



REPORT FOR THE HEARING

in Case E-2/02

Admissibility

-revised-*

DIRECT ACTION brought under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the “Surveillance and Court Agreement”) in the case brought by Technologien, Bau- und Wirtschaftsberatung GmbH (hereinafter “TBW”) and the Bellona Foundation (hereinafter “Bellona” and together with TBW, the “Applicants”), and seeking annulment of the decision of 31 May 2002 by the EFTA Surveillance Authority (hereinafter the “Defendant”).

Technologien, Bau- und Wirtschaftsberatung GmbH and the Bellona Foundation

v

EFTA Surveillance Authority

I. Facts and procedure

1. In September 2001, the Norwegian Government proposed an amendment to the Petroleum Taxation Act No 35 of 13 June 1975 (the “PTA”) designed to permit the Snøhvit liquefied natural gas project to go forward.¹ The amendments, which involved distinctly favourable depreciation rates for large-scale liquefied natural gas projects in Norway, were later adopted by the Parliament.

2. On 11 December 2001, the Applicant, Bellona, brought a complaint to the Defendant claiming that the aforementioned amendments to the Petroleum Taxation Act were State aid under Article 61(1) of the Agreement on the European Economic Area (hereinafter the “EEA”) and thus incompatible with it.

3. In a letter to the Norwegian Government dated 18 March 2002, the Defendant concluded that the depreciation rates for the Snøhvit project could be

* Amendments to paragraphs 24, 30, 33, 38, 39, 43, 45, 46, 47, 54, 55, 90 and 99.

¹ Ot. prp. nr. 16 (2001-2002).

considered State aid within the meaning of Article 61(1) EEA. The Government was further given an opportunity to present its viewpoints on whether or not the measure could fall under the derogations provided for in Article 61(2) and 61(3) EEA.

4. The Government adhered to its viewpoint that the measure was not State aid, but argued in the alternative that it would fall within the derogation for regional aid under Article 61(3)(c) EEA. The Defendant, however, concluded that the contested measure was State aid under Article 61(1) and furthermore that its general nature would disqualify it from falling within the derogation for regional aid. In a meeting with the Norwegian Minister of Finance on 16 May 2002, the Defendant stated that unless changes were made to recently adopted amendments to the Petroleum Taxation Act, it would open a formal examination procedure as prescribed in point 5.2(1) of the Defendant's State Aid Guidelines.

5. On 27 May 2002, on the proposal of the Ministry of Finance, the Government approved a revised bill in which the geographical scope of the tax measure was limited to Finnmark County and the municipalities of Kåfjord, Skjervøy, Nordreisa and Kvænangen in Troms County. The Defendant was notified the same day. On 30 May, the Defendant was notified of the application of the depreciation rules of the Petroleum Taxation Act to the Snøhvit project. The Defendant approved the measure as regional aid by decision of 31 May 2002. The revised bill was thereafter adopted and entered into force on 28 June 2002.²

6. By an application of 30 July 2002, received at the Court Registry on the 31 July 2002, TBW and Bellona jointly brought an action under Article 36 of the Surveillance and Court Agreement for annulment of the Defendant's decision of 31 May 2002. The application is based on the following grounds: (i) that the Defendant has, by reference to Article 5.2(1) in the EFTA Surveillance Authority's State Aid Guidelines,³ infringed an essential procedural requirement by deciding not to raise objections, and thereby not opening formal examination proceedings; (ii) that the Defendant has failed to comply with the obligation to provide proper reasons for its decision of 31 May 2002 and thereby has not fulfilled the requirement laid down in Article 16 of the Surveillance and Court Agreement. The Applicants further claim that the contested decision implies an infringement of Article 61(3)(c) EEA, and furthermore, that on the whole, the Defendant has misused its powers, contrary to relevant principles laid down in the case law of the Court of Justice of the European Communities, which should also lead to the annulment of the decision.

² Ot. prp. nr. 84 (2001-2002).

³ Procedural and Substantive Rules in the Field of State Aid. Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement (OJ 1994 L 231, EEA Supplement 03.02.94 No.32, as amended).

7. On 8 November 2002 and pursuant to Article 36 of Protocol 5 to the Surveillance and Court Agreement, the Kingdom of Norway lodged an application to intervene in support of the Defendant. By a letter of 11 February 2003, the Court informed the Norwegian Government of its decision to allow the intervention.

8. On 8 November, the Defendant lodged at the EFTA Court an application for a decision on admissibility pursuant to Article 87 of the Rules of Procedure of the EFTA Court (hereinafter the “Rules of Procedure”). On 31 January 2003, the Applicants lodged a statement in response to that application.

9. On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87(4) 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 a letter dated 11 February 2003.

II. Form of order sought by the parties as regards admissibility of the Application

10. The claim of the Defendant, the EFTA Surveillance Authority, in the request for a decision on the admissibility is that the Court should:

- dismiss the application as inadmissible;
- order the Applicants to pay the costs.

11. The Norwegian Government, as intervener, supports the Defendant’s claim and asks the Court principally to:

- dismiss the application as inadmissible.

12. The claim of the Applicants, TBW and Bellona, as regards admissibility, is that the Court should:

- declare the application admissible;
- in the alternative, reserve its decision on admissibility pending its determination on the merits;
- award the Applicants the costs of the present proceedings.

III. Legal background

The EEA Agreement

13. Article 61 EEA provides:

“1. 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 following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.”

The Surveillance and Court Agreement

14. Article 1 of Protocol 3 to the Surveillance and Court Agreement, on the functions and powers of the EFTA Surveillance Authority in the field of State aid reads as follows:

“1. The EFTA Surveillance Authority shall, in co-operation 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.

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

On application by an EFTA State, the EFTA States may, by common accord, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the functioning of the EEA Agreement, in derogation from the provisions of Article 61 of the EEA Agreement, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the EFTA Surveillance Authority has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the EFTA States shall have the effect of suspending that procedure until the EFTA States, by common accord, have made their attitude known.

If, however, the EFTA States have not made their attitude known within three months of the said application being made, the EFTA Surveillance Authority shall give its decision on the case.

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.”

15. Article 16 of the Surveillance and Court Agreement states:

“Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.”

16. Article 36 of the Surveillance and Court Agreement states:

“The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

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

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.”

17. Article 5.2(1) of the EFTA Surveillance Authority’s State Aid Guidelines states:

“The EFTA Surveillance Authority is obliged to open the procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement whenever it is in any doubt about the compatibility of the aid with the functioning of the EEA Agreement.”

IV. Submissions of the parties and the intervener regarding admissibility

18. The Court has received the following submissions on the issue of admissibility:

- the Applicants, Technologien, Bau- und Wirtschaftsberatung GmbH and the Bellona Foundation, represented by Ian S. Forrester, Q.C.;
- the Defendant, EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal and Executive Affairs and Michael Sánchez Rydelski, Senior Officer, Legal and Executive Affairs, acting as Agents;

- the Intervener, the Kingdom of Norway, represented by Thomas Nordby, Advokat, Office of the Attorney General acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent.
- the Commission of the European Communities, represented by James Flett, member of its Legal Service, acting as Agent.

The Defendant

19. As regards the question of admissibility, the Defendant refers to the conditions laid down in Article 36(2) of the Surveillance and Court Agreement. The Defendant points out that the contested decision is not addressed to the Applicants. Thus it follows from the wording of Article 36(2) that, under these circumstances, the Applicants are entitled to challenge the contested decision only in so far as it is of direct and individual concern to them.

