



REPORT FOR THE HEARING
in Case E-6/09
Admissibility

APPLICATION to the Court pursuant to Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Magasin- og Ukepresseforeningen

and

EFTA Surveillance Authority

seeking a declaration that the EFTA Surveillance Authority has failed to act on a complaint lodged with the Authority in August 2006 concerning State aid to newspapers.

I Introduction

1. Magasin- og Ukepresseforeningen (“Association for the Magazine and Weekly Press”, hereinafter “the Applicant”) is an association of Norwegian magazine publishers with the purpose of safeguarding the interests of the weekly press. It covers 74 magazine titles, issued by 10 editorial houses. The number of magazines produced by the Applicant’s members totals approximately 88 million annually and represents 95% of magazines in Norway.

2. The application concerns an alleged failure by the EFTA Surveillance Authority (hereinafter “the Defendant”) to act on a complaint lodged by the Applicant with the Defendant concerning the VAT exemption of newspapers and periodicals in Norway, which in the view of the Applicant constitutes unlawful State aid under EEA law.

II Legal background

National law

3. In Norway, Act No. 66 of 19 June 1969 relating to Value Added Tax (hereinafter “the VAT Act”) subjects magazines to the normal rate of Value Added Tax (hereinafter “VAT”) of 25% of the taxable base. Newspapers and periodicals are, however, by virtue of section 16(7) and (8) of the VAT Act, “zero-rated”, i.e. output VAT is charged at 0%.

EEA law

4. Article 61(1) of the Agreement on the European Economic Area (hereinafter “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.

5. Paragraphs 3 and 4 of Article 109 EEA read:

3. The EC Commission and the EFTA Surveillance Authority shall receive any complaints concerning the application of this Agreement. They shall inform each other of complaints received.

4. Each of these bodies shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body.

6. Article 1 of Part I of Protocol 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter “SCA”) reads:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

[...]

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it

considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

7. Under Section I of Part II of Protocol 3 SCA *Implementing provisions, Article 1 Definitions* reads:

[...]

(b) *'existing aid'* shall mean:

(i) 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;

[...]

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalization;

[...]

8. Under Section I of Part II of Protocol 3 SCA *Procedure regarding notified aid, Article 4 Preliminary examination of the notification and decisions of the EFTA Surveillance Authority* reads:

[...]

4. *Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').*

5. *The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the EFTA Surveillance Authority does not request any further information. The period can be extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned. Where appropriate, the EFTA Surveillance Authority may fix shorter time limits.*

6. *Where the EFTA Surveillance Authority has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the EFTA*

Surveillance Authority. The EFTA State concerned may thereupon implement the measures in question after giving the EFTA Surveillance Authority prior notice thereof, unless the EFTA Surveillance Authority takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.

9. Under Section II of Part II of Protocol 3 SCA *Procedure regarding notified aid*, Article 4 *Preliminary examination of the notification and decisions of the EFTA Surveillance Authority* reads:

[...]

2. *Where the EFTA Surveillance Authority, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.*

3. *Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61 (1) of the EEA Agreement, it shall decide that the measure is compatible with the functioning of the EEA Agreement (hereinafter referred to as a 'decision not to raise objections'). The decision shall specify which exception under the EEA Agreement has been applied.*

4. *Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').*

10. Under Section II of Part II of Protocol 3 SCA *Procedure regarding notified aid*, Article 6(1) *Formal investigation procedure* reads:

1. *The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the EFTA Surveillance Authority as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the functioning of the EEA Agreement. The decision shall call upon the EFTA State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the EFTA Surveillance Authority may extend the prescribed period.*

11. Under Section V of Part II of Protocol 3 SCA *Procedures regarding existing aid schemes*, Article 17 *Cooperation pursuant to Article 1(1) in Part I* reads:

1. *The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.*

2. *Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a*

period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.

12. Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes*, Article 18 *Proposal for appropriate measures* reads:

Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:

- (a) substantive amendment of the aid scheme,*
- or*
- (b) introduction of procedural requirements,*
- or*
- (c) abolition of the aid scheme.*

13. Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes*, Article 19 *Legal consequences of a proposal for appropriate measures* reads:

1. *Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.*

2. *Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.*

14. Under Section V of Part II of Protocol 3 SCA *Interested Parties*, Article 20 *Rights of interested parties* reads:

1. *Any interested party may submit comments pursuant to Article 6 of this Chapter following an EFTA Surveillance Authority decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the EFTA Surveillance Authority pursuant to Article 7 of this Chapter.*

2. *Any interested party may inform the EFTA Surveillance Authority of any alleged unlawful aid and any alleged misuse of aid. Where the EFTA Surveillance Authority considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the EFTA Surveillance Authority takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.*

3. *At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11 of this Chapter.*

15. Article 37 SCA reads:

Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established.

The action shall be admissible only if the EFTA Surveillance Authority has first been called upon to act. If, within two months of being so called upon, the EFTA Surveillance Authority has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the EFTA Court that the EFTA Surveillance Authority has failed to address to that person any decision.

16. Article 36(2) 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.

III Facts and Procedure

17. By letter dated 25 August 2006, the Applicant lodged a complaint with the Defendant, claiming that the differentiated VAT rates for newspapers and magazines in Norway constitute State aid. The Applicant enclosed two opinions of the Norwegian Competition Authority, according to which the measure was distortive of competition.

18. After having acknowledged receipt of the complaint on 14 September 2006, the Defendant asked the Norwegian authorities for their comments on the complaint on 15 December 2006. The Norwegian authorities submitted their comments on 29 January 2007.

19. Further comments were lodged by the *Mediebedriftenes Landsforening* (the Norwegian Media Businesses' Association) on 22 March 2007 and, on 29 June 2007, the Applicant lodged observations on the comments of the Norwegian authorities.

20. On 17 July 2007, the Defendant sent a letter according to Article 17(2) in Part II of Protocol 3 SCA to the Norwegian authorities in which the Defendant made a preliminary assessment of the contested measures. In the letter, the Defendant stated that, based on the information submitted by the Norwegian authorities, it could not exclude the possibility that the contested measures constituted State aid within the meaning of Article 61(1) EEA and that it doubted that the measures could be regarded as complying with Article 61(3)(c) EEA.

The Defendant's preliminary conclusion was that the contested measures cannot be declared to be compatible with the functioning of the EEA Agreement.

21. The Norwegian authorities replied to the Defendant's letter on 18 September 2007, refuting the Defendant's preliminary assessment.

22. On 7 November 2007, the Applicant lodged with the Defendant observations on the reply of the Norwegian authorities, maintaining and further substantiating its original complaint. On 13 December 2007, the Applicant and its representatives met with servants of the Defendant in Brussels to discuss the case.

23. In the course of 2008, letters expressing support for the complaint were addressed to the Defendant: by the Norwegian Association for Specialized Press on 24 January 2008, by the European Federation of Magazine Publishers on 15 April 2008 and by the International Federation of the Periodical Press on 13 May 2008. In a letter of 10 November 2008, two university professors in the field of media supported the Applicant's contention that the measures at issue are bound to create distortions of competition. On 22 January 2009, the Applicant informed the Defendant of declarations made by the Prime Minister of Norway which in its view recognized that the VAT regime involves State aid and that it entails a distortion of competition.

24. By letter dated 15 January 2009, which the Defendant received on 20 January 2009, the Applicant invited the Defendant to define its position on the complaint, giving notice of the possibility of an action under Article 37 SCA.

25. By letter of 10 March 2009, the Defendant declined the invitation to define its position, stating that the Applicant would not have standing to bring an action for failure to act and that the original complaint was still under consideration.

26. By application registered at the EFTA Court on 14 May 2009, the Applicant submitted the present action, seeking a declaration that the EFTA Surveillance Authority has failed to act on its complaint. The action is based on two pleas in law, namely a breach of the right to good administration and a breach of the right to bring a complaint under Article 109 EEA and Article 20 in Part II of Protocol 3 SCA.

27. On 20 July 2009, the Defendant lodged at the EFTA Court an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87 of the Rules of Procedure of the EFTA Court (hereinafter "the Rules of Procedure"). On 1 September 2009, the Applicant lodged a statement in response to that application.

28. On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87 of the Rules of Procedure, the Court decided that an oral

hearing would be held on the request for a decision on admissibility as a preliminary issue. The Court informed the parties of this decision by letter dated 15 October 2009.

