Case No: 79559
Document No: 919684
Decision No: 037/20/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 22 April 2020

closing a complaint case arising from an alleged failure by Iceland to properly implement the Services Directive in national law and an alleged breach of that Directive by maintaining in force an authorisation scheme in the tourism sector

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Introduction

On 12 September 2016, the EFTA Surveillance Authority ("the Authority") received a complaint against Iceland in the field of free movement of services, in particular the area of tourism.

According to the complaint, Directive 2006/123/EC on services in the internal market ("the Services Directive" or "the Directive")[1] has not been properly implemented in Icelandic law. Furthermore, the complainant alleged that the authorisation scheme under the Icelandic Tourism Administration Act No 73/2005 ("the Tourism Act") is incompatible with some of the requirements laid down by the Services Directive. The complainant had previously also alleged that the Tourism Act places Icelandic tour operators in a less favourable position than their competitors, resulting in so-called reverse discrimination.

As regards the point on implementation, the Authority concluded in June 2015 that the Services Directive has been fully implemented in the Icelandic legal order. The Authority analysed the implementation of the Directive in the context of a conformity assessment (Case No 74956), and identified some shortcomings. After the Icelandic Government had addressed and rectified these issues, the Authority closed the case.

Furthermore, the Authority has already assessed the issue of reverse discrimination under the Tourism Act and found that it does not raise issues under EEA law. In 2008, in the context of another complaint case, the Authority had already determined that the EEA Agreement does not protect domestic actors from reverse discrimination and consequently closed the case (Case No 64810, Decision No 46/09/COL). The Authority has not identified any new developments in EEA law that would entail an adjustment of those findings and therefore finds that there is no need to reassess the issue.

[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), incorporated into the EEA Agreement at point 1 of Annex X to the EEA Agreement by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009.

For the sake of completeness, the Authority also notes that, in the previously mentioned Case No 64810, it assessed the Tourism Act in light of Articles 31 and 36 EEA and concluded that it contained no unjustified restriction in breach of those provisions.

Following this, the remaining issue for the Authority to assess is the question as to whether the authorisation scheme under the Tourism Act is compatible with the requirements laid down by the Services Directive.

On 12 December 2016, the Authority sent a request for information (Doc No 829370) to the Icelandic Government concerning the authorisation scheme. The Government replied by letter dated 2 February 2017 (Doc No 839396), stating that it considered the scheme under the Tourism Act to fall within the scope of Article 4(6) of the Services Directive. It further argued that the scheme was non-discriminatory, could be justified by overriding reasons in the public interest, and that it was necessary and proportionate.

The case was subsequently discussed at the package meeting in Iceland on 8 June 2017. The representatives of the Authority and the Icelandic Government discussed various aspects related to the authorisation scheme, including its justification. The representatives of the Icelandic Government also informed the Authority of a proposal for legislative amendments that was pending approval by the Icelandic Parliament. The proposed act would replace the Tourism Act. However, the authorisation scheme would be maintained with some adjustments, in particular as concerns legally binding safety measures.

On 1 January 2019, the legislative amendments entered into force. The Tourism Act was then replaced by Act No 96/2018 on the Icelandic Tourist Board ("the new Tourism Act").[2] Following that, the framework challenged by the complaint was no longer applicable. The Authority therefore adjusted its assessment to instead consider the continued, but slightly revised scheme under the new Tourism Act and its compliance with EEA law in light of the issues raised by the complaint.

The case was then discussed at the package meeting in Iceland on 4 June 2019. The representatives of the Icelandic Government explained that the authorisation scheme remained mainly unchanged under the new rules, but that a new requirement had been introduced for tour operators to put in place mandatory safety plans. The representatives further provided information on the justification for the individual requirements under the authorisation scheme, as well as the necessity and proportionality.

In its follow-up letter to the package meeting (Doc No 1079489), the Authority invited the Icelandic Government to confirm in writing the information provided at the meeting and to provide any documentation substantiating the justifications presented.

By letter dated 29 August 2019 (Doc No 1085339), the Icelandic Government replied. It provided further information on the justification of the authorisation scheme, along with supplementary information on the new Tourism Act.

2 The Authority's assessment

The complainant has argued that the Icelandic Government is not properly taking into account the obligations deriving from the Services Directive, in particular by maintaining in force the authorisation scheme under the Tourism Act. According to the complainant, the scheme is overly burdensome, wholly unjustified and discriminatory.

