**JUDGMENT OF THE COURT**
21 February 2008

*(Action for annulment of a decision of the EFTA Surveillance Authority – Municipal kindergartens – State aid – Notion of undertaking – Decision not to raise objections – Initiation of the formal investigation procedure – Admissibility)*

In Case E-5/07,

**Private Barnehagers Landsforbund,** represented by advokat Peter Dyrberg and advokat Ingvald Falch, with the law firm of Schjødt, Oslo, Norway,

*Applicant*,

v

**EFTA Surveillance Authority**, represented by Niels Fenger, Director, and Bjørnar Alterskjær, Senior Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

*Defendant*,

supported by **the Kingdom of Norway**, represented by Thomas G. Naalsund, advocate, Office of the Attorney General (Civil Affairs) and Siri Veseth, legal adviser, Ministry of Foreign Affairs, acting as agents,

*Intervener*,

APPLICATION for the annulment of Decision No 39/07/COL of 27 February 2007 on public financing of municipal day-care institutions in Norway,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Bjørg Ven (ad hoc), Judges

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as agent, and the written observations of the Commission of the European Communities, represented by Christophe Giolito and Bernd Martenczuk, members of its Legal Service, acting as agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, the Defendant, the Intervener and the Commission of the European Communities at the hearing on 16 January 2008,

gives the following

## Judgment

### I Factual background

1 Kindergartens (*barnehager*) for children under compulsory school age (i.e. between 0 and 6 years) have been available in Norway for decades. Public kindergartens are run either by the municipalities (hereinafter "municipal kindergartens") or, to a very limited extent, by public institutions (e.g. hospitals). Private kindergartens are run by companies or organisations or as family day-care institutions (hereinafter "private kindergartens"). At the relevant time, out of 235 000 children enrolled at kindergartens in Norway, 108 000 attend private kindergartens, whereof 80 000 were enrolled at kindergartens represented by the Applicant, Private Barnehagers Landsforbund (hereinafter "PBL").

2 Since the start of funding of the kindergarten sector by the state in 1963, there have been three sources of finance for kindergartens in Norway: the State, the municipalities and the parents. Activity-based State subsidies are granted equally to the municipalities and to private kindergartens. The scale of these grants is set by Parliament annually, with a present target of on average 50% coverage of the operational costs of day-care centres. With regard to parental fees, there were no limitations on municipal and private kindergartens before 2003. Furthermore, some municipalities granted additional aids to private kindergartens on a voluntary basis.

3 Municipal kindergartens in general have been and are still organised like other municipal activities. As such, the financing of the municipal kindergartens is a part of the general budget of the municipality. It is subject to the general rules of public budgeting, which means that the municipal budget has to be complete, meaning that all expected costs connected with an activity have to be budgeted in full.

4 In 2003, a reform of the financing of the kindergarten sector took place. It originated from an agreement between political parties in June 2002, the so-called “Kindergarten Agreement”. The goal was to ensure equal treatment for private and public kindergartens, affordable prices for parents and full coverage of high quality kindergarten places for all children whose parents so wish. From the outset, it was recognised that a system where the majority of the costs should be borne by the central State budget had to take into account the important cost deviations with regard to kindergartens amongst the different municipalities. It became furthermore clear in the legislative procedure that the municipalities had much higher costs than the private kindergartens. In 2003, the costs per child per hour of the private kindergartens were on average at 85% of the costs of the municipal kindergartens.

5 The major change introduced by the above mentioned reform was the introduction of a maximum price ceiling on parental fees, to obtain the goal of capping parents’ fees at 20% of the costs of the services. As of 1 January 2006, the applicable rate was fixed at NOK 2 250 per month with an intention of reducing it to approximately NOK 1 800. The parental fee is disconnected from the actual costs of the service; cost differences stemming from the age of the child (given that costs for children aged 0–2 years are substantially higher than for children aged 3–6 years) or from special needs are not accounted for. Furthermore, parents with more than one child benefit from a fee reduction of minimum 30% for the second child and minimum 50% for the third or following children. Another main change was the introduction of a new obligation of the municipalities to cover operational costs of non-municipal kindergartens.

6 In order to compensate for the new obligations of the municipalities (i.e. the loss of revenue of both municipal and non-municipal kindergartens through the introduction of the price ceiling which had to be covered by the municipalities), so-called “discretionary funds” were introduced. These earmarked subsidies are paid to the municipalities from the State budget and may be used to compensate for the loss of revenue of existing kindergartens (non-municipal or municipal) or for running costs of new kindergarten places. The system came into effect on 1 May 2004 and for the year 2004, NOK 485 million were allocated in the State budget for this purpose.

