

Brussels, 15 December 2021
Case No: 86978
Document No: 1237612
Decision No: 283/21/COL

Ministry of Transport and Local Government
Sölvhólgötu 7
101 Reykjavík
ICELAND

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning the obligation of air carriers to inspect COVID-19 certificates for international flights to Iceland

1 Introduction

By a letter dated 29 June 2021, the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case regarding the compatibility of Law No 41 of 28 May 2021 amending Act No 60/1998 (“*Lög um breytingu á lögum um loftferðir, nr. 60/1998, með síðari breytingum (skyldur flugrekenda vegna COVID-19)*”) concerning the obligations of air carriers to take measures due to COVID-19, in tandem with the related national Regulation No 650/2021 of 1 June 2021 (“*Reglugerð um skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi*”), with EEA law. In particular, the Authority’s concerns pertain to the obligation of air carriers to deny boarding to passengers who do not possess the required documentation pertaining to COVID-19, and the fact that the acts in question provide that denial of boarding in such circumstances shall not constitute ‘denial of boarding’ under Article 4 of Regulation (EC) No 261/2004.

The Authority’s letter requested information from the Icelandic Government in order to ascertain whether the above-mentioned acts were compatible with the requirements of Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights,¹ and the rules covering the free movement of persons within the EEA, in particular Articles 5, 6 and 7 of Directive 2004/38/EC² and Article 4 of the EEA Agreement.

In the exchanges between the Authority and the Icelandic Ministry of Transport, Iceland has consistently defended the measures adopted as justified on the grounds of public health protection in the context of the ongoing global pandemic.

After having examined the relevant legislation and regulations, as well as the explanations received from Iceland, the Authority has now reached the conclusion that by maintaining in force the current rules, Iceland has failed to fulfil its obligations arising from EEA law. Namely, Article 4 of the EEA Agreement, Articles 5, 6 and 7 of Directive

¹ 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) as adapted to the EEA Agreement by protocol 1 thereto.

² The Act referred to at point 1 of Annex V to the EEA Agreement (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as adapted to the EEA Agreement by protocol 1 thereto.

2004/38/EC, and Article 4 in combination with Article 2(j) of Regulation (EC) No 261/2004.

2 Correspondence

In its letter dated 29 June 2021 (Doc No 1207727), the Authority informed the Icelandic Government that it had opened an own initiative case, and identified three main points of EEA law Iceland should provide clarifications on, specifically relating to: (1) the proportionality of the measures that had been justified on public health grounds; (2) the potential consequences for travelers following an erroneous assessment by the airlines of their health documentation; and (3) the basis for the distinction between Icelandic nationals on the one hand, and non-Icelandic EEA national residents of Iceland on the other. The Authority invited the Icelandic Government to submit its observations on the issues raised in the letter by 14 July 2021.

The Authority sent a reminder letter to Iceland on 9 August 2021, to highlight that a response had not been received within the stated deadline (Doc No 1220449). The Icelandic Government submitted its reply to the Authority's Request for Information on 10 August 2021 (Doc No 1220668, ref. SRN21060106/2.22).

On 31 August 2021, the Icelandic Government adopted Regulation No 961/2021 amending Regulation No 650/2021.³ The amended provisions included the publication of interpretative guidelines on the obligations of air carriers on international flights to Iceland due to COVID-19.⁴ In light of these changes, and in order to seek clarification on certain points raised under EEA law in Iceland's reply of 10 August 2021, the Authority addressed an additional Request for Information to Iceland on 13 September 2021 (Doc No 1223892) and invited the Icelandic Government to submit its observations on the issues raised in the letter by 28 September 2021.

The Icelandic Government again did not submit its reply within the stated deadline, and the Authority sent two follow-up emails highlighting this, and asking for a swift response, on 5 and 7 October 2021 (Doc Nos 1233919 and 1232960).