[2] Available in English online at https://www.ferdamalastofa.is/static/files/ferdamalastofa/leyfi_log/log-um-ferdamalastofu_en_loka.pdf.

The contested authorisation scheme under the Tourism Act was repealed with effect from 1 January 2019. However, the new Tourism Act contains a prior authorisation scheme largely identical to the scheme contested by the complainant. The complaint is therefore considered transferable to the scheme under the new Tourism Act.

On this basis, the Authority has assessed the authorisation scheme under the new Tourism Act in light of EEA law and the issues raised by the complainant. The question is whether Iceland has breached its obligations arising from the Services Directive by maintaining in force an authorisation scheme for some groups of operators in the tourism sector.

The Icelandic Government has not disputed that the revised system under the new Tourism Act amounts to an authorisation scheme within the meaning of Article 4(6) of the Services Directive.[3] That provision defines authorisation schemes as "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a services activity or the exercise thereof".

The first paragraph of Article 7 of the new Tourism Act states that anyone intending to operate as a travel agency or day tour operator in Iceland is required to obtain a licence for such operations from the Icelandic Tourist Board.

Consequently, that provision establishes an authorisation scheme within the meaning of the Services Directive.[4]

The obligation of prior authorisation should be limited to cases in which it is essential, cf. recital 43 of the Preamble to the Services Directive. According to Article 9(1) of the Directive, this entails that EEA States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following three cumulative conditions are met:

a) the authorisation scheme does not discriminate against the provider in question;
b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

The authorisation scheme under the new Tourism Act must consequently be assessed in light of these three conditions.

Following that assessment, the Authority will assess whether the authorisation scheme could be in breach of other requirements laid down in relevant provisions of the Services Directive. In that assessment, the Authority will mainly examine elements related to the complainant's argument that the authorisation scheme is overly burdensome, unjustified and discriminatory.

2.1 Article 9 of the Services Directive

[3] In its letter dated 2 February 2017 (Doc No 839396), the Icelandic Government considered the previous scheme under the Tourism Act to be an authorisation scheme as defined in Article 4(6) of the Services Directive (on page 2). The same explicit statement has not been done as regards the scheme under the new Tourism Act. However, in its letter dated 29 August 2019 (Doc No 1085339), the Icelandic Government stated that the reasoning in the letter from 2 February 2017 also apply to the new rules (on page 2).

[4] For comparison, see Case E-19/15, *ESA* v *The Principality of Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 45.

2.1.1 The requirement of non-discrimination

The first condition to consider is whether the authorisation scheme set out in the new Tourism Act discriminates against the service providers in question.

According to the general authorisation obligation laid down in the first paragraph of Article 7 of the new Tourism Act, "anyone" intending to operate as a day tour operator or a travel agency must obtain a license from the Icelandic Tourist Board. The obligation applies regardless of nationality.

As for the substantive requirements, Article 8 of the new Tourism Act lays down the same conditions for all service providers applying for a license, irrespective of their nationality. Under the second paragraph of Article 8, all applicants are required to be a resident of one of the EEA states (or Switzerland or the Faroe Islands) but otherwise the conditions relate to other factors, such as legal majority, financial competency, a clean criminal record in relation to certain offences, and insurance from an insurance provider in the EEA.[5]

The seventh paragraph of Article 8 further states explicitly that the authorisation requirement also applies to foreign travel agencies or day tour operators that intend to open a place of business in Iceland, entailing that local and foreign operators are subject to the same requirements when establishing themselves in Iceland.

Furthermore, all formal requirements under Article 8 of the new Tourism Act are general and applied in the same way to all potential applicants. They concern other factors than nationality, such as the timeframe for applications, the possibility for the Icelandic Tourist Board to request documentation, requirements on the intended specification of names and titles, and an obligation in some cases to provide confirmation of insolvency protection.

In its correspondence with the Authority, the Icelandic Government has stated that the criteria for attaining licenses under the Tourism Act were objective, transparent and fact-based with no provisions that could be used by the authorities in an arbitrary manner.[6]

The Authority finds that this applies to the criteria in Article 7 and 8 of the new Tourism Act, described above. The requirements are objective and transparent and they appear to preclude any arbitrary decision-making by the authorities based on nationality.