20. The Defendant submits that in the context of the corresponding provision of Community law, Article 230(4) EC, it is settled case law that persons, other than those to whom a decision is addressed, may claim *locus standi* in relation to a decision only if that decision affects them by “ ... reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.”⁴ The Defendant in particular points to *Unión de Pequeños Agricultores v Council* (at paragraph 36) and submits that the judgment in *Jégo-Quéré et Cie SA v Commission*,⁵ to which the Applicants refer, can not in any case be said to reflect the case law of the Community courts.

21. The Defendant submits that Article 36(2) of the Surveillance and Court Agreement is identical in substance to Article 230(4) EC. The EFTA Court is not required by Article 3(1) of Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of the Surveillance and Court Agreement. Nevertheless, in accordance with the judgment of the EFTA Court in the *SSGA*-case,⁶ the case law of the Court of Justice of the European Communities on Article 230(4) EC is relevant when interpreting Article 36(2) ESA/Court Agreement, *i.a.* on questions

⁴ Reference is made to the following case law: Case 25/62 *Plaumann v Commission* [1963] ECR 95, at paragraph 107; Case 231/82 *Spijker v Commission* [1983] ECR 2559, at paragraph 8; Case 169/84 *Cofaz and Others v Commission* [1986] ECR 391, at paragraph 22; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, at paragraph 14; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, at paragraph 20; Case T-2/93 *Air France v Commission* [1994] ECR II-323, at paragraph 42; Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, at paragraph 71; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others v Commission* [1999] ECR II-3663, at paragraph 83; Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft v Commission* [2001] ECR II-1037, at paragraph 35; Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, at paragraph 60; and, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, at paragraph 36.

⁵ Case T-177/01 *Jégo-Quéré et Cie SA v Commission*. Judgment 3 May 2002 (not yet reported).

⁶ Case E-2/94 *Scottish Salmon Growers Association (SSGA) v EFTA Surveillance Authority* [1995] EFTA Court Report 59 at paragraphs 11-13.

concerning who has *locus standi* to bring an action for the annulment of a decision. Furthermore, the EFTA Court has held that when interpreting Article 36(2) of the Surveillance and Court Agreement, due account shall also be taken of the principles laid down in rulings of the Court of First Instance of the European Communities.

22. The Defendant contends that in order to establish whether the Applicants fulfil the condition of *being affected*, it is necessary to bear in mind the aim of the procedures provided for by the EEA legal framework in State aid cases, in particular Articles 1(2) and 1(3) of Protocol 3 of the Surveillance and Court Agreement. Due account should also be given to the relevant case law concerning *locus standi* in the field of State aid.

23. The Defendant continues by describing the procedural framework and case law in the field of State aid. It is asserted that a distinction must be made between a *prima facie* opinion on compatibility of the aid in question and an *examination* under Article 1(2) of Protocol 3 of the Surveillance and Court Agreement. It is pointed out that it is only in connection with an examination on the basis of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement that EEA law imposes an obligation on the Defendant to give the parties concerned notice to submit their comments. The relevant provisions in Article 1(2) and 1(3) of Protocol 3 to the Surveillance and Court Agreement correspond to those in Article 88(2) and 88(3) EC.

24. According to case law of the Court of Justice of the European Communities, a decision whereby the Commission finds on the basis of Article 88(3) EC that State aid is compatible with the functioning of the common market, can be challenged before the Court of First Instance of the European Communities by those persons who are intended to benefit from the procedural guarantees laid down in Article 88(2) EC. Thus, it is a precondition that the party seeking annulment of a decision can be considered to be a party concerned for the purpose of Article 88(2) EC, and that the person is asking for annulment of the decision taken on basis of Article 88(3) EC, in order to safeguard his procedural rights under Article 88(2) EC.⁷ The Court of First Instance of the European Communities has clarified that, when applicants do not seek the annulment of a decision on the basis of Article 88(3) on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 88(2) EC or on the ground that the procedural safeguards provided for by Article 88(2) EC were infringed, the mere fact that the applicants may be considered to be parties concerned within the meaning of Article 88(2) EC cannot be sufficient to render the application admissible. In such a case, the action will be admissible only if the applicants are affected by the contested

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See, Case 198/91 *Cook v Commission* [1993] ECR-I 2487, at paragraphs 23 – 26.

decision by reason of circumstances distinguishing them individually in like manner to the person to whom the decision is addressed.⁸

25. The Defendant points out that in the case at hand the contested decision was taken on the basis of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, without the Defendant having initiated the formal procedure provided for in Article 1(2) of the same Protocol, on which grounds annulment is partially claimed. However, the Applicants could only be regarded, in relation to this claim, as directly and individually concerned by the contested decision, and substantiate this claim, if they have the status of “parties concerned” within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

26. It is the opinion of the Defendant that the Applicants cannot be held affected by the contested decision and are therefore not “parties concerned.”

27. The Defendant submits that it is settled case law within the Community that “parties concerned” within the meaning of Article 88(2) EC include not only the undertaking or undertakings benefiting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. The Defendant points out that the EFTA Court has followed this interpretation in *Norwegian Bankers’ Association v EFTA Surveillance Authority*.⁹ From this case law the Defendant draws the conclusion that, in order to be “parties concerned,” it is necessary for the Applicants to show that they are in a competitive position with the aid beneficiaries and that the aid affects their position in the market.

28. The Defendant furthermore submits that it is also settled case law in the Community that the alleged competitor must demonstrate that his competitive position in the market is affected by the grant of the aid. To support this argument the Defendant refers to the judgment in *Cofaz v Commission*,¹⁰ and draws the conclusion that an applicant must be adversely affected to a significant extent in order to have standing.

29. In order to assess whether an applicant’s position in the market is affected by the aid, the Defendant contends that the Court of First Instance of the European Communities has required concrete proof and looked in great detail into the question of whether the applicant was directly competing with the beneficiary of the aid or whether they were active in different markets. It is the view of the Defendant that this requirement reflects the general principle that the fact that a measure may influence an existing competitive position cannot, in itself, suffice to create standing for a trader in competition with the beneficiary of

⁸ Case T-266/94 *Skibsvaerftsforeningen and Others v Commission* [1996] ECR II-1399, at paragraph 45.

⁹ Case 4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1998] EFTA Court Report 38.

¹⁰ See footnote 4.

the contested aid measure. See the judgements in *Hamburger Hafen- und Lagerhaus Aktiengesellschaft*¹¹ *Eridania*,¹² and *BP Chemicals*.¹³

30. The Defendant points out that the approach outlined above applies only where the aid, which the European Commission has found to be compatible with the common market, was an individual aid granted to a specific party. The present case, however, relates partly to the approval of an implementation of a tax provision of a general character where the potential beneficiaries are defined only in a general and abstract manner. The existence of an actual beneficiary presupposes the practical application of the aid scheme by the grant of individual aids. The Defendant submits that in this situation the assessment of whether an applicant is affected in a way that provides *locus standi* will then have to be undertaken by looking at the applicant's competitive position with respect to the actual beneficiaries of the aid. A reference is made to the judgment in *Kahn Scheepvaart*¹⁴ where the Court of First Instance of the European Communities also underlined that a complaint by an applicant to the Commission and, in that connection, correspondence and meetings with the Commission, could not constitute sufficient circumstances peculiar to the applicant on the basis of which it could be distinguished individually from all other persons, and thus confer on it standing to bring proceedings against a general aid scheme.

31. As to the position of the Applicants, TBW and Bellona, the Defendant submits that the evaluation of their interest in challenging the contested decision must be assessed in two parts.

