

Brussels, 21 June 2017
Case No: 79508
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Decision No: 104/17/COL

Ministry for Foreign Affairs
Raudararstigur 25
105 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning discriminatory provisions in the regulations of the Icelandic Basketball Association

1 Introduction and correspondence

1. On 30 August 2016, the EFTA Surveillance Authority (“the Authority”) received a complaint against Iceland regarding allegedly discriminatory provisions in the Regulation on Basketball Tournaments (*reglugerð um körfuknattleiksmót*) (“the IBA Regulation”) (Doc. No 816744) adopted by the Icelandic Basketball Association (*Körfuknattleikssamband Íslands*) (“the IBA”).
2. According to the complaint, the IBA Regulation includes discriminatory provisions that infringe the right of free movement of workers, as guaranteed by Article 28 EEA. In particular, Article 18 of the IBA Regulation introduces a quota on the number of foreign players allowed to participate in a basketball match in Iceland. Under the provision at issue a club can only field one foreign player, alongside at least four players with the Icelandic citizenship or Icelandic permanent residency, in a match (the “4+1” rule).
3. By a letter dated 6 September 2016 (Doc. No 816745), the Authority informed the Icelandic Government of the complaint.
4. The Authority sent a request for information to the Icelandic Government on 27 September 2016 (Doc. No 819024). The Icelandic Government replied by a letter dated 25 November 2016 (ref. IRR16090056/30.18.2, Doc. No 829190).
5. In the current letter of formal notice, the Authority holds the opinion that Iceland has infringed Articles 4 and 28 EEA, Articles 1 and 4 of Regulation (EU) No 492/2011¹, and Article 24(1) of Directive 2004/38/EC² by maintaining in place the abovementioned quota

¹ Act referred to at point 2 of Annex V to the EEA Agreement (*Regulation (EU) No 492/2011 of the European Union and of the Council of 5 April 2011 on freedom of movement for workers within the Union*), as adapted to the EEA Agreement by Protocol 1 thereto.

² Act referred to at point 3 of Annex VIII 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.

on the number of foreign players allowed to participate in a basketball match in Iceland or by empowering the IBA to maintain this quota.

6. Alternatively, Iceland has infringed Articles 4 and 28 EEA, Articles 1 and 4 of Regulation (EU) No 492/2011, and Article 24(1) of Directive 2004/38/EC, interpreted in conjunction with Article 3 EEA, by failing to adopt all necessary and proportionate measures in order to prevent the IBA to maintain in force the quota.

2 Relevant National Law

7. Act No 105/2014 on the Free Right to Employment and Residence within the European Economic Area (*Lög nr. 105/2014 um frjálsan atvinnu- og búseturétt launafólks innan Evrópska Efnahagssvæðisins*) implements via the reference method Regulation (EU) No 492/2011.

8. According to Article 5(1) of the Icelandic Sports Act No 64/1998 (*Íþróttalög nr. 64/1998*) (“the Sports Act”), effective as of 18 June 1998, the National Olympic and Sports Association of Iceland (“the ISI”) is the highest authority for sports activities in Iceland.

9. Article 5(1) of the Sports Act reads as follows³:

*“The National Olympic and Sports Association of Iceland is the highest authority in sports activities in the country and in the sports association’s foreign relations. The Icelandic Youth Association is an independent organisation in the field of sport.”*⁴

10. On 18 April 2015, during the 72nd Sports Assembly of ISI, rules of the ISI were adopted (“the ISI rules”)⁵.

11. Article 1(4) of the ISI rules reads as follows:

*“The ISI operates independently and shall reject all pressure, whether of political, religious or economic nature, as provided for by the Olympic Charter.”*⁶

12. Article 3 and Article 47 of the ISI rules allow for the creation of special sports federations with authority over individual branches of sports, such as the IBA in the field of basketball.

13. Article 3 of the ISI rules reads as follows:

“3. Local Federations – Special Federations

3(1) Local federations/sports federations are created depending on the location and the capability to cooperate with regard to the practice of sport.