Article 11 of the new Tourism Act introduced an additional requirement on tour operators to put in place adequate safety plans for each type of tour organised within the Icelandic territory. Article 11 is not strictly a part of the authorisation scheme, as it appears that an authorisation may be granted where only the requirements in Articles 7 and 8 are fulfilled. However, Article 14 of the new Tourism Act states that an authorisation may be revoked if the mandatory safety plans required by Article 11 is inadequate. The Icelandic Tourist Board will monitor that safety plans are in place and updated as needed, cf. Article 11.

On this basis, the Authority considers the requirement of adequate safety plans to be a de facto requirement to operate as a licenced tour operator in Iceland. In the Authority's view, Article 11 must therefore be considered part of the authorisation scheme under the new Tourism Act.

As regards the question of non-discrimination, Article 11 of the new Tourism Act equally applies to "anyone" intending to perform organised tours in Iceland and makes no distinction between providers on the basis of nationality.

[5] There is also a requirement for registration of operations with the Directorate of Internal Revenue, cf. letter c in the second paragraph of Article 8. This is linked to VAT obligations in Iceland, which is a matter falling outside the scope of the EEA Agreement.

[6] Letter dated 2 February 2017 (Doc No 839396) under point 4 on page 2.

Taking into account the information above, the Authority finds that the authorisation scheme under the new Tourism Act fulfils the requirement of non-discrimination in Article 9(1)(a) of the Services Directive.

2.1.2 Scheme justified by an overriding reason relating to the public interest

The second condition in Article 9(1) of the Services Directive requires that the need for an authorisation scheme is justified by an overriding reason relating to the public interest.

In its correspondence with the Authority, the Icelandic Government has sought to justify the authorisation scheme for travel agencies and tour operators by referring to the protection of the environment, public safety, public health, and consumer protection.[7]

The concept of overriding reasons relating to the public interest is defined in Article 4(8) of the Services Directive to mean, without prejudice to Article 6 EEA, reasons recognised as such in the rulings of the Court of Justice of the European Union ("CJEU"). This includes inter alia public safety, public health, the protection of consumers, the protection of the environment, and social and cultural policy objectives. The concept and acknowledged overriding reasons are also described in recitals 7 and 40 of the Preamble to the Directive, which equally lists the mentioned objectives.

Accordingly, the reasons invoked by the Icelandic Government are among those explicitly mentioned in the Services Directive and thereby constitute overriding reasons relating to the public interest that are capable in general of justifying restrictions on service provision.

It must then be established whether these overriding reasons are capable in this specific case to justify the need for the authorisation scheme under the new Tourism Act.

As regards protection of the environment, the Icelandic Government has emphasised that the main tourist attraction in Iceland is the unique nature, the natural areas, and the unspoiled wilderness.[8] Many tourists enjoy organised tours of these areas and the Icelandic Environmental Agency has concluded that the main hazard to Icelandic nature is mass tourism. The Government finds it essential for the protection of the environment that tour operators and their customers protect the areas from too much intrusion and that they respect nature. The authorisation scheme contributes to safeguarding nature. It ensures that tour operators are supervised and respect their legal obligations and safety measures.

When it comes to public safety and public health, the Icelandic Government has argued that many of the tours in Iceland involve risk to the personal safety of the participants. The mandatory scheme and the Icelandic Tourist Board's authority is instrumental in providing effective surveillance of the tour operators in order to better ensure the safety of the customers. The obligation to prepare safety plans entails that all tour operators will have in place sufficient risk assessments, procedures, contingency plans and incident reports. Under the previous scheme, such plans were recommended in published guidelines, but the revised scheme makes it binding by law to have them in place.

[7] The invoked overriding reasons and the Icelandic Government's arguments for why they justify the authorisation scheme (presented in this chapter) follow from point 4 on page 3 in letter dated 2 February 2017 (Doc No 839396), and point 4 on page 3-4 and point 5 on page 4 in letter dated 29 August 2019 (Doc No 1085339).

[8] In this regard, reference is made to a report by the Icelandic Tourist Board from 2017, "*Tourism in Iceland in Figures*", available online at https://www.ferdamalastofa.is/static/files/ferdamalastofa/Frettamyndir/2017/juli/tourism-in-iceland-2017-9.pdf. On page 16, it is stated that "the majority of respondents mentioned interest in nature and the country when asked why they decided to come to Iceland" and on page 17, it is stated that a "large majority of winter and summer visitors said that nature had influenced their decision to come to Iceland".