IV Forms of order sought by the parties

29. The Applicant claims that the Court should:

- (i) *Declare that the EFTA Surveillance Authority has failed to act by not acting on the complaint lodged with the Authority in August 2006 concerning State aid to newspapers; and*
- (ii) *Order the EFTA Surveillance Authority to pay the costs of the proceedings.*

30. The Defendant claims that the Court should:

- (i) *Dismiss the Application as inadmissible; and*
- (ii) *Order the Applicant to pay the costs.*

V Written procedure regarding admissibility

31. Pleadings have been received from:

- the Applicant, Magasin- og Ukepresseforeningen, represented by advokat Peter Dyrberg and advokat Jan Magne Juuhl-Langseth, with the law firm of Schjødt.

32. Pursuant to Article 87(1) of the Rules of Procedure of the EFTA Court, a plea of inadmissibility has been received from:

- the Defendant, EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Acting Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as agents.

33. Pursuant to Article 87(2) of the Rules of Procedure of the EFTA Court, a statement regarding the plea of inadmissibility has been received from:

- Magasin- og Ukepresseforeningen, represented by advokat Peter Dyrberg and advokat Jan Magne Juuhl-Langseth, with the law firm of Schjødt.

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

- the Commission of the European Communities, represented by Bernd Martenczuk and Kilian Gross, members of its Legal Service, acting as agents.

The Defendant

The Defendant bases its plea of inadmissibility on two pleas in law: firstly, that there is no obligation to act in cases relating to existing aid, and secondly, that the Applicant is not individually concerned by the alleged failure to act and thus does not have *locus standi*.

35. With regard to the first plea, the Defendant recalls that the possibility to bring an action under Article 37 SCA depends on the existence of an obligation to act.¹

36. The Defendant points out the differences between the rules applying to the review of new and existing aid. Reference is made to the fact that there is no obligation to suspend aid payments pending the Authority's review.² The Defendant submits that, unlike in the situation of complaints regarding new aid, it is under no obligation to act on complaints with regard to existing aid.³ It argues that the review that is performed with regard to existing aid is similar to the surveillance function that the Authority fulfils in relation to the internal market rules, and, accordingly, that the initiative to act lies with the Authority alone, similar to the situation under Article 31 SCA.⁴

37. Having regard to the fact that the contested measures constitute existing aid, the Defendant argues that the Applicant confuses the different procedures relating to new and existing aid. The Defendant considers that the possible courses of action referred to by the Applicant in his application are only available in the presence of new aid, but not under the procedure for existing aid, as regulated in Articles 17–19 in Part II of Protocol 3 SCA.⁵ Under Article 17 in Part II of Protocol 3 SCA, the only options are to not pursue the case or to issue a recommendation proposing appropriate measures, in accordance with Article 18 in Part II of Protocol 3 SCA.

¹ Reference is made to Case 247/87 *Star Fruit Company v Commission* [1989] ECR 291.

² Reference is made to Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, at paragraph 20; and Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraph 66.

³ Reference is made to Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraphs 43–44.

⁴ Reference is made to Case 247/87 *Star Fruit Company v Commission* [1989] ECR 291, at paragraphs 11 and 12; Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, at paragraph 11; and Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraph 57.

⁵ Reference is made to Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraphs 60–63.

38. It is submitted that such a recommendation does not constitute a challengeable act under Article 36 SCA and that, correspondingly, neither can the refusal to adopt such an act be challenged.⁶ In that regard, it is recalled that Articles 36 and 37 SCA prescribe one and the same method of recourse, and that the possibility for individuals to assert their rights does not depend upon whether the institution concerned has acted or failed to act.⁷ The Defendant concludes that the failure to take such a step cannot form the basis of an action for failure to act under Article 37 SCA.

39. With regard to the second plea of inadmissibility, the Defendant recalls that in order to be individually concerned, the decision must affect the applicant by reason of attributes peculiar to it, or by reason of factual circumstances differentiating it from all other persons.⁸

40. The Defendant submits that, whereas “parties concerned” under Article 1(2) in Part I of Protocol 3 SCA have standing to bring an action for annulment against a decision not to open the formal investigation procedure in cases relating to new aid,⁹ case law which is to be seen in relation to the procedural guarantees inherent in the procedure regarding new aid is not relevant in those cases where the relevant procedure is the one laid down in Articles 17 to 19 in Part II of Protocol 3 SCA.¹⁰ In that regard, the Defendant points out that Articles 17 to 19 in Part II of Protocol 3 SCA do not provide procedural rights for third parties.