3(2) Special federations are created around special branches of sport and, in accordance with chapter 6, are considered as the national federations for all local federations that practice that special branch of sport on their platform.

3(3) The clubs within every local federation/sports federation that practice the same sport can form a special committee, in accordance with chapter 8.

³ Here and further unofficial translation by the Authority of the provisions of the national law.

⁴ Icelandic version of Article 5(1) of the Sports Act reads as follows: “(1) Íþrótt- og Ólympíusamband Íslands er æðsti aðili frjálsrar íþróttastarfsemi í landinu og í erlendum samskiptum íþróttahreyfingarinnar. Ungmennafélag Íslands eru sjálfstæð féлага samtök á sviði íþróttar.”

⁵ Accessible at: [http://isi.is/library/Skrar/Efnisveita/Log-og-reglugerdir/L%20C3%B6g%20C3%8DS%20C3%8D%20\(2015\).pdf](http://isi.is/library/Skrar/Efnisveita/Log-og-reglugerdir/L%20C3%B6g%20C3%8DS%20C3%8D%20(2015).pdf), checked on 19 May 2017.

⁶ Article 1(4) of the ISI rules: “ÍSí starfar sjálfstætt og ber að hafna öllum þrýstingi, hvort sem hann er af pólitískum, trúarlegum eða efnahagslegum toga, svo sem kveðið er á um í Ólympíusáttmálanum.”

3(4) *Only one special federation can be recognised for each branch of sport. It is assumed that this federation will be or can be a member of an international special federation for that branch of sport recognised by the International Olympic Committee.*

3(5) *Olympic special federations are those federations that are members of a recognised special international federation, which are on the roster for the Olympic Games. These federations shall maintain active operation of their sport both at home and abroad, especially with regard to organizing sports events and provide systematic training for athletes.”⁷*

14. Article 47 of the ISI rules reads as follows:

“47(1). Special sports federation is a federation of local federations/sports federations in their perspective branch of sport. A special federation has the authorisation to have direct communication with those clubs that practice the sport under the umbrella of the special federation.

47(2) Special federation is the highest authority within its branch of sport within the ISI with regard to special issues related to that sport.

47(3) Special federation shall send the ISI a yearly work report.

47(4) The objectives of the special federations are essentially: a) Work on the establishment of new special committees and promoting their relevant branch of sport in the country. b) Establishing of necessary rules, legalisation of referees, conduct of the national competition and verification of records. c) Representation of their branch of sport with regard to foreign countries and verification that the rules in their branch of sport are in accordance with international rules.”⁸

15. On the basis of the authority granted to it by the rules of the ISI over the field of basketball, the IBA has published regulations on the conduct of basketball within Iceland. Article 18 of the IBA Regulation states that a club can only field one foreign player, alongside at least four players with the Icelandic citizenship or permanent residency, in a match.

16. Article 18 of the IBA Regulation reads as follows:

“In the men’s Premier League there shall always be at least four Icelandic nationals on the field and never more than one foreign player. If a team cannot declare four match fit players on the team sheet there shall nevertheless be no more than one foreign player on the field.

⁷ Icelandic version of Article 3 of the ISI rules reads as follows “3. grein Héraðssambönd – Sérsambönd 3.1. Héraðssambönd/íþróttabandalög eru mynduð eftir legu og aðstöðu til samvinnu um iðkun íþróttanna. 3.2. Sérsambönd eru mynduð um ákveðnar íþróttagreinar og eru landsamtök allra héraðssambanda, sbr. kafla 6, sem hafa iðkun þeirrar íþróttagreinar á stefnuskrá sinni. 3.3. Þau félög innan hvers héraðssambands/íþróttabandalags sem leggja stund á sömu íþróttagrein, geta myndað sérráð sbr. kafla 8. 3.4. Aðeins má viðurkenna eitt sérsamband fyrir hverja íþróttagrein. Er þá við miðað, að það samband verði eða geti orðið aðili að alþjóðasársambandi fyrir þá íþróttagrein, er njóti viðurkenningar Alþjóðaólympíunefndarinnar. 3.5. Ólympísk sérsambönd eru þau sambönd, er eiga aðild að viðurkenndu alþjóðasársambandi fyrir íþróttagreinar, sem eru á dagskrá Ólympíuleikanna. Ber þessum samböndum að halda uppi virkri starfsemi á sviði íþróttagreinar sinnar heima fyrir og á alþjóðavettvangi, einkum með því að skipuleggja og taka þátt í keppnismótum og sjá fyrir kerfisbundinni hjálfun íþróttamanna.”

