

Case No: 72806
Event No: 720038
Dec. No: 272/14/COL

[non confidential version]

EFTA SURVEILLANCE AUTHORITY DECISION

of 9 July 2014

on alleged state aid to Icelandair
(Iceland)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 4(2) and Article 13 of Part II,

Whereas:

I. FACTS

1. Procedure

- (1) On 22 October 2012, the Authority received a complaint, dated 16 October 2012¹ from Iceland Express ehf. (hereinafter referred to as “Iceland Express” or the “complainant”),² alleging that Icelandair ehf. (“Icelandair”) had been granted unlawful state aid through inter alia framework agreements with the Icelandic State for the purchase of airline tickets.
- (2) By letter dated 14 November 2012,³ the Authority acknowledged receipt of the complaint and requested clarification of certain issues. The complainant responded by email on 21 November 2012,⁴ providing the Authority with the requested information.

¹ Event No 650466.

² Iceland Express was an Icelandic private limited liability company, which specialized in low-cost airfares on international flights. The complainant operated its flights via the Czech airline, Holidays Czech Airlines and previously the British airline Astreaus. The complainant’s main destinations were large cities in Europe and in 2011 the complainant carried around 500 000 passengers.

³ Event No 653239.

⁴ Event No 654283.

- (3) By letter dated 14 December 2012,⁵ the Authority forwarded the complaint to the Icelandic authorities for comments and requested additional information and observations. The Icelandic authorities replied and provided the Authority with the relevant information by letter dated 28 January 2013.⁶ The case was also the subject of discussions between the Authority and the Icelandic authorities at the package meetings in Reykjavík on 4 June 2013 and on 21 May 2014.

2. Description of the measures

2.1 Introduction

- (4) The measures complained of are various framework agreements concluded between the Icelandic State and Icelandair regarding the purchase of international airline tickets as well as an alleged preferential treatment given to Icelandair by the Icelandic Civil Aviation Authority (“the ICAA”) in its procedure concerning the granting of traffic rights.

2.2 Framework agreements concerning the purchase of airline tickets by the Icelandic State

2.2.1 General

- (5) The Icelandic State has throughout the years concluded a number of rebate agreements with airlines concerning the purchase of airline tickets. Examples of such agreements are an agreement with Icelandair, dated 6 April 2003,⁷ an agreement with Scandinavian Airlines System (“SAS”), dated 15 August 2003, framework agreements concluded between the Icelandic Ministry of Finance and Icelandair, dated 22 June 2007 and dated 29 May 2009, and between the Ministry of Finance and Icelandair and Iceland Express respectively in 2011. According to the Icelandic authorities, these agreements were concluded to ensure that the State could perform a price comparison when purchasing airline tickets and to obtain quantity rebates in line with the volume of airline tickets purchased by the State. The Icelandic authorities also state that these agreements did not include any exclusivity clauses.

2.2.2 The Icelandic Public Procurement Act

- (6) In Iceland, public procurement rules are laid down in the Act No 84/2007⁸ (“the Public Procurement Act”) which implemented Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (“the Public Sector Procurement Directive”)⁹ into Icelandic law. The

⁵ Event No 653298.

⁶ Event No 661209.

⁷ The agreement was made in order to prolong a contract from 1996 that was concluded between the Ministry of Finance and Flugleidir hf, the predecessor of Icelandair.

⁸ Act No. 84/2007 on Public Procurement, available in English at: http://eng.fjarmalaraduneyti.is/media/skjal/Act_nr_84_2007_on_Public_Procurement_28102013.pdf.

⁹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114), incorporated as point 2 to Annex XVI to the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18), e.i.f. 18.4.2007. Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (“the Utilities Sector Procurement Directive”), is incorporated on the basis of secondary legislation, i.e. by Regulation 755/2007. See Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1), incorporated as point 2 to Annex XVI to the EEA

Public Procurement Act lays down rules concerning government procurement and establishes a special government agency for that purpose, referred to as the State Trading Centre (Ríkiskaup, “the STC”). The Act is designed to impose obligations on the government to procure its goods and services at competitive terms and at the same time create an environment where bidders can compete fairly and equally for the government’s business. The procurement rules are designed to conform to EEA standards.

- (7) The STC is responsible for the organisation of public procurement procedures on behalf of State institutions and prepares framework agreements on behalf of the State,¹⁰ always endeavouring to ensure cost-efficiency in State procurement.¹¹
- (8) The bids in the preparation of a tender procedure have to be done in a non-discriminatory and transparent manner. Framework agreements may be awarded by using either the restricted, negotiated or competitive dialogue procedure and such agreements may never be used to prevent or restrict competition.
- (9) According to Article 4 of the Public Procurement Act, service contracts are defined as contracts, other than works or supply contracts, having as their object the provisions of services as referred to in Annex II of the Public Sector Procurement Directive.¹² Contracts for the provision of air transport services of passengers are regarded as service contracts.
- (10) A specific administrative entity, the Icelandic Public Procurement Complaints Committee (Kærunefnd útbodsmála, “the PPCC”), has a non-exclusive, non-mandatory jurisdiction to enforce the Public Procurement Act. Participants in public procurement procedures can lodge complaints to the PPCC, which has the competence to annul a decision by the contracting authority (such as the STC), to instruct the contracting authority to put certain procurements out for tender, to re-advertise a tender or to alter a tender notice, tender description or other aspects of the tender documents. The decisions of the PPCC are however subject to review by the Icelandic courts and in order to obtain a binding and final decision on damages, a court order is needed.

