-Agder and NSB AS, the State-owned national rail operator. On 1 September 1988, NSB AS established a new division, NSB Biltrafikk which acquired full ownership of Aust-Agder Trafikkselskap AS from the county. NSB Biltrafikk was reconstituted as a limited liability company on 29 November 1996 and was renamed Nettbuss AS on 10 February 2000. Nettbuss Sør operated as a wholly-owned subsidiary until 16 December 2015 when it merged with its parent company, Nettbuss.

II FACTS AND PROCEDURE

3 On 23 March 2011, the applicant filed a combined State aid and public procurement complaint against Norway, contending that the County of Aust-Agder had, since 2004, awarded contracts for the provision of local bus services to Nettbuss Sør in excess of NOK 1 billion (approximately EUR 125 million) without any public

tender or any other form of competition. This led the EFTA Surveillance Authority ("the defendant" or "ESA") to open two separate investigations: one on public procurement issues (ESA cases No 69548 and 69656) and another on State aid issues (ESA cases No 69694 and 73321).

4 The public procurement part of the complaint resulted in ESA issuing a letter of formal notice to Norway on 12 October 2011, which led to the adoption of a reasoned opinion against Norway on 27 June 2012.

5 On 10 November 2011, ESA sent to the Norwegian authorities the State aid complaint it had received from Konkurrenten, requesting information from them. Subsequently, there was a series of correspondence between ESA and the Norwegian authorities, requesting and receiving additional information, ending on 18 January 2013.

6 On 6 February 2013, by way of ESA Decision No. 60/13/COL, ESA opened a formal investigation into the State aid matter. The Norwegian authorities and Konkurrenten responded to the opening decision by way of letters dated 5 April 2013 and 23 May 2013, respectively. On 21 and 26 June 2013, ESA sent to the Norwegian authorities the comments from Konkurrenten and two other interested parties, including Nettbuss Sør. The Norwegian authorities responded by letter of 12 August 2013. There followed a series of letters between ESA and the Norwegian authorities requesting and receiving further information and clarifications from 17 December 2013 to 22 December 2014.

7 On 7 May 2015, ESA issued Decision No 179/15/COL of 7 May 2015 ("the contested decision"). The operative part of the contested decision reads as follows:

"Article 1

The compensation for local scheduled bus transport (including the financing of the ATP project) and school bus transport in Aust-Agder in the period from 1994 until today constitutes state aid within the meaning of Article 61(1) of the EEA Agreement that has been granted under an existing aid scheme; and the formal investigation into it is therefore closed.

Article 2

The payments that Nettbuss Sør AS received outside the remits of the existing aid scheme referred to in Article 1 from 2004 to 2014 constitute state aid within the meaning of Article 61(1) of the EEA Agreement which is incompatible with the functioning of the EEA Agreement.

Article 3

The Norwegian authorities shall take all necessary measures to recover from Nettbuss Sør AS the aid referred to in Article 2 that was unlawfully made available to it.

The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

Article 5

The Norwegian authorities shall, within two months from the date of notification of this Decision, submit the following information to the Authority:

1. The total amount (principal and recovery interests) to be recovered from Nettbuss Sør AS;

2. To the extent possible, the dates on which the sums to be recovered were put at the disposal of Nettbuss Sør AS;

3. A detailed report on the progress made and the measures already taken to comply with this Decision; and

4. Documents proving that recovery of the unlawful and incompatible aid from Nettbuss Sør AS is under way (e.g. circulars, recovery orders issued etc).

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version of this Decision is authentic."

8 By letter of 7 July 2015, in accordance with Article 5 of the contested decision, the Norwegian authorities informed the defendant that the total amount of unlawful aid granted to Nettbuss Sør was NOK 99 453 890. The letter set out how the sum had been calculated.

9 On 7 September 2015, the time limit set out in Article 4 of the contested decision for Norway to recover the unlawful aid expired. Recovery had not taken place.