32. In relation to the authorisation of the individual Snøhvit project, the relevant factor is whether the Applicant, TBW, is in a sufficiently direct competitive position with undertakings involved in the project and whether it can be said that TBW is affected to a significant degree by the aid to that particular project. The information available to the Defendant shows that TBW is a consultancy firm and not a natural gas producer. Furthermore, its involvement in plant oil fuel and renewable biogas projects seems to be of an advisory nature and seems to be limited to the development projects in Africa. The Defendant is therefore of the opinion that the Applicant has not even remotely shown that it is a competitor with any of the companies involved in the Snøhvit project. Nor has TBW adduced a shred of evidence demonstrating that its alleged position in the market is indeed affected by the aid in question to those companies. The Defendant further submits that even if TBW were able to show that the consultancy firm did, in fact, itself produce and sell plant oil and renewable biogas, the Applicant would be operating in a different market and would not be directly competing with the beneficiaries.

¹¹ See footnote 4.

¹² Joined cases 10/68 and 18/68 *Eridania and Others* [1969] ECR 459.

¹³ See footnote 4.

¹⁴ Case T-398/94 *Kahn Scheepvaart v Commission* [1996] ECR II-477, at paragraph 49.

33. Similar considerations apply in relation to the authorisation of the general aid scheme. TBW has not demonstrated that it is competing with undertakings actually benefiting from the advantageous depreciation rules. Similarly, TBW has not substantiated how it is even remotely adversely affected by such aid. In any event, even if one were to assume that TBW could find itself in a position whereby it was competing with undertakings benefiting from the PTA depreciation rules, TBW would not have standing to challenge the PTA rules since there would still not be any attributes peculiar to TBW which would differentiate it from all other persons and distinguish it in the same way as the addressee.

34. As to the Applicant, Bellona, the Defendant points out that Bellona is a non-profit and non-membership driven environmental foundation, and as such, not a gas producer that itself competes with the licensees of the particular Snøhvit project. Further, Bellona, has not even remotely substantiated that it is directly competing with undertakings benefiting either from the general depreciation rules in the PTA or from the application thereof to the Snøhvit project.

35. Further, based on the case law of the Court of Justice of the European Communities and the Court of First Instance of the European Communities, the Defendant submits that the mere fact that Bellona made a complaint to the EFTA Surveillance Authority cannot, in the present situation, where the Defendant decided not to open formal investigations, constitute sufficient circumstances peculiar to that Applicant by which it can be distinguished individually from all other persons, and thus confer on it standing to bring proceedings against the contested decision.

36. The Defendant concludes from the foregoing that in the present case, the Applicants cannot be considered to be “parties concerned.” Neither are there any attributes peculiar to the Applicants, which differentiate them from all other persons and distinguish them individually in the same way as the addressee. The Defendant consequently submits that the application be dismissed as inadmissible.

The Intervener, the Kingdom of Norway

37. The Intervener states that the facts of the case are adequately set out in the Defendant’s request for a decision on admissibility. Nevertheless the Intervener emphasizes that although the amendments to the PTA were based on the development in the Snøhvit field, it was formulated generally and applicable to prospective projects as well. Thus it was by no means an “exceptional and abnormal” advantage for a single project as alleged by the Applicants.

38. The Intervener first discusses the relevance of the case law of the Court of Justice of the European Communities and the Court of First Instance of the European Communities to the present case. It is submitted that Articles 3(1) and

(2) of the Surveillance and Court Agreement and Article 6 of the EEA are directly applicable in the case at hand, mainly because the assessment of *locus standi* is so closely linked to substantial rules that it in reality is a matter of an interpretation of these substantial rules. The substantial rules on State aid are identical in the EFTA and EU pillars. The Intervener submits that the same conclusion is reached by applying general rules of interpretation, such as the parties' intentions and preparatory works. It is argued that the regulation of *locus standi* is found in the Surveillance and Court Agreement rather than in the main part of the EEA Agreement only due to the systematisation of the EEA Agreement. Furthermore, reference is made to the judgment in *SSGA*.¹⁵

39. The Intervener contends that the findings as regards the relevance of the case law of the European Community Courts are also relevant as regards the case law of the Court of First Instance. Reference is again made to the judgment in *SSGA*. Finally, the Intervener argues that another approach to the relevance of the case law of the European Community Courts would jeopardise the principle of homogeneity laid down in Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement, directly distort the economic playing field in the two pillars, and thus be detrimental to the functioning of the internal market.

40. The Intervener then turns to the Applicants' argument that there is no national remedy available for them since national courts lack competence to declare aid to be contrary to the EEA Agreement. However, the Intervener points out that in spite of this, Bellona, as an environmental organisation, would generally have standing before national courts in order to advance environmental considerations.

41. In addition, the contested decision by the Defendant can undoubtedly be brought before the Court. The question is not whether there can be a judicial review of the decision, but rather which natural or legal person is able to bring the case before the Court.

42. In the view of the Intervener, it follows from the foregoing that the Court has to distinguish between State aid cases decided by the Defendant, which may be challenged before the Court by natural or legal persons with *locus standi* and other cases, which may be challenged before the national courts.

43. As to the relevant criteria for *locus standi*, the Intervener agrees with the Defendant's general description, as to the test of direct and individual concern. In addition, the Intervener points out that the term "centrally concerned" used by the Court in *SSGA* must be read as the equivalent "individually concerned" developed by the Court of Justice of the European Communities.

44. As regards the test of direct and individual concern in State aid cases the Intervener submits that the special procedures provided for in Article 1 of

¹⁵ See footnote 6.

Protocol 3 to the Surveillance and Court Agreement are important when assessing the test of individual concern in State aid cases. Article 1, in particular paragraphs 2 and 3, should be construed in such a way that “parties concerned” should be able to challenge a decision based on Article 1(3) before the Court. In other words, the interpretation of the words “parties concerned” in Article 1(2) are decisive for the question of *locus standi* in relation to decisions taken pursuant to Article 1(3).

45. As to the interpretation of the words “parties concerned” the Intervener offers first some remarks on general and individual State aid schemes. The contested amendments to the PTA constitute a general aid scheme. Therefore, when assessing whether the Applicants have *locus standi* to challenge the amendments to the PTA, the relevant criteria are those applicable to such schemes, whose potential beneficiaries are defined only in a general and abstract manner.

46. The Intervener thereafter concentrates on the individual aid to the Snøhvit project. It is submitted that to be considered a party concerned as regards individual aid, the relevant party must be competing in the same market as the aid beneficiary and he must show an actual competitive position on that market. It is argued by the Intervener that Bellona activities are to a large extent of such a nature that its position in the market is only hypothetical and potential.

47. The Intervener also argues that the objective of the State aid rules in the EEA Agreement is to protect competition in the EEA market, not to safeguard environmental interests. Therefore, the Intervener is of the opinion that the fact that one of the Applicants is an important player in the national and European environmental scene cannot constitute a rationale for *locus standi* in the State aid case at hand. These environmental interests cannot suffice to create standing in the present State aid case, although they are relevant when assessing a possible standing based on national law.

48. The Intervener agrees with the Defendant that the fact that a measure may influence an existing competitive position cannot suffice to create standing. According to the case law of the Court of Justice of the European Communities, the market position of the undertakings concerned must be “significantly affected” by the aid in question. This view is supported by reference to the judgment in *Cofaz v Commission*.¹⁶

49. The Intervener then turns to the question of whether the Applicants can claim to be in a competitive position with respect to the aid beneficiaries. It is argued that a minimum requirement for awarding the Applicants *locus standi* is that they are in an actual competitive position with the aid beneficiaries. The Intervener submits that neither of the Applicants is an oil or gas company that is actively taking part in the production and sale of natural gas or other fuels. Thus

¹⁶ See footnote 4.

it is clear that the Applicants are not in direct competition with respect to the aid beneficiaries nor can they claim that they are an association representing possible competitors.

