

Case No: 60482
Event No: 457668
Decision No: 341/08/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 4 JUNE 2008
on alleged state aid granted to the Leifur Eiríksson Air Terminal Ltd.

(Iceland)

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,

Whereas:

I. FACTS

1. Procedure

By letter dated 12 July 2006, “SVTH”, the Icelandic Federation of Trade & Services, filed a complaint against alleged state aid granted to the Leifur Eiríksson Air Terminal Ltd.⁴ The letter was received and registered by the Authority on 18 July 2006 (Event No 381793).

By letter dated 11 August 2006 (Event No 383594), the Authority acknowledged receipt of the complaint and asked the complainant to fill in the complaint form in order to provide the Authority with the information necessary to assess the measure.

By letter dated 20 December 2006 (Event No 395432), the Authority pointed out that it had received no further information from the complainant, and declared that unless the complainant submitted further information by 19 January 2007, the case would be closed without further notice. The complainant twice asked for and was granted an extension to that deadline.

By letter dated 6 February 2007, the complainant submitted further information on the alleged state aid. The complaint form was registered by the Authority on 9 February 2007 (Event No 409394).

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 “LEAT”.

By letter dated 23 April 2007 (Event No 418197), the Authority informed the Icelandic authorities of the complaint and requested that they provide certain information concerning the alleged state aid.

The Icelandic authorities replied to the information request by letter dated 29 June 2007. The letter was received and registered by the Authority on 2 July 2007 (Event No 427686 plus annexes).

By letter dated 4 October 2007 (Event No 445063), the Authority sent a request for further information concerning the measure complained about.

By letter dated 26 October 2007, the Icelandic authorities responded to the Authority's information request. The letter was received and registered by the Authority on the same date (Event No 449082).

The case was furthermore discussed at a meeting between the Authority and the Icelandic Government in Reykjavík on 26 October 2007.

2. Description of the measure complained about

2.1 Regulation of operating licences for duty free sales in Iceland

According to Article 101 of the Customs Act No 88/2005, the Minister of Foreign Affairs can grant legal persons a licence for the operation of duty free shops in air terminals and seaports.⁵ The conditions and application procedure for such operating licenses are laid down Articles 101 to 104 of the Customs Act.

The first two paragraphs of Article 104 of the Customs Act read as follows:

“Duty free shops are only authorized to sell goods to departing passengers and crew of vessels engaged in international journeys. A sale shall only be permitted against presentation of a boarding card.

Without prejudice to the provisions of paragraph 1 the Minister can authorize the licensee to sell goods from a duty free shop to arriving passengers and crew of vessels engaged in international journeys. Such a shop shall be specially demarcated and only accessible to passengers and crew upon arrival to this country.”⁶

According to the Icelandic authorities, the Customs Act does not provide that there is a duty to pay a licence fee for licences to operate duty free stores in air terminals or sea ports.

2.2 Keflavík Airport and Leifur Eiríksson Air Terminal - background

According to the Defence Agreement entered into by the United States of America and Iceland in 1951, the United States of America, on behalf of the North Atlantic Treaty Organisation, pledged to make arrangements regarding the defence of Iceland. The Defence Agreement stipulated that Iceland would assume the management of and

⁵ The Customs Act 88/2005, in force at the time of the complaint, was amended by Act Nos 80/2006, 108/2006, 146/2006, 16/2007 and 170/2007. The amendments do not seem to alter the provisions of the Customs Act relevant for the case at hand, except that the decisions to be taken by the Minister of Finance in the provisions of the Customs Act relevant to the current case were transferred to the Director of Customs in Reykjavík. This change does not influence the state aid assessment of the case.

⁶ Translation by the Icelandic Directorate of Customs, www.tollur.is.

responsibility for the civil aviation operations at the Keflavík Airport. The airport itself, however, was a dual purpose airport, open to both civil and military activity. The construction of the Leifur Eiríksson Air Terminal started in 1983. The terminal was co-financed by the United States of America and it was built as a dual purpose air terminal, which would be used for civil aviation purposes by the Icelandic authorities and for military purposes by the United States of America, in accordance with the Defence Agreement. The terminal was owned solely by the Icelandic State.

