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Ministry of Transport and Local Government
Attn: Ms Valgerður Eggertsdóttir, Mr Rúnnar Guðjónsson
Sölvhólgötu 7
101 Reykjavík
ICELAND

Dear Madam / Sir,

Subject: Reply to Iceland – Request for Information concerning the obligation of air carriers to inspect COVID-19 certificates in international flights to Iceland

Further to your letter of 10 August 2021 (Document No 1220668, your Ref. SRN21060106/2.22) in response to the request for information of the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) of 29 June 2020 (Document No 1207727), the Directorate is writing with a request for further clarifications on the points raised under EEA law.

The Directorate has also taken note of the adoption of regulation no. 961/2021 amending Regulation no. 650/2021 on 31 August 2021,¹ including the publication of interpretative guidelines on the obligations of air carriers on international flights to Iceland due to Covid-19².

1 Proportionality assessment:

As noted in the Directorate’s request for information, the measures in question have been justified by Iceland on the grounds of the protection of public health, particularly in light of the continuing global pandemic. However, the measures have the potential to restrict the freedom of movement of EEA nationals. In order for such restrictions to be justified, it is for the EEA State in question to demonstrate that such measures are proportionate to the aim pursued.³ Your letter grounds the justification of the measures in question on the basis that less restrictive measures – involving quarantine – have been attempted, but that this has not been effective in stemming the spread of COVID-19, since certain persons who were obliged to quarantine did not respect the rules.

¹ ‘Breyting á reglugerð er varðar skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi’ of 31 August 2021, available at: <https://www.samgongustofa.is/um/frettir/flugfrettir/breyting-a-reglugerd-er-yardar-skyldu-flugrekenda-til-ad-kanna-vottord-vegna-covid-19-i-millilandaflugi>

² ‘Leiðbeiningar um skyldu flugrekenda vegna COVID-19 í millilandaflugi’ of 31 August 2021, available at: https://www.samgongustofa.is/media/flug/ISL-leidbeiningar_31.08.21_B.docx.pdf

³ Case E-8/17 *Kristoffersen*, [2018] EFTA Ct. Rep. 383, para 123.

The Directorate notes, firstly, that it is long-standing and well-established case law that an EEA State may not plead public non-compliance as a ground for failing to ensure freedom of movement.⁴ Second, the Directorate notes that the Icelandic Government has not demonstrated that no less restrictive means exist that have not already been employed.

While the Icelandic Government's contention that COVID certificates are easily procurable for many passengers is true, this is immaterial to the question as to what should occur, should an individual attempt to board a flight without being in possession of such a certificate.

2 Denial of boarding under Article 4 of Regulation (EU) No 261/2004:

Regulation 650/2021 in Article 2 fourth sub-paragraph states that denial of a carrier to board a passenger on the grounds established under the said Regulation cannot be interpreted as 'denial of boarding' in accordance with Article 4 of Regulation (EC) 261/2004 on air passenger rights.⁵ In its request for information, the Directorate asked Iceland to clarify how this exemption from the application of EEA rules on passenger rights could be justified, notably bearing in mind the possibility of an erroneous assessment by the carrier.

Your letter notes in reply to the Directorate's question on this point that air carriers are not responsible for verifying the content of the documentation required, that remains the task of border control officers. However, you add that in the event of an erroneous assessment on the part of the air carrier, the latter remains liable for the damages caused by the denied boarding based on the "culpa rule" (liability for negligence).

This statement disregards the provisions of Article 4 of Regulation (EC) No 261/2004, and in particular paragraph 3 thereof, where the right to compensation for denial of boarding is established. Article 2(j) of the said Regulation defines denial of boarding with an exception "*where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation*". The exception is to be interpreted by the competent courts should a dispute on the application of the said Regulation arise.⁶ In the view of the Directorate, it is not for national administrations of EEA Member States to issue blanket exemptions from EEA rules in the form of national regulations and interpretative guidelines.

3 Discrimination against EEA nationals legally residing in Iceland:

With respect to any potential discrimination between EEA nationals resident in Iceland on the one hand, and Icelandic citizens on the other, your letter notes that

⁴ See, *inter alia*, Case Case C-265/95 *Commission v France*, *ECLI:EU:C:1997:595*, paras 55 and 56.

⁵ The Act referred to at point 68ab of Annex XIII to the EEA Agreement (Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1)).

⁶ See case law referred to in the letter of the Directorate of 29 June, namely *Case C-584/18 D. Z. v Blue Air - Airline Management Solutions SRL*, *ECLI:EU:C:2020:324*, para. 98.

the Icelandic Constitution forbids denying Icelandic citizens entry to Iceland. However, it does not substantively address the question posed.

The Directorate observes that, as a general rule, nationals of other EEA States who are legally resident in Iceland (per Articles 6 and 7 of Directive 2004/38) should be afforded equal rights to Icelandic nationals residing in Iceland, further taking into account the non-discrimination principle per Article 4 EEA. In light of the foregoing, and given that the epidemiological risk associated with Icelandic nationals on the one hand, and EEA national residents of Iceland on the other, who are boarding the same aeroplane is likely to be similar, the Directorate questions why any additional privileges extended to Icelandic citizens are not afforded to EEA nationals resident in Iceland.

The Icelandic Government is invited to provide further clarifications on the points raised above. Iceland is invited to submit its comments, as well as any other information it deems relevant to the case, so that they reach the Authority *by 28 September 2021*.

Yours faithfully,

Valgerður Guðmundsdóttir
Deputy Director
Internal Market Affairs Directorate

*This document has been electronically authenticated by Valgerdur
Gudmundsdottir.*