

Case

E-7/16

Míla ehf.



EFTA Surveillance Authority

(Preliminary objection to admissibility – State aid – Decision to close formal investigation procedure)

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Order of the Court, 15 November 2016

Summary of the Order

- 1 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. Persons other than those to whom a decision is addressed may claim to be individually concerned only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision.
- 2 In State aid law an applicant who challenges the merits of a decision appraising State aid is considered to be individually concerned by that decision only if its market position is substantially affected by the aid to which the contested decision relates.
- 3 Míla has not established that its market position is substantially affected by the measure which is the subject of the contested decision. Míla therefore failed to demonstrate that the present circumstances distinguish it individually. Consequently, Míla lacks standing to challenge the contested decision.

Order of the Court

15 November 2016

(Preliminary objection to admissibility – State aid – Decision to close formal investigation procedure)

In Case E-7/16,

Míla ehf., represented by Espen Bakken and Atle Erling Lunder, Attorneys-at-law,
– *applicant*,

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EFTA Surveillance Authority, represented by Carsten Zatschler and Maria Moustakali, members of its Department of Legal & Executive Affairs, acting as Agents,
– *defendant*,

APPLICATION for the annulment of Decision No 061/16/COL of 16 March 2016 of the EFTA Surveillance Authority to close the formal investigation into alleged State aid through the lease of an optical fibre previously operated on behalf of NATO,

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 parties,
makes the following

Order

I LEGAL BACKGROUND

- 1 Article 61(1) of the Agreement on the European Economic Area (“the EEA Agreement” or “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 *inter alia*:

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 Article 87(1), (2) and (4) of the Court’s Rules of Procedure (“RoP”) reads:

1. *A party applying to the Court for a decision on a preliminary objection or other preliminary plea not going to the substance of the case shall make the application by a separate document. The application must state the pleas of fact and law relied on and the*

form of order sought by the applicant; any supporting documents must be annexed to it.

2. *As soon as the application has been lodged, the President shall prescribe a period within which the opposite party may lodge a document containing a statement of the form of order sought by that party and its pleas in law.*

...

4. *The Court shall decide on the application or reserve its decision for the final judgment.*

...

II FACTS AND PROCEDURE

- 4 There is an eight-fibre optical cable which circles Iceland. The cable was laid in cooperation with NATO to service the Icelandic Air Defence System.
- 5 In August 2007, the Icelandic Government fully took over the operation of three of the optical fibres. Míla ehf. (“Míla”), which operates an infrastructure telecommunications service, owns the remaining five fibres.
- 6 On 1 February 2010, following a tender procedure, the Icelandic Defence Agency entered into a contract with Og Fjarskipti hf. (“Fjarskipti”) for a 10-year lease of one of the three optical fibres that were under the Government’s operation. The annual rental price, which was to include repair and maintenance of the fibre, was set at ISK 19 150 000.
- 7 On 16 July 2010, Míla lodged a complaint with the EFTA Surveillance Authority (“ESA”) alleging that the rental price was significantly below market price and therefore amounted to State aid.

- 8 On 21 November 2012, after a preliminary examination, ESA decided to close the case on the basis that the lease for the use and operation of the optical fibre did not involve State aid within the meaning of Article 61 EEA. Accordingly, ESA concluded that there was no need to initiate the formal investigation procedure.
- 9 On 19 February 2013, Míla brought an action for the annulment of ESA's decision. By a judgment of 27 January 2014 (Case E-1/13 *Míla v ESA* [2014] EFTA Ct. Rep. 4) ("*Míla I*"), the Court held that ESA should have had doubts or serious difficulties as to whether the lease agreement conferred an economic advantage on FjarSKIPTI. ESA's decision to close the case without initiating the formal investigation procedure therefore infringed the rights of Míla as an interested party in the case. Consequently, the Court annulled ESA's decision.
- 10 On 16 July 2014, ESA initiated the formal investigation procedure into potential State aid granted through the lease of the NATO optical fibre. In the course of ESA's investigation, comments were received from the Icelandic authorities, Míla, FjarSKIPTI and a private individual.
- 11 On 16 March 2016, ESA adopted Decision No 061/16/COL to close the formal investigation into alleged State aid ("the contested decision"). Articles 1 and 2 of the contested decision read:

Article 1

The lease by the Defence Agency of the Ministry for Foreign Affairs in Iceland with Og FjarSKIPTI of 1 February 2010 for the use and operation of an optical fibre does not involve State aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to Iceland.

- 12 By an application registered at the Court on 21 June 2016, Míla brought an action against ESA. Míla requests the Court to:
1. *Declare void Article 1 and 2 of decision 061/16/COL.*
 2. *Order the Authority to pay the costs of the present proceedings.*
- 13 On 12 July 2016, ESA lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Rules of Procedure (“RoP”). ESA claims that the Court should:
1. *Dismiss the application as inadmissible; and*
 2. *Order Míla to pay the costs.*
- 14 On 26 August 2016, Míla submitted, pursuant to Article 87(2) RoP, its observations on the preliminary objection, requesting the Court to refuse ESA’s objection of inadmissibility.

III ARGUMENTS OF THE PARTIES ON THE PRELIMINARY OBJECTION TO ADMISSIBILITY

- 15 In its application of 21 June 2016, Míla argues that it is directly and individually concerned by the contested decision. Míla has a direct interest in the annulment of the contested decision due to its competitive relationship with the alleged aid recipient. Furthermore, the favourable terms offered in the lease contract has significantly affected Míla’s ability to compete in the market for telecommunications services. Consequently, Míla is also individually concerned by the contested decision. This is also confirmed by Míla’s significant role in the investigation of the case.
- 16 In its preliminary objection of inadmissibility, ESA submits that Míla lacks standing to challenge the merits of the contested decision. Reference is made to paragraph 57 of the Court’s judgment in *Míla I*,

which states that Míla “has not established that its position on the market may be significantly affected by the State aid to which the contested decision relates”, and that, “[c]onsequently, the applicant lacks legal standing to challenge the merits of the contested decision”.

- 17 ESA maintains that Míla has, despite that clear statement, limited its submissions on admissibility in its application in the present case to the same points in law and in fact that it had put forward in *Míla I*. The ratio of paragraph 57 of the judgment in *Míla I* and the reasoning underpinning it is therefore fully applicable to the present case.
- 18 Even though the question of whether Míla’s market position was substantially affected was not a distinct question in *Míla I*, this does not in ESA’s view mean that the Court erred in its unambiguous conclusion in paragraph 57.
- 19 As for Míla’s role and involvement in the case, ESA contends that Míla’s participation cannot be distinguished from the role of any complainant in a State aid case, and in any event has no bearing on the standing test set out in paragraph 57 in *Míla I*.
- 20 In its statement in response to ESA’s inadmissibility plea, Míla submits that the Court’s statement in paragraph 57 of the judgment in *Míla I* merely concerns the legal standing in that specific case. The admissibility of the present case must be subject to an individual assessment based on the facts and arguments put forward.
- 21 Míla contends that it is directly and individually concerned by ESA’s decision. Its position follows from its particular role in the progress of the case, but most importantly from its position as competitor to the alleged aid recipient. Míla notes that it is one of at least four entities operating on the wholesale market for trunk segments of leased lines in Iceland.