50. As to Bellona in particular, the Intervener points out: *firstly*, that owning shares and options in companies dealing with sustainable energy production is not sufficient to create *locus standi*. Further, the Intervener questions whether the products of these companies are a part of the same market as the gas from Snøhvit. In any event the Intervener finds it highly questionable whether the Snøhvit project will affect the price of gas keeping in mind that the size of the project in relation to the European gas market will only be 0.46 to 0.66 per cent.

51. *Secondly*, the Intervener is of the opinion that Bellona's involvement in the so called B7 programme (described further in paragraphs 66 and 77-87 below) does not make Bellona a competitor, since a co-operation, as consultant or partner, with trade and industry is not sufficient to create *locus standi*.

52. *Thirdly*, although the decision of the Defendant might have factual consequences for Bellona's interests, such consequences are not protected by the State aid rules and cannot suffice to create standing. A pretension to having economic interests by way of contribution to the development of framework conditions for trade and industry obviously cannot give standing within the scope of State aid rules.

53. *Fourthly*, as regards Bellona's argument that its promotion of renewable energy sources will be jeopardised by the aid given to Snøhvit, the Intervener questions whether renewable energy sources are a part of the same market as *liquefied natural gas*.

54. *Fifthly*, as to Bellona's Cleaner Oceans programme (B3) (referred to in paragraphs 70 and 73-74), the Intervener refers to the arguments stated in paragraph 52 above. *Sixthly*, the Applicants' arguments, related to planned wind-power projects and to draft agreements that have been made to preserve these plans, and to involvement in other renewable energy and clean fossil energy projects, refer to a hypothetical or potential position, not to Bellona's actual position.

55. *Seventhly*, the Intervener submits that the establishment of an affiliated commercial company that will handle Bellona's investments and shareholdings, the "Bellona Environventure AS", has no impact on the assessment of Bellona's *locus standi*. Bellona has only taken steps to establish this company, and Bellona's actual position is therefore not affected.

56. *Finally*, the Intervener, referring to the Applicants' arguments concerning possible harm to its partner and supporters, fails to see that potential harm to partners and supporters, including other non-profit environmental organisations, is of relevance in the assessment of the case at hand.

57. As to the position of TBW in particular, the Intervener submits that it fails to see that TBW has *locus standi* in the case. *Firstly*, it is questionable whether the company is active today since they have not been able to present annual reports for the past three years. *Secondly*, the company's activities include areas that are hardly in a competitive relationship with the Snøhvit project. *Thirdly*, many of their activities seem to be of hypothetical and potential nature. *Fourthly*, as stated earlier, it is highly questionable whether the Snøhvit project will affect the price of gas.

58. The Intervener concludes that in the present case the Applicants cannot be considered to be "parties concerned." Consequently, they do not have *locus standi*. Thus the application should be dismissed as inadmissible. In addition, the Applicants should be ordered to bear the costs.

The Applicants

59. The Applicants submit that their interest in the case is central to the matter at hand. They point out that Bellona's complaint of December 2001 brought an illegal and non-notified aid to the attention of the Defendant. Furthermore, Bellona has two separate but complementary roles, which are both centrally concerned by the contested decision. Firstly, Bellona advances the interests of its partners and supporters (including a number of companies engaged in energy production), which provide funding to Bellona because Bellona's activities are economically advantageous to them, particularly its influence on public authorities and its experience in promoting and developing the use of environmentally friendly energy sources. The interests of these partners and supporters are directly affected by the State aid measure in question. Further, Bellona's own economic interests – its investments, shareholdings, future funding and strategic goals – are directly concerned by the decision.

60. The Applicants also submit that TBW is centrally concerned by the decision. TBW is a German limited company (GmbH), whose commercial activity is the development of sustainable forms of energy production. The contested decision will directly and negatively affect TBW's commercial activities because the energy sources resulting from its activities will be used for heating and electricity production in direct competition with heating and electricity produced from the fuels resulting from the Snøhvit project. The Authority's decision will distort competition in these markets by giving Snøhvit gas an advantage compared to TBW's products, and by reducing prices for non-renewable energy sources.

61. As to the relevance of the case law of the Court of Justice of the European Communities, the Applicants stress the independence of the EFTA Court and that the Court is not bound to follow the jurisprudence of the Court of Justice of the European Communities and the Court of First Instance of the European Communities on the question of admissibility of challenges to Commission decisions. The EFTA Court has been, and should be, prepared to draw different

conclusions from those courts, if their application would defeat interests of justice in the present case. The Applicants also stress that there is no national remedy for their problem, neither before the national courts nor other state or European institutions.

62. The Applicants then turn to the question of whether they are directly and individually concerned within the meaning of Article 36 of the Surveillance and Court Agreement. They submit that they are centrally concerned with the contested decision. In particular, they refer to *Plaumann v Commission* (the *Plaumann* test).¹⁷ According to the *Plaumann* test, the Court will have to establish that the measure affects the Applicants “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguish them individually just as in the case of the person addressed.” The Applicants maintain that they fulfil the *Plaumann* test, as the Court of Justice of the European Communities and the Court of First Instance of the European Communities have applied it.

63. First, the Applicants submit that Bellona is *directly concerned*. It is evident that the Government’s sole purpose in proposing amendments to the PTA, which revise the rules adopted earlier, was to give the depreciation rules for the Snøhvit project a form that the Defendant would approve. The immediate steps between receiving the blessing of the Defendant and entry into force were purely formalities. Thus, the Applicants submit that the process involving the Defendant and Bellona’s complaint, was in effect the same process as the Defendant’s hasty blessing of the aid. Since this whole process was a continuum, Bellona is directly concerned.

64. Bellona also submits that it is *individually concerned* by the contested decision. Bellona brought the original complaint that led to an investigation by the Defendant. It is also clear that the decision taken by the Defendant will adversely affect Bellona’s legitimate interests by seriously jeopardising not only the commercial position of Bellona itself, but also the interests of its partners and supporters. Bellona therefore fulfils the requirements set out in *Cofaz*.¹⁸ It also matches the position of the applicant in *Aktionsgemeinschaft Recht und Eigentum*.¹⁹

65. The Applicants also stress the role Bellona performed in the administrative proceedings. It is submitted that it follows from the case law of the Court of Justice of the European Communities that “individual concern” can be demonstrated by a person’s participation in the administrative procedure leading up to the contested measure. It is pointed out that in *Cofaz*²⁰ the Court of Justice

¹⁷ See footnote 4.

¹⁸ See footnote 4.

¹⁹ Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum v Commission*. Judgment 5 December 2002 (not yet reported).

²⁰ See footnote 4.

of the European Communities pointed out that it was necessary to consider the part played by the applicant in the administrative procedure leading to the adoption of the contested measure. According to the judgment, the following factors should be taken into account: (i) the applicant had instigated the complaint which led to the opening of the investigation, (ii) its view had been communicated during that investigation, and (iii) it had produced a significant impact on the conduct of the procedure. It is stressed that Bellona had been a prominent actor in the matter to date, both at the national and the EEA level. Bellona's involvement has had a decisive effect not only on the procedure of the case but also its outcome. This fact clearly distinguishes it from, for instance, the position of Greenpeace in the *Stichting Greenpeace Council* case.²¹ In that case, Greenpeace brought an action two years after the initial Commission decision had been adopted. This case cannot be given significance for the present case as suggested by the Commission.

