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Ministry of Transport and Local Government
Sölvhólgötu 7
101 Reykjavík
ICELAND

Dear Sir / Madam,

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

The Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) is currently examining 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 obligations of air carriers due to COVID-19, in tandem with Regulation No 650/2021 of 1 June 2021 (“*Reglugerð um skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflogi*”). The Directorate seeks to ascertain whether the above-mentioned acts comply 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 Directive 2004/38/EC² and Article 4 of the EEA Agreement.

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 (SARS-CoV-2). The certificates a passenger is required to present are the following:

- (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.

These certificates must be in line with the requirements of the Icelandic Directorate of Health applicable to all travellers arriving in Iceland.³

In addition, it 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

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)).

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.

³ As these are listed on the website of the Directorate of Health: <https://www.landlaeknir.is/um-embættid/greinir/grein/item43709/Certificates-regarding-previous-COVID-19-infection-that-are-accepted-at-the-border-in-Iceland-from-10-December-2020>

not apply to Icelandic nationals. This is a temporary measure, valid until 31 December 2021, 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 of 28 May 2021, elaborates further on the content of the obligations established for air carriers operating passenger flights to Iceland, with actual 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 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.

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."*

The Directorate further wishes to draw the Icelandic Government's attention to Articles 5, 6 and 7 of Directive 2004/38/EC and Articles 4, 28 and 36 of the EEA Agreement.

In particular, Article 5 ('Right of Entry') provides that:

"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", subject to their: being workers or self-employed; or having sufficient resources and comprehensive sickness insurance; or being enrolled in study; or being family members of a national of an EC Member State or EFTA State.

Article 4 EEA provides that:

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

In the light of the above, the Directorate would like to bring the following points to Iceland's attention:

1. 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.⁴ How has the proportionality of the measures in question been assessed, particularly with respect to less restrictive measures than denial of boarding that could have been adopted instead?

2. It remains unclear what the consequences would be to the passengers travelling by air to Iceland in the event of an erroneous assessment of the relevant COVID documentation by the carrier, including the carrier's employees and/or representatives. More specifically, the above-listed provisions recently adopted under Icelandic law, seem to exclude passengers travelling by air to Iceland from the application of the rights established under Regulation (EC) No 261/2004 for 'denied boarding', even in cases in which the air carrier's assessment of the public health-related documents submitted by the passenger is erroneous.⁵ The Icelandic Government is invited to explain the consequences for travellers denied boarding in such circumstances.
3. Law No 41 of 28 May 2021 establishes a distinction between Icelandic nationals, on the one hand, and all other passengers – including EEA nationals – on the other, for the purposes of the possibility of air carriers to deny boarding on flights travelling to Iceland. 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 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, what is the basis of the distinction in question?

The Icelandic Government is invited to comment 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 *14 July 2021*.

Yours faithfully,

Janne Britt Krakhellen
Deputy Director
Internal Market Affairs Directorate

CC: Mr Jónas B Jónasson (jonas.b.jonasson@srn.is), Mr Ómar Sveinsson (Omar.sveinsson@samgongustofa.is)

This document has been electronically authenticated by Janne Britt Krakhellen.

⁴ Case E-8/17 *Kristoffersen*, [2018] EFTA Ct. Rep. 383, para 123.

⁵ Case C-584/18 *D. Z. v Blue Air - Airline Management Solutions SRL*, ECLI:EU:C:2020:324, para. 98.