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EFTA SURVEILLANCE AUTHORITY DECISION
of 3 December 2003

regarding the prolongation of supplementary insurance cover for third-party damage due to acts of war and terrorism ('war insurance') in support of Norwegian airline companies and airports (covering the period from 1 June 2002 until 30 June 2002)

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 thereof and Article 1 in Part I of Protocol 3³ thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid⁴,

WHEREAS:

I. FACTS

1. Procedure

By Decision of 30 October 2001 (Dec. No. 315/01/COL), the Authority approved the temporary provision of 'war insurance' by the Norwegian State to Norwegian airline companies and certain airports for the duration of one month, from 24 September until

¹ Hereinafter referred to as the 'EEA Agreement'.

² Hereinafter referred to as the 'Surveillance and Court Agreement'.

³ Protocol 3 to the Surveillance and Court Agreement as amended by the EFTA States on 10 December 2001. The amendments entered into force on 28 August 2003.

⁴ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision No 198/03/COL of 5 November 2003, not yet published, hereinafter referred to as the 'Authority's State Aid Guidelines'.

24 October 2001. In a second Decision, adopted 31 May 2002 (Dec. No. 88/02/COL), the Authority authorised the prolongation of the war insurance scheme for the period covering 24 October 2001 until 31 May 2002.

The Norwegian Government informed the Authority, by letter from the Ministry of Transport and Communications dated 30 May 2002, forwarded by the Mission of Norway to the European Union on 4 June 2002, received and registered by the Authority on that same day (Doc. No. 02-4209-A) of a further prolongation, on existing terms, of the above aid scheme covering the period from 1 June to 30 June 2002.

By letter dated 19 June 2002 (Doc. No. 02-4634-D) the Authority acknowledged receipt of that letter and asked the Norwegian Government to forward to the Authority updated information on the premiums collected under the war insurance scheme as approved by the Authority on 31 May 2002. The Authority also took note of the fact that the Norwegian Government had informed the benefiting companies by special notice dated 28 May 2002 that the Governmental war insurance scheme would be wound up after 30 June 2002, if nothing extraordinary occurred. In that respect, the Authority asked the Norwegian Government to submit the notice in question. The notice of 28 May 2002, was forwarded by the Mission of Norway to the European Union, received and registered by the Authority on 10 July 2002 (Doc. No. 02-5278-A).

By letter from the Ministry of Transport and Communication dated 22 July 2002, received and registered by the Authority 25 July 2002 (Doc. No. 02-5672-A), the Norwegian Government submitted information on the premium collected until 31 May 2002.

By letter of 24 September 2003 (Doc. No. 03-6517-D), the Authority asked the Norwegian Government to confirm that the scheme ended on 30 June 2002. The Authority also asked the Norwegian Government to submit information showing that the premium had been paid by the airlines and Oslo airport until the end of the scheme, and to provide a verification that the insurance company administering the scheme received remuneration in accordance with the Authority's Decision of 31 May 2002⁵.

By letter of 8 October 2003, forwarded by the Mission of Norway to the European Union received and registered by the Authority 10 October 2003 (Doc. No. 03-6966-A), the Norwegian Government confirmed that the scheme was wound up with effect from 1 July 2002 and submitted information about the premiums collected from the beneficiaries and the remuneration of the insurance company.

2. Description of Aid Measures

The notified aid measure concerns the prolongation of the 'war insurance' offered as a supplementary insurance by the Norwegian Government after 11 September 2001 to airlines and airports, when commercial insurers no longer provided adequate insurance coverage. The Governmental war insurance scheme is administered by a Norwegian insurance company, Gjensidige NOR. Gjensidige NOR receives a

⁵ Dec. No. 88/02/COL.

remuneration of 7.5% of the gross premium income, which it deducts before transferring the premium income (paid by the airlines and the airports) to the State.

With the present notification, Norway informed the Authority about the final prolongation of the war insurance scheme until 31 June 2002. According to the information submitted by the Norwegian Government, the prolongation of the ‘war insurance’, was granted on existing terms. For further information on the conditions of the Governmental war insurance scheme, reference is made to the Authority’s Decision of 30 October 2001⁶ and its Decision of 31 May 2002⁷.

The four air carriers (i.e. SAS Norge ASA, Braathens ASA, Norwegian Air Shuttle AS and Widerøe’s Flyveselskap ASA) as well as Oslo Airport Gardermoen were informed about the prolongation for the period 1 June 2002 until 30 June 2002, by a letter from the Ministry of Transport dated 28 May 2002. The Norwegian Government terminated the war insurance scheme with effect from 1 July 2002 accordingly.

II. APPRECIATION

1. Procedural requirements

Pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, “[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit comments, of any plans to grant or alter aid...The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision.”

Since the Norwegian Government put the measures into effect before the Authority had given its approval, the aid must be regarded as unlawful on procedural grounds within the meaning of Article 1 (f) in Part II of Protocol 3 to the Surveillance and Court Agreement.