## II Relevant law

*EEA law*

7 Article 59(2) of the Agreement on the European Economic Area (hereinafter “EEA” or the “EEA Agreement”) reads as follows:

> *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The*

*development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

8 Article 61(1) EEA reads as follows:

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

9 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") reads as follows:

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

10 Article 36(2) SCA reads as follows:

*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.*

11 Article 1(2)–(3) in Part I of Protocol 3 to the SCA, as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001 (hereinafter "Protocol 3 SCA") reads as follows:

*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.*

12 Article 4(2)–(4) in Part II of Protocol 3 SCA reads as follows:

> *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').*

13 Article 13(1) in Part II of Protocol 3 SCA reads as follows:

> *The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 of this Chapter. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.*

*National law*

14 According to Section 1 of Act No 64 of 17 June 2005 on Day-Care Institutions (hereinafter "the Kindergarten Act"), a kindergarten shall give children under compulsory school age good possibilities for development and activities. It must also, unless otherwise decided, assist in giving the child an upbringing in accordance with the basic values of Christianity.

15 Section 8 of the Kindergarten Act establishes that the municipality is the local kindergarten authority, charged with the supervision of kindergartens' compliance with the applicable rules. Section 8, second paragraph, maintains that the municipality shall see to it that there is a sufficient number of kindergarten places.

16 Section 14 of the Kindergarten Act reads:

> *Approved day-care centres shall be given equivalent treatment as regards public contributions. The King may adopt regulations with further provisions on what is meant by equivalent treatment.*

17 Regulation No 539 of 19 March 2004 relating to equivalent treatment of child care institutions in relation to public subsidies, as amended in 2005 (hereinafter

the "Regulation"), lays down the applicable rules on the public financing of the kindergarten sector. Articles 1 and 2 of the Regulation establish the principle of equivalent treatment, independent of ownership, as subject to the principles laid down in the Regulation.

18 Section 3 of the Regulation *Responsibility of the municipalities* reads:

> *The municipality is the authority responsible for ensuring that all approved kindergartens in the municipality receive public subsidies in an overall equal manner.*
>
> *The municipality shall pay the costs of ordinary operation of kindergartens which are not paid by other public subsidies and parental contributions. If parental contributions in non-municipal kindergartens are lower than parental contributions in the municipality's own kindergartens, the municipal is not liable to pay the difference.*
>
> *The municipality is under an obligation to grant subsidies such that the overall public subsidies amount to at least 85% of what equivalent kindergartens owned by the municipalities on average receive in public subsidies.*
>
> *The municipality is not obliged to pay subsidies such that the overall public financing of the kindergartens exceeds public subsidies received on average by an equivalent kindergarten owned by the municipality.*
>
> *The municipality is not obliged to pay the cost increases which exceed normal price and cost increases for the municipal sector.*

19 According to the explanatory remarks accompanying the Regulation, the municipalities have under Section 3, second and fourth paragraphs, the choice between establishing the subsidy either in accordance with the cost coverage principle (second paragraph) or as an equal nominal subsidy amount based on unit costs (fourth paragraph). The choice must be the same for all non-municipal kindergartens in the municipality.

## III The administrative procedure and the contested decision

20 In August 2004, PBL contacted the EFTA Surveillance Authority (hereinafter "the Defendant" or "ESA") with a view to filing a complaint concerning public subsidising of municipal kindergartens in Norway. Some informal exchanges of views between ESA and PBL took place in the course of 2004, *inter alia* in a meeting on 16 September 2004.

21 By letter dated 23 February 2005, PBL submitted a formal complaint alleging that the system for public contributions to the operation of municipally owned day-care centres contained elements of State aid.

22 By e-mail dated 25 April 2005 and by letters dated 17 January 2006, 4 May 2006 and 6 June 2006, PBL submitted further information on the case. Representatives of ESA held meetings with PBL on 5 April 2005 and 16 February 2006.

23 By letter dated 13 July 2006, ESA requested clarifications from the Norwegian authorities. The Norwegian Government replied to the request by letter dated 25 September 2006.

24 By letters dated 2 October 2006 and 11 October 2006, PBL provided further comments to ESA. On 13 December 2006, ESA officials held a meeting with PBL, which formally called upon ESA to act under Article 37 SCA.