The Icelandic Government submitted its reply to the Authority's additional Request for Information on 15 October 2021 (Doc No 1235085, ref. SRN21060106/2.22).

3 Relevant national law

Law No 41 of 28 May 2021 ("Law No 41") establishes an obligation for air carriers operating passenger flights to Iceland to check that passengers fulfil the requirements of pre-registration and certification in relation to COVID-19 (SARS-CoV-2). Passengers are required to present:

- (a) a certificate of vaccination against COVID-19; or
- (b) a certificate proving that a COVID-19 infection is in remission; or
- (c) a certificate, or other official confirmation, of a negative test result against COVID-19.

³ 'Breyting á reglugerð er varðar skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi' of 31 August 2021, available at: <https://www.samqonustofa.is/um/frettir/flugfrettir/breyting-a-reglugerd-er-vardar-skyldu-flugrekenda-til-ad-kanna-vottord-vegna-covid-19-i-millilandaflugi>

⁴ 'Leiðbeiningar um skyldu flugrekenda vegna COVID-19 í millilandaflugi' of 31 August 2021, available at: https://www.samqonustofa.is/media/flug/ISL-leidbeiningar_31.08.21_B.docx.pdf

These certificates must be in line with the requirements of the Icelandic Directorate of Health applicable to all travelers arriving in Iceland.⁵

Law No 41 obliges air carriers to deny boarding to passengers who do not possess the required documentation pertaining to COVID-19. The requirement to deny boarding does not apply to Icelandic nationals. This is a temporary measure, valid until 31 December 2021,⁶ and is justified by the Icelandic Government on public health grounds. In the event of failure by the air carrier, including its employees or representatives, to comply with these obligations, Law No 41 of 28 May 2021 provides for administrative fines of up to two million Kr.

Regulation No 650/2021, which was adopted on the basis of Law No 41, further elaborates on the obligations for air carriers operating passenger flights to Iceland, with disembarkation in Iceland. In particular, Article 2 fourth sub-paragraph thereof stipulates that denial of boarding in line with the requirements of Law No 41 and Regulation No 650/2021 shall not constitute 'denial of boarding' under Article 4 of Regulation (EC) No 261/2004.

Regulation No 961/2021 amending Regulation No 650/2021 clarifies the requirement for carriers to check that passengers have proof of a negative PCR test only in cases where a full vaccination or past infection certification is not available. It also includes a reference to Regulation No 938/2021 on quarantine, isolation and testing for COVID at the Icelandic border.⁷

The interpretative guidelines on the obligations of air carriers on international flights to Iceland due to COVID-19, to which Regulation No 961/2021 also refers, elaborate on the duty imposed upon air carriers through Law No 41 and Regulation No 650/2021. In particular, the guidelines identify the tasks that constitute a check of relevant certification by the air carriers. Namely, verification of the name of the passenger, verification of the validity of the certificate, and examination of whether the relevant certification is *prima facie* compliant with the instructions of the health authorities. The guidelines also stipulate that the obligation of carriers to deny boarding does not apply vis-à-vis Icelandic nationals, but it does apply to other EEA nationals legally residing in Iceland. Furthermore, denial of boarding in line with Regulation No 650/2021 does not constitute a 'denial of boarding' in accordance with Article 4 of Regulation (EC) No 261/2004, according to the guidelines. Finally, the guidelines elaborate on the process for the imposition of fines for air carriers by the Icelandic Transport Authority for violations of Regulation No 650/2021.

4 Relevant EEA law

4.1 The EEA Agreement

Article 4 of the EEA Agreement provides:

"Within the scope of application of this Agreement...any discrimination on grounds of nationality shall be prohibited."