10 On 25 September 2015, the applicant filed a new complaint with the defendant concerning the failure of the Norwegian authorities to comply with the contested decision and the recovery obligation pursuant to Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA"). Konkurrenten called on ESA to bring Norway before the Court under the fast-track procedure in Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

11 On 6 October 2015, the Norwegian authorities wrote to ESA asking for a clarification of the contested decision, attaching a letter written by the County of Aust-Agder.

12 On 26 October 2015, ESA replied to that letter. It states:

"In conclusion, the following overcompensatory payments shall be deducted from the recovery claim:

i. Transportation of schoolchildren to and from swimming lessons and for a specific bus route (paragraph 244);

ii. Production regarding school years and 'duplication school years', as well as for school bus services (paragraph 245); and

iii. Shortening of stretches without the County's approval (paragraph 246)."

13 On 12 November 2015, the Norwegian authorities wrote to ESA. They noted that "in order to comply with the Authority's demarcation of the new aid measures, the Norwegian authorities will have to recalculate the amount to be recovered, and present a significantly reduced claim to Nettbuss". They further noted that it would not be possible, in the circumstances, to implement the recovery order by 26 November 2015.

14 On 8 September 2016, the County of Aust-Agder and Nettbuss AS ("Nettbuss") entered into a settlement agreement, whereby Nettbuss agreed to repay NOK 5 million (approximately EUR 625 000).

15 On 11 January 2017, the applicant lodged an application pursuant to the second paragraph of Article 36 SCA. The applicant considers that the contested decision has left intact virtually all State aid received by Nettbuss Sør from the County of Aust-Agder, during a 10-year period from 2004-2014. The applicant relies on three pleas in law and submits that the contested decision conflicts with the definitions specified in Article 1(b)(i) and 1(c) of Part II to Protocol 3 SCA, and infringes the duty to state reasons as required by Article 16 SCA and the duty to conduct a diligent and impartial investigation. Therefore, the applicant requests the Court to order as follows:

1. Annul ESA decision no. 179/15/COL dated 7 May 2015; and

2. Order the defendant and any intervener to pay the costs.

16 On 20 March 2017, the defendant lodged its statement of defence. The defendant asserts that the application does not meet formal requirements set out in Article 19 of the Statute of the Court ("the Statute") and Article 33 of the Rules of Procedure ("RoP") and opposes the three pleas in law relied on by the applicant. The defendant requests the Court to:

1. Dismiss the Application as inadmissible.

2. Alternatively, to dismiss the Application as unfounded.

3. Order the Applicant to pay the costs of the proceedings.

17 On 5 April 2017, the applicant requested an extension of time to submit the reply from 24 April 2017 to 8 May 2017.

18 On 11 April 2017, the Registrar wrote to the applicant company informing it that, pursuant to Article 78 RoP, the President had

granted an extension of the time limit for submitting a reply to 8 May 2017.

19 On 19 April 2017, the Government of Norway submitted an application for leave to intervene.

20 Also on 19 April 2017, the County of Aust-Agder submitted an application for leave to intervene.

21 On 21 April 2017, Nettbuss AS submitted an application for leave to intervene.

22 On 25 April 2017, the present application to intervene was served on the parties in accordance with Article 89(2) RoP.

23 On 5 May 2017, ESA submitted comments on the applications for leave to intervene lodged by the Norwegian Government, the County of Aust-Agder and Nettbuss.

24 On 8 May 2017, the applicant submitted its reply.

25 On 9 May 2017, the applicant submitted comments on the applications for leave to intervene lodged by the County of Aust-Agder and Nettbuss.

26 On 24 May 2017, the European Commission ("the Commission") submitted written observations pursuant to Article 20 of the Statute.

III SUBMISSIONS OF THE APPLICANT INTERVENER

27 Nettbuss seeks leave to intervene in support of the form of order sought by the defendant in accordance with the second paragraph of Article 36 SCA. Nettbuss submits that as the application was published in the Official Journal of the European Union on 9 March 2017, its application is timely.

28 Nettbuss submits that the subject of the contested decision is aid granted to Nettbuss Sør AS (now incorporated in Nettbuss AS) in the period 2004-2014. It submits that, according to established case-law, a party may intervene in a case where it has a direct and existing interest in the ruling on the forms of order sought and makes reference to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 9.