66. The Applicants also contend that the contested State aid will harm Bellona's activities. Bellona is an environmental foundation, supported by individuals and businesses, which aims to combat problems of environmental degradation, pollution induced dangers to human health, and the ecological impact of economic development strategies. It has concrete economic interests in various aspects of the environment and the energy sector, for instance through its shareholdings and investments in various companies, its involvement in various forms of clean energy production, and as a result of its so called B7 programme, through which it cooperates with trade and industry. These economic interests relate in particular to the production of energy and development of ways to achieve more environmentally friendly energy production.

67. As regards Bellona's various business and commercial interests in the energy market and the development of future sustainable sources of energy production, it is pointed out that Bellona has shares and options in companies dealing with sustainable energy production and has invested in various environmental technologies and has taken steps to establish an affiliated commercial company, Bellona Enviroventure AS, to manage these business interests. The establishment of this company was approved at Bellona's board meeting of February 19, 2001. The aim of the company is primarily to handle Bellona's investments and shareholdings in undertakings engaged in sustainable energy production.

68. The State aid granted to the Snøhvit project will, as pointed out below, jeopardise the competitiveness of production from renewable energy sources and the development of new technology for production of such energy. Moreover, a not insignificant part of the gas from the Snøhvit project will be used on the EEA energy market as "alternative energy" for electricity production in direct competition with other renewable energy produced from windmills and tidewater.

²¹ T-585/93 *Stichting Greenpeace Council and Others v Commission* [1995] ECR II-2205.

69. The Applicants refer to the fact that Bellona has an option for shares in the company Water Power Industries (WPI), a company engaged in producing renewable energy from tidewater. Bellona has also been involved in various planned wind power projects. It is submitted that the aid granted to Snøhvit will reduce the possibilities for companies to develop and commercialise new technology based on renewable energy, both by distorting competition and taking away incentives for the funding of such projects. It will also aggravate the conditions for marketing products leading from such projects. These interests of Bellona will therefore be jeopardised by the State aid granted to the Snøhvit project and the Defendant's approval of the aid.

70. The Applicants then proceed by referring to different programs with which Bellona is involved. They are: (i) The Environmental Capital and Economic Framework Programme, (ii) the Cleaner Energy Programme, and (iii) the Clean Ocean Programme.

71. The first programme involves a co-operation with large corporations to develop profitable, commercially feasible energy-friendly schemes. It is submitted on behalf of the Applicants that the State aid in the present case has been granted to an environmentally unsustainable project based on fossil fuel, which will be economically unprofitable without the aid. The granting of the aid threatens the position of the aforementioned projects aimed at developing cleaner methods of exploiting fossil fuel and contradicts the aims of Bellona's current activities under the Economic Framework programme. Bellona is therefore individually concerned by the Defendant's approval of the contested State aid measure.

72. The second programme involves identifying constructive solutions to ensure development of the energy sector and thus promoting increased use of light-impact, renewable energy sources such as wind, waves, bio mass, tidewater and solar energy. The finding, which the Applicants dispute, that the aid benefiting the Snøhvit project is "regional aid" gives rise to the assumption that the Norwegian government, in order to keep itself within the maximum aid ceiling, will have to impose stricter aid limits when it comes to supporting potentially more environmentally friendly energy projects within the region. The expected decline in the development of a renewable energy will make it harder to promote the production of such energy, and so it becomes harder for Bellona to find future partners and supporters. Thus, Bellona is individually concerned by the Defendant's decision approving State aid granted to Snøhvit, as this aid will have a negative impact on Bellona's sources of income.

73. The third programme, the Cleaner Ocean Programme, aims at protecting the ocean as a nutritional source and protecting its biodiversity. The threat posed by the Snøhvit project to fishing, aquaculture and fish breeding, and the likely increase in petroleum activities resulting from the Snøhvit project, directly impact Bellona's current work in this area under the Cleaner Ocean Programme and the efforts it is making to promote energy from renewable sources. As such,

Bellona is individually concerned by the Defendant's decision to approve the contested aid.

74. Taken together, the Applicants argue that the aid granted will disrupt the economic assumptions underlying energy exploitation in the EEA, to the detriment of Bellona's specific activities. The granting of the aid to an unprofitable and environmentally unsound project will jeopardise the future development of renewable energy and of "clean" fossil energy, and will make it more difficult to promote the production of such energy. As a result, it will be harder for Bellona to find future partners for programmes and projects such as the programmes described above. If it becomes too difficult to make money from pursuing economically wholesome policies, many of Bellona's partners will invest their limited resources elsewhere. Thus the State aid granted to Snøhvit will negatively influence Bellona's future sources of income and economically damage its environmentally friendly activities.

75. The Applicants further argue that the contested aid will harm the interests of Bellona's partners and supporters. First they point out that the 2% increase in CO₂ emissions resulting from the Snøhvit project will, as a consequence of the Kyoto protocol, have to be compensated by placing a burden on land-based industry. This will harm several of Bellona's partners and supporters, including several of the undertakings that are organised in the federation of Norwegian Process Industries, which were meant to enter into formal co-operation with Bellona through the B7 programme in February 2003. The burden is also likely to fall on members of the Norwegian Ferroalloy Producers Research Association, which has also signed the B7 agreement with Bellona.

76. The Applicants also point out that the Snøhvit project will increase the Norwegian emissions of NO_x by 0,3%. Norway is under an obligation to reduce such emissions by 31% of its 2001 emissions by 2010. These commitments have now been transformed into EC law in directive 2001/81/EC, which will become EEA law in the near future. Bellona's partners in the process industry will have to carry the burden related to these obligations.

77. Bellona has also co-operated closely with other environmental organisations that are opposing the Snøhvit project. The interests of these organisations will also be affected by the project. Further, one of Bellona's partners, the Norwegian Fishing Vessel Association, has members whose livelihood in the fishing industry will be put at risk by the Snøhvit project.

78. In the opinion of the Applicants it is clear that the Defendant's decision to approve the State aid is of individual concern to Bellona's supporters and partners in a number of sectors.

79. The Applicants refer to the *Extramet* case.²² In that case, the Court of Justice of the European Communities held that the applicant was individually concerned because it had established the existence of a set of factors constituting a situation that is peculiar to the applicant, and that differentiates it, as regards the measure in question, from all other traders.

80. Bellona, in the present case, is differentiated from all other parties by virtue of the fact that: (i) Bellona has been extensively involved in the administrative procedure leading up to the adoption of the Defendant's decision, Bellona was the complainant whose intervention revealed the original illegality, it was thanks to Bellona that the Defendant intervened, it is in response to Bellona's criticism that the law was rewritten to make the illegal features less obvious; and, (ii) the decision will entail substantial adverse consequences for Bellona, rendering infeasible alternative energy projects that it has developed, turning away partners and supporters who would otherwise be interested in pursuing environmentally wise programmes, hindering the achievements of the aims of its B7 programme, and damaging the interests of actual and potential partners and supporters.

81. The Applicants then turn to the position of TBW. It is submitted that TBW is directly concerned by the Defendant's decision. TBW's commercial activity is the production of energy using biogas and anaerobic technologies from various sources of material. It is pointed out that over the last few years TBW has initiated several hundred biogas plants in Europe and thousands more, further afield. The Defendant's decision will individually and negatively affect TBW's commercial activities. The electricity produced by TBW competes with electricity from non-renewable sources on the open market, heat produced as a by-product competes with heat produced by gas or liquid fossil fuels.