25 By letter dated 5 January 2007, PBL supplied further information to ESA. On 26 January 2007, ESA officials held a further meeting with PBL. By e-mail dated 9 February 2007, PBL informed ESA that it maintained its complaint and submitted further information by fax dated 12 February 2007.

26 On 27 February 2007, ESA adopted Decision 39/07/COL addressed to the Kingdom of Norway, and notified the Decision to PBL by a letter dated the same day. The operative part of the Decision reads as follows:

> *The EFTA Surveillance Authority concludes that the system of financing municipal day-care institutions in Norway does not constitute State aid within the meaning of Article 61 (1) of the EEA Agreement.*

27 ESA based its conclusion on three separate grounds: First, that municipal kindergartens are not undertakings in the meaning of Article 61(1) EEA; second, that the measure does not affect trade between Member States as required by Article 61(1) EEA; and third, that even if the measure would be considered State aid, the activity concerned constitutes a service of general economic interest, and the contested measure constitutes an appropriate and not manifestly discriminatory compensation thereof, the measure thus being justified on the grounds of Article 59(2) EEA.

## IV Procedure and forms of order sought

28 By an application lodged at the EFTA Court on 4 April 2007, PBL brought an action under Article 36 SCA for annulment of ESA's Decision No 39/07/COL of 27 February 2007 on public financing of municipal day-care institutions in Norway. The statement of defence from ESA was registered at the Court on 14 June 2007.

29 The Applicant claims that the Court should:

- Annul Decision No. 39/07/COL, of 27 February 2007, of the EFTA Surveillance Authority; and

- order the EFTA Surveillance Authority to pay the costs of the proceedings.

30 The application for annulment of the contested decision is based on four pleas in law:

- that the EFTA Surveillance Authority failed to initiate the formal investigation procedure;

- that the EFTA Surveillance Authority interpreted and applied wrongfully Article 61(1) EEA;

- that the EFTA Surveillance Authority interpreted and applied wrongfully Article 59(2) EEA; and

- that the EFTA Surveillance Authority violated Article 16 SCA and the principles of good administration, in particular the obligation to conduct an impartial and diligent examination of the case.

31 The Defendant claims that the Court should:

- Dismiss the Application as inadmissible; in the alternative

- dismiss the Application as unfounded; and

- order the Applicant to pay the costs.

32 The Applicant's reply to the statement of defence was registered at the Court on 20 August 2007. A rejoinder from the Defendant was registered on 5 October 2005. A statement of intervention from the Kingdom of Norway was registered on 8 October 2007. Furthermore, a reply from the Applicant to the statement in intervention from the Kingdom of Norway was registered on 26 October 2007.

33 The Republic of Iceland submitted written observations registered at the Court on 20 August 2007. The Commission of the European Communities (hereinafter the "Commission") submitted written observations registered at the Court on 16 August 2007.

34 The Applicant, the Defendant, the Intervener and the Commission presented oral argument and replied to questions put to them by the Court at the hearing on 16 January 2007 in Luxembourg.

35 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

## V Admissibility

*Pleas based on substantive grounds – the second, third and fourth plea*

Arguments of the parties

36 The Defendant, the Intervener and the Commission point out that in order to have *locus standi* under Article 36(2) SCA for pleas based on substantive grounds, the Decision must be of direct and individual concern to the Applicant. It is submitted that it is not enough to qualify as a "party concerned" under Article 1(2) of Protocol 3 SCA in order to be individually concerned with regard to pleas on substantive grounds. Rather, the Applicant has to be able either to rely on a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled, or to show that one or more of its members are individually concerned. Reference is made, *inter alia*, to Cases 25/62 *Plaumann* v *Commission* [1963] ECR 95, English special edition; T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739, at paragraphs 42–43, and T-69/96 *Hamburger Hafen- und Lagerhaus and others* v *Commission* [2001] ECR II-1037, at paragraph 49.

37 The Defendant adds that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned by a measure affecting the general interests of that category. Reference is made to Cases T-585/93 *Greenpeace* v *Commission* [1995] ECR II-2205, at paragraph 59, and T-350/03 *Wirtschaftskammer Kärnten and best connect Ampere Strompool GmbH* v *Commission* [2006] ECR II-68. It is argued that the Applicant cannot gain standing by pooling the general interests of its members, as this would amount to a circumvention of the requirements of Article 36 SCA. Reference is made, inter alia, to Case *Hamburger Hafen- und Lagerhaus*, at paragraph 49.

