ROYAL NORWEGIAN MINISTRY OF GOVERNMENT
ADMINISTRATION, REFORM AND CHURCH AFFAIRS

EFTA Surveillance Authority
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Your reference	Our reference	Date
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Observations to Letter of formal notice to Norway regarding the ban on collection of frequent flyer points on domestic routes in Norway

Reference is made to the Letter from the EFTA Surveillance Authority ("the Authority") dated 4 July 2012, in which the Authority concludes that the Norwegian Regulation No 684/2007 *Forskrift om forbud mot bonusprogram i innanriks luftfart* is not in line with the Unfair Commercial Practices Directive or in line with the restriction of both the freedom to provide air services within the European Economic Area, and the freedom of establishment of air carriers in Norway. Reference is also made to the e-mail dated 25 September 2012 extending the deadline for submitting observations until 18 October 2012.

The Norwegian Ministry of Government Administration, Reform and Church Affairs ("the Ministry") is currently considering whether to continue the ban on collection of frequent flyer points on domestic routes in Norway (hereinafter "the frequent flyer program", "the FFP Regulation" or "the measure"). In case this political evaluation of the FFP Regulation results in an amendment or the termination of the FFP Regulation, the Ministry will notify the Authority.

The current legal assessment is based on an economic analysis of the market undertaken by the Norwegian Competition Authority. The Competition Authority concludes that frequent flyer programs have anticompetitive effects and that under the current conditions, where the ban is central, competition works well. The earning structure of these programs leads to additional costs for the traveller if choosing a competing company; hence customers are "locked in" with its original company. Lock-in effects leads to reduced price sensitivity, reduced competition and thus higher fares.

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The Competition Authority's assessment shows that small- and medium-sized routes are at risk of significantly weakened competition, which will lead to higher prices and fewer departures. If a company pulls completely out of a route, bonus programs will increase the entry barrier and make it difficult for the company or other companies to re-enter the route again. Reference is made to the report by the Competition Authority which the Ministry forwarded to the Authority by e-mail dated 7 March 2012.

Regardless of the Ministry's ongoing assessment of whether to continue, repeal or alter the regulation, the Ministry disagrees with the Authority's legal assessments in its Letter of formal notice dated 4 July 2012.

1. Observations regarding the Directive 2005/29/EC on Unfair Commercial Practices ("the UCP Directive)

The Ministry disagrees with the view of the Authority that the ban on offering frequent flyer programs in domestic aviation in Norway falls within the scope of the UCP Directive.

The purpose of the UCP Directive is to achieve a high level of consumer protection by approximating the Member States' rules on unfair commercial practices harming consumers' economic interests. The UCP Directive "*neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests*".[1]

When assessing whether a measure falls within the scope of the UCP Directive, the aim of the measure is decisive.[2] The sources for assessing whether the aim of the FFP Regulation is protecting competitors' interests and/or consumers' interests are inter alia the meaning and purpose of the FFP Regulation, the background for the measure and the legislative purpose.[3]

The FFP Regulation has as its sole objective to ensure effective competition in the market for air transport, by facilitating market entry and increasing competition between established air carriers.[4] Also, there is no legal basis in Section 14 of the Competition Act to ban commercial practices of traders in order to protect the economic interest of the consumer. Consequently, the FFP regulation does not regulate commercial practices which "*directly harm consumers' economic interests*". It thus falls outside the scope of the UCP Directive.

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[1] Reference is made to recital 6 in the preamble to the UCP Directive.

[2] Reference is made to cases C-288/10 Wamo and C-126/11 INNO.

[3] Reference is made to Opinion of Advocate General Trstenjak in case C-304/08 Plus Warenhandelsgesellschaft paragraphs 63-67.