41. The Defendant argues further that a decision – and correspondingly the failure to adopt such a measure – can only be of direct and individual concern to a third party if it is intended to have legal effects capable of affecting the interests of that party by bringing about a distinct change in its legal position. It is recalled that intermediate measures, the purpose of which is to prepare for a final decision, do not produce such effects.¹¹ The Defendant adds that the legal situation does not change until such time as the State concerned accepts the

⁶ Reference is made to Case T-330/94 *Salt Union v Commission*, [1996] ECR II-1475, at paragraph 36.

⁷ Reference is made to Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, at paragraph 27; Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59; and Joined Cases 97, 193, 99 and 215/86 *Asteris v Commission* [1988] ECR 2181, at paragraph 17.

⁸ Reference is made to Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, at paragraph 62 (and the case law cited therein).

⁹ Reference is made to Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] Ct. Rep. 61, at paragraphs 61–62.

¹⁰ Reference is made to Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, at paragraphs 63–64; and Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] Ct. Rep. 61, at paragraph 64.

¹¹ Reference is made to Case C-521/06 P *Athinaiki v Commission* [2008] ECR I-5829, at paragraphs 29 and 42 (and the case law cited therein).

proposal for appropriate measures.¹² The Defendant thus maintains that a proposal for appropriate measures under Article 18 in Part II of Protocol 3 SCA does not result in legal effects. It then follows that a decision not to propose appropriate measures does not produce legal effects either, and thus cannot be of direct and individual concern to the Applicant.

42. Furthermore, the Defendant argues that the Applicant has not adduced any information as to how the Applicant itself or its members are individually concerned by the alleged failure to act. The Defendant points out that the contested measures are of general application and that, accordingly, it is not sufficient that the Applicant or its members are affected by the alleged aid measure in the same way as other economic operators within the sector concerned. Rather, the Applicant must be affected in a way which distinguishes it from these operators.¹³ As far as the Defendant is concerned, the Applicant's members are not affected by the scheme in any other manner than by virtue of being undertakings in the sector concerned. In the view of the Defendant, this is not sufficient to establish individual concern.¹⁴

43. Lastly, the Defendant considers that the Applicant neither has *locus standi* based on its aims and activities or its involvement in the case. With regard to the former, it is submitted that an association formed to further the collective interests of a category of persons cannot be considered to be individually concerned for the purposes of Articles 36 and 37 SCA by a measure affecting the general interests of that category.¹⁵ With regard to the latter, the Defendant argues that the Applicant's complaints, meetings and correspondence do not constitute

¹² Reference is made to Case C-400/99 *Italy v Commission* [2001] ECR I-7303, at paragraph 61; and Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraph 67.

¹³ Reference is made to Joined Cases E-5 to E-7/04 *Fesil and Finnjord, PIL and others v EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraph 55; and Case T-228/00 *Gruppe ormeggiatori del porto de Venezia v Commission* [2005] ECR II-787, at paragraph 34.

¹⁴ Reference is made to Joined Cases E-5 to E-7/04 *Fesil and Finnjord, PIL and others v EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraph 56; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v Commission* [1999] ECR II-179, at paragraph 45; Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraph 72; and C-106/98 P *Comité d'entreprise de la Société française de production v Commission* [2000] ECR I-3659, at paragraph 41. Further reference is made to Case T-358/02 *Deutsche Post AG and DHL International Srl v Commission* [2004] ECR II-1565, at paragraphs 37–43; Case C-367/04 P *Deutsche Post AG and DHL Express (Italy) Srl v Commission* [2006] ECR I-26, at paragraphs 40–43; Case C-6/92 *Federazione Sindacale Italiana dell'Industria Estrattiva and others v Commission* [1993] ECR I-6357, at paragraphs 11–15; Case T-11/95 *BP Chemicals Limited v Commission* [1998] ECR II-3235, at paragraphs 76–83; and Case T-398/94 *Kahn Scheppvaart BV v Commission* [1996] ECR II-477, at paragraphs 39–41 and 49.