⁵ These rules are listed on the website of the Directorate of Health: <https://www.landlaeknir.is/um-empaettid/greinar/grein/item43709/Certificates-regarding-previous-COVID-19-infection-that-are-accepted-at-the-border-in-Iceland-from-10-December-2020>

⁶ A proposal to amend Act No 41 of 2021 has been tabled at the Icelandic Parliament in December 2021, extending the validity of the said Act until 1 July 2022. *Frumvarp til laga um breytingu á lögum um lofthæðir, nr. 60/1998 (framlenging gildistíma)*, available at: <https://www.althingi.is/altext/152/s/0156.html>

⁷ *Reglugerð um sóttkví og einangrun og sýnatöku við landamæri Íslands vegna COVID-19 Nr. 938/2021 of 23 August 2021*, available at: <https://www.stjornartidindi.is/Advert.aspx?RecordID=8f71a18e-663f-4ae5-99f2-e200aced32d3>.

Article 28 provides:

“1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.”

Article 33 provides:

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

Article 36 provides:

“1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.”

Article 39 provides:

“The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter [i.e. in respect of the freedom to provide services].”

4.2 Directive 2004/38/EC

Article 5 ('Right of Entry') of Directive 2004/38/EC reads:

“1. ...Member States shall grant Nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.”

Article 6 ('Right of residence for up to three months') provides:

“1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.”

Article 7 ('Right of residence for more than three months') provides:

“1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or*
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
- (c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and — have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or*
- (d) are family members accompanying or joining a National of an EC Member State or EFTA State who satisfies the conditions referred to in points (a), (b) or (c).”*

Article 27 ('General principles') provides:

“1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Nationals of EC Member States and EFTA States and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.”

Article 29 ('Public health') provides:

“1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.”

Article 30 ('Notification of decisions') provides:

“1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State.

Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.”

Article 31 ('Procedural safeguards') provides:

“1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.”

4.3 Regulation (EC) No 261/2004

Regulation (EC) No 261/2004 defines 'denied boarding' in Article 2(j):

"denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation".

Furthermore, Article 4 of the said Regulation states in paragraph (3):

"If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9."

Recital (10) of the said Regulation notes:

"Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight."

5 The Authority's assessment

As noted above, the Authority has taken cognisance of the fact that the Icelandic Government adopted Regulation No 961/2021 amending Regulation No 650/2021 on 31 August 2021,⁸ and that the amended provisions included the publication of interpretative guidelines on the obligations of air carriers on international flights to Iceland due to COVID-19.⁹ While these guidelines rendered the obligations of air carriers somewhat clearer, having examined the relevant legislation and regulations, as well as the explanations received from Iceland in the correspondence outlined above, the Authority has reached the conclusion that by maintaining in force the current rules, Iceland has failed to fulfil its obligations arising from Article 4 of the EEA Agreement, Articles 5, 6 and 7 of Directive 2004/38/EC, and Article 4 in combination with Article 2(j) of Regulation (EC) No 261/2004.

5.1 The proportionality of restrictions upon freedom of movement of EEA nationals

Law No 41 of 28 May 2021 establishes an obligation for air carriers operating passenger flights to Iceland to check that passengers fulfil the requirements of pre-registration and certification in relation to COVID-19, entailing that they must present either:

- (a) a certificate of vaccination against COVID-19; or
- (b) a certificate proving that a COVID-19 infection is in remission; or
- (c) a certificate, or other official confirmation, of a negative test result against COVID-19.

The Law further obliges air carriers to deny boarding to passengers who do not possess the required documentation. However, the requirement to deny boarding does not apply to Icelandic nationals. In its correspondence with the Authority, the Icelandic Government,

⁸ 'Breyting á reglugerð er varðar skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi' of 31 August 2021, available at:

<https://www.samqonustofa.is/um/frettir/flugfrettir/breyting-a-reglugerd-er-vardar-skyldu-flugrekenda-til-ad-kanna-vottord-vegna-covid-19-i-millilandaflugi>

⁹ 'Leiðbeiningar um skyldu flugrekenda vegna COVID-19 í millilandaflugi' of 31 August 2021, available at: https://www.samqonustofa.is/media/flug/ISL-leidbeiningar_31.08.21_B.docx.pdf

while acknowledging the potential of the measure in question to restrict freedom of movement, notes that it is a temporary measure valid until 31 December 2021, undertaken in the context of an ongoing pandemic, and is justified on public health grounds.