⁸ Article 47 of the ISI rules reads as follows: “47.1. Sérsamband er samband héraðssambanda/íþróttabandalaga í hlutaðeigandi íþróttagrein. Sérsamband hefur heimild til að hafa ein boðskipti við þau félög sem hafa iðkun íþróttagreinar viðkomandi sérsambands á stefnuskrá sinni. 47.2. Sérsamband er æðsti aðili innan ÍSÍ um sérfræðileg málefni íþróttagreinar sinnar. 47.3. Sérsamband skal senda ÍSÍ árlega starfsskýrslu. 47.4. Hlutverk sérsambanda er í meginatriðum: a) Að vinna að stofnun nýrra sérráða og efla á annan hátt viðkomandi sérgrein í landinu. b) Að setja nauðsynlegar reglur, löggilda dómara, ráðstafa landsmótum og staðfesta met. c) Að vera fulltrúi íþróttagreinar sinnar gagnvart útlöndum og sjá um að reglur varðandi greinina séu í samræmi við alþjóðareglur.”

In the women's Premier League there shall always be at least four Icelandic nationals on the field and never more than one foreign player. If a team cannot declare four match fit players on the team sheet there shall nevertheless be no more than one foreign player on the field.

In the men's and women's First Division there shall always be at least four Icelandic nationals on the field and never more than one foreign player. If a team cannot declare four match fit players on the team sheet there shall nevertheless be no more than one foreign player on the field.

In the men's cup games, company cup games and championships the same rules apply as applicable to the men's Premier League.

A foreign national that has in accordance with the National Registry had formal continuous permanent residence in Iceland does not count as a foreign player in relation to this Regulation and he shall provide the necessary paperwork to the office of the IBA. The IBA confirms that he shall be counted as an Icelandic national in respect to this Regulation. A player that starts the season as a foreign national is counted as such during the remainder of the season.

The coach of the team who has perpetrated the infraction of the Regulation shall be punished with a technical foul. The application of this Regulation is ensured by declaring on the players' registers, which teams hand to the secretary, who is counted as a foreign player and by the secretary writing (E) in front of their name. If an infraction is perpetrated with regard to this Regulation, the following procedure shall apply:

- *Before the ball is put again into play – a player shall be substituted and a technical foul shall be imposed on the coach (C).*
- *After the ball has been put into play and the opponents of the illegally manned team have the control of it – the game shall be stopped immediately unless the opponents would be inconvenienced by it. The excess of foreigners shall be substituted and a technical foul shall be imposed on the coach (C).*
- *After the ball has gone into play again and the illegally manned team has control of it – the game shall be stopped immediately. The excess of players shall be substituted and a technical foul shall be imposed on the coach (C).*
- *After the ball has gone again out of bounds after the team became illegally manned – the excess players shall be substituted and a technical foul shall be imposed on the coach (C)."⁹*

