


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION of 31 May 2002

regarding the prolongation of supplementary insurance cover for third-party damage due to acts of war and terrorism ('war insurance') in support of Icelandic airline companies and cargo operators (covering the period from 24 October 2001 until 31 March 2001)
(ICELAND)

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 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid³,

WHEREAS:

I. FACTS

Procedure

It should be recalled that by Decision of 21 November 2001 (Dec. No. 361/01/COL), the Authority approved the temporary provision of re-insurance by the Icelandic State for 'war insurance' offered to Icelandic airline companies and cargo operators. This decision concerned the State offered re-insurance for 'war insurance' for a period of one month, i.e. from 24 September 2001 until 24 October 2001.

¹ Hereinafter referred to as the 'EEA Agreement'.

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

³ 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. 370/01/COL of 28 November 2001, not yet published; hereafter referred to as the 'Authority's State Aid Guidelines'.

In the following, the Icelandic Government informed the Authority of further prolongations as well as the conditions applicable under the insurance contracts offered to Icelandic airline companies and cargo operators. This information was provided in the letters from the Ministry of Finance dated 26 October 2001, received and registered by the Authority on 29 October 2001 (Doc. No. 01-8586-A), 23 November 2001, received by fax and registered on that same day (Doc. No. 01-9419-A), 2 January 2002, received and registered by the Authority on 9 January 2002 (Doc. No. 02-145-A), 15 February 2002, received and registered by the Authority on 18 February 2002 (Doc. No. 02-1294-A), 5 April 2002, received and registered by the Authority on 9 April 2002 (Doc. No. 2545-A), and 7 May 2002, received by fax and registered by the Authority on that same day (Doc. No. 02-3438-A).

The Icelandic Government submitted additional information, in particular as regards the premium payments, by letter from the Ministry of Finance dated 15 February 2002 (see above). Further information was requested by the Authority, in particular as regards the level of remuneration for the insurance company administering the 'war insurance' scheme, by letter dated 27 February 2002 (see above). The Icelandic authorities provided the requested information by letters from the Ministry of Finance dated 15 March 2002, received by fax and registered by the Authority on 18 March 2002 (Doc. No. 02-1982-A), as well as 9 April 2002, received and registered by the Authority on 11 April 2002 (Doc. No. 02-2624-A).

Description of Aid Measures

By Parliamentary Act No 120/2001, the Icelandic Government was authorised to prolong the temporary third party insurance offered to Icelandic airline companies and cargo operators, and re-insured by the Icelandic State until 31 December 2001. On the basis of this authorisation from the Icelandic Parliament, the Icelandic Government concluded a new agreement with the insurance company Sjóvá-Almennar Ltd. and the Nordic Aviation Insurance Group, regarding the provision of re-insurance for 'war insurance', having a duration of one month, i.e. from 25 October 2001 until 25 November 2001. This new agreement built on the previous agreement, which was assessed by the Authority in its decision of 21 November 2001. It contains certain amendments as described below:

As regards the period from 24 October 2001 until 31 October 2001, the agreement stated that no compensation would be paid for the special insurance which Sjóvá-Almennar Ltd. on behalf of the Nordic Aviation Insurance Group would issue until damage payments as provided for by existing insurance policies had reached USD 50 million. The premiums to be collected by Sjóvá-Almennar Ltd. from the airline companies were set at USD 0.25 per passenger for liability insurance amounting to up to USD 700 million for each damage event or total damages during the insurance

period in excess of USD 50 million for each damage event or total damages during the insurance period.

As regards the period from 1 November 2001 to 24 November 2001, the agreement stated that no compensation will be paid for the special insurance which Sjóvá-Almennar Ltd. on behalf of the Nordic Aviation Insurance Group would issue until damage payments as provided for by existing insurance policies had reached USD 150 million. The premiums to be collected by Sjóvá-Almennar Ltd. from the airline companies were increased to USD 0.35 per passenger per flight for liability insurance amounting up to USD 600 million for each damage event or total damages during the insurance period in excess of USD 150 million for each damage event or total damages during the insurance period.

As regards cargo carriers, a premium amounting to USD 1000 was to be collected for the insurance of freight aircraft for the original insurance agreement until 24 November 2001. This premium was to be paid in addition to premiums paid by cargo operators for 'war insurance' cover obtained on the private insurance market.

As in the previous agreement, 85% of premium income was to be transferred to the National Treasury for re-insurance. Premiums were to be collected at the end of the insurance period (i.e. 25 November 2001).