¹⁵ Reference is made to Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft v Commission* [2001] ECR II-1037, at paragraph 49; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v Commission*, [1999] ECR II-179, at paragraphs 55–57 and 60; and Case T-117/04 *Vereniging Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others v Commission* [2006] ECR II-3861, at paragraph 66.

sufficient circumstances peculiar to the Applicant by which it can be distinguished individually from all other persons.¹⁶

The Applicant

44. As a general observation, the Applicant submits that it follows from the fundamental right to good administration that the Defendant must act upon complaints diligently, impartially and within reasonable time.¹⁷ It is added that in the absence of the right to petition, and without the existence of an Ombudsman in the EFTA pillar of the EEA, it is for the EFTA Court alone to ensure the respect of these principles by the Defendant.

45. The Applicant also refers to Article 109(4) EEA. In its view, the right to lodge a complaint entails, in order not to be illusory, also a right to see the complaint processed within a reasonable time. It argues further that as the Defendant has committed itself to receive complaints it must deal with them within a reasonable time.¹⁸

46. Furthermore, the Applicant considers that the exclusive competence of the Defendant to assess the compatibility of existing aid with European law entails that individuals whose legitimate interests are at stake cannot seek protection before the national courts and are restricted to seeking protection from the Defendant. Therefore, the Defendant must take a stand on matters coming within this competence. The failure to do so must be challengeable before the EFTA Court. Otherwise, no remedy would be available for the Applicant to protect its legitimate rights. Such a result would be unacceptable in a community governed by the rule of law.¹⁹

47. In view of this, the Applicant submits that the Defendant may, upon preliminary assessment of an aid measure, find that the measure does not constitute State aid and close the case, that the measure does indeed constitute State aid but that it is compatible and thus close the case, or entertain doubts as to

¹⁶ Reference is made to Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraphs 53–57; Case T-254/05 *Fachvereinigung Mineralfaserindustrie e.V. v Commission* [2007] ECR II-124, at paragraphs 38–40; Case T-117/04 *Vereniging Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others v Commission* [2006] ECR II-3861, at paragraphs 68–73; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v Commission* [1999] ECR II-179, at paragraph 65; and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* [1995] ECR II-1971, at paragraph 60.

¹⁷ Reference is made to Article 41 of the Charter of Fundamental Rights, OJ 2000 C 364/1; Case C-365/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, at paragraph 62; and Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, at paragraph 36.

¹⁸ Reference is made to Case T-9/89 *Hüls v Commission* [1992] ECR II-499, at paragraphs 47 and 48.

¹⁹ Reference is made to Case 222/84 *Johnston* [1986] ECR 1651; and Case 294/83 *Les Verts v Parliament* [1986] ECR 1339.

the compatibility of the aid and open the formal investigation procedure.²⁰ If there are doubts, the ‘default’ option is thus to open the formal investigation procedure.²¹ Notwithstanding the Defendant’s wide discretion in the field of State aid, it must assume its responsibility of exercising diligent and constant supervision and control in this field in order to safeguard the functioning of the internal market.

48. With regard to the first plea of inadmissibility, the Applicant recalls that according to Article 1 in Part I of Protocol 3 SCA, the Defendant shall keep under constant review all systems of existing aid in the EFTA States. The Applicant points out that its only request is that the Defendant defines its position regarding the complaint. By its request, the Applicant aims to protect its fundamental rights conferred by the EEA Agreement and to ensure that the Defendant complies, *inter alia*, with the principle of sound administration. As it does not intend to compel the Defendant to issue any recommendation proposing appropriate measures, the Applicant considers that Case T-330/94 *Salt Union v Commission* bears no relevance to the present case.

49. The Applicant maintains that the Defendant is, by reason of its exclusive competence and the principle of sound administration, under an obligation to act on the complaint.²² The Applicant argues that if the safeguarding of procedural rights is concerned, whether the measure at stake is new or existing aid cannot be the deciding factor.²³ It is added that earmarking the aid in question as existing and not new aid does not change the harmful effects of the aid on workable competition in the market.