2.2.3 The 2009 framework agreement

- (11) The Icelandic Ministry of Finance concluded a framework agreement with Icelandair on 29 May 2009 on behalf of the majority of State entities. According to the Icelandic authorities, the purpose of the agreement was to provide discounts to State entities when they purchased airline tickets from Icelandair. The discounts were based on cost benefits, in accordance with the number of purchased tickets, similar to the 2003 agreement between the Icelandic State and SAS. The rebates were not conditional upon the State purchasing tickets exclusively from Icelandair. The State entities therefore still had the option to purchase airline tickets from and enter into similar agreements with other airlines and booking agencies.
- (12) In particular, clause 2 of the 2009 framework agreement provides for a progressive rebate system calculated on the total turnover generated by the Icelandic’s State purchase of airline tickets over a three-month period. In addition, the State reserved the right to purchase airline tickets and enter into similar agreements with other companies. If airline tickets were purchased both from Icelandair and other airlines (e.g. connecting flights),

Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18), e.i.f. 18.4.2007.

¹⁰ Public Procurement Act, article 85.

¹¹ Public Procurement Act, article 87.

¹² See footnote 9.

clause 2 states that the rebate would be limited to the tickets purchased from Icelandair. The rebates were determined every quarter based on the total price of sold airline tickets, excluding taxes and other fees. Icelandair's general business and service conditions applied except where otherwise stated in the agreement.

- (13) The 2009 framework agreement was concluded between the Icelandic State and Icelandair by direct award. The complainant therefore challenged the agreement before the PPCC. In 2010, the PPCC issued a ruling concerning the agreement¹³ and found that the Icelandic State should have initiated a public tender procedure prior to directly awarding the agreement to Icelandair since the total amount of airline tickets purchased by the State exceeded the minimum threshold for organizing a public tender procedure. The PPCC did not find the State liable for damages as the complainant had not provided evidence demonstrating that it likely would have been chosen by the State in a public tender procedure.

2.2.4 The 2011 framework agreement

- (14) In March 2011, the STC initiated a public tender procedure in order to conclude a new framework agreement for the State's purchase of airline tickets.
- (15) According to the tender documents, the bidders needed to provide information on the maximum prices and maximum discounts they could offer on economy class tickets of certain pre-defined routes. According to Section 1.2.2 of the tender documents, the STC would choose the most economically advantageous tender/tenders or reject them all. Furthermore, the tender documents stipulated the right to choose part of a tender and/or choose a tender from more than one bidder.
- (16) Sections 1.1.1 and 2.1 of the tender documents stated that the aim of the tender was to reduce the overall cost of travel by employees, meaning that the employees were instructed to travel less, organise their trips well in advance and purchase the travel route that would be economically most advantageous. In practice this meant that the State, by issuing a tender, was trying to obtain discounts on airline tickets but also wanted to simplify and harmonise the procedure for service providers and State institutions in order to obtain better prices. In order to achieve this goal, the bidders were *inter alia* instructed to appoint special service representatives to handle all purchases under the framework agreement. The State entities that were parties to the framework agreement were also instructed to appoint one employee which should handle all bookings under the agreement on behalf of the respective institution.
- (17) The selection of tenders was, according to section 1.2.3 of the tender documents, *firstly* based on price (90%), where the lowest price would get the highest score. *Second*, the selection was based on supply (5%), where frequency was evaluated based on information submitted by the bidder concerning the estimated supply/frequency of flights on the routes indicated in the tender documents. *Thirdly* the selection was based on reliability (5%), whereby the bidder needed to submit information on how schedules were fulfilled and how often flights on each route were cancelled.
- (18) According to section 1.2.9 of the tender documents, the prices offered could not include bonuses except for those mentioned in section 2.3 *e.g.* access to lounge areas, extra insurances and baggage claims or other benefits. However, the bidders should present the

¹³ See the Icelandic Procurement Complaint Committee Ruling No 7/2010, *Iceland Express v the Ministry of Finance*, 22.6.2010, available online at: <http://www.urskurdir.is/Fjaramala/KaerunefndUtbodsmala/nr/3477> (only available in Icelandic).

prices that would be charged for these services. It was however expressly stated in section 2.3 that bidders were forbidden to provide gifts or equivalent benefits, including offers of any loyalty programs or other comparable programs.¹⁴

- (19) There were two competing bids, one from Icelandair and one from Iceland Express. According to the abovementioned tender criteria, Iceland Express obtained a total score of 92,96 points (90 for price, 2,31 for supply and 0,65 for reliability) while Icelandair obtained a score of 53,57 points (43,57 for price, 5 for supply and 5 for reliability). After evaluating the bids and the score points, STC decided to conclude framework agreements with both Icelandair and Iceland Express on behalf of all State institutions and State-controlled entities as it was allowed to do so under section 1.2.2. of the tender documents. The framework agreements entered into force on 1 July 2011 and were applicable until 31 June 2012.
- (20) Clause 4 of the 2011 framework agreement between the Icelandic State and Icelandair provided for a 9% discount on the nominal ticket value (excluding VAT). These discounts were given on the routes between Reykjavik and Copenhagen, London Heathrow, Brussels, New York and Boston. The framework agreement did not contain any clauses referring to additional services offered by Icelandair to the Icelandic State.
- (21) Clause 4 of the framework agreement between the Icelandic State and Iceland Express provided for a fixed rate for each of the routes (expressed in Icelandic Krona (ISK) and excluding VAT – see table below). These rates were given on the routes between Reykjavik and Copenhagen, London Gatwick, New York, Boston and Brussels. The framework agreement did not contain any clauses referring to additional services offered by Iceland Express to the Icelandic State.

