


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION
of 25 July 2001

regarding compensation granted to CHC Helikopter Service and Widerøe's Flyveselskap for
the temporary operation of air transport services on the route between Bodø and Røst
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 59 (2) and 61 to 63 thereof,

HAVING REGARD TO the Act referred to at point 64 a. of Annex XIII to the EEA Agreement (Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community routes)²,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice³, in particular Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid⁴, and in particular Chapter 30⁵ thereof,

WHEREAS:

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as Regulation No 2408/92.

³ Hereinafter referred to as the Surveillance and Court Agreement.

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. 152/01/COL of 23 May 2001, not yet published, hereinafter referred to as the "Authority's State Aid Guidelines".

⁵ Pursuant to Chapter 30 of the Authority's State Aid Guidelines, the EC Commission's communication on the Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector will be applied by the Authority when assessing aid to the aviation sector; hereinafter referred to as the Aviation Guidelines.

I. FACTS

Procedure

By fax dated 2 April 2001, received and registered by the Authority on that same day (Doc. 01-2649-A), the Norwegian Ministry of Transport and Communications informed the Authority of steps taken to secure continuation of air services between Bodø and Røst from 30 March 2001 until 10 May 2001. This followed information to the Ministry on 29 March 2001 by the incumbent operator on that route, Guardair AS, that from 30 March 2001 air services would be terminated. By letter of 9 April 2001 (Doc. No. 01-2723-D), the Authority acknowledged receipt of this fax and reminded the Norwegian Government of its obligation to notify any aid granted to operators for provision of air services on that route under contracts awarded for the temporary provision of air transport services on that route until an air carrier has been selected under the normal tender procedure as required under Article 4 of Regulation No 2408/92.

By letter of 11 April 2001, received and registered by the Authority on 27 April 2001 (Doc. No. 01-3210-A), the Ministry of Transport and Communications informed the Authority of procedural measures taken in order to award contracts for the provision of air services on the route in question for the period after 10 May 2001. The invitations to tender, which were attached to this letter, expressed the Government's intention to award contracts lasting from 11 May 2001 until 31 March 2003. The Authority was also informed that further information, including possible remuneration to carriers, would be submitted to it after the awards had been made. In the meantime, the Authority learned through a press release issued by the Ministry of Transport and Communications on 27 April 2001, that Widerøe's Flyveselskap had been awarded the contract for the operation of the route Bodø-Røst from 11 May 2001.

By letter of 8 May 2001 (Doc. No. 01-3520-D), the Authority reminded the Norwegian Government of its obligation not to put the proposed aid into effect before the Authority had taken a final decision on this matter. The Norwegian Government was asked to confirm in writing before 11 May 2001 that no payments would be made under the contract until the Authority had finalised its assessment. By fax from the Ministry of Transport and Communications, dated 10 May 2001, received and registered by the Authority on that same day (Doc. No. 01-3606-A), the Norwegian authorities confirmed that no payments would be made. Furthermore, additional information, as requested in the Authority's letter of 8 May 2001, was furnished (including invitation to tender and incoming offers). By letter of 11 June 2001 (Doc. No. 01-4286-D), the Authority acknowledged receipt of this fax and requested additional information, in particular copies of the measures taken to fully comply with the requirements under Regulation No 2408/92.

After informal contacts between the Authority and the Ministry of Transport and Communications, the Authority clarified, in an e-mail of 15 June 2001 (Doc. No. 01-4494-D) that, in addition to the submission of the tender documents as required under Article 4 of Regulation No 2408/92, the Norwegian authorities were being asked to explain the delay of more than two months between the termination of air services on that route and the initiation of a proper tender procedure. By letter from the Ministry of Transport and Communications of 15 June 2001, received and registered by the

Authority on 21 June 2001 (Doc. No. 01-4708-A), the Norwegian authorities submitted the tender documents as requested and explained that, due to consultations with local authorities regarding the imposition of public service obligations on the route in question, the process had taken about two months from the date the previous operator stopped air services. Final clarifications were provided by e-mail of 18 July 2001, received and registered on that same day (Doc. No. 01-5658-A).