82. It is further argued that the price of fossil fuel energy is crucial to the feasibility of biogas projects.

83. The Applicants then turn to a criticism of the *Plaumann* test described above. Firstly, they contest the appropriateness of the test and then point out that even if the test were correct, they, in any event, fulfil its requirements.

84. The Applicants point out that this test has been applied in series of cases since 1963, with a number of exceptions and relaxations. They are, however, of the opinion that a growing body of opinion asserts that the *Plaumann* test can lead to injustice and should be revised. The Applicants submit that the EFTA Court should ensure that justice is done in this case, by adopting a more flexible interpretation of standing, appropriate to modern times.

85. The Applicants then proceed by citing case law from the Court of Justice of the European Communities and Court of First Instance of the European

²² Case C-358/89 *Extramet Industrie S.A. v Council* [1991] ECR I-2501, at paragraph 17.

Communities, which, in their opinion, shows that a strict adherence to the test excludes so many parties from challenging acts of the EU institutions that it would be contrary to the interest of justice if the parties could take no other judicial route. As proof of the injustices that can follow from the *Plaumann* test the Applicants cite the judgments in *Pfizer v Council*²³ and *Sadam Zuccherifici v Council*.²⁴ In the view of the Applicants these judgments show that the standard *Plaumann* test prevents a person from bringing a legal challenge, even if that person is the only person in the world affected by an act and even if the body undertaking the act had the situation of that person in mind when acting. It is pointed out that the test has been the subject of repeated and rigorous criticism. The Court of Justice of the European Communities and the Court of First Instance of the European Communities have sought to limit the injustice to which it leads, by clarifying its application in certain spheres and extending the ambit of the test in two exceptional cases. Although the test has not been abandoned, it is in a state of flux and is increasingly isolated from the principle of standing applied at national level. The Applicants submit that the EFTA Court need not and should not adopt, as its criterion for direct and individual concern, a test which appears likely to lead to injustice, which is being heavily criticised by judicial figures, and which is inconsistent with the broad principle that a complete set of judicial remedies should exist.

86. The Applicants point out that the *Plaumann* test has been criticised for being too restrictive. In general terms it has been argued that the rule of law would be better served if citizens had the right to take action directly before the Court when their legal rights have been prejudiced by a Community measure, rather than by the current restrictive interpretation of standing deriving from the *Plaumann* test and subsequent case law.²⁵ The criticism of the *Plaumann* test serves to emphasize the need of the EFTA Court to take an objective view of the question of admissibility and to decide how best justice may be served, in the context of the EEA Agreement.

87. The criticism of the *Plaumann* test is particularly important in cases which involve damage to environmental interests where strict application of these criteria may in fact prevent the Courts from being able to fulfil their essential function of assessing whether the Community or EEA institutions have acted lawfully. If the *Plaumann* test was good law there would rarely, if ever, be a closed class of victims eligible to challenge an environmental decision. A reference is made to criticism of Advocate General Jacobs²⁶ and to the Commission's proposal for a Directive on Environmental Liability.²⁷ In the view

²³ Case T-13/99 *Pfizer v Council*. Judgment 11 September 2002 (not yet reported).

²⁴ Case C-41/99 P *Sadam Zuccherifici v Council* [2001] ECR I-4239.

²⁵ Smith and Herzog in their *Commentary on the EEC Treaty*, Vol. 5 at p 379.

²⁶ Francis G. Jacobs: "Access to Justice, the Rule of Law and due Process," presented at the Nordic Conference of the European Union, Access to Justice, the Rule of Law and the Due Process, 6-8 November 1998.

²⁷ See in particular Explanatory Memorandum to Proposal for a Directive of the European Parliament and the Council of environmental liability with regard to the prevention and remedying of environmental damage, COM (2002) 17 final, 23 January 2002.

of the Applicants, the draft proposal is an acknowledgement of, and an attempt to remedy the failure of the criteria of “direct and individual concern” to ensure appropriate judicial control in environmental cases. The Applicants submit that the EFTA Court should ensure that such a failure does not arise in the case at hand. This is especially important since access to national courts in State aid cases is blocked. If the Applicants’ challenge to the legality of the State aid is inadmissible, no one will force judicial review of the State aid. Alternative environmentally friendly techniques of generating energy in Scandinavia will wither.

88. Furthermore, a more flexible approach to *locus standi* would be consistent with the Aarhus Convention of 1998. It is also pointed out that pursuant to the “Second Working Document on [a Directive for] Access to Justice in Environmental Matters” adopted under the same Convention on 22 July 2002, legal standing should, within the framework of national legislation, be conferred upon “members of the public concerned – who have a sufficient interest.” The acts recognise the need to remedy the gap in judicial remedies for environmental matters. Their aims and provisions should be taken into due consideration in this case. Furthermore, a broad interpretation of *locus standi* in the present case would also be compatible with the principles set out in Article 6 and 13 of the European Convention on Human Rights, as well as those in Article 47 of the Charter of Fundamental Rights of the European Union.

89. The Applicants point out that the Court of Justice of the European Communities and the Court of First Instance of the European Communities have clarified the test as it applies to particular sectors, notably State aid, anti-dumping and competition law. In essence it amounts to a softer approach to the overly rigid *Plaumann* test. Although, in State aid cases, only the Commission and a Member state are concerned from a formalistic point of view; private individuals can be involved at various stages, and decisions in such cases may affect them in different ways. In line with this, the Court of Justice of the European Communities has in State aid cases, recognised that the *Plaumann* test cannot be applied without causing significant injustice. Thus, beneficiaries of the aid (see judgment in *Philip Morris*)²⁸ and competitors (see judgment in *Waterleiding Maatschappij*)²⁹ have been allowed to bring action. Reference is also made to *Associazione Italiana Tecnico Economica del Cemento*³⁰ and *Aktionsgemeinschaft Recht und Eigentum*.³¹ From this case law, the Applicants draw the conclusion that the *Plaumann* test has been the subject of many exceptions and its strictness is being continuously eroded in the interest of justice. It has been demonstrated how both its own interests and those of its partners and supporters will be detrimentally affected by the grant of aid to the Snøhvit project. It is submitted that the EFTA Court should, by parity of reasoning, find the present case

²⁸ Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671.

²⁹ Case T-188/95 *Waterleiding Maatschappij v Commission* [1998] ECR II-3713.

³⁰ Joined cases T-447/93, 448/93 and 449/93 *Associazione Italiana Tecnico Economica del Cemento and Others v Commission* [1995] ECR II-1971.

³¹ See footnote 19.

admissible just as the Court of First Instance of the European Communities did in *Aktionsgemeinschaft Recht und Eigentum*.³²

90. The Applicants are of the opinion that the *Kahn Scheepvaart v Commission*³³ case is not relevant for the present case, since there is nothing general about an aid scheme (even though it is granted by way of a tax measure) that benefits only one project. The Snøhvit project is specifically intended as the beneficiary of the contested State aid. The *Kahn Scheepvaart* case involved a general aid scheme, and not a targeted focused act of fiscal generosity favouring one investor and its partners in one region.

91. The Applicants argue, that the Defendant's and the Commission's reference to Council Regulation 659/1999 in their submissions, to support their view that the Applicants do not have *locus standi*, is irrelevant since this Regulation is not in force in the EEA.