In the context of public safety, the Government has further held that the authorisation scheme also ensures that tour operators must present (general) liability insurance before commencing their operations. When guiding and transporting people, which tour operators in Iceland mostly do, there is a real risk of accidents and that risk increases during winter and in areas that can generally be considered dangerous. In the view of the Icelandic Government, this demonstrates the need for the requested liability insurance for anyone wishing to be a tour operator in Iceland.

Finally, the Icelandic Government has argued that the authorisation scheme is necessary for the protection of consumers. This is essential in the tourism sector and reference is made to specific EEA provisions, the main purpose of which is consumer protection: Directive 2015/2302/EU on package travel and linked travel arrangements[9] requires all EEA States to ensure that tour operators and organisers established in their territory provide security for the refund of all payments made by or on behalf of travellers if the services are not performed as a consequence of insolvency. This includes carriage of passengers, which is most often part of package travel arrangements sold in Iceland.

On this basis, the Icelandic Government argues that the authorisation scheme safeguards consumers in that it requires license holders to be insured by an insurer in the EEA when operating in Iceland. The Icelandic Tourist Board calculates the level of the security requirement and ensures that all travel agencies hold sufficient insolvency protection before starting any operation in Iceland.

Having considered these arguments, the Authority finds that the reasons invoked by the Icelandic Government are capable of justifying the authorisation scheme may. By requiring travel agencies and tour operators to obtain an authorisation, the Icelandic Tourist Board may ensure that less serious actors cannot operate in Iceland. The licence requirements are suitable for ensuring that tourists are guided by responsible operators who have in place sufficient safety plans and who will contribute to respect for sensitive natural areas and to avoid excessive intrusion in nature. Furthermore, they are suitable for ensuring that all travel agencies hold sufficient insolvency security to protect consumers.

On this basis, the Authority considers that the specific need for the authorisation scheme under the new Tourism Act is justified by overriding reasons related to the public interest and the requirement in Article 9(1)(b) of the Services Directive is thereby fulfilled.

2.1.3 Lack of appropriate less restrictive means

Article 9(1)(c) of the Services Directive finally requires that an authorisation scheme must satisfy a test of proportionality. It must be established that the objectives pursued by the authorisation scheme under the new Tourism Act cannot be attained by less restrictive means, in particular because an a posteriori inspection would take place too late to be genuinely effective.

In Case E-19/15 *ESA* v *Liechtenstein*, the EFTA Court delivered a seminal judgment on authorisation schemes.[10] The Court assessed a scheme that required prior authorisation for all undertakings intending to establish themselves in Liechtenstein. When assessing proportionality under Article 9(1)(c) of the Services Directive, the Court stated that the reasons invoked by an EEA state as justification for a restriction on one of the fundamental freedoms must be accompanied by an analysis of the appropriateness and

[9] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 325, 11.12. 2015, p. 1), incorporated into the EEA Agreement at point 7f of Annex XIC to the EEA Agreement by Decision of the EEA Joint Committee No 187/2017 of 22 September 2017.

[10] Case E-19/15 *ESA* v *Liechtenstein*, cited above.

proportionality of the restriction, and precise evidence enabling the arguments to be substantiated.[11]

In that case, the EFTA Court found that the authorisation scheme was not proportionate, in particular because it targeted all sectors of the provision of services and because the arguments provided as justification were too broad and too general to constitute evidence of proportionality. In essence, the EFTA Court found that a less restrictive measure was available. It stated that one alternative measure could be to limit the authorisation scheme to specific sectors or businesses where it had been established by experience or objective risk assessment that there was a need for protection of the objectives sought.[12]

Compared to the case at hand, the authorisation scheme under the new Tourism Act differs from the scheme assessed by the Court in Case E-19/15 in that it does not apply generally to all service sectors, but targets the tourism sector exclusively. In addition, the obligation to obtain a prior authorisation is limited to travel agencies and day tour operators establishing themselves in Iceland. By its nature, the scheme is therefore in line with the example given by the Court of an authorisation scheme limited to specific sectors or businesses.