Offer Iceland Express (inc.taxes and other fees)				
Departure airport	IATA code	Arrival airport	IATA code	Price ISK
Reykjavík	KEF	Copenhagen	CPH	19.900
Reykjavík	KEF	London	LGW	19.900
Reykjavík	KEF	Brussels	BRU	32.900
Reykjavík	KEF	New York	EWR	31.900
Departure airport	IATA code	Arrival airport	IATA code	Price ISK
Copenhagen	CPH	Reykjavík	KEF	19.500
London	LGW	Reykjavík	KEF	19.500
New York	EWR	Reykjavík	KEF	27.900
Boston	BOS	Reykjavík	KEF	27.900
*Framework agreement 2867 July 2011				

- (22) The Icelandic authorities provided the following information, collected by the STC, regarding the total amount of tickets purchased from Iceland Express and Icelandair under the 2011 framework agreements.

¹⁴ See the explanations, clarifications and corrections contained in the annex to the tender documents, dated 26.4.2011 (Event No 661218).

Airline	1/7-31/12 2011	1/1-30/9/2012
	Total turnover	Total turnover
Icelandair	2,677,409	3,662,549
Iceland Express	569,654	387,420
Total	3,247,063	4,049,969

- (23) In the period from July until December 2011, 82.5% of the tickets were purchased from Icelandair and 17.5% from Iceland Express whereas from the period of January until the end of September 2012, 90.5% of the tickets were purchased from Icelandair and 9.5% from Iceland Express.
- (24) Shortly after the 2011 framework agreements were concluded, the agreement concluded with Icelandair was challenged by the complainant before the PPCC. On 8 August 2012, the PPCC issued a ruling concerning the Agreement and found that the STC had breached the Icelandic Public Procurement Act because, even though the tender procedure was meant to establish a framework agreement, the STC should only have accepted the economically most advantageous offer.¹⁵ According to the PPCC, public authorities that purchase goods or services are not allowed to accept both the economically most advantageous offer as well as another less favourable offer and conclude framework agreements with both parties. The PPCC found that the complainant's bid should have been the only one that the STC could accept as its score was higher according to the criteria spelled out in the tender documents. If the STC wanted to put more emphasis on supply and reliability, then they should have expressed that in the tender documents. The STC was therefore liable for damages.

2.3 The award procedure by the Icelandic Civil Aviation Authority

- (25) In 2009, Icelandair was the only Icelandic air carrier that operated scheduled flights to Halifax in Canada. Iceland Express wanted to enter this market and therefore made an application to the ICAA on behalf of Astreaus, an air carrier established in the UK, to fly to Winnipeg in Canada. The ICAA decided to consult with Icelandic air carriers prior to granting traffic rights to Astreaus. After receiving comments from two Icelandic air carriers, including Icelandair, ICAA decided, by letter dated 30 November 2009, that the application could only be approved if the Canadian government would grant reciprocal traffic rights to Icelandic air carriers. However, ICAA's decision was subsequently annulled by the Ministry of Transport which granted Astreaus the requested traffic rights for the year 2010 without the requirement of having to ensure reciprocal rights for Icelandic air carriers.
- (26) On 3 March 2010, Iceland Express and Astreaus lodged a complaint to the Icelandic Competition Authority concerning the above-mentioned practices of the ICAA. In Decision No 4/2011, of 7 February 2011,¹⁶ the Icelandic Competition Authority concluded that the procedure applied by the ICAA with regard to the award of traffic rights had a negative impact on competition. The Competition Authority therefore instructed the ICAA

¹⁵ See the Icelandic Procurement Complaint Committee Ruling No 12/2012, *Iceland Express v Ríkiskaup* 08.08.2012, available online at: <http://www.urskurdir.is/Fjaramala/KaerunefndUtbodsmala/nr/6030> (only available in Icelandic).

¹⁶ See the Icelandic Competition Authority's Decision No 4/2011, of 7.2.2011, concerning the ICAA's granting of traffic rights in Iceland to foreign air carriers, available online at: http://www.samkeppni.is/media/akvardanir-2011/akvordun_04_2011_Kvortun_Iceland_Express_og_Astraeus.pdf (only Icelandic version available).

to revise its procedures and not to consult with Icelandic air carriers prior to granting traffic rights to their competitors.¹⁷