29 Nettbuss makes reference to the Order of the President of 25 March 2011 in Case E14/10 *Konkurrenten.no AS* v *ESA* [2011] EFTA Ct. Rep. 266, paragraph 11, and submits that, as the recipient of the contested aid, it has a direct and existing interest in the grant of the order sought by the defendant, and in the outcome of the case, which will have a direct economic effect on it, as well as reputational consequences.

30 Nettbuss concludes that as the case will directly affect it, it must be clear that Nettbuss has an interest in the result of the case and submits that, pursuant to the second paragraph of Article 36 SCA, it should be granted leave to intervene.

IV OBSERVATIONS OF THE PARTIES

31 The applicant submits that the application from Nettbuss for leave to intervene should be dismissed.

32 First, it notes that Nettbuss incorrectly relies on the second paragraph of Article 36 SCA and not the second paragraph of Article 36 of the Statute.

33 Second, it contends that the real aid beneficiary is Nettbuss Sør AS and not Nettbuss AS. The applicant asserts that no proof of incorporation or of assumption of the State aid liability by Nettbuss AS has been provided. Consequently, Nettbuss cannot rely on the Order of the President in Case E-14/10 *Konkurrenten*, cited above, as

that order concerns the possibility of leave to intervene for a beneficiary of State aid. As such, the applicant maintains that Nettbuss has not proved that it has a direct and existing interest in the result of the case. At most, according to Konkurrenten, the applicant intervener would have an indirect interest in the result of the case since the contested decision was addressed to Norway, and Article 61 EEA is addressed to the EEA States.

34 Third, the applicant contends that Nettbuss has failed to submit proof that its power of attorney has been signed by a person authorised to do so on behalf of the company, in breach of Articles 89(1) and 33(5)(b) RoP. In addition, pursuant to Article 17(2) of the Statute, an applicant intervener must be represented by a lawyer. In this regard, Konkurrenten makes reference to the Order of the President of 21 December 2012 in Case E-7/12 *DB Schenker* v *ESA* [2013] EFTA Ct. Rep. 356, paragraphs 28 and 29. Nettbuss, however, has presented a power of attorney issued to a law firm and not to an individual lawyer. Consequently, the applicant asserts that Nettbuss has failed to submit a valid power of attorney as required by Article 33(5)(b) RoP.

35 The applicant requests the Court to:

1. Dismiss the application for leave to intervene from Nettbuss AS

2. Order Nettbuss AS to bear the costs of Konkurrenten.no AS

36 According to the defendant, Nettbuss has substantiated a sufficient interest in the result of the case within the meaning of the second paragraph of Article 36 of the Statute, as required by Article 89(1)(f) RoP. It submits that the concept of an interest in the result of the case has previously been defined in light of the actual subject matter of the dispute and understood as meaning a direct and existing interest in the ruling on the form or forms of order sought and makes reference to the Order of the President of 30 May 2013 in Case E-4/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 1180, paragraph 19; the

Order of the President of 24 March 2015 in Case E22/14 *DB Schenker* v *ESA* [2015] EFTA Ct. Rep. 350, paragraph 31; and the Order of the President in *Schenker* v *Air France*, C589/11 P(I), EU:C:2012:332, paragraph 10.

37 The defendant submits that the Order of the President of 25 March 2011 in Case E14/10 *Konkurrenten.no AS* v *ESA*, cited above, clarified that, where the subject matter of the contested decision concerned State aid, the recipient of the contested State aid had a direct and existing interest in the case and thus was granted leave to intervene. In view of the information that Nettbuss Sør AS was incorporated in Nettbuss AS, ESA assumes that all rights and obligations of Nettbuss Sør AS have been transferred to the latter. Accordingly, Nettbuss should be granted leave to intervene in the present case.

V LAW

ADMISSIBILITY

38 With respect to the assertion that Nettbuss has failed to submit proof that its power of attorney has been signed by a person properly authorised to do so, it is clear from the Certificate of Registration issued by the Brønnøysund Register Centre that the power of signature is granted to the chair of the board and one board member jointly. The power of attorney issued by Nettbuss is signed by the chair of its board, and one board member jointly.