The Authority notes that the measures in question have the potential to restrict free movement of persons and of services under Articles 28 and 36 of the EEA Agreement, respectively. The fact that it is a temporary measure does not affect this assessment. The Authority further notes, as stated in its Reply of 13 September 2021,¹⁰ that in order for measures that restrict freedom of movement to be justified, it is for the EEA State in question to demonstrate that such measures are proportionate to the aim pursued, in this case, the protection of public health.¹¹

The Authority notes that Article 5 of Directive 2004/38 provides that “*Member States shall grant Nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport.*” This provision, entitled ‘Right of entry’, entails that additional conditions may not be required by EEA States to permit entry to their territory.¹²

The right of entry into an EEA State is not absolute, and may be limited, *inter alia*, on the grounds of public health, as set out in Articles 27 and 29 of the Directive. However, any derogations to the free movement of persons must be interpreted restrictively.¹³ The Icelandic measures, as they presently apply, effectively constitute an outright ban on EEA nationals not possessing the requisite documentation from entering Iceland.

Iceland’s letter of 10 August 2021¹⁴ 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. Iceland’s letter of 15 October 2021¹⁵ argues further that constant re-evaluation of the rules in question has been carried out, including stakeholder meetings, and that these amount to a fresh proportionality assessment every 4 weeks. It was further noted that the wider availability of COVID-19 certificates and testing capabilities entailed that a regime requiring proof of vaccination or testing was less restrictive and more efficient than one based on quarantine. Finally, Iceland’s letter states that it is of the view that it cannot be obliged to show that “*no other conceivable measure could enable the same objective*”.

The Authority notes, first of all, in relation to the failure of quarantine measures to achieve the stated public health objectives due to the failure of some individuals to follow the rules, that it is long-standing and well-established case law that an EEA State may not plead public non-compliance as a ground for restricting freedom of movement.¹⁶ Rather, in such circumstances, it is incumbent upon the State in question to ensure that the rules in question are enforced. As such, Iceland’s argumentation that less restrictive measures such as quarantine were not practicable due to non-compliance by certain individuals with quarantine rules must be rejected, as an EEA State may not plead its own incapacity as a means of escaping its obligations (including the obligation to employ less restrictive means in circumstances such as those in the present case).

Second, the Directorate notes that the Icelandic Government has not demonstrated that no less restrictive means exist that have not already been employed. Iceland’s contention

¹⁰ Doc No 1223892, p 1.

¹¹ Case E-8/17 *Kristoffersen*, [2018] EFTA Ct. Rep. 383, para 123.

¹² Case C-157/03 *Commission v. Spain*, ECLI:EU:C:2005:225, paras 29 and 30.

¹³ Case E-15/12 *Jan Anfinn Wahl*, [2013] EFTA Ct. Rep. 534, para 117.

¹⁴ Doc No 1220668.

¹⁵ Doc No 1235085, pp 1-2.

¹⁶ See, *inter alia*, Case Case C-265/95 *Commission v France*, ECLI:EU:C:1997:595, paras 55 and 56.

that its Government cannot be obliged to show that “*no other conceivable measure could enable the same objective*” does not find any basis in EEA law. Rather, whether or not the measure in question – i.e. obliging air carriers to deny certain persons from boarding flights to Iceland – is suitable for attaining the objective of protecting public health, it must also be assessed whether it goes beyond what is necessary in order to attain that objective. This implies precisely that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.¹⁷

While the Icelandic Government’s contention that COVID certificates are easily procurable for many passengers is true, this is not universally the case, as certain individuals may not have access to such certificates. Further, the availability of COVID certificates is effectively 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. In relation to *such* individuals, it must be determined whether, in accordance with the principle of proportionality, a less restrictive means would have been available to the Icelandic Government, in order to achieve the same outcome.

