


EFTA SURVEILLANCE AUTHORITY

Doc. No: 01-7084-I
Ref. No: SAM 030.01.005
Dec. No: 280/01/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 19 September 2001

regarding compensation granted to Widerøe's Flyveselskap ASA for the temporary operation
of air transport services on the route between Oslo and Fagernes
(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 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 re-establish scheduled air services on the route Oslo-Fagernes. The need to carry out an abridged tender procedure stemmed from the withdrawal of the previous operator, Guardair AS, from the tender contract on very short notice (as from 30 March 2001). The Authority was also informed that further information, including possible remuneration to carriers, would be submitted to it after the awards had been made.

By letter of 8 May 2001 (Doc. No. 01-3520-D), the Authority reminded the Norwegian Government of its obligation to submit a complete notification. It was also recalled that Norway could not put any aid to air carriers into effect before the Authority has 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 Government informed the Authority of its intention to carry out the formal tender procedure as required under Regulation No 2408/92 as soon as possible.

By letter of 1 June 2001, received and registered by the Authority on 7 June 2001 (Doc. No. 01-4178-A), the Norwegian authorities informed the Authority that, due to the urgency of the circumstances of the matter, the air carrier requiring the lowest level of compensation had been selected in an abridged tender procedure from among the four offers received.

By letter dated 18 June 2001 (Doc. No. 01-4526-D), the Authority acknowledged receipt of this letter and requested additional information.

By letter from the Ministry of Transport and Communications, dated 18 July 2001, registered by the Authority on 23 July 2001 (Doc. No. 01-5945-A), previously received by fax of 18 July 2001 (Doc. No. 01-5696-A), the Norwegian Government submitted the additional information requested as well as the documents sent for publication in the Official Journal of the European Communities (documents related to the imposition of public service obligations and the invitation to tender⁶). In this letter the Norwegian authorities also informed the Authority that, due to the withdrawal of the offer by the air carrier which had been originally selected under the abridged tender procedure, the contract would now be awarded to Widerøe's Flyveselskap ASA.

By letter dated 20 July 2001 (Doc. No. 01-5688-D), the Authority acknowledged receipt of the letter as transmitted by fax. The Norwegian authorities furnished further clarifications by fax dated 11 September 2001, received and registered by the Authority on that same day (Doc. No. 01-7032-A).

⁶ These documents were also registered by the Authority under number SEA 132.400.007 and sent for publication.

Description of the aid measure

The operation of air services on the route in question establishes an air link between Oslo and Fagernes, located in the county of Oppland, approximately 180 km North of Oslo. The travel time between Gardermoen airport, Oslo, and Leirin airport, Fagernes, is approximately 30 minutes. In accordance with the public service obligations imposed on this route and published in 1999⁷, air services were provided on this route throughout the year, with a frequency of two daily return services (Monday – Friday) and one return service on Sundays. Air services were provided by an aircraft registered to carry a minimum of 15 passengers. This route mainly provides domestic and foreign connections to and from Fagernes via Oslo. The share of transfer passengers on this route is, according to the Norwegian authorities, between 70 and 80%. Other modes of public transport available on this route are express buses operating on the route between Oslo and Fagernes, with travel time amounting to approximately 3 hours.

On 29 March 2001, Guardair AS, the incumbent operator on the route, announced that it would terminate its air services, *inter alia*, on this route, as from 30 March 2001. Guardair AS had been selected to operate this route as a public service route according to the provisions of Regulation No 2408/92, for the period 1 April 2000 until 31 March 2003.⁸ Since the termination of air services provided by Guardair AS as from 31 March 2001, the route is without air services.

As no air carrier had expressed an interest in serving this route on a commercial basis, and in order to avoid a prolonged interruption of air services, the Norwegian authorities sent invitations to tender to air carriers who had expressed an interest in the route on the occasion of previous tender procedures on that route. The authorities also sent an invitation to tender to the association of foreign carriers BARIN, by fax of 5 April 2001. The tender documents laid down the conditions which had to be fulfilled by the successful tenderer, including a maximum ceiling of compensation (not exceeding the amount granted to the previous air carrier Guardair AS, which amounted to NOK 6.92 million p.a., approximately € 866 000) 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, with the start of operation preferably still in April. As regards the duration of the contract, the tender documents specified that the contract was due to expire on 31 March 2003.

In June 2001, the Norwegian authorities finalised its evaluation of the four offers received and took the decision to award the contract to the Swedish air carrier Golden Air Flyg AB, given that this operator required the lowest amount of compensation (NOK 385 000 per month, approximately € 48 000). This operator subsequently withdrew its offer. Consequently, the Norwegian authorities decided to award the contract to Widerøe's Flyveselskap ASA, which required, among the remaining three offers, the lowest amount of compensation (NOK 571 700 per month, approximately € 71 000).

⁷ OJ C 340 of 27.11.1999, page 74.

⁸ 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; see also Press Release No 13/2000 from the Ministry of Transport and Communications of 3 March 2000 regarding the award of the contract to Guardair.

According to the Norwegian authorities, the contract to be awarded to Widerøe's Flyveselskap ASA is a standard contract, including a provision on the termination of the contract in case either, another operator is willing to provide the services in question on a commercial basis, or a new carrier has been selected according to the procedure provided for under Article 4 of Regulation No 2408/92.

The Norwegian authorities initially, took the view that a contract could be awarded having a duration until 31 March 2003. However, after further consultation 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 to limit the duration of the 'interim contract'.

After consultation with the local authorities on the scope of the public service level on the route, the Norwegian Government finalised the documents. These were sent to the Authority by letter from the Ministry of Transport and Communications of 18 July 2001 (documents related to the imposition of public service obligations and the invitation to tender⁹), pursuant to the provisions of Regulation No 2408/92. According to these documents, the new air carrier is supposed to start operation on this route on 1 April 2002 until 31 March 2003. The public service obligations imposed on air carriers serving this route are, apart from certain changes, mainly the same as those published in 1999.

As the new carrier selected under the formal tender procedure will, supposedly, start operation on 1 April 2002, the contract to be awarded to Widerøe's Flyveselskap ASA will have a limited duration, until 31 March 2002. Its operations are foreseen to start on 1 October 2001. Based on the above duration of the contract, the total amount to be paid to this air carrier will amount to NOK 3 430 200 (approximately € 429 000).

The conditions under which Widerøe's Flyveselskap ASA will provide air services (frequency, capacity, timetables, etc.) are those published in 1999¹⁰. According to the terms of the contract, the company will not enjoy exclusive rights on the route concerned.

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 would 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

⁹ The imposition of new public service obligations was published in OJ C 242 of 30.8.2001, page 7; temporarily available on the internet (one month following date of publication): http://europa.eu.int/eurlex/en/dat/2001/c_242/c_24220010830en00070010.pdf; the tender documents are also available on the Ministry of Transport and Communication's homepage: <http://www.odin.dep.no/archive/sdvedlegg/01/01/Anbud071.pdf>

¹⁰ As regards the maximum fares, the ceiling was set at NOK 730, based on the ceiling set in 1999 and adjusted for the general price increase.

services on certain routes which would not, otherwise, 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 of 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, including compensation for the provision of such air services, provided these measures are in compliance with the pertinent provisions in Regulation No 2408/92.

Reimbursement of air carriers pursuant to Regulation No 2408/92

According to Article 4 (1) (a) of the Regulation, EFTA States “...*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 fixed standards of continuity, regularity, capacity and pricing, which standards air carriers would not assume if they were solely considering their commercial interest. The EFTA Surveillance Authority shall publish the existence of this public service obligation in the Official Journal of the European Communities.*”

Article 4 (1) (d) of the Regulation allows EFTA States to limit access to routes, if no carrier has commenced or is about to commence scheduled air services on that route in accordance with the public service obligation which has been imposed on that route. This provision further stipulates that “[t]he right to operate such services shall be offered by public tender either singly or for a group of such routes to any...air carrier entitled to operate such air services. The invitation to tender shall be published in the Official Journal of the European Communities and the deadline for submission of tenders shall not be earlier than one month after the day of publication. The submissions made by air carriers shall forthwith be communicated to the other EEA States concerned and to the EFTA Surveillance Authority.” It further follows from Article 4 (1) (g) of the Regulation that “...*a period of two months shall elapse after the deadline for submission of tenders before any selection is made, in order to permit other Member States to submit comments.*”

The selection among the submissions shall be made in accordance with the criteria enumerated in Article 4 (1) (f) of the Regulation.

Finally, Article 4 (1) (h) allows EFTA States to “...*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 revenue generated by the service.*”

The Norwegian Government proposed to award the contract for the provision of air services on the route between Oslo and Fagernes to Widerøe's Flyveselskap ASA. The selection of this company took place after having invited potentially interested air carriers through letters, setting short deadlines for the submission of offers. It is apparent from the information submitted to the Authority that the Norwegian authorities have not followed the procedural requirements laid down in Regulation No 2408/92, in particular in Article 4 (1) (d) and (g), as regards publication of the call for tender and deadlines.

However, the Authority acknowledges that the provision of air services in the general interest may be obstructed by full compliance with the requirements under Regulation 2408/92 where, due to circumstances beyond the State's control, a route considered as being in the general interest would not be served or would have to be interrupted until an air carrier was selected under the procedure laid down in Regulation 2408/92.

Information submitted by the Norwegian authorities shows that, when the incumbent operator publicly announced its decision to terminate air transport services on the Oslo-Fagernes route as from 30 March 2001, the remaining time (one day between the announcement and the termination of services) was too short for the Norwegian authorities to follow the procedures as laid down in Regulation No 2408/92 and at the same time ensure the re-establishment of air services on that route as fast as possible. The incumbent operator's announcement of its intention to stop services had immediate effects, in particular since the incumbent operator could not be obliged to continue services until a new carrier had been selected. 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, air transport services on this route would have been interrupted and passengers deprived of an air service until a new carrier had been selected under the normal tender procedure. This would have implied that the route would have been without air services for at least 8/9 months. Recourse to invitation to tender through letters and with short deadlines was, therefore, and for reasons beyond the Norwegian Government's control, unavoidable in order to limit the interruption of air services on that route to a minimum.

Under these circumstances, the Authority was satisfied that the Norwegian authorities found themselves in an emergency situation, in which full compliance with the tender procedure as laid down in Regulation No 2408/92 might have obstructed the provision of air services on the route and in which Article 4 of the Regulation had not been applied. As a consequence, the compensation to be granted to Widerøe's Flyveselskap ASA is not covered by Article 4 (1)(h) of Regulation No 2408/92.

In such a situation, the Authority will examine whether compensation to an air carrier for the provision of air services on a public service route may be regarded as compatible with the basic provisions of the EEA Agreement, in particular Article 61 (1) and 59 (2) thereof.

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 that: "*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 to be awarded to Widerøe's Flyveselskap ASA is covered by the Ministry of Transport and Communications' budget to air carriers (cf. Chapter 1310, post 70 of the State Budget 2000-2001). Payments are thus granted by the Norwegian State. As stated above, the Norwegian authorities have not followed the procedural requirements laid down in Article 4 (1) of Regulation No 2408/92 with respect to the contract to be awarded to Widerøe's Flyveselskap ASA. Under these circumstances, it cannot be excluded that the compensation payment gives the air carrier a financial benefit that it would not have enjoyed in the normal course of business. The compensation may thus strengthen the position of the selected air carrier 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.¹¹

Therefore, the compensation payment to Widerøe's Flyveselskap ASA to the amount of NOK 3 430 200 (approximately € 429 000) for the contract period 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 plans to award aid to Widerøe's Flyveselskap ASA have been notified to the Authority and no aid has been granted pending the outcome of the present investigation. The Authority can therefore conclude that the Norwegian Government has fully complied with its obligations under Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

¹¹ 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.

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...”.

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)”.

As a rule, compensation for public service obligations on a specific air route must comply with the conditions for public tender laid down in Regulation No 2408/92. However, under certain exceptional circumstances, such as, in the present case, the emergency of the situation due to the immediate termination of services by the incumbent operator, the procedural rules regarding the public tender as laid down in Regulation No 2408/92 may not be applied (see above). In such a case, compensation granted to an air carrier, selected without having followed the tender procedure as required under Article 4 of Regulation No 2408/92, may be regarded as compatible with the functioning of the EEA Agreement, pursuant to Article 59 (2) thereof.

Article 59 (2) of the EEA Agreement reads: “Undertakings entrusted with the operation of services of general economic interest...shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.”

Consequently, the Authority has assessed 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*);
- 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

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. However, this freedom may, to a

certain extent, be limited by the existence of secondary EEA legislation. In the field of air transport, Regulation No 2408/92 contains more detailed provisions regarding the imposition of PSOs, which will be used as interpretative means for the application of Article 59 (2) of the EEA Agreement.

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 the imposition of PSOs on the route concerned had originally been communicated to and published by the Authority pursuant to Article 4 (1) (a) of Regulation No 2408/92¹². It should, however, be stressed in this context that the Authority has not assessed whether the route in question possesses a genuine public service character, 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 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. However, this does not 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 from the general prohibition of operating aid to demonstrate that the air services in question are services in the general economic interest within the meaning of Article 59 (2) of the EEA Agreement. It must also assess the public service character of the route in question taking into account the criteria laid down in Article 4 of the Regulation No 2408/92.

According to the information submitted by the Norwegian authorities, this route is not served by other air carriers. After termination of air services previously provided by Guardair AS, there was no air carrier showing an interest in serving this route on a commercial basis. It can, therefore, be concluded that air carriers, solely considering their commercial interest, would not provide air services on this route.

¹² 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.

Alternative means of public transport consist of express buses operating on this route. However, according to the Norwegian authorities, the absence of air services on the route between Oslo and Fagernes is not acceptable, given the importance of such an air link in particular for the tourist industry in that region. In this respect, the Norwegian authorities have emphasised the importance of this air route for connecting flights both within Norway and to and from abroad; an importance which is reflected in the high share of transfer flights on this route. Consequently, the Norwegian authorities stressed that the air service between Oslo and Fagernes was important to promoting economic growth and employment. Furthermore, the Norwegian authorities stressed that air services from Oslo to Fagernes were necessary given the remoteness of the region, due to its location in the mountain areas of southern Norway, with travelling time to Oslo of more than 3 hours. Against this background, the Norwegian authorities maintain that the travel needs in question could not be satisfied by other means of transport as these result in longer travelling times and increased travel costs.

The Authority takes note of the information and explanations provided by the Norwegian Government as regards the inadequacy of alternative means of transport having regard to the transport needs, and in particular the importance of the air link for the tourism industry in the region concerned. Based on these explanations, in view of the urgency of the matter, which excludes a more thorough assessment, and in view of the fact that public service obligations had already been imposed by the Norwegian Government on that route in 1999, the Authority has concluded that the air transport services provided on the route Oslo-Fagernes could be considered as services in the general economic interest within the meaning of Article 59 (2) of the EEA Agreement for the purpose of the present State aid proceedings.

However, the Authority would like to reiterate that the conclusion in the case at issue does not prejudice any future assessment by the Authority of air routes under the criteria laid down in Article 4 of Regulation No 2408/92 in the context of an appraisal of PSO-routes communicated by the Norwegian Government to the Authority.

Entrustment

By the contract to be awarded to Widerøe's Flyveselskap ASA, which contains 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 route¹³.

Necessity and proportionality of the compensation payment

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*

¹³ 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.

undertaking to be able to perform its public service obligations under conditions of economic equilibrium (underlined here)¹⁴.

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 a necessary incentive.

As regards the amount of the compensation payment, the Authority had to ascertain that the compensation granted to Widerøe's Flyveselskap ASA did not exceed the amount required to compensate for public service obligations imposed on the air carrier.

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 will not reflect the minimum price necessary for the provision of the service in question.

However, in the case at issue, the Authority has verified that the amount awarded to Widerøe's Flyveselskap ASA did not exceed the amount (per month) granted to the previous air carrier. Under the previous contract Guardair AS had received NOK 6.92 million p.a., i.e. approximately NOK 577 000 per month (approximately € 72 000), whereas Widerøe's Flyveselskap ASA will, under the 'interim contract', receive NOK 571 700 per month (approximately € 71 000). The Authority takes note of the explanations provided by the Norwegian authorities that, if the start of operations would be later than 1 October 2001, the compensation amount would be reduced accordingly.

Furthermore, the Authority observes that the Norwegian authorities invited potentially interested air carriers to submit offers regarding the operation of this route and had finally selected, among the three remaining offers, 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 571 700 per month, approximately € 71 000), the amount of compensation can be regarded as necessary and proportionate for the provision of the air services in question.

Proportionality and effect on trade between the Contracting Parties

As regards the effects of the compensation granted to Widerøe's Flyveselskap ASA on the development of trade between the Contracting Parties, the Authority observes that, where the tender formalities as laid down in Article 4 of Regulation No 2408/92 are not followed, there is, in principle, a risk of impeding domestic and, in particular, foreign air carriers from fully benefiting from full market access, which these rules intend to achieve.

The resulting negative effect on trade may, under circumstances requiring immediate action from the competent authorities not allowing them to fully comply with the tender requirements laid down in Article 4 of Regulation No 2408/92, be considered as not being "contrary to the interests of the Contracting Parties". This would be to the extent

¹⁴ 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.

that the conditions under which the contract was awarded, or the terms and conditions of the contract itself did not limit competition and trade on the air transport market more than was necessary and proportionate to guarantee air services on the route in question.

In this respect, the Authority verified in particular that:

- (1) the contract 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'*);
- (2) the contract would not grant exclusive rights; and that
- (3) the conditions under which the contract was awarded respected the general principles of an open, transparent and non-discriminatory procedure (*minimum procedural requirements*).

(1) 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 necessary steps to ensure operation of this route under the conditions laid down in Article 4 of Regulation No 2408/92.

As has been emphasised by the Authority on previous occasions, where compensation for the operation of air routes is granted under an interim contract, such compensation 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.

The Authority takes note of the Norwegian Government's statement that the Ministry of Transport and Communication is requested to examine the scope of the public service remit on this route with the counties and municipalities concerned. Furthermore, the Authority takes the view that the delay in initiating the formal tender procedure as required under Article 4 of Regulation No 2408/92 will, in the case at issue, not result in an unnecessary extension of the duration of the 'interim contract', since, pending consultations on these issues, no contract was awarded.

As regards the contract to be awarded to Widerøe's Flyveselskap ASA, the Authority takes note that the contract is limited in time, with operations foreseen to start on 1 October 2001 and continue until the new carrier starts operations. To this end, the Norwegian authorities have already initiated the tender procedure in order to ensure that the new carrier will start operation of air services on that route on 1 April 2002 and continue until 31 March 2003. The Authority has verified that the date on which 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 Norwegian Government's assurance that the contract awarded to Widerøe's Flyveselskap ASA 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.

Against this background, the Authority is satisfied that the Norwegian authorities have undertaken the necessary steps to fully comply with the requirements under Regulation No 2408/92 regarding the initiation of a tender procedure concerning the future operation of air services on that route from 1 April 2002 until 31 March 2003, and that the contract to be awarded to Widerøe's Flyveselskap ASA, starting from 1 October 2001 until 31 March 2002, is limited in time.

(2) Non-exclusive rights

In this respect, the Authority observes that, under the terms of the contract, Widerøe's Flyveselskap ASA does not enjoy exclusive rights on the route Oslo-Fagernes.

(3) Minimum procedural requirements

Based on the information submitted to it, the Authority is satisfied that the procedure, as regards the award of a contract as from 1 October 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 several 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.

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

Therefore, the Authority is satisfied that neither the conditions under which the contract was awarded, nor the terms and conditions of the contract itself went beyond what was necessary and proportionate to guarantee continuous air services on the route in question.

In light of all the above considerations, the Authority has concluded that the compensation granted to Widerøe's Flyveselskap ASA for the temporary operation of air transport services on the route between Oslo and Fagernes 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 air services until an air carrier is selected under the formal tender procedure, the Authority considers that the compensation granted to Widerøe's Flyveselskap ASA for the operation of air services on the route Oslo-Fagernes 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 3 430 200 (approx. € 429 000) granted to Widerøe's Flyveselskap ASA for the operation of air transport services on the route between Oslo and Fagernes from 1 October 2001 until 31 March 2002.

Done at Brussels, 19 September 2001

For the EFTA Surveillance Authority

Knut Almestad
President

Hannes Hafstein
College Member