38 The Defendant and the Intervener argue that in order to demonstrate individual concern of the members of an association, it is not sufficient for them to be direct competitors of the beneficiaries of the aid scheme. Rather, it is necessary to examine whether they are merely affected by the alleged aid measure in the same way as other operators in the sector concerned, or whether at least one of them is affected in a way that distinguishes it from all other operators. Reference is made to Cases C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, hereinafter "*Aktionsgemeinschaft Recht und Eigentum*", at paragraph 35–37 and 72; Joined Cases E-5/04 to E-7/04 *Fesil and Finnfjord and others* v *EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraphs 55–56 and 60, and Case T-228/00 *Gruppo ormeggiatori del porto di Venezia Soc. coop. rl and others* v *Commission* [2005] ECR II-787, at paragraph 34.

39 The Commission submits that for the members of the Applicant to be individual concerned, it is required that their position on the market be significantly affected by the aid which is subject to the contested decision. During the oral hearing, the Commission specified that, as pointed out by the Defendant, this would require that certain of them are affected by the alleged aid measure in a way which sets them apart from all other undertakings in the market.

40 The Defendant, the Intervener and the Commission are of the opinion that the Applicant did not provide any factual information with regard to admissibility in its application, and that even in its reply, the Applicant has not adduced evidence to fulfil the condition of individual concern.

41 Furthermore, the Defendant, the Intervener and the Commission claim that the Applicant had no particular negotiating role in the proceedings leading to the Decision. The Defendant argues that the Applicant's complaints, meetings and correspondence, or its relationship with the Norwegian Government cannot constitute sufficient circumstances which distinguish the Applicant individually from all other persons, and thus confer on it standing to bring proceedings against a general aid scheme. Reference is made, inter alia, to Cases T-398/94 *Kahn Scheppvaart BV* v *Commission* [1996] ECR II-477, at paragraph 42; T-41/01 *Rafael Pérez Escolar* v *Commission* [2003] ECR II-2157, at paragraphs 39–40, and *Aktionsgemeinschaft Recht und Eigentum*, at paragraphs 53–57.

42 The Applicant submits that under the Court's case law, the action should be admissible in its entirety. It argues that the Court has not examined whether the individual members of the association would be more concerned than any other competitor, that it has held admissible pleas both in relation to an alleged failure to open the formal investigation procedure as well as to challenging the contested decision on the merits, and that the high number of members of the association did not keep the Court away from finding them individually concerned by the decision at issue. Reference is made to Cases E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Court Report 59, at paragraphs 20–23; E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1998] EFTA Court Report 38, "*Husbanken I*", at paragraphs 30–35, and *Fesil and Finnfjord*, at paragraphs 58–60. Further reference is made to Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, at paragraph 53.

43 The Applicant contends that it represents the overwhelming part of the private kindergarten sector in Norway, that it was at the origin of the complaint and was active in the procedure leading to the contested decision and that the core of the complaint is the distortion of competition to the detriment of the private kindergartens which its members are exposed to on a daily basis and which, according to the Applicant, in some cases threatens their economic survival.

44 Furthermore, the Applicant claims to be the established caretaker of the interests of private kindergartens in Norway vis-à-vis the Norwegian Government, and that assisting its members by dealing with the financing system and doing away with the distortion of competition is at the forefront of the Applicant's work.

Findings of the Court

45 With its second, third and fourth plea, the Applicant requests the Court to review the contested decision on the merits.

46 Under Article 36(2) SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision in question is of direct and individual concern to the former. Since the contested decision was addressed to the Kingdom of Norway, it must be considered whether it is of individual and direct concern to the Applicant within the meaning of Article 36(2) SCA.

47 In this respect, the Court notes that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ and the CFI when interpreting the main part of that Agreement, the reasoning which led those Courts to their interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court. This principle must also apply to the issue of *locus standi* to bring an action for annulment (see *Scottish Salmon Growers*, at paragraphs 11 and 13, and Case E-2/02 *Bellona* [2003] EFTA Court Report 236, at paragraphs 39–40).

48 Article 230(4) EC corresponds in substance to Article 36(2) SCA. As the Court held in *Bellona*, at paragraph 42, persons other than the addressees of a decision cannot, according to the case law of the ECJ, claim to be individually concerned, unless they are affected by that decision 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, are distinguished individually just as in the case of the person to whom a decision is addressed (compare *Plaumann*; Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, at paragraph 22, and *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 33).