3. The complaint

- (27) Soon after the complaint was filed, it was publicly announced that the undertaking WOW Air had acquired the route network, branding and customer base of Iceland Express and that Iceland Express was ceasing all regular operations.¹⁸ The complainant changed its name to IEMI ehf. (“IEMI”), a private limited liability company which changed from a company specialising in low fares to a company renting out commercial buildings.¹⁹ IEMI informed the Authority that it wished to pursue the complaint.²⁰
- (28) The complainant claims that Icelandair, the complainant’s main competitor on the Icelandic market, has been granted unlawful state aid through the 2009 and 2011 framework agreements regarding the purchase of international airline tickets by the Icelandic State and through preferential treatment given to Icelandair by the ICAA.
- (29) According to the complaint, the 2009 framework agreement granted exclusivity to Icelandair for the State’s purchases of international airline tickets. The complainant alleges that this agreement was concluded without following a public tender procedure and therefore no other airline was afforded the chance to bid for the contract. The complainant moreover considers it likely that, prior to 2009, the State had concluded similar exclusive contracts with Icelandair without following a public tender procedure.
- (30) The complainant furthermore alleges that the Icelandic State has favoured Icelandair under the 2011 framework agreements, which were concluded both with Icelandair and the complainant, by almost exclusively using Icelandair’s services, even though these services were priced substantially higher than the corresponding services offered by the complainant.²¹ According to the complainant, the application of the framework agreement was discriminatory, *inter alia*, due to the application of Icelandair’s frequent flyer program, the so-called Saga Club bonus system, allegedly allowing State employees to use points earned in the course of official travel for their personal travel and thus providing them with an incentive to buy tickets predominantly from Icelandair. Moreover, the complainant maintains that the 2011 framework agreement was flawed because the tender procedure had not been followed correctly.
- (31) Finally, the complainant alleges that state aid has been granted to Icelandair through preferential treatment given to Icelandair by the ICAA with regard to the granting of traffic rights to fly to Winnipeg, Canada. As discussed above, this matter was assessed by the Icelandic Competition Authority in Decision No 4/2011.²²

¹⁷ *Idem*

¹⁸ See press releases at <http://www.marketwired.com/press-release/icelandic-low-fares-airline-wow-air-purchases-iceland-express-1717635.htm> (English version) and <http://www.vb.is/frettir/77438/> (only Icelandic version available).

¹⁹ IEMI was declared bankrupt on 25.3.2013.

²⁰ Event No 664542.

²¹ According to the complainant, the Icelandic State only purchased tickets from Iceland Express for an amount of 861.874 ISK in the 12-month period from June 2011 to June 2012 (which according to the complainant constitutes approximately 0,1% of the State’s total airline ticket purchases). Furthermore, according to the complainant, its prices were 200% lower than those of Icelandair.

²² See footnote 16 above.

4. Position of the Icelandic authorities

- (32) According to the Icelandic authorities, the State's purchase of airline tickets does not involve state aid within the meaning of Article 61(1) of the EEA Agreement, because the State has always ensured that the economically most advantageous travel option be chosen, while taking into consideration the total travel cost of any trip. The State thus applies the same criteria and takes into account the same considerations as any private market purchaser would when purchasing airline tickets.
- (33) The Icelandic authorities have stated that the sole criterion used by the Icelandic State is cost-efficiency with regard to the itinerary of each trip. In particular, business class or economy comfort airline tickets are generally not purchased when travelling on official business. Indeed, according to the Ministry of Finance, about 80-85% of all airline tickets are booked on economy class.
- (34) In addition, most State institutions have a central buyer responsible for purchasing the most cost-efficient flight route. The State employee who is travelling only in exceptional circumstances purchases the tickets directly and in those circumstances the employee is obliged to select the most cost-efficient travel itinerary.
- (35) According to the Icelandic authorities, neither the Ministry of Finance nor any other Ministry or State agency have ever concluded exclusivity agreements with Icelandair or granted the company exclusivity by any other means with regard to the purchase of international airline tickets. The Icelandic authorities note that the 2009 and the 2011 framework agreements were mere examples of quantity rebates provided to large customers in line with the volume of purchased airline tickets. Indeed, Icelandair generally uses the same standard contract for all of its [...] ²³ corporate customers and thus applies the same quantity rebate scheme to all of these customers. The Icelandic authorities also maintain that these agreements were neither binding nor exclusive and that any other airline could have entered into similar agreements with the Icelandic State. ²⁴
- (36) With respect to the allegation that the Icelandic government has almost exclusively used the services of Icelandair under the 2011 framework agreement, the Icelandic authorities wish to emphasise that the price of the airline ticket is just one aspect among a number of other factors which is taken in consideration to determine which airline will be used for official travel. First, the total cost of the trip is assessed, which not only includes the price of the airline ticket but also the hotel costs and travel allowances. Secondly, the supply of routes is also taken into consideration, and in particular the frequency and timing of flights (including stopovers). And finally, the total time spent away from work and the convenience of flight arrivals and departures in relation to the time of meetings and conferences are also part of the assessment. All these factors are to be considered when airline tickets are purchased. Thus, the price of the ticket itself becomes the deciding factor only when two flights actually correspond in relation to destination and timing. In the view of the Icelandic authorities, this explains why a smaller number of tickets have been purchased from Iceland Express under the 2011 framework agreement.
- (37) The Icelandic authorities maintain that the motivation for the tendering out of the 2011 framework agreement was to seek the best market terms and all offers were to include total cost and expenses arising from the purchase of airline tickets. According to the tender

²³ The exact figure is covered by the obligation of professional secrecy.

²⁴ The Icelandic authorities submitted copies of agreements concluded with Icelandair in 2003, 2007, 2009 and 2011 (Events No 661213 and 661215).

documents (in particular section 1.1.1 and section 2.1), the aim of the tender was to reduce the overall cost of travel by employees by obtaining discounts on airline tickets and to simplify and harmonise the procedure for service providers and institutions, as described in section 2.2.4 above.

- (38) Finally, with regard to the practices of ICAA when granting traffic rights, the Icelandic authorities refer to the fact that the Icelandic Competition Authority has already assessed this issue in its Decision No 4/2011. Moreover, according to the Icelandic authorities, the granting of traffic rights does not involve any transfer of state resources and can therefore not entail state aid.

II. ASSESSMENT

1. The presence of state aid

(39) Article 61(1) of the EEA Agreement 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.”