However, this is not sufficient to conclude that the authorisation scheme under the new Tourism Act is proportionate. As emphasised by the EFTA Court, even such limited authorisation schemes may only apply where a need for protection has been established, and a claim that the restrictive measure is justified and proportionate must be supported by reasonable and appropriate evidence.[13]

As described under point 2.1.2 above, the Icelandic Government argues that there is a need for an authorisation scheme for travel agencies and day tour operators in order to protect consumers, the environment, public health, and public safety. In its correspondence with the Authority, the Government has referred to various reports and documentation describing the specific characteristics of tourism in Iceland, the possible harm to nature, and the risks it poses to tourists participating in various tours in Iceland.

Among the evidence referred to is the finding of the Environmental Agency of Iceland that tourism poses a grave hazard to Icelandic nature and constitutes the main challenge for natural conservation in Iceland. Reports from 2016 and 2017 show that most of the "Red List" areas in danger of deterioration are some of the most popular tourist attractions in Iceland. Tourism stands for some of the most negative effects on these protected areas. The Environmental Agency has identified a need for improved infrastructure and for educating visitors on the environmental impact on nature.[14]

The Icelandic Government has further referred to a 2018 report by the Ministry of Tourism, Industry and Innovation that analyses the impact of tourism on the environment and inter alia describes efforts by the Environmental Agency to close off particularly sensitive areas to hold off tourists.[15] According to the Government, the closures have not held off everyone intent on visiting the areas but licensed tour operators are likely to comply with such measures and as such contribute to natural protection through their

[11] Case E-19/15 *ESA* v *Liechtenstein*, cited above, paragraph 49.
[12] Case E-19/15 *ESA* v *Liechtenstein*, cited above, paragraphs 50-52.
[13] Case E-19/15 *ESA* v *Liechtenstein*, cited above, paragraphs 51-52.
[14] The report by the Environmental Agency of Iceland from 2016 is available online at www.ust.is/library /Skrar/utgefid-efni/astand-fridlystra-svaeda/Astandsskyrsla%202016%20febr%C3%BAar_final.pdf. The report from 2017 is available online at https://www.ust.is/library/Skrar/utgefid-efni/Annad/Rau%C3%B0listask %C3%BDrsla%202017%20finale.pdf. See in particular pages 4-5, 11-12, 14, 17, and 25 of the 2017 report. The Icelandic Government has also made reference to a letter to the Parliament from the Environmental Agency, in relation to amendments to the Act on Natural Protection No 60/2013, referring to the strain organised group tours put on nature. The letter is available online at https://www.althingi.is/altext/erindi/145/145-148.pdf.
[15] The report by the Ministry is available online at https://www.althingi.is/altext/pdf/148/s/0717.pdf.

work as tour operators. Experience shows that tourists travelling with a licensed tour operator behave more properly and intrude less on nature.

As for the public health and safety aspects, the Icelandic Government has pointed to the high safety risks that many of the popular tours pose to individuals. Reference has been made to a 2017 report from the Icelandic Tourist Board, showing that a large part of visitors to Iceland choose to go on risk-filled tours, such as whale watching, guided hiking and mountain trips, and glacier or snowmobile tours. Experience has shown that tourists tend to disregard safety signs and dangerous edges of cliffs, for example close to Geysir and Gullfoss, with 1.2 million visitors annually. Additional risks arise in winter, with high risk of icing of the surrounding surfaces.[16]

In 2013, the Icelandic Tourist Board published guidelines on safety plans for tour operators and travel agencies in cooperation with the Icelandic Search and Rescue Association, the Tourism Association, and the Association of guides.[17] These identified risks for specific tours and recommended tour operators to put in place safety plans. However, already the following year, the Tourist Board published a report in cooperation with relevant stakeholders discussing the need for improved safety measures. The Icelandic Government has stated that several unfortunate incidents showed a need to make such plans mandatory. A legal requirement was therefore introduced in the new Tourism Act.

At the package meeting in June 2019, the Icelandic Government stated that the scheme is admittedly a mild entry barrier to the tourism sector, but it increases professionalism and contributes to keeping unserious actors out. The requirements of a licence, now also including adequate safety plans, entail that tourists will receive necessary instructions and supervision by the tour operators, making them less likely to behave in a way that could cause harm to themselves or nature. The objectives sought are also ensured indirectly by the requirements of legal majority, financial competency and clean criminal records.