In the following, the re-insurance agreement was further prolonged until 31 December 2001. The premiums to be collected by Sjóvá-Almennar Ltd. from airline companies were raised to USD 0.50 per passenger. Premiums to be collected from cargo carriers remained the same.

By provisional act No 156/2001, the National Treasury was authorised to prolong the re-insurance offered until 15 February 2002. On this basis, the re-insurance agreement was prolonged covering the period 1 January 2002 until 14 February 2002 (23:59 GMT). The conditions remained unchanged.

In February 2002, the Icelandic Parliament adopted Act No. 5/2002, by which the initial authorisation for the State to provide re-insurance was prolonged until 10 April 2002. The Icelandic Government assured the Authority that this Act was only an authorisation, but would need to be further implemented by an explicit re-insurance agreement. In line with the EC Council's conclusions regarding the permissibility of Governmental war insurance until the end of March 2002, this agreement was valid from 15 February until 31 March 2002. Following the developments on EC level and in line with the Icelandic Parliament's authorisation, the Icelandic authorities prolonged the duration of the 'war insurance' scheme until 10 April 2002. Consequently, a new agreement was signed between the Government and the insurance company, covering the period from 1 April 2002 until 10 April 2002.

In April 2002, the Icelandic Parliament adopted Act No 26/2002, which authorizes the Icelandic Government to continue to grant re-insurance for 'war insurance' offered to Icelandic air carriers and cargo operators until the end of 2002. The conditions under which the 'war insurance' scheme has been prolonged remained the same as before. Based on this authorization, the Minister of Finance, on behalf of the Treasury, has extended the 'war insurance' scheme until the end of May 2002. Consequently, the new agreement between the Icelandic State and the insurance company, signed on 9 April 2002, has a limited duration until 31 May 2002. The Icelandic Government explained that the Act No. 26/2002 only gave authorization to the Government to further prolong the existing 'war insurance' scheme; any further prolongation needed to be implemented through an explicit agreement.

The Icelandic Government informed the Authority that the premiums had been collected by the insurance company from the airline companies and the cargo operators. The premiums collected amounted for the first period (until 25 October 2001) to USD 58,576.25, for the second period (until 25 November 2001) USD 80,447.45 and for the third period (until 31 December 2001) USD 90,562 and USD 108,605 for the period 1 January 2002 until 14 February 2002.

As regards the remuneration of services provided by Sjóvá-Almennar Ltd., the Icelandic authorities informed the Authority that the 15% of premium income was in proportion with the services provided. The Icelandic Government stated that Sjóvá-Almennar Ltd. had received on average USD 11,500 per month as remuneration. The company administers the 'war insurance' scheme for five airlines in Iceland. According to the Icelandic authorities direct costs involved in the administration of the scheme could be estimated to be around USD 6,500 per month. It was stressed that, in addition, the company had indirect costs which had, however, not yet been assessed. As regards the reduction of the remuneration in Sweden and Denmark from 15% to 7.5% of premium income as from 24 October 2001 onwards - to which the Authority had drawn the Icelandic Government's attention - the Icelandic authorities claimed that these markets were considered to be larger and thus generating higher premium income than in Iceland. By way of example, the Icelandic authorities claimed that the Danish operator (Codan) would receive about USD 22,500 per month for the handling of 'war insurance' for eight airlines and two airports. This information is based on information from the Nordic Aviation Insurance Group (NAIG), of which Sjóvá-Almennar Ltd. in Iceland, Gjensidige NOR in Norway and Codan in Denmark are members.

II. APPRECIATION

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

By virtue of Article 61 (1) of the EEA 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.*”

Aid to airline companies and cargo operators

Given that the Icelandic State provides 100% re-insurance for supplementary insurance cover offered to Icelandic air carriers, and thus guarantees fully for damages resulting from the supplementary insurance, State resources are involved⁴.

The provision of supplementary insurance cover (provided by Sjóvá-Almennar Ltd. on behalf of the NAIG, and based on a 100% guarantee given by the Icelandic State), confers an advantage on the air carriers as, in their absence, they would not have had sufficient insurance cover to operate. The existence of an obligation to pay a premium does not take away the advantage which airline companies, benefiting from this supplementary insurance coverage, enjoy since the amount charged is still below the premiums at which comparable war insurance is offered by private insurance companies.⁵

The measures in question allow air carriers established in Iceland to continue their business activities with full insurance coverage, which would otherwise not have been the case. The possibility to continue operations and thus generate income may place the beneficiaries of State insurance in a better position than companies established or operating elsewhere within the EEA. The measures thus strengthen the financial position of air carriers operating in a liberalised market⁶, and hence distort or threaten to distort competition and affect trade between the Contracting Parties.