In this regard, it should be observed that under the previous regime, many categories of air passengers arriving in Iceland would in any event be obliged to quarantine upon arrival – thus shielding them from the general populace and avoiding further viral dissemination of infection – it is unclear why individuals without adequate documentation according to of Law No 41 of 28 May 2021 and Regulation 650/2021 could not be permitted to enter the country on the same basis. In the Authority’s view, this points to the clear availability of a less restrictive measure that could have been employed in these circumstances. Iceland’s argument in its letter of 15 October 2021 that such a regime would in fact be *more* restrictive must be rejected, as such a regime would allow EEA nationals without adequate documentation to enter Iceland, although they would be obliged to quarantine, whereas the present regime prevents such individuals from entering Iceland. As such, the measures are, by their very nature, disproportionate for the attainment of the objective pursued.

In light of the foregoing, the Authority must conclude that by maintaining in force the current measures, Iceland has failed to fulfil its obligations arising from Article 5 of Directive 2004/38/EC and Articles 28 and 36 of the EEA Agreement.

5.2 Discrimination against EEA nationals legally residing in Iceland

As noted above, Law No 41 of 28 May 2021 obliges air carriers to deny boarding to passengers who do not possess the required documentation. However, the requirement to deny boarding does not apply to Icelandic nationals. This entails that Icelandic nationals may be permitted to board such flights, even if they are not in possession of the requisite documentation set out in the law in question.

This distinction places non-Icelandic EEA national residents of Iceland in the same category as tourists and other temporary visitors to Iceland, insofar as they will be denied boarding (and thus, in essence, denied entry to Iceland) if they are not in possession of documentation that satisfies the agents of the air carrier in question.

The Authority notes that Articles 6 and 7 of Directive 2004/38 provide for a right of residence for EEA nationals in other EEA States, subject to no conditions or any formalities other than the requirement to hold a valid identity card or passport for a period of up to three months, and thereafter, subject to the requirement that they are workers or self-employed persons in the host Member State; or have sufficient resources not to become a burden on the social assistance system of the host Member State and have

¹⁷ Case E-8/20 *N*, not yet reported, para 94.

comprehensive sickness insurance cover in the host Member State; or are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover and have sufficient resources; or are family members accompanying any of the previous listed groups.

The Authority notes that Article 4 of the EEA Agreement provides that “*any discrimination on grounds of nationality shall be prohibited*” within the Agreement’s scope. As such, nationals of other EEA States who are legally resident in Iceland (and who satisfy the conditions set out in Articles 6 and 7 of Directive 2004/38) should be afforded equal rights to Icelandic nationals residing in Iceland, including any rights that impact directly upon their freedom of movement. In this regard, it should further be noted that the discrimination in question need not be overt. The prohibition in question extends to any forms of discrimination that “*by the application of other criteria of differentiation, lead to the same result.*”¹⁸ In the present case, the Authority notes that the effect of the measures in question amount to direct discrimination against non-Icelandic EEA national residents of Iceland.

The Icelandic Government, in its letter of 15 October, defended the measure in question, noting that it had received legal advice that the Icelandic Constitution prevented the barring of entry of Icelandic nationals to Iceland, whereas the original intent behind the measure in question had been to prohibit *all* entry to Iceland of individuals (including Icelandic nationals) who were not in possession of documentation meeting the requirements set out in Law No 41 of 28 May 2021 and Regulation 650/2021.¹⁹ The letter further noted that the exemption for Icelandic nationals was to be interpreted as narrowly as possible, in order for the Regulation’s objectives to be achieved as far as possible.