(40) This implies that a measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled:

- the measure must involve the transfer of State resources;
- the measure must confer an economic advantage upon the recipient;
- the measure must be selective, *i.e.* it must favour certain undertakings or the production of certain goods;
- the measure must distort or have the potential to distort competition; and
- the measure must affect trade between EEA States.²⁵

(41) Prior to assessing whether the State’s purchasing of airline tickets through framework agreements constitutes state aid, the Authority will address the complainant’s submission that state aid has been granted to Icelandair through preferential treatment given to Icelandair by the ICAA with regard to the granting of traffic rights.

(42) The Icelandic authorities have provided information that ICAA’s decision, to consult with Icelandic air carriers prior to granting traffic rights to Astraëus, was annulled by the Ministry of Transport and Astraëus obtained the traffic rights it had requested for the year 2010. Moreover, the Icelandic Competition Authority instructed the ICAA to revise its procedures and not to consult with Icelandair, or other Icelandic air carriers, prior to granting traffic rights to their foreign competitors.²⁶ The Ministry of Transport and the Competition Authority thus prevented the gaining of an undue advantage to Icelandair, or other Icelandic air carriers, over its competitors. Under these circumstances, this part of the complaint is without object and will therefore not be assessed further.

(43) The Authority will set out below the reasons why the State’s purchasing of airline tickets through framework agreements does not confer an economic advantage on Icelandair. Taken into account that the above-mentioned conditions should be cumulatively fulfilled, the non-fulfilment of one condition, *in casu* the absence of an economic advantage, is sufficient to conclude that no state aid is present.

1.1 The measure does not confer an economic advantage upon the recipient

(44) In order to constitute state aid within the meaning of Article 61 (1) of the EEA Agreement, the measure must confer an economic advantage on the aid recipient.

²⁵ According to settled case-law, classification as aid requires that all conditions set out in the provision should be fulfilled, see Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”) [1990] ECR I-959.

²⁶ See footnote 16 above.

1.1.1 Introduction

- (45) In order to determine whether Icelandair received an economic advantage from the Icelandic State through the purchase of airline tickets and therefore whether state aid was involved, it will need to be assessed whether Icelandair received an economic advantage which it would not have obtained under normal market conditions.²⁷ The Court of Justice of the European Union (“CJEU”) has confirmed that where a state measure consists in normal remuneration for a service provided by a commercial operator, no aid is involved.²⁸ In particular, the Court found that a determination of what constitutes normal remuneration for the services in question presupposes an economic analysis taking into account all factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.²⁹ On the other hand, the Court also ruled that the fact that the parties undertake reciprocal commitments or provide one another with mutual consideration does not rule out a finding of state aid.³⁰ Indeed, in order to qualify a transaction as a normal commercial transaction, the State must not only purchase goods or services on market conditions but must also have an actual need for the goods or services purchased.³¹
- (46) In order to determine whether an economic transaction carried out by the State or a public authority has been carried out according to normal market conditions, the conduct of the public authorities is compared to that of private economic operators of a comparable size acting under normal market conditions.³²
- (47) In order to determine whether the State is purchasing goods or services on market terms, it will thus need to be assessed whether a private company would have purchased the goods or services at stake for the same consideration. It follows from the Commission’s decisional practice³³, the Commission’s and Authority’s guidance documents³⁴ and the

²⁷ Case C-39/94 *SFEI* [1996] ECR I-3547, paragraph 60; Case C-256/97 *DMT* [1999] ECR I-3913, paragraph 22 ; Case T-163/05 *Bundesverband Deutscher Banken v Commission* [2010] ECR II-387, paragraph 35; Cases T-267 and T-279/08 *Région Nord-Pas-de-Calais v Commission* [2011] ECR II-1999, paragraph 158.

²⁸ Case C-39/94 *SFEI v Commission* [1996] ECR I-3547, paragraphs 60-61.

²⁹ *Idem*.

³⁰ Case T-14/96 *BAI v Commission* [1999] ECR II-39, paragraph 71 and Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2957, paragraph 114.

³¹ Case T-14/96 *BAI v Commission* [1999] ECR II-39, paragraphs 76 and 79 and Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2957, paragraphs 116 and 117.

³² In particular, the Courts have developed the “*market economy investor principle*” to identify the presence of state aid in cases of public investments (capital injections), the “*private creditor test*” to identify whether state aid is present in cases of debt renegotiations by public creditors and the “*private vendor test*” to determine whether the sale by public authorities would entail state aid. See Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”) [1990] ECR I-959, paragraph 29, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraph 208; Case C-256/97 *DM Transport* [1999] ECR I-3913; Case E-1/13, *Mila v EFTA Surveillance Authority*, 27 January 2014, paragraph 101 [not yet reported but available online at http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2013/1_13/1_13_Judgment.pdf].

³³ Commission Decision N 264/2002 *London Underground Public Private Partnership*, paragraph 79, Commission Decision N 657/1999 on the Welsh business infrastructure development, page 4, Commission Decision N 574/2004 concerning the exemption of dredging sludge from a waste tax in the Netherlands, paragraph 14.

³⁴ Community Framework for State aid for Research, Development and Innovation, OJ C323, 30.12.2006, p. 1, point 2.1 and Authority Guidelines regarding Aid for Research and Development and Innovation, paragraph 44; Commission communication concerning aid elements in land sales by public authorities, OJ C209, 10.7.1997, page 3, point II.1 and Authority Guidelines on State aid elements in sales of land and buildings by public authorities, chapter 2.1; Application of Articles 92 and 93 of the EC Treaty and

case law of the European Courts³⁵ that compliance with an open, transparent, unconditional, well-publicized and non-discriminatory tender procedure creates a presumption that the remuneration offered by the State reflects market conditions. This leads to there being no “advantage” to the seller of the goods, works or services in question. The use of the tender is evidence of a transaction taking place under normal market conditions.

- (48) The Commission, the Authority and the European Courts have, over the years, come to regard an open, transparent and unconditional bidding procedure as an appropriate means to ensure that the market economy investor test has been complied with and thus that fair market value is paid for certain goods and services. However, this does not automatically mean that the absence of an orderly bidding procedure justifies a presumption of state aid. Indeed, public procurement law and state aid law exist in parallel and there is no reason that the violation of, for example, a public procurement rule should automatically mean that state aid rules have been infringed.³⁶
- (49) The fundamental question to be determined is whether Icelandair was granted an advantage, *i.e.* an advantage over and above that which could arise from a normal commercial transaction, or whether Icelandair was simply receiving normal remuneration for services it provided to the Icelandic State at fair market value.
- (50) In the case at hand, an advantage could have been granted by the Icelandic State if (1) the Icelandic State purchased more tickets from Icelandair than it actually needed; and (2) the Icelandic State purchased airline services on conditions that would not have been acceptable to a private market operator of a comparable size, either because the State paid a higher price for these airline tickets than the actual market price paid by corporate airline customers of a comparable size or because the State could have received the same or comparable services at a lower price. Therefore, it must be assessed whether the Icelandic State purchased services that corresponded to its actual needs³⁷ and on conditions which would have been acceptable to a private market operator in a comparable situation.

1.1.2 *Did the Icelandic State purchase services that corresponded to its actual needs?*

- (51) Employees of the Icelandic State need to travel abroad for work and therefore need airline tickets on a regular basis. According to information provided by the Icelandic authorities, airline tickets were purchased from Icelandair only after an actual need to travel had been identified by the ministry in question. Accordingly, the Icelandic State did not purchase a predetermined amount of airline tickets from Icelandair but only purchased airline tickets when there was an actual demand or need for them.³⁸

Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10. 12. 1994, p. 5, point 18.

³⁵ See, for example, Joined Cases T-116/01 and T-118/01 *P & O European Ferries v Commission* [2003] ECR II-2957, paragraph 118. Albeit in a different context, the Altmark judgement of the European Court of Justice concerning services of general economic interest also expressed the view that public procurement procedures allow for the selection of the tenderer capable of providing the given services “at the least cost to the community”. See Case C-280/00, *Altmark* [2003] ECR I-7747, paragraph 93.

³⁶ Case T-442/03 *SIC v Commission* [2008] ECR II-1161, paragraph 147. By analogy, see Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 44.

³⁷ Case T-14/96 *BAI v Commission* [1999] ECR II-39, paragraphs 76 to 79, and Joined Cases T-116/01 and T-118/01 *P & O European Ferries v Commission* [2003] ECR II-2957, paragraph 117.

³⁸ This is contrary to the facts in the Case T-14/96 *Bretagne Angleterre Irlande (« BAI ») v Commission* [1999] ECR II-139, where the Spanish authorities purchased a predetermined amount of travel vouchers, irrespective of whether the journeys were actually made.

1.1.3 *Did the Icelandic State purchase services based on conditions which would have been acceptable to a market operator in a comparable situation?*

- (52) In the case at hand, the Authority is of the view that the absence of a tender procedure in the case of the 2009 agreement or the flaws in the tender procedure leading up to the 2011 framework agreements does not as such indicate that the Icelandic State did not purchase airline tickets from Icelandair in line with market conditions. First, the Authority is of the view that the tender procedure for the 2011 framework agreements was not well designed to guarantee for the most economically advantageous offer to win the tender and did not guarantee sufficient competition. Secondly, the Authority is of the view that, by assessing the framework agreements in light of the terms and conditions under which comparable transactions carried out by private economic operators of a comparable size have taken place in comparable situations (so-called benchmarking), it can be demonstrated that these agreements were in line with market conditions.

The 2011 tender procedure does not allow for the most economically advantageous offer to win the tender and cannot be regarded as sufficiently competitive.

- (53) It follows from the *Míla* judgment that the Authority should examine a tender procedure sufficiently when there are doubts that the outcome of the tender procedure accurately reflects the market price.³⁹ In the Authority's view, the tender procedure for the 2011 framework agreement was not well designed to guarantee for the most economically advantageous offer to win the tender. In particular, the extraordinary weight given to price and the very low weight given to supply and reliability was not in line with the Icelandic authorities' aim of the tender. The aim was to achieve the most cost-efficient and thus economically advantageous itinerary possible for each and every employee,⁴⁰ in terms of frequencies offered at convenient times in the morning and late afternoon and the reliability of flights. Therefore, the relative weighting given to the selection criteria did not correctly reflect the object of the contract, *i.e.* to achieve the most cost-efficient travel itineraries possible, and therefore did not allow for an objective comparison of the two tenders.⁴¹

³⁹ Case E-1/13, *Míla v EFTA Surveillance Authority*, 27 January 2014, paragraph 101 [not yet reported but available online at

http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2013/1_13/1_13_Judgment.pdf

⁴⁰ See sections 1.1.1 and 2.1 of the tender documents, where it was clearly stated that employees should endeavor to travel less, organise their trips well in advance and purchase the travel itinerary that would be economically most advantageous.

⁴¹ According to the public procurement directives, the decisive criterion for the award of contracts must either be the economically most advantageous tender or the lowest price only, thus providing the EEA States with the right to award a contract to "*the tender most economically advantageous from the point of view of the contracting authority*", according to "*criteria linked to the subject matter of the contract in question.*" The underlying rationale is that a procurement process that is reduced to competition on price alone would not necessarily produce the results that satisfy the procuring authorities' real needs. The Directives leave it to the contracting authority to specify the relative weighting it will give to each of the criteria chosen to determine the most economically advantageous outcome. In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. See Paragraph 55 of the preamble to and Article 55 of Directive 2004/17/EC of the European Parliament and of the Council of 31.3.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1), incorporated as point 2 to Annex XVI to the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18), e.i.f. 18.4.2007, and Paragraph 46 of the preamble to and Article 53 of Directive 2004/18/EC of the European Parliament and of the Council of 31.3.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114), incorporated as point 2 to Annex XVI to the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18), e.i.f. 18.4.2007.

- (54) In addition, the relative weighting provided to the three different criteria is not in line with the weighting that corporate airline customers would give to these criteria, taken into account the relevant market analyses performed by the Commission in the below-mentioned cases.⁴² In these cases, the Commission clearly identified a separate passenger group, the so-called premium customers (previously known as time-sensitive customers) who indicated that they focus more on flexibility and the number of frequencies offered in order to maximise their time at destination and minimise their travel time, thereby paying higher prices for this flexibility and level of comfort and thus preferring full service network carriers over low cost carriers. As Icelandic State employees travel for business purposes, they could be qualified as premium passengers who would give preference to the increased flexibility and level of comfort provided by full service network carriers, such as Icelandair, over low cost airlines, such as Iceland Express.
- (55) It should also be borne in mind that the Icelandic State clearly provided in the tender documents that it reserved the right to choose part of a tender or choose a tender from more than one bidder. Therefore, it concluded contracts with both Icelandair and Iceland Express. However, the PPCC ruled that the STC should not have accepted both tenders and should only have accepted the offer from Iceland Express as it scored higher according to the tender criteria. However, the tender procedure arguably was insufficiently competitive because, due to the extraordinary weight given to price in the tender criteria, only one operator, *in casu* Iceland Express, could realistically submit a credible bid because no full service network carrier could ever win the tender from a low-cost carrier when such extraordinary weight is given to price. The tender procedure presumably thus did not adequately establish the market conditions for the framework agreements in question. Therefore, the Authority is of the view that recourse should be had to alternative methods, such as benchmarking, to establish that the framework agreements were in line with market conditions.

The 2009 and 2011 framework agreements with Icelandair are in line with the terms and conditions of comparable agreements entered into by corporate airline customers

- (56) It is possible to establish that a transaction is in line with market conditions through other methods, for example by assessing it in light of the terms and conditions under which comparable transactions carried out by private economic operators of a comparable size have taken place in comparable situations (so-called benchmarking).⁴³
- (57) According to information provided by the Icelandic State and Icelandair, all of the framework agreements concluded with Icelandair contained the same terms and conditions and covered the same time periods as the standard corporate agreements concluded with all of Icelandair's [...] ⁴⁴ corporate customers. In particular, the framework agreements included the same rebate schemes as the ones contained in the standard corporate agreements concluded between Icelandair and its large number of corporate customers. Therefore, the 9% discount awarded to the Icelandic State under the 2011 framework agreement was in line with the largest discount for economy-class tickets corporate airline customers could obtain at the time of the conclusion of the agreement. According to information provided by Icelandair, it is the company's policy to apply the same standard rebates to all of its corporate customers, including the Icelandic State, in order to comply with applicable competition law rules. Moreover, Icelandair's standard corporate agreement has been reviewed by the Icelandic Competition Authority as a result of a

⁴² See paragraphs (62) and (63) below.

⁴³ Case T-296/97 *Alitalia – Linee aeree italiane SpA v Commission* [2000] ECR II-3871, paragraph 81.

⁴⁴ The exact figure is covered by the obligation of professional secrecy.

complaint but the Competition Authority never initiated a formal procedure and formally closed the case.

- (58) In addition, during the time the 2011 framework agreement was in place, the Icelandic State employees had access to a dedicated website provided by Icelandair ensuring that the 9% discount was deducted from the normal ticket price upon booking. The prices paid by the Icelandic State per ticket were thus in line with prices paid by other corporate customers of a comparable size. The mere fact that the Icelandic State bought tickets from a service provider at the same price and according to the same conditions as a large number of comparable customers as such demonstrates that these transactions were in line with market conditions and thus excludes the presence of an advantage.
- (59) For the sake of completeness, the Authority has also assessed whether the Icelandic State could have received comparable airline services from other airlines at a lower price or in other words, whether the cheaper services of Iceland Express could be considered to be comparable to those of Icelandair. In this respect, it should be recalled that, through the framework agreements, the Icelandic State aimed not only to obtain maximum discounts on purchased airline tickets but also to ensure that employees chose the most cost-efficient itinerary possible. The ticket price was not the only factor that had to be taken into account when deciding from which airline tickets would be purchased. Other quantitative and qualitative elements also had to be taken into consideration in order to secure the most cost-efficient itinerary possible, for example by looking at the network of routes and the frequency and timing of flights provided.
- (60) Indeed, it appears that these factors are also taken into account by other corporate airline customers when deciding with which airline to travel as they can affect the total travel times (including stopovers), hotel costs and travel allowances, and thus the total cost of a particular travel.
- (61) According to a survey conducted by *Business Travel News* regarding air travel, it appears that corporate airline customers purchasing a large amount of airline tickets per year use several selection criteria in order to determine from which airline the tickets will ultimately be bought. These criteria not only include the price of the ticket as such but also include, *inter alia*, the flexibility offered by the airline in terms of numbers of flights per day, the timeliness, reliability and the cleanliness of the service as well as the network, partnerships and frequencies offered by an airline.⁴⁵
- (62) In addition, according to relevant market analyses carried out by the Commission in airline merger cases and in antitrust investigations of airline alliances, a distinction should be made between two types of passengers, *i.e.* the premium (previously called time-sensitive passengers) and non-premium customers (previously called non-time sensitive passengers). Premium passengers are generally defined as customers who tend to travel for business purposes, require significant flexibility with their tickets (thus also requiring a higher number of frequencies on a given point of origin-point of destination pair as well as specific departure and arrival times at the points of origin and destination) as well as in-flight services and grounds services, and tend to pay higher prices for this flexibility and level of comfort. It appears that these passengers want to maximise their time at

⁴⁵ See for example, the 2013 BTN Airline Survey by Business Travel News, see <http://www.businesstravelnews.com/Business-Travel-Research/Surveys/>. In addition, Icelandair offers all of its corporate airline customers the possibility to enter into rebates agreements, see: http://www.icelandair.is/information/corporate-travel/about-the-service/?utm_source=vb&utm_medium=banner&utm_content=310x400&utm_campaign=corp_haust13 (only available Icelandic.)

destination and minimise their travel time, thus requiring, if possible, early morning and late afternoon flights, a sufficient number of frequencies and a convenient airport location (mostly primary airports) in order to be able to have same-day returns (in order to save time and costs). Therefore, the Commission concluded that premium or time-sensitive passengers tend to prefer full service network carriers to low cost carriers. On the other hand, it appears that non-premium customers who travel predominantly for leisure purposes, do not necessarily require the same flexibility with their booking and are more price-sensitive, and are therefore not willing to pay higher prices for additional services.⁴⁶

- (63) Although responses to requests for information in airline merger or alliance cases have also demonstrated that time-sensitive or premium passengers do travel with low-cost carriers, the Commission has observed that the degree of substitution greatly depended on the airport locations served by these low-cost carriers and the number of frequencies offered. However, corporate respondents in a merger case indicated that the percentage of low-cost carriers represented in their travel budget is at most 10% for the majority of the respondents.⁴⁷
- (64) Based on the above-mentioned information, it is clear that corporate airline customers do not consider the services of a low-cost airline to be comparable to those of a full service network carrier. By booking tickets predominantly from Icelandair, the Icelandic State thus acted as any private economic operator of a comparable size would have done in a comparable situation, *i.e.* as any other corporate airline customer. In particular, even if the Icelandic State could have purchased certain individual tickets at lower prices from Iceland Express, it is clear that the Icelandic State, like any corporate airline customer, not only takes into account the price of the ticket but the overall costs of any travel arrangement. The Icelandic State employees travel for business purposes and can thus equally be regarded as time-sensitive or premium passengers who tend to favour full-service network carriers, such as Icelandair, in order to benefit from the large network, the reliability and increased flexibility with respect to the number of frequencies and the arrival and departure times of flights in order to save time and costs. In addition, the low percentage of flights booked with Iceland Express by the Icelandic State appears to be in line with the percentage booked with low-cost carriers by corporate airline customers, according to the responses in the merger cases mentioned in paragraph (63) above, *i.e.* not more than 10%.
- (65) In light of the above, the Authority is of the view that the Icelandic State's purchasing of airline tickets from Icelandair through the framework agreements not only corresponded to an actual need for airline services on the part of the Icelandic State but was also in line with the purchasing behaviour of other corporate airline customers in comparable situations. Therefore, the Authority is of the view that these framework agreements with Icelandair constituted normal commercial transactions and accordingly that Icelandair was not granted an advantage as a result of the State's purchase of airline tickets under the framework agreements.

⁴⁶ See COMP/M.3280 – *Air France/KLM*, paragraph 19; COMP/M.3770 – *Lufthansa/Swiss*, paragraph 15; COMP/M.5335 – *Lufthansa/SN Airholding*, paragraph 12 et seq; COMP/M.5440 – *Lufthansa/Austrian Airlines*, paragraphs 18-22; and COMP/M.5889 - *United Airlines/Continental Airlines*, paragraph 16. See also COMP/A.38477 – *British Airways, SN Brussels Airlines*, paragraph 10; COMP/38284 – *Air France/Alitalia*, paragraphs 44 – 46; COMP/39596 – *BA/AA/IB*, paragraph 20.

⁴⁷ COMP/M.5335 - *Lufthansa/SN Airholding*, paragraph 27.

2. Conclusion

- (66) Based on the above considerations, the Authority concludes that the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement are not met with respect to the State's purchasing of airline tickets through framework agreements with Icelandair.

HAS ADOPTED THIS DECISION:

Article 1

The Icelandic State's purchase of airline tickets from Icelandair through various framework agreements does not involve state aid within the meaning of Article 61 (1) of the EEA Agreement.

Article 2

This Decision is addressed to Iceland.

Article 3

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 9 July 2014.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Helga Jónsdóttir
College Member