92. The Applicants then turn to *locus standi* in anti-dumping cases. They argue that such cases follow distinctive procedure. They point out that in such cases the Court of Justice of the European Communities has recognised that legislation imposing anti-dumping duties is of direct and individual concern to producers and exporters who are able to establish that they were identified in the measure adopted by the Commission or the Council or were concerned by the preliminary investigations.³⁴ Actions brought by such persons against the measures are admissible. Equally, in the *Timex* case, the Court of Justice of the European Communities decided that a direct action brought by a complainant was admissible because of the rights accorded to a complainant by the basic regulation, and the role played in the preliminary investigation. This, in the view of the Applicants, echoes the role of *Bellona* in the present case. However, actions brought by independent importers are not admissible, unless they can fulfil the special conditions set out in *Extramet*³⁵ or satisfy the test set out in *Euromin*³⁶ – namely that they prompted the Community institutions' intervention or formed a part of the *raison d'être* of the Regulation itself.

93. The Applicants assert that the standing requirement in anti-dumping cases has clearly evolved over the past 20 years with a view to ensuring that justice be done. With their acknowledgement of the special circumstances present in *Extramet* and the “*raison d'être*” exception set out in *Euromin*, the Court of Justice of the European Communities and the Court of First Instance of the European Communities have whittled down the extreme effects of the traditional *Plaumann* test.

³² See footnote 19.

³³ See footnote 14.

³⁴ See Case 53/83 *Allied Corporation and Others v Council* [1985] ECR 1621, at paragraph 4.

³⁵ See footnote 35.

³⁶ Case T-597/97 *Euromin v Council* [2000] ECR II-2419.

94. In the present case it may also be noted that Bellona’s actions prompted and formed a part of the decision’s “*raison d’être*.” Furthermore, Bellona’s role in the investigation has been crucial. Echoing the aforementioned judgments, Bellona’s participation in the process should demonstrate the admissibility of the present case.

95. The Applicants also point out that a further example of the flexible interpretation of the requirement for direct and individual concern can be found in the field of competition, where the Court has recognised that participation in an administrative procedure culminating in the administrative determination of a party’s rights may result in a presumption of standing to challenge that determination. In support of this view a reference is made to the judgment in *Metro*.³⁷ It is asserted by the Applicants, that by acknowledging standing in the case, the Court of Justice of the European Communities has adopted a common sense approach, enabling justice to be done, and permitting the most concerned parties to challenge acts that affect them.

96. It is further argued that in two exceptional cases, *Codorniu*³⁸ and *Extramet*,³⁹ the Court of Justice of the European Communities and the Court of First Instance of the European Communities have been prepared to depart from *Plaumann* and create new law. These cases indicate that the *Plaumann* test is not a rigid rule and that the courts are willing to depart from it in the interest of justice. Echoing the criteria used in *Extramet*, the Applicants would argue that their business activities “depend” to a very large extent upon the continuing viability of alternative energy sources. And echoing *Codorniu*, the Applicants would argue that the contested measure would prevent them from pursuing their own corporate objectives.

97. The Applicants assert that attempts to reform the *Plaumann* test are apparent. To support this they refer to the criticism put forth by Advocate General Jacobs,⁴⁰ where he argues that the *Plaumann* test creates a serious gap in the system of judicial remedies established by the EC Treaty. They also argue that the recent judgment in *Jégo-Quéré*⁴¹ reflects a change in the case law. In that case, the Court of First Instance held that in order to ensure effective legal protection, a person should be regarded as individually concerned by a Community measure of general application if that measure affects his legal position in a manner which is definite and immediate, such as by restricting his rights or by imposing obligations. This was justified by the Court’s duty to ensure effective judicial protection.

³⁷ Case 26/76 *Metro v Commission* [1977] ECR 1875.

³⁸ See footnote 4.

³⁹ See footnote 22.

⁴⁰ See footnote 26.

⁴¹ See footnote 5.

98. The Applicants point out that the judgment in *Unión de Pequeños Agricultores*⁴² is a witness of possible return to a narrow interpretation. The Applicants, however, stress that in this judgment the Court noted that alternative courses of action before national courts might be possible for the unsuccessful appellant.

99. The Applicants also argue that the *Aktionsgemeinschaft Recht und Eigentum* case, where standing of the association was approved, points to a different direction. The criteria used in that case apply to the present case. In fact, Bellona finds itself in a stronger position than the German association. Firstly, Bellona challenges the Defendant's failure to open the procedure set out in Article 1(2) of Protocol 3 of the Surveillance and Court Agreement, which would have safeguarded its procedural rights. Secondly, Bellona advances legal grounds, which demonstrate the existence of serious issues of compatibility with the EEA Agreement, which should have obliged ESA to open the formal procedure. Thirdly, the competitive position of Bellona's partners and supporters is affected by the aid; and, fourthly, Bellona itself is affected by and insofar as it submitted the initial complaint to the Defendant. Given the direct link between the Defendant's assessment of March 18, 2002 and its subsequent decision of May 31, 2002, Bellona submits that its current application should be considered no less admissible than that of *Aktionsgemeinschaft Recht und Eigentum*.

100. The Applicants then turn to the issue of how the *Plaumann* test compares to standing requirements around the world. The Applicants offer a description of the legal situation in Norway, the EU Member States and the USA. Their main conclusion is that the *Plaumann* test compares unfavourably with the standing requirements in other developed democracies. In fact, the case law of the Court of Justice of the European Communities is increasingly out of line with more liberal developments in the laws of other jurisdictions. A broader interpretation of the rules governing standing would thus not represent a particularly bold or unusual step by the EFTA Court.

101. As concluding remarks on admissibility, the Applicants submit the following:

a) The EFTA Court should hesitate to apply a strict interpretation of a test that has been so widely criticised as an inadequate formula by many academics and members of the EC Courts in their private capacity. The current debate about the traditional test for standing puts in question the legitimacy of this test. Fortunately, the EFTA Court is not obliged to apply it, and can elect to follow its own test, such as that which it used in *SSGA*.⁴³

b) Today, there are a number of compelling reasons why the EFTA Court should maintain its more inclusive approach to admissibility.

⁴² See footnote 4.

⁴³ See footnote 6.

c) The case law on admissibility as established by the Community Courts is inconsistent and in flux. This is illustrated by the extraordinary changes in direction taken by the Community Courts in 2002.

d) It is pointed out that the Council and the Commission have opposed a broader interpretation of the notion of individual concern than that adopted in the existing case law, on the grounds that such an interpretation would result in an unmanageable flood of additional challenges to Community acts. The Applicants, even assuming such doubtful “floodgates” theories are well founded, submit that the same argument cannot be made in respect of the EFTA Court, where the number of cases is fewer. Moreover, other effective methods for addressing this issue exist, such as time limits for bringing an appeal and the requirements of the “centrally concerned” test of *SSGA*.⁴⁴

e) A more expansive approach to admissibility would also permit courts to hear the substantive issues of the cases before them in a timely manner, rather than being bogged down by admissibility questions. The speed alone with which the Defendant’s decision in this case was taken gives rise to doubt, or at least offers no reassurance to alleviate doubts, as to its legality. Legal certainty would be better assured via efficient and immediate judicial review.

f) Additionally, a broader test is appropriate in the present case where the EFTA Court provides the sole avenue of legal redress for the Applicants. There is no alternative remedy available under Norwegian law. Furthermore, as indicated above, there is no ombudsman on whom the Applicants may rely to promote their rights. If the EFTA Court were to find that the present action was inadmissible, the Applicants would be denied effective judicial remedy.

g) A broader test is also in line with the national rules in Norway, major EU countries and the USA. As noted above, in England, for example, the establishment of judicial review has greatly enhanced public satisfaction with the accountability of government and the administration. US courts have had lengthy experience in dealing with judicial review in the environmental field. They have noted the absence of safeguards for environmental interests which are merely aesthetic or recreational, rather than individual or competition-driven, and have developed from scratch a test to ensure judicial fairness.

h) Finally, the Applicants do fulfil the more expansive interpretation given to the *Plaumann* test in the *Aktionsgemeinschaft Recht und Eigentum* case.⁴⁵ The Court of First Instance of the European Communities in that case clearly recognised the interest of a representative organisation itself having standing to bring an application for annulment. The Applicants submit that the EFTA Court should do no less in this case.