2. The presence of State aid

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

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 the Contracting Parties, be incompatible with the functioning of this Agreement.”

2.1 Aid to airlines companies and Oslo airport

Based on the Authority’s assessment in its previous decisions⁸, the war insurance scheme gives the four benefiting air carriers and Oslo airport a financial advantage

⁶ Dec. No. 315/01/COL.

⁷ Dec. No. 88/02/COL.

⁸ See footnotes 6 and 7.

which is financed by the Norwegian State and distorts, or threatens to distort, competition between air carriers and airports within the EEA, and affects trade between the Contracting Parties.

Therefore the Authority concludes that the prolongation of the war insurance scheme for the period of 1 June to 30 June 2002 constitutes aid within the meaning of Article 61(1) of the EEA Agreement.

2.2 Remuneration for services rendered by Gjensidige NOR

Based on the Authority's assessment in its Decision of 31 May 2002, the level of remuneration set at 7.5% corresponds to market conditions.

Therefore the Authority concludes that the payment which Gjensidige NOR received for the administration of the war insurance scheme for the period of 1 June 30 June 2002 does not constitute aid within the meaning of Article 61(1) of the EEA Agreement.

3. Compatibility of the war insurance scheme - assessment under Article 61(2)(b) of the EEA Agreement

By virtue of Article 61(2)(b) of the EEA Agreement, "*aid to make good the damage caused by natural disasters or exceptional occurrences*" shall be compatible with the functioning of this Agreement.

Such aid is deemed compatible with the functioning of the EEA Agreement to the extent that it merely re-establishes the pre-existing competitive position of undertakings affected by exceptional occurrences (i.e. the cancellation of insurance cover for third party damages due to acts of war and terrorism following the terrorist attacks of 11 September 2001). In order for the Authority to verify that the measures taken by the Norwegian Government are necessary and proportionate to re-establish the conditions under which airline companies and airports operated before the events of 11 September 2001, the Authority has taken into account the criteria for the compatibility of war insurance schemes as applied in its earlier decisions. It has also taken note of prolongations periods accepted by the European Commission in a number of guidelines and communications.

In its Decision No. 88/02/COL of 31 May 2002, the Authority referred to the Communication of 10 October 2001, concerning "*The repercussion of the terrorist attacks in the United States in the air transport industry,*"⁹ in which the European Commission explained, *inter alia*, its approach regarding State aid for airline companies related to temporary insurance problems.

On 23 October 2001, the European Commission issued "*Guidelines for renewal of the temporary Government insurance scheme for the airline industry established after the 11 September 2001.*" These guidelines laid down the criteria which have to be fulfilled by the war insurance measures adopted by the EC Member States in order to be regarded as compatible with the EC Treaty, and in particular Article 87 (2) (b)

⁹ COM (2001) 574 final, 10.10.2001.

thereof. The scheme was initially limited to 30 days but as the commercial insurance market did not return to normal, the scheme was sustained¹⁰. The Authority applied the same criteria for the assessment under Article 61 of the EEA Agreement in its earlier decisions.

On 28 May 2002, the European Commission agreed that Member States could continue to provide war insurance cover to companies in the air transport industry for a further month, up to 30 June 2002. The European Commission would authorise such prolongations, provided that the criteria laid down in the guidelines were respected.¹¹

On 2 July 2002, the European Commission adopted a Communication on “*Insurance in the Air Transport sector following the terrorist attacks of 11 September 2001 in the United States*” which allowed EC Members to continue their government mechanisms until 31 October 2002. The Authority notes that Norway did not extend its scheme until that period, but stayed within the deadline of 30 June 2002 which the European Commission had accepted for the EU Member States in its statement of 28 May 2002.

Since the prolongation of the Norwegian war insurance scheme was granted on existing terms, already authorised by the Authority in its Decisions of 30 October 2001¹² and 31 May 2002¹³, the Authority regards the final one-month-prolongation as also being compatible with the EEA Agreement, in particular Article 61(2)(b) thereof, and with the criteria established by the Authority and the European Commission for insurance in the air transport sector following the attacks of 11 September 2001.

The Authority also verified that the premium required was actually paid by the benefiting airlines and Oslo airport.

HAS ADOPTED THIS DECISION:

The Authority has decided not to raise objections to the prolongation of ‘war insurance’ provided by the Norwegian State to Norwegian airline companies and airports for the period from 1 June to 30 June 2002.

Done at Brussels, 3 December 2003

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member

¹⁰ For further details please consult Decision of 31 May 2002 (Dec. No. 88/02/COL).

¹¹ See Press release dated 28 May 2002, IP/02/767 “*Air transport insurance after 11 September: the Commission authorizes an extra month of emergency state aid.*”

¹² Decision of 30 October 2001 (Dec. No. 315/01/COL).

¹³ Decision of 30 May 2002 (Dec. No. 88/02/COL).