⁹ Icelandic version of Article 18 of the ISI rules reads as follows: “18. Grein Í úrvalsdeild karla skulu alltaf vera a.m.k. 4 íslenskir ríkisborgarar á leikvelli og aldrei fleiri en 1 erlendur leikmaður. Ef lið á ekki 4 leikhæfa íslenska ríkisborgara eftir á skýrslu en fleiri en 1 erlendan skulu samt sem áður aldrei vera fleiri en 1 erlendur ríkisborgari á leikvelli. (1) Í úrvalsdeild kvenna skulu alltaf vera a.m.k. 4 íslenskir ríkisborgarar inn á leikvelli og aldrei fleiri en 1 erlendur leikmaður. Ef lið á ekki 4 leikhæfa íslenska ríkisborgara eftir á skýrslu en fleiri en 1 erlendan skal samt sem áður aldrei vera fleiri en 1 erlendur ríkisborgari á leikvelli. (2) Í 1. deild karla og 1. deild kvenna skulu alltaf vera a.m.k. 4 íslenskir ríkisborgarar á leikvelli og aldrei fleiri en 1 erlendur leikmaður. Ef lið á ekki 4 leikhæfa íslenska ríkisborgara eftir á skýrslu en fleiri en 1 erlendan skal samt sem áður aldrei vera fleiri en 1 erlendur ríkisborgari á leikvelli. (3) Í bikarkeppni karla, fyrirtækjabíkar karla og meistarakkeppni karla gilda sömu reglur og um úrvalsdeild karla. (4) Í bikarkeppni kvenna, fyrirtækjabíkar kvenna og meistarakkeppni kvenna gilda sömu reglur og um úrvalsdeild kvenna. (5) Erlendur ríkisborgari sem hefur samkvæmt Þjóðskrá haft lögheimili á Íslandi samfellt í 3 ár telst ekki sem erlendur leikmaður í reglugerð þessari og skal hann framvísa nauðsynlegum gögnum til skrifstofu KKÍ. KKÍ staðfestir að hann teljist með íslenskum ríkisborgurum í þessari reglugerð. Sá sem hefur leiktíðina sem erlendur leikmaður telst sem slíkur út leiktíðina. (6) Fyrir brot á þessari reglugerð skal refsa með tæknivillu (C) á þjálfara þess lið sem brotið fremur. Vinnulag við eftirlit á þessu skal vera þannig háttað að á leikmannaalistaum sem lið afhenda ritara skal koma fram hverjir teljast erlendir leikmenn og skal ritari skrifa (E) framan við nafn þeirra. Ef upp kemstu um brot á þessu er framgangsmáti eftirfarandi:

- *Áður en knöttur fer í leik þegar leikur er settur af stað – leikmanni skipt út af aftur og dæmd tæknivilla á þjálfara (C).*

3 Relevant EEA Law

17. Article 4 EEA prohibits, within the scope of the application of the EEA Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality.

18. Article 28 EEA guarantees freedom of movement for workers. It reads as follows:

“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 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.

<...>”

19. Regulation (EU) No 492/2011 elaborates on the rights of workers to move to and to have access to employment in another EEA State without unjustified discrimination as guaranteed by Article 28 EEA.

20. Article 1 of Regulation (EU) No 492/2011 reads as follows:

“1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State within the same priority as nationals of that State.”

21. Article 4(1) of Regulation (EU) No 492/2011 reads as follows:

“Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any

- Eftir að knöttur hefur aftur farið í leik og andstæðingur hins ólöglega skipaða liðs hefur vald á honum. – Stöðva skal leik án tafar nema að andstæðingar verði fyrir óhagræði. Umframfjölda erlendra leikmanna skipt útaf og dæmd tæknivilla á þjálfara (C).

- Eftir að knöttur hefur aftur farið í leik og hið ólöglega skipaða lið hefur vald á honum. – Leikur stöðvaður án tafar. Umframfjölda erlendra leikmanna skipt útaf og dæmd tæknivilla á þjálfara (C).

- Eftir að knöttur hefur aftur farið úr leik eftir að lið varð ólöglega skipað. - Umframfjölda erlendra leikmanna skipt útaf og dæmd tæknivilla á þjálfara (C).”

undertaking, branch of activity or region, or at a national level, shall not apply to nationals of other Member States.”

22. Article 7(1) of Directive 2004/38/EC guarantees to all EEA nationals, on certain conditions, the right of residence on the territory of another EEA State for a period of longer than three months.