49 In the field of State aid, applicants who challenge the merits of a decision appraising aid taken on the basis of Article 1(3) in Part I of Protocol 3 to the SCA or at the end of the formal investigation procedure are, according to the case law of the Court and of the ECJ, considered to be individually concerned by that decision if their market position or, in the case of an association of undertakings, the market position of its members, is substantially affected by the aid to which the contested decision relates (see *Aktionsgemeinschaft Recht und Eigentum*, at paragraphs 37 and 70; Case C-260/05 P *Sniace* v *Commission*, judgment of 22 November 2007, not yet reported, at paragraph 54, and Case 525/04 P *Lenzing* v *Commission*, judgment of 22 November 2007, not yet reported, at paragraph 31).

50 Accordingly, an applicant such as PBL must demonstrate that the position on the market of at least some of its members is substantially affected. As regards establishing such an effect, the ECJ has clarified that the mere fact that a measure such as the contested decision may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure cannot in

any event suffice for that undertaking to be regarded as individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (for comparison, see *Lenzing*, at paragraphs 32–39, and *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 72).

51 In the case at hand, it has not been demonstrated that any of the Applicant's members are affected in this sense. Accordingly, the Court concludes that the Applicant does not have *locus standi* on behalf of its members.

52 Neither can the Applicant be considered to have *locus standi* by reason of its own position. In this respect, the Court notes that the Applicant cannot be regarded as a negotiator of the same kind as, for instance, the Landbouwschap in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 or the International Rayon and Synthetic Fibres Committee (CIRFS) in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125. The Landbouwschap was a body established under public law to protect the common interests of agricultural undertakings, taking into account the public interest, and acting in certain tariff negotiations (*Van der Kooy*, at paragraphs 3 and 18–23). CIRFS, an association whose membership consisted of the main international manufacturers of synthetic fibres, had been, in particular, the Commission's interlocutor with regard to the introduction, extension and adaptation of a "discipline" connected with the policy of restructuring that sector in the EC (*CIRFS*, at paragraphs 3–5 and 29).

53 It follows from the foregoing that the action is inadmissible insofar as it challenges the contested decision on substantive grounds.

*Failure to initiate the formal investigation procedure – the first plea*

Arguments of the parties

54 The Defendant submits that the first plea is inadmissible. It recalls that under Article 1(3) of Protocol 3 SCA, its obligation to initiate the formal investigation procedure may arise only if the measure must be regarded, at least from a preliminary assessment, as new aid. With respect to the procedure for existing aid, no similar role for "parties concerned" exists, and consequently a decision with regard to existing aid is not challengeable before the Court. Reference is made to *Bellona*, at paragraph 46, and to the judgment of the Court of First Instance of the European Communities (hereinafter "the CFI") in Case T-330/94 *Salt Union Ltd* v *Commission* [1996] ECR II-1475, at paragraphs 33–38. The Defendant points to the special procedure applicable to existing aid and submits that it would be illegal to initiate the formal investigation procedure with regard to existing aid. Reference is made, in particular, to the judgment of the CFI in Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, at paragraph 115.

55 The Defendant argues that long before the entry into force of the EEA Agreement, the funding of municipal kindergarten services was based on a cost coverage model, and that municipal kindergartens have been established and run by municipalities before and after that date at the expense of the municipal treasury. To the Defendant, the only change was the introduction to finance the non-municipal kindergartens in 2003. It is therefore of the opinion that the decision concerned existing aid.

56 The Defendant concludes that the Court should examine whether the financing system would, under the assumption that it constitutes aid, constitute new aid. To the Defendant, this is a logical step in the assessment of admissibility to verify that the procedural rights of the alleged "party concerned" actually exist.

57 The Intervener supports the Defendant's line of argument and claims that the system for the municipalities' financing of their municipal kindergartens has remained completely unchanged.

58 The Applicant submits that neither the Court nor the Community Courts have considered the question of whether an aid scheme constitutes new or existing aid in their case law on admissibility, even in cases relating to existing aid. Reference is made to *Scottish Salmon Growers*, at paragraphs 20–23; *Husbanken I*, at paragraphs 30–35, and Case C-400/99 *Italy* v *Commission*, at paragraph 53.