[4] Reference is made to the "Høringsnotat" from the Ministry dated 7 March 2012 section 2. dated 7 March 2012 section 2, to be found here http://www.regjeringen.no/en/dep/fad/documents/horinger/horingsdokumenter/2012/horing-flybonus/horingsnotat.html?id=674294

In fact, it seems that many consumers consider the availability of such FFP programs to be a quality enhancing service on top of the flight service. This is demonstrated by the fact that such programs are continuously offered by most network airlines. If the Ministry had held the view that FFP programs were harmful to consumers, the ban would necessarily have been extended to the offering of such programs for all sales of aviation services to Norwegian consumers, and not limited to domestic air travel. Further, it could not have been adopted pursuant to Section 14 of the Competition Act.

When assessing the cases relating to the UCP Directive prior to the cases C-288/10 Wamo and C-288/10 INNO, it is seen that consumer protection was an express or clear aim of the contested national measure. For instance, in C-540/08 Mediaprint the national provision at issue laid down a general prohibition on sales with bonuses which was aimed at ensuring both the protection of consumers and maintenance of the pluralism of the press. The Court of Justice (paragraph 20-23) stated that the national provision "*refers expressly to the protection of consumers and not only that of competitors and other market participants*". The contested national measures in those cases are thus clearly distinguishable from the FFP Regulation; the latter is justified by the effect the FFP have on competition in the market for air transport, and not by the effect the FFP have on consumers.

As long as the aim of the national measure solely is protecting competition, it is of no importance whether or not the measure also has some *indirect* effect on consumer interests. First, this is indicated by Point 1.7 of the Commissions guidance on the implementation and application of the UCP Directive.[5] It states that: "*national rules regulating commercial practices such as below-cost selling/selling at a loss, for which the sole rationale is to ensure fair competition in the market space, do not fall within the scope of the Directive.*" One example mentioned in the guidance is that "*national measures regulating the dates of seasonal sales in order to protect SMEs from intensive sales all year long from big chain stores have as their purpose to ensure fair competition. Consequently they do not fall within the scope of the Directive*". The examples used in this guidance are national regulations on commercial practices which will also have indirect consequences for the consumers. The guidance however states that as long as the aim of the measure is not consumers' protection, the measures fall outside the scope of the Directive.

This part of the guidance has now also been confirmed by the Court of Justice in the judgment C-126/11 INNO. In the INNO case the measure at issue was a prohibition on announcing price reductions during a specific period (pre-sales period). The Court of Justice took no notice of whether the national rule had indirect consequences for the consumers. It ruled that, as long as the prohibition was merely aimed at regulating the competitive relationship between traders, it would fall outside the scope of the UCP Directive.

[5] Commission Staff Working Document SEC(2009)1666 of 3.12.2009.

It should be recalled that all competition policy measures are to a certain extent expected to indirectly benefit consumers, reference is made to Section 1 of the Competition Act. However, as explained above, the Ministry cannot see the legal justification for declaring that this indirect effect of competition policy on consumers imply that the UCP Directive is applicable to the FFP Regulation. In this relation the Ministry also refers to recital 9 of the preamble to the UCP Directive: "*This Directive is [...] without prejudice to [...]Community competition rules and the national measures implementing them.*"

The regulation is, as pointed out above, solely concerned with the negative effects by frequent flyer programs on competition, and as such disregards whether it is in the interest of the individual consumer or not. The indirect positive effect the FFP Regulation has for consumers does not imply that the FFP Regulation is covered by the UCP Directive.

2. Observations regarding the freedom to provide and receive services (Article 36 EEA) and the freedom to establishment (Article 31 EEA)

The Authority contends in the Letter of formal notice that should the regulation fall outside of the UCP-directive, it nevertheless constitutes an unjustified restriction on the right to provide services under Article 36 of the EEA Agreement, or the right of establishment under Article 31 of the EEA Agreement. The objective of fostering competition in inland aviation cannot, according to the Authority, justify a restriction on the fundamental freedoms. The reasoning is that maintaining or improving inland competition in a given sector is an economic objective which as such can never be recognised as an overriding requirement relating to the public interest under the basic freedoms of the EEA Agreement.

The Ministry also disagrees on this point, and maintains from previous correspondence the view that even if the regulation is considered to have a restrictive effect, it is a justifiable and proportionate measure, the suitability and necessity of which is demonstrated by the said analysis of the Competition Authority.

The Ministry does not agree that the objective of maintaining competition in a sector of vital importance for citizens and businesses in Norway should be considered to be an "economic" objective in this sense, unable to be considered overriding requirement relating to the public interest. Firstly, as demonstrated in earlier correspondence, the regulation at issue here bears no similarities with the "golden shares"-arrangements at issue in case C-367/98 Commission/Portugal, to which the EFTA Surveillance Authority refers. There is no discrimination of foreign nationals in our case, no prior authorisation scheme, and the objective of this regulation is not to protect the market structure as such, but rather the general regulatory conditions for continued well functioning competition in the Norwegian inland aviation market. Further, the regulation does not protect Norwegian undertakings from competition from foreign

services providers, as the objective and proven effect of the regulation is to open the Norwegian market for competition.

Secondly, in the opinion of the Ministry, it is clear that economic concerns to a certain extent do qualify as overriding requirements, even if the prevailing rule seems to be that economic concerns relating to avoiding expenses for the public purse or for commercial undertakings, avoiding administrative difficulties, and protecting national undertakings from competition from foreign ones, will not be accepted. This case-law is not without exceptions, and the Ministry maintains that the objective of safeguarding competition in the aviation sector is an objective which may justify restrictions on the basic freedoms of the EEA Agreement.

The first and perhaps most relevant example is the Serratoni-case (C-376/08), which is referred to in the Letter of formal notice. In this case a very similar objective to the one in question here was accepted as legitimate; the objective of combating possible collusion among bidders on public contracts. The effort made in the Letter to distinguish that case from the one at hand addresses the differences in the regulations in that case and this one, but does not address the central question of why safeguarding competition was considered legitimate in that case but not in this one. In the opinion of the Ministry, this case demonstrates that the ban on frequent flyer programs is based on a legitimate concern.

Another area in which economic concerns have been accepted as legitimate, is Council Directive 96/71 on the posting of workers, which – based on case law developed by the European Court of Justice – has as one of its central objectives to secure a climate of fair competition (see the fifth recital in the preamble, and paragraph 21 of the Judgement of the EFTA Court in case E-2/11).

Other examples of cases where economic concerns have been accepted, despite appearing to be related to the need to avoid increased costs or administrative burdens for public authorities or private undertakings are not unknown. The cases relating to medical expenses, such as Kohll (Case C-158/96, at paragraph 41) and Decker (Case C-120/95, at paragraph 39), demonstrate that in some instances, restrictions may be justified in the legitimate concern of gaining control of health expenditure, thus departing from the main principles described above. Yet other examples, such as Commission/Italy (Case C-10/05, at paragraph 67), and Mickelson and Roos (Case C-142/05, at paragraph 37) demonstrate that in some cases, the courts are willing to accept restrictions even if they pursue the aim of reducing administrative burdens.

These examples from the case law of the European courts demonstrate that there is no clear line between legitimate non-economic public interest, and illegitimate economic concerns, as underlined by Rognstad in Sejersted EØS-rett (Universitetsforlaget 2011), at page 448.

Thirdly, the Ministry would like to reiterate that the FFP Regulation does not discriminate between foreign and Norwegian service providers, as it applies to all relevant airlines operating within the national territory, and it affects the marketing of domestic products and those from other Member States in the same manner.[6] The Authority seems to agree to the non-discriminatory nature of the FFP Regulation, reference is made to the Letter of formal notice paragraph 45.

As regards the suitability and necessity of the ban, the Ministry would simply point to the extensive research undertaken by the Norwegian Competition Authority, which first documents that the ban has had an important effect on securing competition in the Norwegian aviation market since its adoption in 2007. The Competition Authority has produced extensive analysis of the aviation market, and based on the conclusions drawn from that research, advice that the ban be continued except for the three largest routes.

Yours sincerely,

Nils Ola Widme
Deputy Director General

Helene Holth Skatvedt
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[6] Reference is made to Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 Semeraro Casa Uno Srl.