23. Under Article 7(2) of Directive 2004/38/EC the right of residence provided for in Article 7(1) shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host EEA State.

24. Article 24(1) of Directive 2004/38/EC reads as follows:

“Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.”

4 The Authority’s Assessment

4.1 Infringement of Article 28 EEA and Articles 1 and 4 of Regulation (EU) No 492/2011 as regards professional and semi-professional players

4.1.1 Direct discrimination on the basis of nationality

25. Article 28 EEA prohibits any direct or indirect discrimination based on nationality between workers of EU Member States and EEA EFTA States as regards employment, remuneration and other conditions of work and employment. This provision is further elaborated in Regulation (EU) No 492/2011. Article 4 of that Regulation states that provisions laid down by law, regulation or administrative action of the EEA States which restrict employment of foreign nationals by number or percentage shall not apply to nationals of the other EEA States. Moreover, Article 1(2) of Regulation (EU) No 492/2011 provides that a worker who is a national of an EEA State shall, in particular, have the right to take up available employment in the territory of another EEA State with the same priority as nationals of that State.

26. According to settled case-law of the Court of Justice of the European Union (“the Court of Justice”), the concept of “*worker*”, within the meaning of Article 28 EEA and Article 7 of Regulation (EU) No 492/2011, must not be interpreted narrowly. Any person who pursues activities which are real and genuine must be regarded as a “*worker*”. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration¹⁰.

27. The Court of Justice has stated that sport is subject to EU law in so far as it constitutes an economic activity¹¹. Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the

¹⁰ Judgment in *Kranemann*, C-109/04, EU:C:2005:187, paragraph 12 and the case-law cited therein.

¹¹ Judgment in *Olympique Lyonnais SASP*, C-325/08, EU:C:2010:143, paragraph 27 and the case-law cited therein.

activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 28 EEA or Article 36 EEA¹².

28. Consequently, a basketball player from another EEA State playing in Iceland for remuneration, is to be categorised as a worker in accordance with Article 28 EEA and Regulation (EU) No 492/2011.

29. It is the Authority's understanding that players of the Icelandic Basketball Premier League are generally under employment contracts with their respective sports clubs under which they receive remuneration. However, there might be situations when players playing outside the Premier League also fall under the concept of "worker".

30. In any case it is, in the Authority's view, for the national sports federation, in this case the IBA, to identify up to which level the basketball competitions in Iceland are normally professional or semi-professional. All other levels of the competitions shall be considered as played by amateur players. In the case of a dispute concerning the classification of a competition (professional v. amateur level), for example, between a club or player and the federation, the national court is best placed to assess the factual situation and decide on the dispute.

31. Having established that professional or semi-professional basketball players fall under the provisions on the freedom of movement for workers in Article 28 EEA and Regulation (EU) No 492/2011, the Authority notes that the "4+1" rule of Article 18 of the IBA Regulation is directly discriminatory towards basketball players from other EEA States aiming to pursue their profession in Iceland and thus violates Article 28 EEA and Articles 1 and 4 of Regulation (EU) No 492/2011.

32. In its judgment in *Bosman*¹³ the Court of Justice assessed the application of similar rules laid down by sporting associations, under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States.

33. It stated that the principle established in Article 4 Regulation (EU) No 492/2011, under which the restriction of employment of foreign nationals by number or percentage shall not apply to nationals of the other EEA States, applies also to clauses contained in the regulations of sporting associations which restrict the nationals of other Member States to take part, as professional players, in football matches¹⁴. The fact that those clauses do not concern the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned¹⁵.

34. For the purposes of establishing direct discrimination, it is irrelevant that, according to Article 18 of the IBA Regulation, when applying the "4+1" rule a player who is a permanent resident in Iceland is considered as an Icelandic national¹⁶. It suffices to say that the rule does not contain any requirements as to the duration of their residency in Iceland with regard to players having the Icelandic citizenship.

35. Accordingly, a provision, such as Article 18 of the IBA Regulation is contrary to Article 28 EEA and Articles 1 and 4 of Regulation (EU) No 492/2011.