59 According to the Applicant, the relevant test has been to examine firstly, on the question of admissibility, whether the applicant could be an interested party under a formal investigation procedure, and secondly, on the merits, whether the assessment of the aid scheme raised serious difficulties of a nature such as to warrant the opening of a formal investigation procedure. Reference is made to Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, at paragraphs 70–73, 85 and 91–96; and Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743. The Applicant finds that the approach submitted by the Defendant would require the Court to investigate into the substance of the case in order to rule on the admissibility. Furthermore, the Applicant considers the financing system introduced in 2003 *prima facie* as new aid, since it would entail *inter alia* new forms of financing, maximum prices on parental payments and transfers at an unprecedented scale.

60 The Commission submits that the first plea is admissible if the Applicant is a "party concerned" under Article 1(2) of Protocol 3 SCA.

Findings of the Court

61 In cases where ESA finds, on the basis of the preliminary examination only and without initiating the formal investigation procedure under Article 1(2) in Part I of Protocol 3 SCA, that aid is compatible with the EEA Agreement, the persons intended to benefit from the procedural guarantees inherent in the formal investigation procedure may secure compliance therewith only if they are able to challenge that decision. An action for the annulment brought under Article 36(2)

SCA by one of the parties concerned should therefore be declared admissible (see Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Court Report 54, at paragraph 51; *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 35, and Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission*, judgment of 20 September 2007, not yet reported, at paragraphs 32–33).

62 The "parties concerned" within the meaning of Article 1(2) in Part I of Protocol 3 SCA who are thus entitled to institute proceedings for annulment are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (compare *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 36, and *Fachvereinigung Mineralfaserindustrie*, at paragraph 34).

63 The Applicant is an association of undertakings running kindergartens as an economic activity and finding themselves in competition with municipal kindergartens. It must therefore be considered a 'party concerned' within the meaning of Article 1(2) in Part I of Protocol 3 SCA. Since the Applicant, by means of the present action, is seeking to safeguard its procedural rights, the Court finds that the application is admissible with respect to the plea that the Defendant failed to initiate the formal investigation procedure.

64 The Court adds that the question of whether aid is new or existing cannot be decisive for an applicant's *locus standi* to safeguard its procedural rights. Where appropriate, the Court would have to assess this question in deciding whether to uphold a plea that ESA failed to initiate the formal investigation procedure (see e.g. E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1999] EFTA Court Report 2, "*Husbanken II*", at paragraphs 31–36).

## VI The first plea – failure to initiate the formal investigation procedure

*Arguments of the parties*

65 The Applicant submits that the Defendant should have entertained serious doubts with regard to the question of whether municipal kindergartens are undertakings under Article 61(1) EEA, leading it to open a formal investigation procedure. It further argues that the findings are borne out of an insufficient examination that translates into an absence of appropriate reasoning.

66 The Applicant points out that the Defendant erred when it concluded that the municipalities, when providing kindergarten services, are acting as a public authority. It purports that the Defendant should have distinguished between the municipality's roles as an authority and as an operator. Some of the duties referred to by the Defendant apply to any operator of a kindergarten, whilst the duties the municipalities have in their role as kindergarten authority do not require them to actually operate any kindergarten themselves. It is argued that under the relevant case law, an entity's exercise of regulatory functions does not impede a finding that the entity is engaged in economic activity. Reference is

made to Case C-69/91 *Decoster* [1993] ECR I-5335, at paragraph 15, and the opinion of Advocate General Jacobs in Case C-218/00 *Cisal* [2002] ECR I-691.

67 The Applicant is of the view that the judgments of the ECJ in Cases 263/86 *Humbel* [1988] ECR 5365 and C-109/92 *Wirth* [1993] ECR I-6447 are not relevant for the decision of the case at hand. It argues that these cases dealt with the rights of the receiver of educational services under the rules on the freedom to provide services, whereas in the present case the status of the service provider has to be assessed under the competition rules. The Applicant submits that under the competition rules, an activity may in principle either qualify as public regulatory power or as economic activity. It is only with regard to certain compulsory social security schemes that the ECJ has made exceptions to this basic test. In these cases, the ECJ referred in particular to compulsory affiliation with those schemes, and to compulsory payments, as essential for application of the principle of solidarity. Reference is made to *Cisal* and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