Description of the aid measure

The air route between Bodø and Røst ensures transport services between the city of Bodø, located on the mainland, and the island Røst, both located in the county of Nordland. Air services are currently provided twice a day, six days a week, with flying time between both cities being approximately 25 minutes. The only other mode of transport available on this route is a car ferry serving Røst six days a week, with the travel time one way being between 4 and 8 hours, depending on how many other ports of call are served.

On 29 March 2001, Guardair AS, the incumbent operator on that route selected under the previous tender procedure⁶, announced that it would terminate its air services, *inter alia*, on the route in question, as from 30 March 2001. To avoid any discontinuation of services, the Norwegian authorities contracted, within a day, CHC Helikopter Service to ensure transport services from 30 March 2001 until 10 May 2001. This gave the Ministry the time necessary to consider how to secure a sufficient service level between Bodø and Røst from 11 May 2001 until 31 March 2003, the latter date being the date of termination of the previous contract with Guardair AS. CHC Helikopter Service had been selected from two offers, as being the one requiring the lowest amount of compensation. This compensation was based on the annual compensation previously paid to Guardair AS, and amounted to NOK 1,201,312 for the relevant period (approximately € 150,000).

Following this, the Norwegian authorities sent invitations to tender to air carriers having shown their interest on the occasion of previous tender procedures on that route, as well as to the association of foreign carriers BARIN, by fax of 2 April 2001. The tender documents laid down the conditions which had to be fulfilled, including a maximum ceiling of compensation (not exceeding the amount granted to the previous air carrier Guardair, which amounted to NOK 10.121 million p.a., approximately € 1.265 million) and the service level, referring to the transport standards as laid down in the previous tender. The operators were asked to submit their offers before 20 April 2001. It emerged that the offer submitted by Widerøe's Flyveselskap constituted the lowest amount of compensation, i.e. NOK 6.884 million p.a. (approximately € 860,000).

According to the Norwegian authorities, the contract awarded to Widerøe's Flyveselskap is a standard contract, as already used in other cases, such as that regarding the operation of the route between Oslo and Røros. This means that the contract may be terminated in case another operator is willing to provide the services in question on a commercial basis, or when a new carrier has been selected according

⁶ See publication of public service obligations in OJ C 340 of 27.11.1999, page 74, and of original tender documents in OJ C 342 of 30.11.1999, page 29.

to the procedure provided for under Article 4 of Regulation No 2408/92. Given the date at which a new carrier is supposed to start operations on this route (see below), the contract awarded to Widerøe's Flyveselskap expires 31 January 2002.

Initially, the Norwegian authorities took the view that a contract could be awarded until 31 March 2003. After further consultations with the Authority, the Norwegian Government agreed to initiate a regular tender procedure as required under Regulation No 2408/92 as soon as possible and limit the interim period until the end of January 2002. After consultation with the local authorities on the scope of the public service level on that route, the Norwegian Government finalised the documents, which were sent to the Authority by letter from the Ministry of Transport and Communications of 15 June 2001 (the letter for publication, with the annexed documents regarding the imposition of public service obligations and the tender, was also registered by the Authority under number SEA 132.400.007) according to the provisions of Regulation No 2408/92. According to these documents, the new air carrier is supposed to start operation on this route as from 1 February 2002.

With the contract awarded to Widerøe's Flyveselskap covering the period from 11 May 2001 until 31 January 2002, the total amount to be paid to this air carrier amounts to NOK 4,960,846 (approximately € 620,000). This figure is based on the offer submitted by Widerøe's Flyveselskap, which specified the compensation required for air services as being NOK 571,696 per month. Accordingly, the total amount necessary was calculated; from 11 May to 31 May 2001: NOK 571,696 x 21/31 = NOK 387,278 and from 1 June 2001 to 31 January 2002: NOK 571,696 x 8 = NOK 4,573,568.