¹² See, to this effect, judgment in *Olympique Lyonnais SASP*, cited above, paragraph 28 and the case-law cited therein.

¹³ Judgment in *Bosman*, C-415/93, EU:C:1995:463.

¹⁴ Judgment in *Bosman*, cited above, paragraph 119.

¹⁵ Judgment in *Bosman*, cited above, paragraph 120.

¹⁶ Compare with judgment in *Angonese*, C-281/98, EU:C:2000:296, paragraph 41.

4.1.2 *Possible justification for direct discrimination based on nationality*

36. A directly discriminatory measure of national law infringes Article 28 EEA and Articles 1 and 4 of Regulation (EU) No 492/2011, unless it can be justified by grounds of public policy, public security or public health and is proportionate, *i. e.* does not go beyond what is necessary with regard to the objective pursued¹⁷.

37. The Authority takes the view that the directly discriminatory requirements laid down in Article 18 of the IBA Regulation cannot be justified by any of the grounds mentioned above.

38. Consequently, by maintaining in place a quota on the number of foreign players allowed to participate in a basketball match in Iceland or by empowering the IBA to maintain this quota, Iceland has failed to fulfil its obligations under Article 28 EEA and Articles 1 and 4 of Regulation (EU) No 492/2011 with respect to semi-professional or professional basketball players.

4.2 **Infringement of Article 4 EEA and Article 24(1) of Directive 2004/38/EC as regards amateur players**

4.2.1 *Direct discrimination on the basis of nationality*

39. Similar considerations as described above, apply on the basis of Article 4 EEA and Article 24(1) of Directive 2004/38/EC as regards amateur basketball players.

40. In particular, under Article 7(1) of Directive 2004/38/EC all EEA nationals, on certain conditions, have the right of residence on the territory of another EEA State for a period longer than three months. According to Article 7(2), this right extends to third-country national family members accompanying or joining the EEA national in the host EEA State. Under Article 4 EEA and Article 24(1) of Directive 2004/38/EC any discrimination on grounds of nationality shall be prohibited as regards, in particular, the EEA and third-country nationals residing on the basis of Directive 2004/38/EC in the host EEA State.

41. The “4+1” rule of Article 18 of the IBA Regulation is directly discriminatory towards amateur basketball players from other EEA States, as well as their third-country national family members, residing in Iceland on the basis of Directive 2004/38/EC and thus violates Article 4 EEA and Article 24(1) of Directive 2004/38/EC.

4.2.2 *Possible justification for direct discrimination based on nationality*

42. Discriminatory treatment prohibited by Article 4 EEA may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued¹⁸.

43. The Authority is however not aware of any public interest for maintaining in place a quota on the number of foreign amateur players allowed to participate in a basketball match in Iceland.

¹⁷ See, to that effect, Case E-13/11 *Granville Establishment* [2012] EFTA Ct. Rep. 400, paragraphs 49-51.

¹⁸ Case E-16/11 *ESA v Iceland* [2013] EFTA Ct. Rep. 4, paragraph 218 and the case-law cited therein.

44. Therefore, by maintaining in place a quota on the number of foreign players allowed to participate in a basketball match in Iceland or by empowering the IBA to maintain this quota, Iceland has failed to fulfil its obligations under Article 4 EEA and Article 24(1) of Directive 2004/38/EC with respect to amateur basketball players.

4.3 The IBA as the national regulatory body and Iceland's responsibility for breaches of EEA law by a private entity

45. The Authority, first, acknowledges the autonomy of sports federations concerning sports rules. However, the fact that rules governing sport, such as Article 18 of the IBA Regulation, are issued by sports associations not governed by public law cannot provide a general justification for not applying the provisions of the EEA Agreement on free movement.

46. It is established case-law that the provisions on the fundamental freedoms not only apply to the action of public authorities, but also to rules of any other nature aimed at regulating gainful employment in a collective manner¹⁹. The abolition of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting of the exercise of their legal autonomy by associations or organisations not governed by public law, such as the ISI and the IBA²⁰.