68 The Applicant submits that elements such as an entity's public-law status, its non-profit character and its pursuit of social objectives cannot be taken into account when assessing whether it pursues an economic activity. To the Applicant, the only relevant question is whether the municipalities are providing services on a given market which could, at least in principle, be carried out by private actors in order to make a profit. Reference is made, inter alia, to Cases C-41/90 *Höfner and Elser* [1991] ECR I-1979, at paragraph 21 *et seq*.; C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297; C-67/96 *Albany* [1999] ECR I-5751, at paragraphs 77–86, and E-8/00 *Landsorganisasjonen i Norge* v *Kommunenes Sentralforbund and Others* [2002] EFTA Court Report 114, at paragraphs 62–67. The Applicant argues that childcare services have traditionally been provided by private actors, that the Norwegian State never attempted to establish an entirely public system and that notwithstanding the limitations to price competition introduced by the reform of 2003, there is competition amongst the providers of the service.

69 The Defendant, supported by the Intervener, maintains that the municipal kindergartens in Norway are not undertakings within the meaning of Article 61(1) EEA and argues that only services provided for remuneration are to be considered as 'services' within the meaning of the Treaty, and that courses provided by a national education system do not qualify as a service. To the Defendant, the existence of parental fees does not change the finding that kindergartens in Norway are essentially financed by the public purse. Such a fee is just a contribution, not the consideration for a service. This is fostered by the facts that the fees are disconnected from the actual costs, as they do not increase for children with special needs and that fee reductions for social reasons exist. Reference is made to *Humbel*, at paragraphs 18–19, and *Wirth*, at paragraphs 16–19.

70 The Defendant and the Intervener argue that the Norwegian State and the Norwegian municipalities have no commercial or other economic interest in

attracting as many children as possible to municipal kindergartens, as they spend money every time they accept a child. Furthermore, they would have no economic interest in making the parents choose a municipal kindergarten instead of a private one. It is pointed out that the municipalities are fulfilling their duties towards their inhabitants in the social, cultural and education fields when offering kindergartens to their inhabitants.

71 Relying on the findings of the ECJ in *Wirth*, at paragraphs 16–19, the Defendant submits that the assessment of an activity of a public educational institution, which is not a service if viewed in isolation, cannot be changed by the fact that a similar activity is performed by other entities as an economic activity.

72 To the Commission, the central question in the present case is whether the municipalities, when providing kindergarten places for their constituency, are engaged in an economic activity by offering services on a market, or whether their activity is non-economic in nature. The Commission notes that the ECJ has not yet decided whether, and to which extent, establishments in the field of education can be seen as "undertakings" within the meaning of the competition provisions of the EC Treaty. However, the ECJ held in *Humbel* and in *Wirth* that courses offered by educational institutions under the national education system do not constitute services within the meaning of the Treaty provisions on free movement of services.

73 The Commission submits that although providing kindergarten services could constitute an economic activity, this is not the case in the specific framework in place in Norway. The decisive factors are in the Commission's view the strong public nature of the system, the absence of any potential price competition, the duty of the municipalities to make available a sufficient number of kindergarten places, the fact that it is not possible to charge cost-covering fees, the objective of providing sufficient kindergarten places irrespective of costs, and the strong element of solidarity which is thereby introduced into the system. The Commission takes the view that by establishing and maintaining such a system, the Norwegian State is not seeking to engage in a gainful activity, but is fulfilling its duties towards its own population in the social, cultural and education fields.

*Findings of the Court*

74 When reviewing new aid, the preliminary examination provided for under Article 1(3) in Part I of Protocol 3 SCA is intended merely to allow ESA to form a *prima facie* opinion on the partial or complete compatibility of the aid in question with the EEA State aid provisions. This examination must be distinguished from the investigation under Article 1(2) in Part I of the Protocol – the formal investigation procedure – which is designed to enable ESA to become fully informed of all the facts of the case and to protect the rights of parties concerned by allowing them to make their views known. The preliminary examination does not include any obligation to give the parties concerned notice to submit their comments. In a formal investigation procedure, consultation is carried out by means of the decision to initiate a formal investigation being publicised in the

Official Journal of the European Union. This decision shall call upon the parties concerned to submit their comments.

75 It is against this background that the requirement under Article 4(4) in Part II of Protocol 3 SCA to initiate a formal investigation procedure when "doubts are raised as to the compatibility with the functioning of the EEA Agreement", must be read. Therefore, when taking a decision in favour of an aid, ESA may restrict itself to the preliminary examination provided for under Article 1(3) in Part I of Protocol 3 SCA only if it is in a position to reach the firm view, following the initial investigation, that the measure cannot be classified as aid within the meaning of Article 61(1) EEA or that the measure, whilst constituting aid, is compatible with EEA rules. If the initial analysis should have led ESA to the opposite conclusion, ESA is under an obligation to carry out all the requisite consultations and to that end to initiate the formal investigation procedure pursuant to Article 1(2) in Part I of Protocol 3 SCA.