⁴⁴ See footnote 6.

⁴⁵ See footnote 19.

102. The Applicants are not requesting that the EFTA Court take over the role of the EFTA Surveillance Authority in reviewing the validity of State aid measures. The Applicants are simply asking the EFTA Court to ensure that proper procedure has been followed, that the facts and the law have been properly assessed and that the decision in question has been adequately reasoned.

The Commission of the European Communities

103. The Commission points out that the Applicants seek annulment of the contested decision in its entirety, *i.e.* both in relation to the approval of the scheme and in relation to the approval of the individual aid. Since a decision approving a scheme is in the nature of a regulation, it is more difficult for an individual to demonstrate individual concerns.

104. The Commission draws attention to the distinction between *phase 2* State aid decisions and *phase 1* State aid decisions. In the former case, to be individually concerned, an applicant must demonstrate a sufficient and actual competitive relationship with the putative beneficiary. In the latter case the “parties concerned” within the meaning of Article 88(2) EC will be individually concerned, but they must still demonstrate a competitive relationship with the putative beneficiary, albeit less than in the case of a phase 2 decision. The Commission also points out that a participation in the administrative procedure is a factor that may be taken into account when assessing admissibility. The Commission refers in particular to *Landbouwschap v Commission*,⁴⁶ *Kahn Scheepvaart v Commission*,⁴⁷ *Waterleiding v Commission*,⁴⁸ and *Hamburger Haf- und Lagerhaus v Commission*.⁴⁹

105. As to the Applicant, Bellona, the Commission states that the Applicant has not demonstrated that it is an undertaking engaged in a relevant economic activity, within the meaning of Article 87(1) EC, nor has it demonstrated that it has any competitive relationship of any kind with Snøhvit or other putative beneficiaries of the scheme. Thus, Bellona is not individually concerned by the contested decision insofar as that decision approves the individual aid for Snøhvit, and still less as it approves the scheme. If the application would be considered admissible, that would mean that Bellona would have standing to seek judicial review of just about any State aid decision, since just about any State aid could be described as at least capable of having some kind of an effect on the environment. The consequence would be that anyone could attack anything and that would empty the term “individual concern” of meaning.

106. Furthermore, the Commission points out that Bellona alleges “to be involved in existing and planned energy projects related e.g. to hydrogen-energy and fuel cells.” This bare assertion is not sufficient to establish individual

⁴⁶ C-295/92 *Landbouwschap v Commission* [1992] ECR I-5003, at paragraph 12.

⁴⁷ See footnote 14, at paragraph 12.

⁴⁸ See footnote 19.

⁴⁹ See footnote 4, at paragraph 41.

concern for several reasons. *Firstly*, the phrase “to be involved” is not sufficiently precise and without any explanation. *Secondly*, the reference to “planned” projects is insufficient since individual concern cannot be established on the basis of subjective intentions or plans about future economic activity. *Thirdly*, the term “e.g.” is inappropriate and needs clarification. *Fourthly*, the phrase “hydrogen-energy and fuel cells” requires elaboration. *Fifthly*, no evidence is offered to support any of the assertions made, and none can be added. *Sixthly*, following the judgment in *Unión de Pequeños Agricultores v Council*,⁵⁰ the reference to *Jégo- Quéré v Commission*⁵¹ cannot be considered sufficient to conclude that application is admissible. The Commission draws particular attention to the judgment in *Stichting Greenpeace Council and Others v Commission*,⁵² confirmed on appeal,⁵³ where the application was confirmed to be inadmissible. In these circumstances, the only possible conclusion is that Bellona is not individually concerned by the contested decision and the application is therefore inadmissible insofar as made by Bellona.

107. As to the Applicant, TBW, the Commission states that its situation is essentially no different from that of Bellona. TBW did not participate in the administrative procedure and appears to have been added in an attempt to bolster the case on admissibility. Bare assertions to the effect that TBW is “an energy company” and engaged in the business of supplying energy, are not supported by any evidence and are insufficient to establish individual concern for several reasons. First, it is not clear whether TBW, who describes itself as “consultants” is producing energy or only supplying it. Second, clarification is required about what type of energy, on what scale it is being offered in which market, and why it competes with Snøhvit. Third, the reference to “plant oil fuels” also appears on the web site, which refers to the production of physic-nut oil in Mali. There would not appear to be any competitive relationship at all between this activity and Snøhvit. Fourth, TBW’s role in relation to the physic-nut oil in Mali is described as “technical and strategic backup support” which does not correspond to the production or supply of energy. Fifth, the reference to renewable biogas production does not indicate that TBW is the producer or the supplier of that energy, but rather the consultant, and the project seems to be in the area of development and there is no explanation about how they might compete with Snøhvit. So, in short, there appears to be no competitive relationship of any kind between TBW and Snøhvit. TBW’s involvement in the case appears to reflect environmental concern as does Bellona’s, and thus the application is inadmissible for the same reasons. The competitive link, which the Applicants attempt to establish, is in any event so remote that it could never form the basis for a determination that TBW would be individually concerned.

⁵⁰ See footnote 4.

⁵¹ See footnote 5.

⁵² See footnote 23.

⁵³ Case C-321/95 P *Greenpeace Council and Others v Commission* [1998] ECR II-1651, at paragraphs 27-35.

108. Contrary to the Applicants' assertion, there is no prospect that TBW would be individually concerned by a phase 2 decision. Although that question does not need to be answered in the present case, the Commission wishes to point out, that the case law shows that, *vis a vis* a phase 2 decision, an applicant must show that it has an actual and particular close competitive relationship with the putative beneficiary. In *Cofaz*⁵⁴ the Court referred to the requirement that the applicant's position in the market be significantly affected by the alleged aid – their *actual* position, not a potential one. The judgment in *ASPEC*⁵⁵ confirms the application of the *Plaumann* criteria in the context of phase 2 State aid decisions, where reference was made to actual, but not potential, competition. The same is true about the judgment in *ACC and Others v Commission*.⁵⁶ Similarly, the *Skibsvaerftsforeningen and Others v Commission*⁵⁷ case is based on the determination that the putative beneficiary admitted that it was in direct competition with two of the applicants. In *BP Chemicals*,⁵⁸ the application was considered inadmissible notwithstanding the fact that the applicant was an actual competitor of the putative beneficiary. In the light of this case law, the Commission respectfully submits that there is no doubt that TBW would not be individually concerned by a phase 2 decision in the present case. Furthermore, for the reasons given above, the application does not establish or evidence that TBW has any basis to assert that it is individually concerned by the contested decisions.

109. The Commission submits that the application is manifestly inadmissible and manifestly unfounded and that the facts as they appear in the contested decision and which are not disputed by the Applicants are more than sufficient to arrive at such a conclusion. Therefore, the Commission invites the Court to dismiss the application.

Thorgeir Örlygsson
Judge-Rapporteur

⁵⁴ See footnote 4.

⁵⁵ Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281.

⁵⁶ Case T-442/93 *ACC and Others v Commission* [1995] ECR II-1381.

⁵⁷ See footnote 8.

⁵⁸ See footnote 4.