47. Since working conditions in the different EEA States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions set out in the fundamental freedoms to acts of a public authority would risk creating inequality in their application²¹.

48. In particular, regulations adopted by sports federations, such as the IBA Regulation, exclusively regulate not just sporting issues in the given sports field, but also access to the sports activity in general, whether for professional or amateur sportspeople. Without being a member of the national sports federation and adhering to its rules, no one can exercise officially organised sports activity in the EEA State of residence or employment.

49. Therefore, the provisions of the EEA Agreement on free movement apply to rules such as Article 18 of the IBA Regulation.

50. Second, the Icelandic Government argues in its letter of 25 November 2016 that the complaint should be directed rather towards the ISI. The IBA Regulation in question is issued by the IBA under the auspices and authority of the ISI and is not subject to government approval. According to Article 1(4) of the ISI rules, the ISI is an independent organisation, in which the IBA is a subsidiary.

51. However, in the view of the Authority, the Icelandic State is, at least, indirectly involved in a measure, such as the “4+1” rule under Article 18 of the IBA Regulation, and thus this rule falls under the notion of “*State measure*”.

¹⁹ See, in the field of sport, judgments in *Walrave and Koch*, C-36/74, EU:C:1974:140, paragraph 17; *Bosman*, cited above, paragraph 82; *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraph 47; *Olympique Lyonnais SASP*, cited above, paragraph 30. See also Case E-14/15 *Holship*, not yet reported, paragraph 112.

²⁰ Judgments in *Walrave and Koch*, cited above, paragraph 18; *Bosman*, cited above, paragraph 83; and *Deliège*, cited above, paragraph 47.

²¹ Judgments in *Walrave and Koch*, cited above, paragraph 19; *Bosman*, cited above, paragraph 84; *Olympique Lyonnais SASP*, cited above, paragraph 31; and Case E-14/15 *Holship*, cited above, paragraph 113.

52. The Court of Justice has acknowledged that Member States can be held liable for breaches of EU law by private entities whose activities are directly or indirectly under the control of State authorities²².

53. It is well established case-law of the Court of Justice that a Member State may be regarded as exercising control over a particular entity when it or its public authorities are in a position to control the decisions or acts of the private entity concerned, either directly or indirectly²³.

54. In its judgment in *Fra.bo SpA*²⁴, the Court of Justice further confirmed that a private entity may still be subject to EU law directly even if it is not controlled or financed by the State, in circumstances where it is exercising a public or regulatory function and where its decisions affect the conditions under which a fundamental freedom may be exercised.

55. In Article 5(1) of the Sports Act the Icelandic State has delegated exclusive powers to the ISI to regulate the sports activities in the country, as well as its foreign relations. By exercising this power the ISI adopts its rules allowing for the creation of special sports federations with the authority over individual branch of sport, such as the IBA in the field of basketball, that in turn adopted the IBA Regulation concerning not only sporting issues, but also the access to sports activity, whether on a professional, semi-professional or amateur level, by players from other EEA States. As mentioned above, without adhering to the rules of the national sports federation, no one can exercise officially organised sports activity in the EEA State of residence or employment.

56. Moreover, the activities of the ISI, of which, as explained by the Icelandic Government, the IBA is a subsidiary, are largely financed by the Icelandic State and this association is therefore dependent on that State. The Icelandic Government confirmed in its letter of 25 November 2016 that the concerns raised by the Authority in the request for information could be assessed by the Government in connection with upcoming discussions for a new agreement between the Government and the ISI for public funding of various sport related activities.

57. Given the links between the Icelandic Government and the ISI, as well as the IBA and the ISI, the Authority holds the view that it is for the Icelandic Government to fulfil its obligations under EEA law and align the rules adopted and implemented by the IBA in accordance with EEA law.