The Authority notes in this regard that, given that Icelandic nationals living in Iceland on the one hand, and EEA nationals, on the other, may return from the same location, on the same flight, having spent a similar amount of time there, and having previously lived and worked alongside one another in Iceland, it is not obvious why one group presents a greater risk profile than the other, and why, therefore, the two groups are subjected to differentiated regimes. The requirement for disparate documentation standards for the two groups entails, *inter alia*, that EEA nationals are subject to additional costs, which are likely to disincentivise freedom of movement to receive services in other EEA States. According to EEA law, an EEA State must not take measures that would run counter to the achievement of a given national measure.²⁰ While Iceland is free to adopt measures to protect public health, requiring that one group of travellers to follow strict documentation requirements while another group presenting a similar risk profile is permitted to board flights without presenting such documentation fails to satisfy the principle of consistency. If the risk associated with boarding flights without such documentation is so high that such documentary requirements are deemed necessary, imposing a looser regime for Icelandic nationals returning from the same location would seem to run contrary to the achievement of the high level of protection of public health associated with the measure in question.

In light of the foregoing, and given that the level of 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 Authority must conclude that by maintaining in force the current measures, Iceland has failed to fulfil its obligations arising from Article 4 of the EEA Agreement and Articles 6 and 7 of Directive 2004/38/EC.

¹⁸ Case E-5/10 *Kottke*, [2009-2010] EFTA Ct. Rep. 320, para 29.

¹⁹ Doc No 1235085, p 2.

²⁰ See Case E-1/06 *ESA v Norway (“Gaming Machines”)* [2007] EFTA Ct. Rep. 8, paras 28, 31, 39, 40 and 43.

5.3 Procedural rights of EEA nationals legally residing in Iceland

As previously observed, Law No 41 of 28 May 2021 obliges air carriers to deny boarding to passengers who do not possess the required documentation set out in the domestic legislation. While the requirement to deny boarding does not apply to Icelandic nationals, it does apply to EEA nationals who are legally resident in Iceland. As noted above, the Authority has concluded that the requirements of Law No 41 and Regulation No 650/2021 (amended by Regulation No 961/2021) drawing a distinction between these two categories of individuals amount to a restriction upon freedom of movement under Articles 28 and 36 of the EEA Agreement, and in particular, Articles 6 and 7 of Directive 2004/38/EC.

The Authority notes that Article 27(1) of Directive 2004/38/EC provides that the free movement and residence rights of EEA nationals and their family members may be restricted on grounds of public policy, public security or public health.²¹ However, in the event that such restrictions do occur, Article 30 of the Directive provides that persons concerned shall be notified in writing of any decision taken under Article 27(1) to restrict their freedom of movement on the grounds of public health, and that this notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the EEA State.

In addition, Article 31 of the Directive provides that the persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host State to appeal against or seek review of any decision taken against them on the grounds of public health.

The Authority notes that while the present Icelandic scheme does provide for the possibility of appeals and judicial redress, this appeals process applies to air carriers which are of the view that that they have subject to a wrongful administrative fine.²² However, the Authority has found nothing in the relevant provisions to suggest that EEA nationals legally resident in Iceland who are denied boarding to flights to Iceland have access to judicial or administrative redress procedures in Iceland. Nor, does it seem that individuals are notified in writing of the decision to restrict their freedom of movement on the grounds of public health.

The Authority notes that the fact that the EEA nationals in question are, in practice, impeded from exercising their rights under Directive 2004/38/EC by air carriers, rather than by Icelandic officials, is of no relevance in this regard. The effect of the national regulations in question is such as to impede EEA nationals from exercising rights under the Directive. As these restrictions are justified by Iceland on public health grounds, it is incumbent upon the Icelandic Government to ensure that the full gamut of procedural guarantees under the Directive are available.²³ However, given that as a matter of fact,

²¹ In the case of public health, Article 29(1) of the Directive clarifies that only diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation shall justify such restrictions. The Authority further notes that the WHO declared COVID-19 to have epidemic potential well over a year ago.