- 22 Míla refers to the 2011 Annual Report of the Icelandic Post and Telecom Administration (“PTA”), which describes how competition increased in the electronic communications market, *inter alia*, because of the tender procedure which led to the lease agreement at issue. Reference is also made to the PTA’s 2015 Analysis of the wholesale market for trunk segments of leased lines, which confirms that Míla’s market share has decreased from around 85 to 90 per cent in 2005 to around 75 to 80 per cent in 2014. Míla alleges that the decrease in market share is even bigger.
- 23 Míla submits that the increased competition has affected Míla’s turnover in a number of contractual relationships from 2010 to 2015, in particular where Míla has lost contracts to Fjarskipti. Reference is particularly made to a contract with the national radio and television company, which was of large value to Míla and affected its market position. Moreover, Míla refers to the fact that, because of its traditionally strong market position, it is subject to price regulation imposed by the PTA, whereas Fjarskipti is not.
- 24 Míla concludes that, irrespective of the size of change in market share, Fjarskipti’s entry into the market demonstrates that Míla is directly and individually concerned by the case and has a particular interest in the question of whether the leasing agreement constitutes State aid.

IV FINDINGS OF THE COURT

- 25 The present action is brought under the second paragraph of Article 36 SCA. Míla seeks the annulment of the contested decision, by which ESA closed the formal investigation procedure into potential State aid granted through the lease agreement with Fjarskipti.

- 26 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 Iceland, it must be considered whether it is of direct and individual concern to Míla.
- 27 Pursuant to settled case law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see Case E-19/13 *Konkurrenten.no v ESA* [2015] EFTA Ct. Rep. 52, paragraph 94 and case law cited).
- 28 In the present case, Míla has played an active role during the procedure before ESA. It filed the initial complaint with ESA on 16 July 2010, sought the annulment of ESA's decision not to open a formal investigation, which was annulled by the Court in *Míla I*, and submitted observations during the subsequent formal investigation procedure. Those factors are relevant to the assessment of legal standing (compare *Konkurrenten.no v ESA*, cited above, paragraph 97 and case law cited).
- 29 However, in State aid law an applicant who challenges the merits of a decision appraising State aid is considered to be individually concerned by that decision only if its market position is substantially affected by the aid to which the contested decision relates (see *Konkurrenten.no v ESA*, cited above, paragraph 95 and case law cited).

- 30 Accordingly, Míla must demonstrate that its position on the market is substantially affected by the lease agreement to which the contested decision relates. It cannot rely solely on its status as a competitor of the alleged aid recipient, but must additionally show that its circumstances distinguish it in a similar way to the recipient (see *Konkurrenten.no v ESA*, cited above, paragraph 96 and case law cited).
- 31 Therefore, the mere fact that the measure considered in the contested decision may have some impact on the competitive relationships existing on the relevant market and that Míla is in a competitive relationship with Fjarskipti does not mean that Míla's competitive position is substantially affected. Míla must also demonstrate the extent of the detriment to its market position (see *Konkurrenten.no v ESA*, cited above, paragraph 99 and case law cited).
- 32 To that end, Míla must establish a link between the measure which is the subject of the contested decision and the alleged substantial effect on its position on the market concerned. However, demonstrating a substantial adverse effect on its position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance, but may be made by demonstrating the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (see *Konkurrenten.no v ESA*, cited above, paragraph 100 and case law cited).
- 33 In the present case, Míla does not suggest it is part of a closed group of competitors. To the contrary, it has stated that it is one of at least four entities operating on the relevant market. Míla has not provided the Court with any information suggesting that its market share is substantially affected by the alleged aid. In addition to the indication of decrease in market share being imprecise, Míla has not demonstrated that the decrease is actually a result of the lease agreement to which the contested decision relates. Furthermore,

Míla has submitted no evidence concerning the loss of contracts or their effect on its market position.

- 34 It follows from the foregoing that Míla has not established that its market position is substantially affected by the measure which is the subject of the contested decision. Míla has therefore failed to demonstrate that the present circumstances distinguish it individually (compare *Konkurrenten.no v ESA*, cited above, paragraph 96 and case law cited).
- 35 Consequently, Míla lacks standing to challenge the contested decision. The application must therefore be dismissed as inadmissible.

V COSTS

- 36 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 Míla be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Míla must be ordered to pay the costs.

On those grounds,

The Court

hereby orders:

1. **The application is dismissed as inadmissible.**
2. **The applicant is to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

*Luxembourg,
15 November 2016.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President