58. Under the principle of loyalty enshrined in Article 3 of the EEA Agreement, EEA States are under an overarching duty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement²⁵. This entails an obligation to establish a legal and regulatory framework consistent with fundamental principles laid down in the EEA Agreement.

²² See, to that effect, judgment in *Commission v Ireland*, C-249/81, EU:C:1982:402, paragraphs 23-27; and, by analogy, judgment in *Ålands vindkraft*, C-573/12, EU:C:2014:2037, paragraph 74 and the case-law cited therein.

²³ See, for example, judgment in *Portgás*, C-425/12, EU:C:2013:829, paragraph 24 and the case-law cited therein concerning the attribution to the State of the actions of a body providing public-interest service pursuant to a measure adopted by that State, for the purposes of relying directly on the provision of a directive; judgments *Italy v Commission*, C-305/89, EU:C:1991:142, paragraph 13, and *France v Commission*, C-482/99, EU:C:2002:294, paragraphs 23 and 57 concerning the attribution to the State of the grant of aid by an autonomous institution; and judgment *Connemara Machine Turf*, C-306/97, EU:C:1998:623, paragraphs 34 and 35 concerning the measures attributable to the State in public procurement field.

²⁴ Judgment in *Fra.bo SpA*, C-171/11, EU:C:2012:453.

²⁵ See, to that effect, Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 236, paragraph 46.

59. Consequently, to the extent that the national legislation does not provide for a direct remedy by the State in respect of the rules adopted by sports associations empowered to act in this field by national legislation infringing the EEA free movement principles, the national legislation must be changed in a way that would provide the State with competence permitting it to fulfil the obligations arising out of the EEA Agreement.

60. In any event, even if a measure, such as the “4+1” rule under Article 18 of the IBA Regulation, could not be considered a “*State measure*”, Iceland is under an obligation pursuant to Articles 4 and 28 EEA, Articles 1 and 4 of Regulation (EU) No 492/2011, and Article 24(1) of Directive 2004/38/EC, interpreted in conjunction with Article 3 EEA, to adopt any necessary and proportionate measures to deal with actions by private individuals which directly discriminate against EEA nationals and their family members as regards their participation in basketball matches in Iceland²⁶.

61. By failing to adopt such measures in order to prevent the IBA to maintain in force a quota on the number of foreign players allowed to participate in a basketball match in Iceland, such as the quota in Article 18 of the IBA Regulation, Iceland has failed to fulfil its obligations arising from Articles 4 and 28 EEA, Articles 1 and 4 of Regulation (EU) No 492/2011, and Article 24(1) of Directive 2004/38/EC, interpreted in conjunction with Article 3 EEA.

5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force a quota on the number of foreign players allowed to participate in a basketball match in Iceland, such as the quota in Article 18 of the Regulation on Basketball Tournaments (*reglugerð um körfuknattleiksmót*) (the IBA Regulation), or by empowering the Icelandic Basketball Association (the IBA) to maintain in force this quota, Iceland has failed to fulfil its obligations arising from Articles 4 and 28 EEA, Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement (*Regulation (EU) No 492/2011 of the European Union and of the Council of 5 April 2011 on freedom of movement for workers within the Union*), as adapted to the EEA Agreement by Protocol 1 thereto, and Article 24(1) of the Act referred to at point 3 of Annex VIII 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.

Alternatively, by failing to adopt all necessary and proportionate measures in order to prevent the IBA to maintain in force a quota on the number of foreign players allowed to participate in a basketball match in Iceland, such as the quota in Article 18 of the IBA Regulation, Iceland has failed to fulfil its obligations arising from Articles 4 and 28 EEA, Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement, and Article 24(1) of the Act referred to at point 3 of Annex VIII to the EEA Agreement, interpreted in conjunction with Article 3 EEA.

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

²⁶ See, to that effect, judgments in *Commission v France*, C-265/95, EU:C:1997:595, paragraphs 39 and 66; and *Schmidberger*, C-112/00, EU:C:2003:333.

Authority requests that the Icelandic Government submits its observations on the content of this letter *within three 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

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel.