

Case No: 48093
Event No: 538839
Dec. No: 535/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 16 December 2009
on alleged state aid in the sector of bus transportation services in favour of Postauto
Schweiz
(Liechtenstein)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD to the Agreement on the European Economic Area², in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴.

Whereas:

I. FACTS

1. Procedure

By letter dated 17 March 2003, the Authority received a complaint against the Liechtenstein authorities in relation to the 2000 tender for local bus services by which the obligation to carry out the regular passenger service in Liechtenstein was awarded to Postauto Schweiz. The letter was received and registered by the Authority on 19 March 2003 (Doc. No 03-1676-A). The letter was followed a further submission on 28 August 2003, which was received and registered by the Authority on 5 September 2003 (Event No. 356295).

By letter dated 12 August 2004 (Event No. 288532), the Authority requested information from the Liechtenstein authorities. The Liechtenstein authorities replied to this information request by letter dated 19 October 2004, which was received and registered by the Authority on the same date (Event No. 296546).

By letter dated 4 July 2007, the Authority informed the complainants that it did not see sufficient grounds to continue the investigation (Event No. 395440). By letter dated 16

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

August 2007, received and registered by the Authority on 20 August 2007, the complainants replied to this letter (Event No. 434396).

2. Background information

In 1998, the Liechtenstein authorities created a state-owned undertaking called Liechtenstein Bus Anstalt (LBA)⁵ responsible for carrying out the regular passenger service in Liechtenstein according to the Personenbeförderungsgesetz Liechtenstein (hereinafter “PBG”).⁶ LBA took over this task from Schweizerische Post, the Swiss company that had provided the service before.

To ensure the provision of the service, LBA could work with third parties, i.e. subcontract the provision of public bus transport to other companies. In order to sub-contract this obligation, LBA organized a tender in 2000 (hereinafter “the tender”) and Postauto Schweiz was awarded a contract on 23 May 2000.

3. Description of the complaint alleging the involvement of state aid

By letter dated 28 August 2003 (Event No 356295), the Authority received a complaint against Liechtenstein alleging *inter alia* the infringement of the state aid rules of the EEA Agreement. This letter forms part of a broad complaint which concerned allegations that Liechtenstein had infringed the applicable rules in the field of road transport as well as public procurement rules. Decisions have already be adopted by the Authority with regard to these aspects of the complaint: Decisions No 321/04/COL of 8 December 2004 and No 495/07/COL of 26 October 2007 respectively.

Regarding the state aid aspects of the complaint, it has been alleged that Postauto Schweiz was granted state aid in relation to the contract awarded by Liechtenstein Busanstalt (hereinafter “LBA”) for the provision of local bus transport services in Liechtenstein in the form of extra payments for handling the wages of five employees, on welfare benefits, meal vouchers and family bonuses and additional payments to the employer’s pension funds.

a) Meal vouchers and family bonuses

The complainants allege that LBA gave Postauto Schweiz supplementary payments beyond those indicated in the 2000 tender documents. In particular, Postauto Schweiz is alleged to have received the following amounts for family bonuses and meal vouchers granted to bus drivers:

Year	Meal vouchers	Family bonuses	Total
2002	CHF 146 999.00	CHF 44 343.00	CHF 191 342.00
2003	CHF 138 486.00	CHF 35 641.00	CHF 174 127.00
2004	ca. CHF 125 000.00	ca. CHF 35 000.00	ca. CHF 160 000.00
2005	ca. CHF 120 000.00	ca. CHF 33 000.00	ca. CHF 153 000.00

In a questionnaire dated 5 April 2000, the complainants had asked LBA whether it was correct that bus drivers were no longer given meal vouchers and that drivers who received family bonuses as of that day no longer received such bonuses (questions 58 and 59). By letter dated 6 April 2000, LBA stated that it was the subcontractor’s own decision whether or not to grant meal vouchers or family bonuses to its employees. The answer letter states explicitly that meal vouchers would have to be paid by the employer. According to the

⁵ LBA was established in accordance with Act of 17 December 1998 on the establishment and organisation of the entity Liechtenstein Bus Anstalt (LBAG). Hereinafter referred to as Act on Liechtenstein Bus Anstalt.