76 The notion of "doubts" in Article 4(4) in Part II of Protocol 3 SCA is an objective one. Whether or not doubts exist with regard to the facts, points of law or economic or social assessments requires investigation of both the content of the contested aid scheme and the circumstances under which it was adopted or operated. The investigation must be conducted objectively, comparing the grounds of the decision with the information available to ESA when it took the decision on the compatibility of the disputed aid with the EEA Agreement. It follows that judicial review by the Court of the existence of "doubts" under Article 4(4) in Part II of Protocol 3 SCA will, by nature, go beyond simple consideration of whether or not there has been a manifest error of assessment by ESA in not initiating a formal investigation procedure (see, to that effect, Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Court Report 54, at paragraph 64).

77 As stated above at paragraph 27, the contested decision is based on three separate grounds, namely first, that municipal kindergartens are not undertakings in the meaning of Article 61(1) EEA, that the measure does not affect trade between Member States, and that even if the measure would be considered State aid, the contested measure would be justified on the grounds of Article 59(2) EEA. Accordingly, if the Defendant did not need to entertain doubts on one of these grounds, the present action will be unfounded.

Doubts as to whether the municipal kindergartens constitute undertakings

78 Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement and *Landsorganisasjonen*, at paragraph 62).

79 The Applicant claims that an activity which could, at least in principle, be carried out by a private operator, is economic in nature. It points out that kindergartens in Norway have not always been, and are not necessarily operated by public

entities. In fact, the Applicant is an association of undertakings running kindergartens as an economic activity.

80 When the nature of an activity carried out by a public entity is assessed with regard to the State aid rules, it cannot matter whether the activity might, in principle, be pursued by a private operator. Such an interpretation would basically bring any activity of the State not consisting in an exercise of public authority under the notion of economic activity. It follows that the specific circumstances under which the activity is performed have to be taken into account in order to assess whether the Norwegian municipalities, when offering their kindergarten places, are providing a service as an economic activity or whether they are exercising their powers in order to fulfil their duties towards their population. In this respect, the reasoning of the ECJ in *Humbel*, which concerned the notion of "service" within the meaning of the fundamental freedoms, can be transposed to a State aid case such as the one at hand.

81 According to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered as services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered (see for comparison, *Humbel*, at paragraph 17, and Case 76/05 *Schwarz*, judgment of 11 September 2007, not yet reported, at paragraph 38).

82 It has been established in the contested decision that about 80% of the costs of municipal kindergartens are borne by the public purse, and that there is no connection between the actual costs of the service provided and the fee paid by the parents whose child is attending the kindergarten. The Defendant also took into account that the municipalities have a statutory duty to ensure that sufficient places for children below compulsory school age exist for their population, and that kindergartens in Norway have important social, cultural, educational and pedagogical purposes.

83 It follows from the foregoing that the element of remuneration is absent in the activity of municipal kindergartens in Norway. The parents' fee which constitutes only a fraction of the true costs of the service cannot be qualified as a quid pro quo vis-à-vis the municipal kindergartens, but only as a contribution to a system which is predominantly funded by the public purse. It is therefore clear that the Norwegian State, when establishing and maintaining a system where every child increases the costs incurred, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields.

84 Accordingly, the Defendant did not need to entertain doubts as to whether the municipal kindergartens might constitute undertakings within the meaning of Article 61(1) EEA. As this finding of the Defendant was sufficient to exclude the existence of State aid in the measure at stake, the question of whether the Defendant should have entertained doubts with regard to the other points raised

in the application cannot be material for the outcome of this case. Therefore, the plea that the Defendant had failed to open the formal investigation procedure must be rejected.

85 As the Court found all pleas of law brought forward by the Applicant either inadmissible or unfounded, the application must be dismissed.

## VII Costs

86 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Defendant has requested that the Applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by the Republic of Iceland, the Kingdom of Norway and the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the Applicant to pay the costs incurred by the Defendant.**

Carl Baudenbacher Thorgeir Örlygsson Bjørg Ven

Delivered in open court in Luxembourg on 21 February 2008.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President