²² The relevant provision states: "A decision on administrative fines may be appealed to the Minister in accordance with administrative law. In other respects, the procedure is in accordance with Art. Act no. 41 amending the Aviation Act, no.60/1998, with subsequent amendments (obligations of carriers due to COVID-19) and regulation on the obligation of air carriers to inspect COVID-19 certificates in international flights with the latter changes." See https://www.samgongustofa.is/media/flug/ISL-leidbeiningar_31.08.21_B.docx.pdf

²³ The ECJ has repeatedly clarified that there are circumstances in which breaches of Union law by private parties may be attributed to Member States. Such circumstances include where the private entity is carrying out a public function and is under the control of Member States in one way or another. See, *inter alia*, Case 249/81 *Commission v. Ireland* [1982] ECR 4005 and Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313. While each case will be assessed on its own

EEA nationals are prevented from exercising their freedom of movement under the Directive by air carriers, Iceland is obliged to ensure that in doing so, air carriers inform EEA nationals of the decision to restrict their freedom of movement in writing, as well as the justification for this restriction, and of any redress procedures that may be available to them for this purpose. It is apparent that in the present case, this has not occurred.

On the basis of the foregoing, the Authority must conclude that by maintaining in force the current measures, Iceland has failed to fulfil its obligations arising from Articles 30 and 31 of Directive 2004/38/EC.

5.4 Rights of passengers travelling by air in the event of ‘denied boarding’

Article 2 fourth sub-paragraph of Regulation No 650/2021 stipulates that denial of boarding in line with the requirements of Law No 41 of 28 May 2021 and Regulation 650/2021 shall not be construed as ‘denial of boarding’ under Article 4 of Regulation (EC) No 261/2004. This effectively excludes passengers travelling by air to Iceland from the application of the rights established under Regulation (EC) No 261/2004 for ‘denied boarding’ due to the application of COVID-related obligations of the air carriers.

Article 2(j) of Regulation (EC) No 261/2004 foresees reasonable grounds to deny boarding, such as reasons of health, as a condition to exclude the application of the rules of the said Regulation on ‘denied boarding’. However, the assessment of the presence of reasonable grounds of health cannot, in the view of the Authority, be implemented as a blanket exemption of all passengers with potentially insufficient COVID documentation. More to the point, this does not take into account the possibility of errors by the air carrier and its employees in the verification of the relevant certificates and documentation.

The Court of Justice of the European Union has stated in relation to this point: *“Regulation No 261/2004, in particular Article 2(j) thereof, must be interpreted as meaning that, where an air carrier denies boarding to a passenger on the ground that he or she has presented inadequate travel documentation, such denied boarding does not, in itself, deprive the passenger in question from protection under that regulation. In the event of challenge by that passenger, it is for the competent court to assess, based on the circumstances of the case, whether or not such denied boarding is reasonably justified in the light of that provision.”*²⁴

Consequently, the Authority is of the opinion that Article 2 fourth sub-paragraph of Regulation No 650/2021 is in conflict with the provisions of Articles 2(j) and 4(3) of Regulation 261/2004, and it should be amended accordingly to remove this conflict. Iceland, in its latest reply to the Authority (Document 1235085) has accepted to take this point into account in the next revision of Regulation No 650/2021.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by adopting national legislation and related regulations, which are in conflict with the EEA Agreement, as well as secondary EEA legislation, *inter alia*, on the free movement of persons and the rights of passengers travelling by air, Iceland has failed to fulfil its obligations arising from Article 4 of the EEA Agreement, Articles 5, 6 and 7 of Directive

facts, the fact that airlines in this instance are effectively carrying out public health controls, and are prevented from operating profitably (due to resulting administrative fines) if they do not do so, serves as to render their controls attributable to the Icelandic Government.

²⁴ Case C-584/18 *D. Z. v Blue Air - Airline Management Solutions SRL*, ECLI:EU:C:2020:324, para. 98.

2004/38/EC, and Article 4 in combination with Article 2(j) of Regulation (EC) No 261/2004.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submit its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

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