⁶ Article 5 in conjunction with article 2 (1) c of the PBG.

complainants, the tender therefore had to be understood to officially exclude that the successful tenderer would receive payments beyond those explicitly specified in the tender documents.

b) Extra payments for handling the wages of five employees and other extra payments within the framework of the employees' wages

The complainant argued that Postauto Schweiz only employed 60 drivers to run the transport business tendered in 2000, five employees less than before. Thus, five drivers appear on the payroll of LBA while they support the operation of Postauto Schweiz. Point 101 of LBA 2001 budget lists a sum of CHF 304.036,00, which, according to the complainants, was granted to LBA by the Liechtenstein State for the handling of the wages of these five drivers.

The complainants further allege that the Liechtenstein State paid Postauto Schweiz an additional amount of money in order to enable the latter to maintain the pre-existing salary level.

c) Additional payments to the employer's pension funds

In 2002 and 2003, Postauto Schweiz received CHF 55.000,00 per year from the Liechtenstein State in compensation for its duty to contribute to the pension fund costs of its drivers. These sums are accounted for under point 451.7 of LBA's respective yearly budgets.

In their questionnaire to LBA of 5 April 2000, the complainants asked which percentage (supposedly of the employees' wages) had to be paid for bus drivers to the national Pension Fund for Civil Servants (question 41). In its answer of 6 April 2000, LBA stated that the contributions to the Pension Fund for Civil Servants amounted to 7,5 % by the employers and employees, respectively.

d) Welfare benefits

Under point 810.1 called Pension Service ("Rentenleistung"), LBA budgets for 2002 and 2003 list a sum of approximately CHF 61.000 for use as extraordinary payments to the employer's pension fund. The complainants allege that these funds were paid out to employees of Postauto Schweiz.

4. Comments by the Liechtenstein authorities

a) Meal gratifications and family bonuses

The Liechtenstein authorities argue that the purpose of these gratifications and bonuses was to guarantee the protection of vested rights of the bus drivers who had been employed by the former transport operator, Schweizerische Post. Those contracts provided for special family and meal vouchers. Payments were exclusively made to drivers whose employment contracts were concluded with Schweizerische Post, i.e. before LBA took over the local bus transport services. By 19 October 2004, 51 out of 69 drivers received meal vouchers and 25 of them also received family bonuses. The payments are expected to diminish over the years as will the number of employees recruited under the old system.

The tender documents did not specifically mention these payments. However, the former Article 24 of the Act on Liechtenstein Bus Anstalt laid down that LBA had to take over and to continue the contracts between Schweizerische Post and the bus drivers on existing conditions. Point 8a) of the tender document states that the worker's situation should not change for the worse as regards their current salary and holiday entitlements. This

condition is also reflected in annex 1 to the tender document (the so-called “Lastenheft” or product requirements document) under point 4.3.

b) Extra payments for handling the wages of five employees and other extra payments within the framework of the employees’ wages

According to the Liechtenstein authorities, the sum of CHF 304.036,00 was included in LBA’s budget for precautionary reasons only. In August 2000, when the budget was drawn up, it was not then clear how many of the 65 drivers would be employed by the winner of the tender. Upon the request of the Liechtenstein Government, who wanted to avoid dismissals due to the change of operator for the ÖPNV, LBA took the sum into its budget for precautionary reasons. However, the sum was never requested by or paid out to LBA and is consequently not mentioned in any of LBA’s annual reports. When Postauto Schweiz started as the new bus transport operator, it took over all 65 bus drivers who had been employed before and has paid their wages ever since. Thus, LBA never paid this provisioned amount.

The Liechtenstein authorities argue that the complainants have not provided any evidence of the payments they refer to as other extra payments within the framework of the employees’ wages. They cannot comment or provide any information on other additional amounts paid out by the Liechtenstein State to Postauto Schweiz in order to enable the latter to maintain the pre-existing salary level.

c) Additional payments to the employer’s pension funds

The Liechtenstein authorities refer to point 5.20 of the “Lastenheft”, which prescribes that the new operator has to insure his bus drivers with the national Pension Fund for Civil Servants. Annex I C paragraph 2 to the tender document reads: “the labour costs may be adapted in case of index-changes and structural changes, ref. point 12 of the tender document”. Point 12 of the tender document contains a price adaptation clause. According to the Liechtenstein authorities, the Pension Fund for Civil Servants in 2002 and 2003 asked for extraordinary contributions, which were qualified as structural changes by LBA. Since LBA expected these extraordinary contributions to be only levied for a limited number of years, they figure under the separate budgetary point no. 451.7.

d) Welfare benefits

The Liechtenstein authorities explain that the payments under Point 810.1 concern pension benefits paid only to bus drivers employed by Schweizerische Post under the pre-2000 regime and their widows. These financial obligations were taken over by LBA when entering into all existing contracts which had been concluded between Liechtenstein State and Schweizerische Post before 1 January 2000. According to the Liechtenstein authorities, no payment under point 810.1 is provided to bus drivers currently employed by Postauto Schweiz or to bus drivers who retired after Postauto Schweiz took over the responsibility for the bus transport service in Liechtenstein.

II. ASSESSMENT

1. The presence of state aid

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.”

In order to fall under Article 61 (1) of the EEA Agreement a measure must fulfil the following cumulative criteria: The measure must (i) confer on the recipient an economic advantage which is not received in the normal course of business; (ii) the advantage must be granted by the state or through state resources; (iii) it must be selective by favouring certain undertakings or the production of certain goods; and (iv) it must distort competition and affect trade between the Contracting Parties.

The Authority will in the following assess whether each of the alleged payments in favour of Postauto Schweiz mentioned above constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

1.1. State resources

The measure must be granted by the State or through state resources. LBA⁷, a 100 % state-owned undertaking, covers all payments to the transport operator within the context of the tender for the provision of local bus services in Liechtenstein.

LBA, is responsible for carrying out the regular passenger service in Liechtenstein according to the Personenbeförderungsgesetz Liechtenstein (hereinafter “PBG”).⁸ In order to sub-contract this obligation, LBA organized a tender in 2000 (hereinafter “the tender”) and Postauto Schweiz was awarded a contract on 23 May 2000.

LBA receives its funding from the General State Budget. Thus, the means allocated by LBA are imputable to the State and constitute state resources within the meaning of Article 61(1) of the EEA Agreement.

1.2. Favouring certain undertakings or the production of certain goods

The measure must further have conferred on Postauto Schweiz advantages that relieved it of charges that are normally borne from its budget. It must also be selective in that it favours “certain undertakings or the production of certain goods”.

a) Meal vouchers and family bonuses

According to the information provided by the Liechtenstein authorities, LBA had to protect the vested rights of the workers who were formerly employed by Schweizerische Post under existing contracts. Even if it can be argued that the tender documents did not specifically mention meal vouchers and family bonuses, the tender documents reflected that these rights would have to be protected. The former Article 24 of the Act on Liechtenstein Bus Anstalt laid down that LBA had to take over and continue the contracts between Schweizerische Post and the operators with existing conditions. Furthermore, point 8a) of the tender document states that as regards the workers’ current salary and holiday entitlements, the worker’s situation should not be worsened. The same is reflected in point 4.3 of annex 1 to the tender document (the so-called Lastenheft).

Although the Authority acknowledges that LBA’s reply of 6 April 2000 to the complainants’ question 58 as to whether employees were still granted meal vouchers or other bonuses was unclear, LBA had legal obligations regarding the vested rights of former employees which had to be fulfilled. Therefore, LBA could not put the payment of these vouchers and bonuses at the discretion of the future subcontractor.

⁷ Article 2 of the GLBA (cited in footnote 5)

⁸ Article 5 in conjunction with article 2 (1) c of the PBG.