Therefore, the Authority concluded that the re-insurance provided by the Icelandic Government for ‘war insurance’ underwritten by Sjóvá-Almennar Ltd. on behalf of

⁴ The guarantee provided by the Icelandic State will have to be reported in the State Budget, in accordance with the Government Financial Reporting Act No 88/1997.

⁵ The premium level required by the private insurance market is about USD 3 per passenger.

⁶ See “Third Package” of liberalisation measures in the aviation sector, Acts referred to in points 66b, 64a and 65 of Annex XIII to the EEA Agreement: EC Council Regulations 2407/92 on licensing of air carriers, 2408/92 on access for Community air carriers to intra-Community air routes and 2409/92 on fares and rates for air services.

the NAIG, constitutes aid to the benefit of airline companies and cargo operators, within the meaning of Article 61 (1) of the EEA Agreement.

Possible aid to Sjóvá-Almennar Ltd. and the NAIG

As regards the payment of a commission amounting to 15% of premium income to the insurance companies, Sjóvá-Almennar Ltd. and the NAIG, the Authority examined whether this payment offered the companies an advantage they would not have enjoyed in the normal course of business.

In its decision of 14 November 2002, the Authority stated *“It results from this provision that for reasons of extreme urgency brought about by events unforeseeable by and not attributable to the contracting authorities in question, the Icelandic authorities were allowed to have recourse to the negotiated procedure without publication of a contract notice.*

The cancellation and the only partial replacement of existing insurance cover by the commercial insurance market following the terrorist attacks in New York and Washington of 11 September 2001 required the adoption of immediate measures. Without the provision of 100% re-insurance and the designation of insurance companies to administer ‘war insurance’ not commercially available at that time, sufficient insurance cover would not have been available for Icelandic air operators. Therefore, the conclusion of an agreement between the Icelandic State and Sjóvá-Almennar Ltd. and the NAIG can be regarded as fulfilling the conditions of Article 11 (3)(d) of the above-mentioned Directive.⁷

Given the extreme urgency of the matter, the Authority regards the commission, offered to Sjóvá-Almennar Ltd. and the NAIG in accordance with the terms and conditions laid down in the agreement concluded between these companies and the State, as remuneration for services rendered to the State.

...In light of the above, the Authority has concluded that the remuneration for services rendered by Sjóvá-Almennar Ltd. and the NAIG under the agreement concluded with the Icelandic State regarding the issuance of ‘war insurance’ policies could, under the current circumstances, be regarded as not containing aid....”

The Authority stressed, however, that *“this assessment is only valid for the duration of the ‘war insurance’, as initially offered by the Icelandic State (i.e. until 24 October 2001) and does not prejudice the Authority’s assessment of any measures the Icelandic*

⁷ Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts. (Footnote added here.)

Government intends to adopt regarding a possible continuation of the insurance scheme.”

The Authority observes that the remuneration for Sjóvá-Almennar Ltd. was expressed as a percentage of premium income (i.e. 15%) and not based on the costs incurred by that company in administering the ‘war insurance’ scheme for the Icelandic State. Estimates presented by the Icelandic authorities indicate that direct costs related to the administration of the ‘war insurance’ scheme would amount to approximately USD 6,500 (approximately 7,100 €) per month. The Icelandic authorities stressed that, in addition, the company had indirect costs which had, however, not yet been assessed. On the other hand, the remuneration to Sjóvá-Almennar Ltd. was on average USD 11,500 (approximately 12,600 €).

The Authority notes that assuming the difference between the estimated costs for the administration of the ‘war insurance scheme’ (USD 6,500 or 7,100 €) and the remuneration received (USD 11,500 or 12,600 €) could not be justified based on actual costs incurred by the insurance company, the difference would amount to only approximately 5,500 € per month. Over the period starting 25 October 2001 until 31 May 2002, this difference would amount to 38,500 €, which is below the *de minimis* ceiling as laid down in point 12.2 (2) of Chapter 12 of the Authority's State Aid Guidelines.