50. With regard to the differences between the procedures concerning existing and new aid, it is argued that these cannot have a bearing on the Defendant’s duty to act. The Applicant points out that the substantive assessment of both types of aid is identical. The only fundamental differences are that existing aid may be disbursed until it is found to be incompatible with the common market, while new aid needs clearance by the Authority first and there can be no recovery of existing aid that has been found to be incompatible with European law. To the Applicant, those differences do not require the judiciary to apply different rules to these two types of aid as far as the duty to act and the standing of applicants is concerned.

51. The fact that in the existing aid procedure the Defendant must first issue a proposal for appropriate measures is considered to reflect only the need to hear

²⁰ Reference is made to Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, at paragraph 55.

²¹ Reference is made to Case E-9/04 *The Bankers’ and Securities’ Dealers Association of Iceland v EFTA Surveillance Authority* [2006] Ct. Rep. 41.

²² Reference is made to Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, at paragraph 73.

²³ Reference is made to Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] Ct. Rep. 61, at paragraphs 64 and 65.

the party interested before further action is taken. The Applicant points out that also in the case of new, non-notified aid, the Defendant will first hear the State concerned. It is submitted that the presence of this intermediary step before the opening of formal investigation proceedings does not mean that the Defendant may let the procedure linger in case of doubts. If the Defendant is not convinced by the reply of the State, it must proceed to the next step in the procedure.

52. In that regard, the Applicant refutes the argument of the Defendant that the action is inadmissible because the proposal of appropriate measures is not a legally binding measure.²⁴ It is argued that even though the Defendant does not issue a decision after submitting a letter according to Article 17(2) in Part II of Protocol 3 SCA (hereinafter “Article 17(2) letter”), the next step will either be to issue a recommendation proposing appropriate measures or to decide against pursuing the case. It is submitted that any of these actions would constitute a definition of the Defendant’s position as requested by the Applicant.

53. The fact that none of the actions following an Article 17(2) letter are legally binding does not deprive the Applicant of the right to launch proceedings based on Article 37 SCA. The adoption of an act which is not challengeable by an action for annulment may lead an institution to define its position, and thus terminate a failure to act if that act is a prerequisite for the next step in a procedure which may culminate in the adoption of a legal act, which would be challengeable by an action for annulment.²⁵

54. The Applicant points out that after a proposal of appropriate measures has been issued, the EFTA State concerned may either accept or refuse the measures in question. In the former case, the State will be bound to implement the measures that it has accepted. In the latter case, the Authority will initiate a formal investigation procedure if it still considers that the proposed measures are necessary. Thus, the definition of the Defendant’s position is a prerequisite for a next step which would constitute a challengeable act.

55. According to the Applicant, on this basis it follows that the Defendant’s obligation to define its position is the same in existing and new aid cases.²⁶

56. With regard to the second plea of inadmissibility, the Applicant submits that it is directly and individually concerned by the contested measure. With regard to direct concern, the Applicant considers that as the State will continue to

²⁴ Reference is made to Case T-186/94 *Guerin Automobiles v Commission* [1995] ECR II-1753, at paragraphs 25–26; and Case T-28/90 *Asia Motor France v Commission* [1992] ECR II-2285, at paragraph 29.

²⁵ Reference is made to Joined Cases T-297/01 and T-298/01 *SIC v Commission* [2004] ECR II-743, at paragraph 32.

²⁶ Reference is made to Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] Ct. Rep. 61; and Case E-4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1998] Ct. Rep. 38.

grant the aid, it is directly concerned by the measure.²⁷ The Applicant submits that it is also individually concerned, being a “party concerned” within the meaning of Article 1(2) in Part I of Protocol 3 SCA. This status is derived from the fact that the Applicant represents the competitors of the beneficiaries of the aid in question.²⁸

The Commission

57. The Commission essentially shares the views of the Defendant. It argues that the procedures applying to the review of existing aid are different and separate from the procedures governing new aid.²⁹ The first stages of the existing aid procedure are entirely bilateral in nature, and it is only once the formal investigation procedure is opened that third parties are given the opportunity to submit comments. This stage of the procedure will never be reached if the appropriate measures proposed by the Authority are accepted by the EFTA State.

58. The Commission further submits that there is no automatism as regards the opening of the formal investigation procedure, but that the review of existing aid is characterised by a strong discretionary element. To the Commission, with regard to existing aid the initiative lies with the Defendant alone.³⁰ It refers to the wording of Article 1(1) in Part I of Protocol 3 SCA which, unlike the new aid procedure, does not foresee any role for interested parties in the early stages of the existing aid procedure,³¹ and the differences from the existing aid procedure such as the standstill obligation and the need for recovery for illegal new aid.³²

59. Against this background, the Commission considers the action to be inadmissible for three reasons: firstly, that it is not aimed at obtaining a

²⁷ Reference is made to Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, at paragraph 61; and Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, at paragraphs 27 and 30.

²⁸ Reference is made to Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, at paragraph 67; Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, at paragraph and 31; and Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] Ct. Rep. 61, at paragraphs 62 and 63.

²⁹ Reference is made to Case C-47/91 *Italy v Commission* [1992] ECR I-4145, at paragraph 22; and Case C-312/90 *Spain v Commission* [1992] ECR I-4117, at paragraph 14.

³⁰ Reference is made to Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, at paragraph 11; and Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraphs 57 and 64.

³¹ Reference is made to Case C-198/91 *Cook v Commission* [1993] ECR I-2487, at paragraphs 21–26; Case C-22/91 *Matra v Commission* [1993] ECR I-3203, at paragraph 15–20; and Case E-9/04 *The Bankers’ and Securities’ Dealers Association of Iceland v EFTA Surveillance Authority* [2006] Ct. Rep. 41, at paragraph 51.

³² Reference is made to Case C-47/91 *Italy v Commission* [1992] ECR I-4145, at paragraph 22; and Case C-312/90 *Spain v Commission* [1992] ECR I-4117, at paragraph 14; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, at paragraph 20; Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraph 66; Case C-199/06 *CELF* [2008] ECR I-469, at paragraph 53; and Case 78/76 *Steinike & Weinlig* [1977] ECR 595, at paragraph 15.

reviewable act; secondly, that the Applicant lacks the necessary standing; and thirdly, that the Defendant is under no obligation to act on existing aid.

60. With regard to the first reason, the Commission recalls that Articles 36 and 37 SCA prescribe, in essence, the same method of recourse. An action for failure to act must therefore aim to obtain a measure which alters the legal situation of the applicant, and thus could constitute a challengeable act under Article 36 SCA.³³

61. The Commission considers that the Applicant seeks to compel the Defendant to issue a recommendation proposing appropriate measures under Article 18 in Part II of Protocol 3 SCA. However, to the Commission, such a recommendation does not constitute a reviewable act under Article 36 SCA.³⁴ It points out that Article 232(3) EC explicitly excludes recommendations from the measures that can be sought with an action for failure to act. In its view, Case T-330/94 *Salt Union v Commission* is applicable to the situation at hand.

62. Moreover, the Commission disagrees with the Applicant that competitors are in particular need of protection with regard to existing aid. It argues that such aid has normally been in place unaltered for a very long time. To the Commission, the specific procedures applicable to existing aid also reflect the principle of legal certainty.³⁵ It considers that the specific treatment of existing aid can be regarded as amounting to “grandfathering” of aid existing at the time of the conclusion of the EEA Agreement. As a consequence, the Commission disagrees with the Applicant that it must be possible to challenge a refusal to act on existing aid.

63. Regarding the second reason, the Commission endorses the arguments of the Defendant that the Applicant does not meet the criteria to be deemed directly and individually concerned.³⁶ It submits that the Applicant has made no effort to explain how its members are substantially affected in their position on the market by the measure.³⁷

³³ Reference is made to Case 15/70 *Chevalley v Commission* [1970] 975, at paragraphs 6 and 14; Case C-68/95 *T. Port* [1996] ECR I-6065, at paragraph 59; and Case T-330/94 *Salt Union v Commission*, [1996] ECR II-1475, at paragraph 32.

³⁴ Reference is made to Case T-330/94 *Salt Union v Commission*, [1996] ECR II-1475, at paragraphs 34–35; and Case T-152/06 *NDSHT v Commission*, judgment of 9 June 2009, not yet reported, at paragraph 57.

³⁵ Reference is made to Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, at paragraph 47.

³⁶ Reference is made to Case C-68/95 *T. Port* [1996] ECR I-6065, at paragraphs 58–59.

³⁷ Reference is made to Case 169/84 *Cofaz v Commission* [1986] ECR 931, at paragraphs 22–25; Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraphs 37 and 72; and Case C-176/06 P *Stadtwerke Schwäbisch Hall v Commission* [2007] ECR I-170, at paragraph 31.

64. It further considers that the Applicant is unable to rely on alleged procedural rights to establish standing, as the case law on new aid is not transposable to the situation of existing aid. The fact that procedural rights arise at a later stage if the EFTA State refuses the appropriate measures proposed by the Authority, and if the latter then decides to open a formal investigation procedure, is in the opinion of the Commission a prospect too distant and indirect to ascribe to the refusal to issue a recommendation for appropriate measures an effect on procedural rights.

65. The Commission also refutes the Applicant's submission that Article 20 in Part II of Protocol 3 SCA and Article 109 EEA would confer standing upon it.³⁸ This would mean that any party lodging a complaint would also have standing to challenge any resulting decision. The Commission moreover notes that Article 20 in Part II of Protocol 3 SCA does not grant complainants any rights with respect to existing aid in circumstances where the formal investigation procedure has not been opened. It is pointed out that Article 20(2) in Part II of Protocol 3 SCA relates only to unlawful aid and to misuse of aid, which does not include existing aid.

66. Concerning the third reason, the Commission submits that the action is inadmissible because the Defendant is under no obligation to act with respect to existing aid.

67. The Commission points out that an action for failure to act that is directed at the refusal to adopt an act which is in the discretionary powers of the Commission is inadmissible.³⁹ In particular, it refers to actions in which applicants have attempted to compel it to initiate infringement proceedings against Member States.⁴⁰ To the Commission, this case law seems entirely transposable to the present case, having regard to the bilateral context of the procedure. It argues that the exercise of the discretion of the Defendant and the Commission is necessarily political in nature, and can therefore not be made the subject of an action for failure to act.

68. The Commission argues that whereas it is under an obligation to act with regard to new aid, it is not with regard to existing aid. Rather, by entrusting the Commission and the Defendant with a discretion to act in this regard, the founders of the Treaty and the Contracting Parties to the EEA Agreement have consciously established a more flexible regime for the review of existing aid.

³⁸ Reference is made to Case T-41/01 *Pérez Escobar v Commission* [2003] ECR II-2157, at paragraph 39; and Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraph 58.

³⁹ Reference is made to Case 247/87 *Star Fruit Company v Commission* [1989] ECR 291.

⁴⁰ Reference is made to Case 247/87 *Star Fruit Company v Commission* [1989] ECR 291; Case C-371/89 *Emrich v Commission* [1990] ECR I-1555, at paragraph 5; Case T-5/94 *J v Commission* [1994] ECR II-391, at paragraph 16; and Case T-201/96 *Smanor v Commission* [1997] ECR II-1081.

69. Finally, the Commission also disagrees with the starting point of the Applicant that it must be necessarily entitled to compel the Defendant to recommend appropriate measures. It points to examples in the area of competition law where the Community courts have held that no action is available against a failure of the Commission to use its powers.⁴¹ Thus, whether the Applicant has a right to seek judicial protection with respect to inaction depends on the rights granted to it by the EEA Agreement. The Commission considers that such limitations of the right to obtain judicial protection cannot be overcome through an extensive interpretation of the EEA Agreement.⁴²

Carl Baudenbacher
Judge-Rapporteur

⁴¹ Reference is made to Case C-141/02 P *Commission v T-Mobile Austria* [2005] ECR I-1283, at paragraph 69; Case T-52/00 *Coe Clerici Logistics v Commission* [2003] ECR II-2123, at paragraph 88; Case T-277/94 *AITEC v Commission* [1996] ECR II-351, at paragraphs 59–60; and Case T-443/03 *Retecal v Commission* [2005] ECR II-1803, at paragraph 44.

⁴² Reference is made to Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, at paragraph 36; and Case C-15/06 *Regione Siciliana v Commission* [2007] ECR I-2591, at paragraph 39.