The Authority thus concludes that the amounts paid by LBA to Postauto Schweiz for family bonuses and meal vouchers to bus drivers were covered by the tender and thus fall inside the awarded contract. Therefore, Postauto Schweiz was not granted any advantage with respect to the payment of meal vouchers and family bonuses.

b) Extra payments for handling the wages of five employees and other extra payments within the framework of the employees' wages

On the basis of the information provided by the Liechtenstein authorities, Postauto Schweiz did not receive any extra payment for handling the wages of five employees, since the amount of CHF 304.036,00 was put provisionally into LBA budget but the payment was never carried out. According to the information provided by the Liechtenstein authorities, Postauto Schweiz, in the end, employed all the workers who had previously been employed and paid for them.

It could be questioned whether the mere fact that this amount of money was made available to Postauto Schweiz already involved the grant of an advantage. According to the information provided by the Liechtenstein authorities, the Authority understands that no matter who the subcontractor of the service would have been, the company would have received the necessary compensation for the salaries of any redundant employees. Since such payments would have been made within the framework of the tender, no advantage was granted to Postauto Schweiz.

Further, based on the information provided by the Liechtenstein authorities, Postauto Schweiz did not receive any supplementary extra payments beyond the family and meal vouchers mentioned above.

For these reasons, the Authority considers that no state resources were transferred and consequently no state aid was granted regarding the above-mentioned extra payments.

c) Additional payments to the employer's pension funds

According to the information provided by the Liechtenstein authorities, point 5.20 of the tender specifications require the new operator to insure the bus drivers with the national Pension Fund for Civil Servants. According to paragraph 2 in Annex I C to the tender document, the labour costs may be adapted in case of index-changes and structural changes. Point 12 of the tender document contains a price adaptation clause. The Liechtenstein authorities have informed the Authority that the Pension Fund for Civil Servants asked for extraordinary contributions which LBA considered as structural changes within the meaning of paragraph 2 in Annex I C. As extraordinary contributions, they were booked under a different budgetary provision, namely point 451.7.

Since extraordinary contribution claims by the Pension Fund can be classified as structural changes for which a subsequent adjustment of the contract may be deemed necessary, the Authority considers these payments as falling within the price adaptation rules of the contract and therefore covered by the award procedure. Irrespective of which company the tender had been awarded to, LBA would have paid the benefits in any event as they were due according to the obligations it had taken over from Schweizerische Post.

Thus, the Authority considers that Postauto Schweiz did not receive any payments beyond those covered by the award contract and accordingly did not get any advantage within the meaning of Article 61(1) of the EEA Agreement.

d) Welfare benefits

The Liechtenstein authorities have explained that the payments under point 810.1 concern pension benefits paid only to bus drivers employed by Schweizerische Post under the pre-

2000 regime and their widows. These financial obligations were taken over by LBA when entering into all existing contracts which were concluded between the Liechtenstein State and Schweizerische Post before 1 January 2000. Irrespective of which company the tender had been awarded to, LBA would have paid the benefits in any event as they were due according to the obligations it had taken over from Schweizerische Post.

According to the information provided by the Liechtenstein authorities, no payment has been given under point 801.1 to any bus driver currently employed by Postauto Schweiz or to bus drivers who have retired after Postauto Schweiz was awarded the contract for the provision of the transport service in Liechtenstein.

For these reasons, the Authority considers that these payments do not involve the grant of any advantage Postauto Schweiz

2. Conclusion

On the basis of the foregoing assessment, the Authority considers that none of the allegations put forward with the complaint regarding payments received by Postauto Schweiz constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that no state aid within the meaning of Article 61 (1) of the EEA Agreement was granted to Postauto Schweiz in the context of the 2000 award procedure for the provision of local bus transport services in Liechtenstein in the form of meal vouchers and family bonuses, payments regarding the wages of five employees and other extra payments within the framework of employees' wages, additional compensation to the employer's pension fund and welfare benefits.

Article 2

This Decision is addressed to the Principality of Liechtenstein.

Article 3

Only the English version is authentic.

Done at Brussels, 16 December 2009

For the EFTA Surveillance Authority

Per Sanderud
President

Kristján Andri Stefánsson
College Member