Therefore, the EFTA Surveillance Authority is of the view that any possible remuneration in excess of the costs incurred by Sjóvá-Almennar Ltd. can be considered not to have an appreciable effect on trade and competition between the Contracting Parties. In line with Chapter 12 of the Authority's State Aid Guidelines, Article 61(1) of the EEA Agreement can be said not to apply.

The Authority would like to point out that, should the Icelandic Government decide to prolong the ‘war insurance’ scheme beyond 31 May 2002, any remuneration which would exceed the *de minimis* ceiling as referred to above, could constitute aid covered by Article 61 (1) of the EEA Agreement.

Notification requirement and stand still obligation

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”.

Since the Icelandic 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 Chapter 6 of the Authority's State Aid Guidelines.

Compatibility of Aid Measures

Introductory remarks

On 10 October 2001, the EC Commission adopted a Communication concerning “*The repercussions of the terrorist attacks in the United States on the air transport industry*”⁸, in which it explained, *inter alia*, its approach regarding State aid for airline companies related to temporary insurance problems.

As regards, in particular, the necessity for State intervention and the level of insurance premiums to be paid by those benefiting from the ‘war insurance’ offered by the EC Member States, the Commission has issued “*Guidelines for renewal of the temporary Government insurance schemes for the airline industry established after the 11 September 2001*”. These guidelines, which were adopted after a meeting of the ad hoc insurance group (representatives of the Commission and EC Member States) on 23 October 2001, 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) thereof.

At a meeting of the ad hoc insurance group on 21 November 2001, it was decided by the Members of the group to continue applying the criteria laid down in these guidelines as regards possible prolongations until the end of 2001.

Furthermore, at a meeting of the EC Transport Council on 6 and 7 December 2001, the EC Ministers noted that “... *the Member States wish to allow those not in a position to return to normal operation of the market to maintain the current arrangements until the end of March.*” Furthermore and as regards the respect of State aid rules, the Conclusions state that “[w]ithin the ad hoc Group, the Commission will continue to monitor the arrangements put in place to guarantee that premiums return to a market situation. It will have to continue to check on notification by the Member States in order to ensure that Community rules on State aid are respected.”

On 18 January 2002, the ad hoc insurance group had a meeting on the continuation of ‘war insurance’ offered by the EC Member States from 1 January 2002 until the end of March 2002. At that meeting, it was decided to amend the previous guidelines as regards the level of premium for the so-called first layer: as from 1 February 2002 the premium level for the first layer (insurance cover from USD 50 million to USD 150 million) would be raised from USD 0.35 to USD 0.40 per passenger. At the next

⁸ COM (2001) 574 final, 10.10.2001.

meeting of the ad hoc insurance group meeting on 15 February 2002, it was decided not to amend the guidelines for the remaining period until the end of March 2002.

In the conclusions of the EC Transport Council of 25/26 March 2002, the “*Council took note of recent developments concerning the question of air-carrier insurance, as well as the guidelines which the Commission proposes to follow in the context of its responsibilities for monitoring State aid. In view of the decision by the Government of the United States to extend its risk-cover guarantee for a further sixty days, the Commission announced its intention of continuing to authorise the aid notified to it by Member States on the existing terms and for the same period as that envisaged by the United States...*”

Against this background, the Authority assessed the prolongation of ‘war insurance’ offered by the EFTA States covering the period from 24 October 2001 until 31 May 2002 in line with the guidelines adopted by the Commission on 23 October 2001, while taking into account the conclusions of the EC Transport Councils as well as the conclusions of the ad hoc insurance group.

Assessment of the aid measure 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 these exceptional occurrences. In order for the Authority to verify that the measures taken by the Icelandic Government do not go beyond what is necessary to re-establish the conditions under which airline companies and airports operated before the events of 11 September 2001, i.e. to maintain satisfactory insurance coverage, and that the measures are proportional with respect to this objective, the Authority has taken into account the criteria established in the Commission’s communication of 10 October 2001 as well as those contained in the Commission’s guidelines issued on 23 October 2001.

‘War insurance’ for airline companies

As regards ‘war insurance’ offered to airline companies, the Commission guidelines referred to above lay down the following requirements:

“*As stated in the previous conclusions of the Ad-Hoc Group's discussions and the Council Conclusions, the coverage of government schemes should fill the gap between cover for third party war and terrorist risks that is now provided to airlines by*

commercial insurers and the level of such cover previously purchased before 11 September.

Member States may begin their schemes at any point from \$50 million upwards, taking as high a figure above that point as possible to encourage commercial insurers back into the market. On no account should the schemes offer airlines cover below the level of \$50 million since this amount is clearly available in the market.

If a Member State government chooses to offer its airlines cover for the layer between \$50 million and \$150 million, it should charge a premium of not less than \$0.35 per passenger;

If a Member State government chooses to offer its airlines cover for the layer between \$150 million and \$1 billion, it should charge a premium of not less than \$0.35 per passenger;

If a Member State government chooses to offer airlines cover above \$1 billion, it should charge a premium of not less than \$0.25 per passenger.”

It is stressed that the premium figures are cumulative.

For the period covering 25 October until 1 November 2001, the premiums charged were set at USD 0.25 per passenger for insurance cover in excess of USD 50 million up to a ceiling of USD 700 million. The Authority notes that this is below the premium level as required under the Commission's guidelines (which would have been USD 0.35 for the layer between USD 50 million and USD 150 million plus USD 0.35 for the layer between USD 150 million and USD 700 million). The premiums charged from airline companies under the Icelandic 'war insurance' scheme were, as from 1 November 2001, raised in line with the requirements. In addition, the excess level was raised, as from 1 November 2001 to USD 150 million.

Given that the Commission's guidelines were adopted on 23 October 2001 and further given the deadlines for giving notice to air operators about changed conditions, the Authority accepted that the premium level required under the guidelines was set only as from 1 November 2001.

As from 25 November 2001, the premiums were further raised to USD 0.50 per passenger (i.e. above the premium level required under the guidelines).

It should also be stressed that the maximum liability for which the Icelandic State provided re-insurance was set at USD 700 million, and as from 1 November reduced to USD 600 million. The Authority has verified that the premiums required were actually paid by airline companies and transferred to the Icelandic State.

In light of these circumstances, the Authority concluded that the conditions under which the Icelandic State provided re-insurance for 'war insurance' offered to

Icelandic airline companies, covering the period from 24 October 2001 until 31 May 2002, are in line with the above requirements.

Cargo Operators

Finally, as regards cargo operators, the guidelines lay down the following requirements:

“Any premium charged by a Member State government for cover of cargo operations should be equivalent to not less than 50% of the premium paid before 11 September by the insured for its normal third party cover.”

Cargo operators have to pay USD 1 000 per month for the Governmental ‘war insurance’. This premium is to be paid by these operators in addition to the premiums paid for insurance cover from the private insurance market for third party damage due to acts of war and terrorism.

It should be recalled that, before 11 September 2001, insurance cover for third party damage due to acts of war and terrorism was included in the insurance policy held by cargo operators. As regards premiums, no differentiation was made between the various third party damages. It is therefore difficult to determine the proportion of premiums related only to ‘war insurance’. In the Commission’s guidelines, the proportion was determined as being 50% of the normal third party cover operators had prior to 11 September 2001. If operators would pay a premium set at that level, it was ensured that operators would pay at least as much as before 11 September 2001.

After 11 September 2001, Icelandic cargo operators had to pay additional premiums for the same insurance cover they had prior to 11 September 2001. Consequently, the premium set at USD 1 000 for the Governmental ‘war insurance’ is necessarily more than what the cargo operators had to pay for the same insurance cover prior to 11 September 2001. Therefore, the Authority concluded that the premiums charged by the Icelandic authorities for ‘war insurance’ cover from cargo operators is in line with the objective of the guidelines.

Final remarks and conclusions

Finally, the Authority also observes that the Icelandic Government respected the principle of necessity and proportionality inasmuch as it offered monthly renewal of the ‘war insurance’ contract, subject to possible developments in the insurance market. It is also noted that the insurance cover was reduced over the period since 24 October 2001, while premiums were raised.

In light of all the above considerations, the Authority has concluded that the prolongation of the aid measures until 31 May 2002 are, by virtue of Article 61 (2)(b)

of the EEA Agreement and in light of the criteria established by the EC Commission with respect to the application of Article 87 (2)(b) EC Treaty, compatible with the functioning of the EEA Agreement.

The Authority reminds the Icelandic Government that any prolongation of the scheme beyond 31 May 2002 needs to be notified to the Authority in advance, pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

HAS ADOPTED THIS DECISION:

The Authority has decided not to raise objections to the prolongation of ‘war insurance’ provided/guaranteed by the Icelandic State to Icelandic airline companies and cargo operators, covering the period from 24 October 2001 until 31 May 2002.

Done at Brussels, 31 May 2002.

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member