The aid measures under scrutiny in this decision are thus the compensation of NOK 1,201,312 granted to CHC Helikopter Service for the provision of air transport services on the route Bodø-Røst from 30 March 2001 until 10 May 2001 and the compensation of NOK 4,960,846 granted to Widerøe's Flyveselskap for the provision of air transport services on the route Bodø-Røst from 11 May 2001 to 31 January 2002.

II. APPRECIATION

Introductory remarks

It should be recalled that, with the adoption of Regulation No 2408/92, a new legal framework was established providing that air carriers holding a licence generally enjoy free access to all intra-Community routes. However, the Regulation allows free market access to be restricted for public policy reasons, such as the maintenance of air services on certain routes, which would not be served by operators on purely commercial grounds.

As regards the maintenance of transport services in the public interest, Regulation No 2408/92 lays down more detailed rules governing the imposition of public service obligations, the selection of air carriers on such routes, as well as reimbursement for costs stemming from the public service obligations imposed on air carriers (cf. Article 4 of Regulation No 2408/92).

It follows from the above that EC Member States and EFTA States are allowed to adopt measures with a view to ensuring air transport services on routes in the public interest, provided these measures are in compliance with the pertinent provisions in Regulation No 2408/92. To the extent such measures, and in particular the award of compensation to air carriers serving these routes, are not in accordance with the rules laid down in that Regulation, the Authority has to examine whether such measures may nevertheless be justified under the relevant basic provisions of the EEA Agreement.

State aid within the meaning of Article 61(1) of the EEA Agreement and procedural requirements pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement

Article 61(1) of the EEA Agreement stipulates: "*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, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of the Agreement.*"

Pursuant to Article 1 (3) 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 its 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*".

In addition, it follows from the Aviation Guidelines that, where an EFTA State selects an air carrier and awards compensation without following the rules laid down in Regulation No 2408/92, there is a presumption of aid within the meaning of Article 61 (1) of the EEA Agreement. This aid must be notified to the Authority pursuant to Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement.

The compensation provided for under the contracts awarded to CHC Helikopter Service and to Widerøe's Flyveselskap is covered by the Ministry of Transport and Communications' budget to the air carriers (cf. Chapter 1310, post 70 of the State Budget 2000-2001). Payments are thus granted by the Norwegian State. The Norwegian Government awarded the contract for the provision of air services on the route between Bodø and Røst to CHC Helikopter Service, after having contacted two carriers in a position to provide the services in question on very short notice, and to Widerøe's Flyveselskap, after having invited potentially interested air carriers through letters, setting short deadlines for the submission of offers. In both cases, the Norwegian authorities have not followed the procedural requirements laid down in Article 4 (1) of Regulation No 2408/92 as regards publication and deadlines. Under these circumstances, it cannot be excluded that the compensation payment gives the air carriers a financial benefit that they would not have enjoyed in the normal course of business. The compensation may thus strengthen the position of the selected air carriers compared with other undertakings competing on the market for air transport services, which was opened to EEA-wide competition, pursuant to Regulation No

2408/92, as of 1 July 1994. Consequently, the aid may distort competition and affect trade between the Contracting Parties.⁷

Therefore, the compensation payment to CHC Helikopter Service to the amount of NOK 1,201,312 (approximately € 150,000) and to Widerøe's Flyveselskap to the amount of NOK 4,960,846 (approximately € 620,000) for the respective contract periods constitutes aid within the meaning of Article 61 (1) of the EEA Agreement.

As regards compliance with the obligations laid down in Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, the Authority observes that the contracts were awarded to CHC Helikopter Service on 30 March 2001 and to Widerøe's Flyveselskap on 27 April 2001, without the contracts having been notified to the Authority. The Authority regrets that the Norwegian Government has put the aid into effect, contrary to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement and point 3.3 of Chapter 3 of the Authority's State Aid Guidelines⁸.

Compatibility of Aid Measures

According to point 14 of the Aviation Guidelines, “[d]irect aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption. However, the Commission must also take into account the concern of Member States to promote regional links with disadvantaged areas”. In this respect, the Guidelines further specify that “direct operational subsidization of air routes can, in principle, only be accepted in the following two cases: public service obligations... and aid of a social character...”.

As stated in the introductory part, compensation for public service obligations on a specific air route may, in principle, only be regarded as compatible with the functioning of the EEA Agreement, provided that the conditions laid down in Regulation No 2408/92 are satisfied.

According to Article 4(1) (h) of Regulation No 2408/92, “[a] Member State may reimburse an air carrier, which has been selected under subparagraph (f), for satisfying standards required by a public service obligation imposed under this paragraph; such reimbursement shall take into account the costs and revenues generated by the service”.

Point 18 of the Aviation Guidelines states that “...it is important that the airline which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender (underlined here)”.

⁷ See Judgment of the Court of Justice of the European Communities of 17 September 1980, Case 730/39 *Philip Morris Holland BV v Commission*, ECR 1980 p. 2671, para. 11.

⁸ In this respect, it is worth recalling that according to point 3.3 (2) of Chapter 3 of the Authority's State Aid Guidelines, “[b]y ‘putting into effect’ is meant not only the action of granting aid to the recipient. It is sufficient that the conferment of powers enabling the aid to be granted without further formality has taken place”.

In this respect, the Authority observes that the procedure chosen by the Norwegian authorities did not respect the obligations regarding publication and time limits, as set out in Article 4 of Regulation No 2408/92.

However, the Authority acknowledges that compensation granted to an air carrier selected without having followed the tender procedure as required under Article 4 of Regulation No 2408/92 may nevertheless be regarded as compatible with the functioning of the EEA Agreement, pursuant to Article 59 (2) thereof, to the extent full compliance with the procedural requirements of the Regulation would, in fact, obstruct the provision of the public service on a particular route and provided that the measures taken by the competent authorities do not go beyond what is necessary to guarantee continuous air services on that route, pending the outcome of the tender procedure as required under Article 4 of Regulation No 2408/92.

Against this background and based on the relevant case-law regarding the application and interpretation of Article 59 (2) of the EEA Agreement, the Authority has verified whether:

- the air services on the route in question could be regarded as services in the general economic interest (*public service remit*);
- the air carriers had been entrusted with the provision of air transport services in the general economic interest (*entrustment*);
- compliance with the requirements under the Regulation would have resulted in an interruption of services until a new carrier would be selected following the procedures under the regulation and whether or not such discontinuation was acceptable taking into consideration the existence and the service level of alternative means of transport (*emergency situation*);
- the contracts would be strictly limited to the time necessary to fully comply with the requirements under Regulation No 2408/02 (*temporary nature of the 'interim contracts'*);
- the conditions under which the contracts were awarded respected the general principles of an open, transparent and non-discriminatory procedure (*minimum procedural requirements*);
- compensation granted under the contracts in question was limited to the amount necessary for the fulfilment of the public service obligation (*necessity of compensation*); and
- the contracts awarded to the selected air carriers would not affect the development of trade to an extent contrary to the interests of the Contracting Parties to the EEA Agreement (*proportionality*)

Public Service Remit

Although, in principle, EFTA States enjoy wide discretion in determining the level of services in the general interest and, may where necessary, impose public service obligations (PSOs), in order to ensure that level of service, this freedom may, to a certain extent, be limited by the existence of secondary legislation. In the field of air transport, Regulation No 2408/02 contains more detailed provisions regarding the imposition of PSOs.

Pursuant to Article 4 (1) (a) of the Regulation, “*a Member State...may impose a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport in its territory, any such route being considered vital for the economic development of the region in which the airport is located, to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying standards air carriers would not assume if they were solely considering their commercial interest*”.