From 1987, when the air terminal began operations, and until 1998, the terminal was managed by the governmental body known as Keflavík Airport Authorities. The duty free shop was organised as a different government body. As of 1998, the operation of the terminal was reorganised and re-financed as a result of substantial debts accumulated during construction and maintenance of the terminal. In particular, tender procedures were carried out in order to subcontract the provision of certain services in the terminal.

In 1999, it was decided to expand the air terminal and, in order to find a lasting solution regarding financing, the operation of the air terminal and the duty free shop was merged into a limited liability company solely owned by the Icelandic State, LEAT, which took over the operation of the terminal.

2.3 LEAT as the operator of the Leifur Eiríksson Air Terminal at Keflavík Airport

LEAT was established in the year 2000 with the purpose of handling the operation, maintenance and development of the Leifur Eiríksson Air Terminal, including operating sales of duty-free commodities at Keflavík Airport.⁷ Thus, as part of its general licence to operate the Leifur Eiríksson Air Terminal, LEAT was also granted a licence to operate the duty free shops in the terminal, cf. Articles 101 to 104 of the Customs Act.

The legal basis for LEAT's activities are laid down in the Act on the Foundation of a Corporation to Run the Leifur Eiríksson Air Terminal No 76/2000⁸, the Regulations on the activities, obligations and monitoring of the Leifur Eiríksson Air Terminal at Keflavík Airport No 766/2000⁹ and an operating licence issued by the Ministry of Foreign Affairs.¹⁰

According to Article 5 of the Regulation, the Minister of Foreign Affairs may grant an operating licence for activities and operations at the Leifur Eiríksson Air Terminal for up to twelve years at the time. On 1 November 2000, LEAT was granted an operating licence with ten years duration.

Upon its establishment, LEAT took over the existing terminal and buildings, as well as all debts, liabilities, rights and obligations of the government bodies operating the air terminal. LEAT's revenues, including from the duty free stores, were to finance the operation and development of the air terminal.

According to Article 8 of the operating licence, LEAT "*shall not pay the licensor a special annual licence fee for the rights attached to this licence unless the parties enter into an independent agreement thereon*". According to information provided by the Icelandic authorities, LEAT does not pay an annual fee for the operating licence and neither did it

⁷ Article 7 of the Act on the Foundation of a Corporation to Run the Leifur Eiríksson Air Terminal No 76/2000.

⁸ Hereinafter referred to as "the Act".

⁹ Hereinafter referred to as "the Regulation".

¹⁰ Hereinafter referred to as "the operating licence".

pay any initial fee for the licence. Furthermore, at the time LEAT was granted the operating licence, Icelandic law did not foresee the payment of a licence fee with regard to such licences.

It follows from Article 2.6 of LEAT's operating licence that LEAT is obliged to conduct its business in accordance with the provisions of the Public Procurement Act and the Public Projects Procedures Act. Furthermore, LEAT's operating licence read in conjunction with the Act, the Regulation and the Customs Act, allows LEAT to decide unilaterally whether to run the stores and restaurants at the air terminal *ex parte* or to subcontract these services to other companies.

Until 2002, most of the duty free stores in the air terminal were in general operated by LEAT. A public tender procedure was initiated in 2002, in order to give interested parties the opportunity to compete for the allocation of an area in the air terminal to offer their goods or services. As a result, operating licences for offering various goods and services in the departure hall of the terminal building were granted to private parties. The operation of the duty free shops in the departure hall is not part of the complaint.

When it comes to the one duty free shop in the arrival hall of the terminal, however, LEAT has decided to run this shop *ex parte*.

3. Arguments of the complainant

According to the complainant, the operating licence enabling LEAT to decide unilaterally whether to run the duty free shops in the Leifur Eiríksson Air Terminal, and in particular the duty free shop in the arrival hall, *ex parte* or to subcontract the services constitutes state aid to the company.