39 The power of attorney seeks to authorise Advokatfirmaet Schjødt AS to represent Nettbuss in all matters concerning the present case including receipt of "all messages concerning the opposition, including announcements and other procedural communications". The letter of good standing issued by the Norwegian Supervisory Council for Legal Practice issued on 20 April 2017 states that "Olav

Kolstad is by the date of this confirmation, registered by the Supervisory Council for Legal Practice as a practising advocate in *Advokatfirmaet Schjødt AS*". The application for leave to intervene bears the name of Olav Kolstad and has been signed by Camilla Fossem *advokatfullmektig* on her principal's behalf.

40 Pursuant to Article 17 of the Court's Statute, parties other than any EFTA State, ESA, the European Union and the Commission must be represented by a lawyer. Such a lawyer must be authorised to practise before a court of an EEA State.

41 Article 17(2) and (3) of the Court's Statute, must be interpreted, so far as possible, independently, without reference to national law (see the Order of the President of 21 December 2012 in Case E-7/12 *DB Schenker* v *ESA*, cited above, paragraph 27 and case law cited).

42 The Court has held that term "represented" in the second paragraph of Article 17 of the Statute must be interpreted as meaning that an individual is not authorised to act in person, but must use the services of a third person authorised to practise before a court of an EEA State (see Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 44, and to the same effect, the Order of the President in Case E-7/12 *DB Schenker* v *ESA* [2013] EFTA Ct. Rep. 356, paragraph 31).

43 As far as legal persons are concerned, the Court has held that the requirement of representation by a third party seeks to ensure that they are represented by someone who is sufficiently detached from the legal person represented. Whether this is so must be determined by the Court on a case by case basis. When interpreting the second paragraph of Article 17 of the Statute, the decisive factor is whether the relationship, regardless of its type, between the lawyer and his client is such as to put into doubt the independence of that lawyer, as required under EEA law (see *Abelia* v *ESA*, cited above, paragraphs 46 and 47).

44 It is clear from the present application, which bears his name, that Dr Kolstad, a qualified lawyer and partner of Advokatfirmaet Schjødt AS, an independent law firm, represents Nettbuss. He is assisted by Ms Fossem *advokatfullmektig* who signed the application on behalf of her principal. Nothing has been raised to put into doubt, in any way, the independence of Dr Kolstad, who must be considered to possess the necessary independence, for the purposes of the second paragraph of Article 17 of the Statute, to represent the applicant in the present case.

45 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 9 March 2017 in the EEA Section of the Official Journal of the European Union. Accordingly, the time limit for submission of an application to intervene was 20 April 2017.

46 The present application to intervene was lodged at the Court's Registry on 20 April 2017, and is therefore timely.

INTEREST IN THE RESULT OF THE CASE

47 It is readily apparent from the application for leave to intervene that the reference by Nettbuss to the second paragraph of Article 36 SCA and not the second paragraph of Article 36 of the Statute is a mere clerical error.

48 Pursuant to the second paragraph of Article 36 of the Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case. The third paragraph of Article 36 of the Statute provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.

49 An interest in the result of a case within the meaning of the Statute must be understood as meaning that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and thus, in the ruling on the specific act whose annulment is sought (see *inter alia* the Order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no AS* v *ESA*, cited above, paragraph 10).

50 The subject of the contested decision is aid granted by the Norwegian authorities to Nettbuss Sør AS which has been merged, or incorporated, into Nettbuss AS, as is clear from *inter alia* the application. Consequently, Nettbuss has established a direct and existing interest in supporting the defendant in the case as required by the second paragraph of Article 36 of the Statute (see the Order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no AS* v *ESA*, cited above, paragraph 11).

51 In light of the above, Nettbuss AS is granted leave to intervene in the case in support of the form of order sought by the defendant.

On those grounds,

The President

hereby orders:

1. **Nettbuss AS is granted leave to intervene in Case E-1/17 in support of the form of order sought by the defendant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg,
12 July 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President