According to Article 4 (1)(b) of the Regulation, “[t]he adequacy of scheduled air services shall be assessed by the Member States having regard to:

- (i) *the public interest;*
- (ii) *the possibility, in particular for island regions, of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration;...”.*

The Authority observes that, originally, the imposition of PSOs on the route concerned had been communicated to and published by the Authority pursuant to Article 4 (1) (a) of Regulation No 2408/92⁹. It should, however, be stressed that, in this context, the Authority has not assessed the genuine public service character of the route in question, nor has the Authority approved this route as being a PSO-route according to the criteria set out in Article 4 of Regulation No 2408/92. It seems appropriate to clarify that Regulation No 2408/92 does not give the Authority the power to formally approve or authorise PSO-routes, but merely opens up for the possibility, without there being an obligation, to initiate an *ex officio* investigation. In the past, the Authority has not made use of this possibility. This does not, however, imply that all routes which were communicated to the Authority under the procedure laid down in Article 4 of Regulation No 2408/92 in the past must automatically be considered PSO-routes fulfilling the criteria laid down in Article 4 of Regulation No 2408/92.

It is worth recalling that it is primarily for the EFTA State, who invokes the exemption, to assess the public service character of the route in question in line with the conditions laid down in Article 4 of the Regulation No 2408/92.

With respect to the above requirements of Article 4 of Regulation 2408/92, which could also be applied as the basis for assessing whether the aid is in conformity with the State Aid Guidelines, the Authority observes that the route between Bodø and Røst establishes an air link to an airport serving a peripheral region. This route is not served by other air carriers. Alternative means of transport, is a car ferry operating between Bodø and Røst, which does not provide a sufficient service level, both with respect to travelling time and comfort, in particular given exposure to harsh weather conditions.

Consequently, the route in question may be considered a route in the public interest in accordance with the criteria enumerated in Article 4 (1) of Regulation No 2408/92.

⁹ Original public service obligations published in OJ C 340 of 27.11.1999, page 74, and original tender documents published in OJ C 342 of 30.11.1999, page 29.

However, the Authority would like to emphasise that the conclusion in the case at issue does not prejudge the Authority's future assessment of air routes under the criteria laid down in Article 4 of Regulation No 2408/92.

Entrustment

By the contracts awarded to, both CHC Helikopter Service and Widerøe's Flyveselskap, which contain obligations in the public interest for which compensation is granted, the air carriers were entrusted by public act with the provision of air transport services on this route¹⁰.

Emergency situation

As regards the emergency nature of the situation, the EFTA State concerned has to demonstrate that, due to circumstances beyond its responsibility, a route considered as being in the general economic interest would not be served or would have to be interrupted until a carrier was selected under the procedure laid down in Regulation No 2408/92. It would further have to demonstrate that any such interruption would not be acceptable given the lack of alternative means of transport ensuring an adequate transport service level on that route.

Information submitted by the Norwegian authorities shows that, when the incumbent operator publicly announced its decision to terminate air transport services on the Bodø-Røst route as from 30 March 2001, the remaining time (one day) was too short for the Norwegian authorities to follow the procedures as laid down in Regulation No 2408/92. Given the lack of interest from air carriers in running this service on a commercial basis it is obvious that, without immediate action from the part of the authorities, continuous air transport service on this route could not have been guaranteed. In this respect, the Authority also takes note that the incumbent operator could not be obliged to continue services until a new carrier had been selected. Recourse to invitation to tender through letters and with short deadlines was, therefore, unavoidable given the short time available between the announcement by the incumbent operator of its intention to stop services and the actual termination of services on that route. Finally, it is noted that a discontinuation of services on that route, was justifiably, not considered as acceptable, given the insufficient service level offered by alternative means of transport.

Therefore, the Authority is satisfied that, under these circumstances, the Norwegian authorities found themselves in an emergency situation as defined above.

Temporary nature of the 'interim contracts'

The Authority emphasises that any deviations from the tender procedure laid down in Regulation No 2408/92 must be strictly limited in time. This implies that the Norwegian authorities have to undertake, within the shortest possible delay, the

¹⁰ According to the Judgment of the Court of Justice of 23 October 1997, Case C-159/94 *Commission v. France*, ECR 1997 p. I-5815, para. 65/66, and the recent Commission communication on services of general interest in Europe (COM (2000) 580 final, 20 September 2000, point 22), contracts are also regarded as a public act of entrustment.

necessary steps to ensure operation of this route under the conditions laid down in Article 4 of Regulation 2408/92.

Compensation for the operation of air routes under an interim contract, awaiting a regular contract established in accordance with Regulation No 2408/92, may only be approved by the Authority once the documents regarding the new tender have been submitted. It is only then that the Authority knows with certainty if and when a new carrier will operate the route in question according to the requirements laid down in Regulation No 2408/92. It is only then that the Authority has the necessary assurance that the contract will be of a temporary nature strictly limited to the time necessary for the Norwegian authorities to fully comply with Regulation No 2408/92.

In this respect, the Authority further takes note that the contract awarded to CHC Helikopter Service was limited to six weeks. The Authority also takes note of the Norwegian Government's assurance that the contract awarded to Widerøe's Flyveselskap is only an interim solution. This means that the latter contract would be terminated should another air carrier wish to serve this route on a commercial basis or when a carrier has been selected under the regular tender procedure. In this respect, the Norwegian authorities have sent the necessary tender documents to the Authority. According to these documents, the new carrier will start operation of air services on that route as from 1 February 2002 and until 31 March 2003.

The Authority verified that the date when the new carrier would start operation on that route was – in particular due to the current delays in publication – the earliest date possible. The Authority also takes note of the requirement for the Ministry of Transport and Communication to examine the scope of the public service remit on this route with the counties and municipalities concerned. The Authority would, however, stress that, given the urgency of the situation invoked by the Norwegian Government in order to justify deviations from the legal requirements as laid down in Article 4 of Regulation No 2408/92, such consultations should be carried out as expeditiously as possible, without unnecessarily delaying the normal tender procedure.

Having said this and under the circumstances of the present case, the Authority is satisfied that the Norwegian authorities have undertaken the necessary steps to fully comply with the requirements under Regulation No 2408/92 as soon as possible.

Minimum procedural requirements

On the basis of the information submitted to it, the Authority is satisfied that the procedure, as regards the award of a contract as from 11 May 2001, initiated by the Norwegian authorities was carried out in an open, transparent and non-discriminatory way. The Norwegian authorities have ensured the participation of a large number of both domestic and foreign air carriers. The Authority observes that the Transport Ministry's decision was based on objective selection criteria, in particular the level of compensation, while at the same time considering the service level on the route.

As regards the award of the interim contract to CHC Helikopter Service, the Authority acknowledges that given the time available (one day), a procedure involving more air carriers was not feasible.

It can, therefore, be concluded that the Norwegian authorities have, to the extent it was possible, respected the minimum procedural requirements in selecting an air carrier for the operation of the route in question.

Necessity and proportionality of the compensation

According to settled case law and practice of the European Commission, the grant of State aid may, under Article 59 (2) of the EEA Agreement be justified ” *provided that the sole purpose of that aid is to offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest and that the grant of aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium* (underlined here)”¹¹.

In this respect, it must be observed that, without State support, no air carrier would be willing to operate this route. State compensation is therefore, in principle, to be regarded as necessary.

As regards the amount of the compensation payment, the Authority had to ascertain that the compensation granted to CHC Helikopter Service and Widerøe’s Flyveselskap did not exceed the amount required to compensate for public service obligations imposed on the air carriers.

Where an air carrier is not selected according to the procedures laid down in Article 4 of Regulation No 2408/92, there is a risk that the amount required by air carriers does not reflect the minimum price necessary for the provision of the service in question.

However, in the case at issue, the Authority is satisfied that the amounts granted to CHC Helikopter Service and Widerøe’s Flyveselskap can be considered as the amount necessary for the provision of air services on the route between Bodø and Røst.

As regards compensation paid to CHC Helikopter Service, the Authority is satisfied that the amount awarded to this carrier did not exceed the amount (per month) granted to the previous air carrier.

As regards compensation paid to Widerøe’s Flyveselskap, the Authority observes that the Norwegian authorities have invited potentially interested air carriers to submit offers regarding the operation of this route and have finally selected, among five offers received, the air carrier requiring the lowest amount of compensation. Given that the award procedure took place in a competitive environment and that the Norwegian authorities awarded the contract to the air carrier requiring the lowest level of compensation (NOK 6.884 million p.a., approximately € 860,000, as opposed to the

¹¹ Judgment of the Court of First Instance of 27 February 1997, Case T-106/95, *FFSA and others v. Commission*, ECR 1997, II-229, para. 178.

previous air carrier which received NOK 10.121 million, approximately € 1.265 million), the amount of compensation can be regarded as necessary and proportionate for the provision of the air services in question.

Proportionality

As regards the effects of the compensation granted to CHC Helikopter Service and Widerøe's Flyveselskap on the development of trade between the Contracting Parties, the Authority took into consideration that the deviations from the tender formalities as laid down in Article 4 of Regulation No 2408/92 were justified in order to avoid undesirable discontinuation of services on the air route between Bodø and Røst. Furthermore, the Norwegian authorities limited the effects of this emergency solution, by granting the contract to CHC Helikopter Service for a very limited period of time and to Widerøe's Flyveselskap only on a temporary basis and limited in time until a new carrier will be selected under the normal tender procedure. Furthermore, the Authority takes note that the contract was awarded to Widerøe's Flyveselskap, after having carried out an open, transparent and non-discriminatory selection procedure, allowing interested domestic and foreign air carriers to submit their offers. Thereby, the Norwegian authorities ensured a minimum degree of competition on that route. The Authority further observes that, under the terms of the contract, Widerøe's Flyveselskap does not enjoy exclusive rights on the route Bodø-Røst. Besides, the contract will be terminated should any other operator be willing to operate air services on that route on a commercial basis. The Authority was, therefore, satisfied that neither the conditions under which the contract was awarded, nor the terms and conditions of the contract itself distort competition to an extent contrary to the interests of the Contracting Parties of the EEA Agreement. As regards the contract to CHC Helikopter Service, the Authority acknowledges that a similar procedure was not feasible under the given circumstances.

In light of all the above considerations, the Authority concluded that the compensation granted to CHC Helikopter Service and to Widerøe's Flyveselskap for the temporary operation of air transport services on the route between Bodø and Røst does not affect the development of trade to such an extent as would be contrary to the interests of the Contracting Parties.

Conclusions

The Norwegian Government having demonstrated that full compliance with the tender formalities as laid down in Article 4 of Regulation No 2408/92 would have obstructed the provision of air transport services in the public interest, and further having shown that the measures taken in this respect do not go beyond what is necessary for the purpose of ensuring uninterrupted air services until an air carrier is selected under the formal tender procedure, the Authority considers that the compensation granted to CHC Helikopter Service and to Widerøe's Flyveselskap for the operation of the Bodø-Røst route can be regarded as compatible with the functioning of the EEA Agreement, pursuant to Article 59 (2) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

The Authority has decided not to raise objections to the compensation of NOK 1,201,312 (approx. € 150,000) granted to CHC Helikopter Service for the operation of air transport services on the route between Bodø and Røst from 30 March 2001 until 10 May 2001, and NOK 4,960,846 (approximately € 620,000) to be granted to Widerøe's Flyveselskap, for the operation of air transport services on the route between Bodø and Røst from 11 May 2001 until 31 January 2002.

Done at Brussels, 25 July 2001

For the EFTA Surveillance Authority

Hannes Haftstein
College Member

Peter Dyrberg
Director