The complainant argues that Article 104 of the Customs Act provides that the operation of a duty free shop in the arrivals hall in the Leifur Eiríksson Air Terminal requires a licence from the Ministry of Foreign Affairs. On the basis of the relevant provisions, a licence has been granted to LEAT for ten years without giving other companies the same possibility. By granting the licence to LEAT without examining the possibilities for a public tender with regard to the duty free shop in the arrivals hall, LEAT has been granted a monopoly position. It is, according to the complainant, obvious that the granting of the operating licence to LEAT must be regarded as state aid coming from state resources.

II. ASSESSMENT

1. The presence of state aid

State aid within the meaning of Article 61(1) EEA

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.”

In order for a measure to qualify as state aid according to Article 61(1) EEA, it must be granted by a State or through state resources.

In the first place, it should be noted that the distinction made between ‘aid granted by a Member State’ and ‘aid granted through state resources’ does not signify that all advantages granted by a State, whether financed through state resources or not, constitute state aid.¹¹ In *PreussenElektra*¹², the Court of Justice of the European Communities¹³ clarified that only advantages granted directly or indirectly through state resources are to be considered state aid within the meaning of Article 87(1) EC.

Hence, the granting of a licence does not in itself constitute state aid if it does not involve any actual transfer of state resources.

In this respect, the Court of Justice has stated that the concept of granting aid “*does not only embrace positive benefits but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which are similar in character and have the same effect*”.¹⁴ In particular, the fact that the State renounces resources to which it is entitled constitutes state aid.¹⁵

However, in order for the State to be held to have foregone resources, a duty to pay must form part of the legal order of that State.¹⁶

This is illustrated in the European Commission Decision concerning the opening of petrol stations by large supermarkets in Spain.¹⁷ The Commission concluded that the legal provisions on elimination of existing construction limitations with regard to the opening of petrol stations by large supermarkets, a possibility that was not given to other operators, did not involve transfer of state resources, notably because no duty to pay was foreseen in the relevant Spanish legislation. The Commission Decision was upheld by the Court of First Instance.¹⁸

According to the information submitted by the Icelandic authorities, Icelandic legislation does not provide for any duty to pay for a licence to operate the duty free sales in the arrival halls of airports or sea ports in Iceland. Nor is a duty to pay for the licence to operate airport terminals in general foreseen in Icelandic legislation. A duty to pay for such licences is thus not part of the Icelandic legal order.

Hence, the fact that LEAT did not have to pay for the licence is not a result of the State renouncing its right to collect resources.

Against this background, the Authority concludes that the granting of the licence to run the duty free shop in the arrival hall at the Leifur Eiríksson Air Terminal does not involve any direct or indirect transfer of state resources.

¹¹ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58 and case law cited therein.

¹² Case C-379/98 *PreussenElektra*, cited above.

¹³ Hereinafter referred to as “the Court of Justice”.

¹⁴ Case 30/59 *Gezamenlijk Steenkoolmijnen Limburg* [1961] ECR p. 3 and Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13.

¹⁵ See, for example, Case C-387/92 *Banco Exterior de España*, cited above, paragraph 14.

¹⁶ See Case C-156/98 *Germany v. Commission* [2000] ECR I-6857, paragraph 26.

¹⁷ Commission decision of 13 November 2002 in Case NN 121/02 – Spain, paragraph 49.

¹⁸ Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v. Commission* ECR [2006] II-4739.

2. Conclusion

On the basis of the foregoing considerations, the Authority considers that the granting of the operating licence allowing LEAT to operate the duty free sales in the arrivals hall in the Leifur Eiríksson Air Terminal at Keflavík Airport does not constitute state aid within the meaning of Article 61(1) EEA.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the operating licence allowing Leifur Eiríksson Air Terminal Ltd to operate the duty free sales in the arrivals hall in the Leifur Eiríksson Air Terminal at Keflavík Airport does not constitute state aid within the meaning of Article 61 EEA.

Article 2

This Decision is addressed to the Republic of Iceland.

Article 3

Only the English version is authentic.

Done at Brussels, 4 June 2008.

For the EFTA Surveillance Authority,

Per Sanderud
President

Kurt Jaeger
College Member