As for the requirements of insurance and insolvency protection, the need for such cover is sought documented by reference to the evidence provided on the high level of risk in the Icelandic tourism sector and to the requirement laid down by Directive 2015/2302/EU.

The Icelandic Government has explained that the insolvency protection requirement under the authorisation scheme is practiced in a way that ensures consumer protection without it being too burdensome for smaller operators. The level of the insolvency protection is calculated by the Icelandic Tourist Board based on individual turnover figures and companies with less turnover thereby pay less than companies with a higher turnover.

Finally, the Icelandic Government has argued that the objectives pursued by the authorisation scheme could not be attained through less restrictive measures, in particular because an a posteriori inspection would take place too late to be genuinely effective.

In this context, the Government has emphasised that tourism operations in Iceland poses greater potential risk to participants and the environment than in other areas. The previously attempted less restrictive measure of a non-binding recommendation on safety

[16] The report by the Icelandic Tourist Board from 2017, *"Tourism in Iceland in Figures"* is available online at https://www.ferdamalastofa.is/static/files/ferdamalastofa/Frettamyndir/2017/juli/tourism-in-iceland-2017-9.pdf. To document the health and safety risks in the tourism sector, the Icelandic Government has also made reference to a 2013 report by Vakinn on "Safety measures in the tourism industry" available online at https://www.vakinn.is/static/files/pdf/hjalpargogn-fyrir-oryggisaetlun/oryggisaaetlanir_3utgafa_29_11_2013.pdf and to page 30 of the 2017 report by the Environmental Agency (cited in footnote 14).

[17] The guidelines of the Icelandic Tourist Board on risk and safety measures for tour operators are available online at https://www.ferdamalastofa.is/static/files/ferdamalastofa/leyfi_log/leidb_reglur_m_fylgiskjolum.pdf.

plans was not sufficiently effective and showed the need for a legally binding requirement. As for liability insurance and insolvency protection, an a posteriori inspection is not feasible for ensuring that the requirement is fulfilled and it could not guarantee adequate coverage.

By contrast, the requirement of prior authorisation guarantees that sufficient safety plans are in place for every trip offered and that all travel agencies and tour operators hold the necessary insurance coverage and insolvency protection. The Icelandic Government has also emphasised that a prior authorisation scheme makes the supervisory work more accurate and targeted, ensuring that all travel agencies and day tour operators are included in the Tourist Board's surveillance work from the time they start their operation in Iceland.

Having assessed the information provided by the Icelandic Government, the Authority finds that it has established a specific need in the tourism sector to introduce an authorisation scheme to protect the environment, public safety, public health, and consumers. The many reports and other documentation show that tourism in Iceland poses great risks both to the environment and to tourists travelling around the country. Reported accidents and incidents show the need for safety measures and adequate insurance, and for tour operators being mature, stable and responsible, both in their operations and financially.

As required by the EFTA Court in its case law, the Icelandic Government has consequently provided reasonable and appropriate evidence to show that the authorisation scheme is justified and proportionate.

Most importantly, the Authority concurs with the Icelandic Government that less restrictive measures, in particular an a posteriori inspection, would not adequately secure the overriding reasons pursued by the Government in the tourism sector.

This finding is evident when it comes to the requirements of adequate insurance and insolvency protection. The overriding reasons pursued by the Icelandic Government could potentially be attained by a general requirement for travel agencies and tour operators to subscribe to such cover. However, there would always be an inherent risk that a travel agency or tour operator would not have sufficient coverage to compensate for physical and economic damage to which their customers are exposed. Effective protection from harm cannot be ensured without a prior check that adequate cover is in place where required.

The same goes for the requirement for tour operators of having in place adequate safety plans. An a posteriori inspection cannot sufficiently secure that all tour operators perform the necessary risk assessments and put in place the safety measures required for each tour, such as the use of special equipment, educational information to the participants on safety and environmental concerns, and use of employees with specific knowledge and competence to lead the tour.

Under the previous scheme, safety plans were not mandatory and although many tour operators followed the recommendation to put in place a safety plan, it was not sufficiently efficient to secure the safety of travellers. This was a weakness in the previous system and it was not entirely obvious to the Authority that the prior authorisation scheme effectively ensured protection of the environment and public health and safety. However, the Icelandic Government identified the concern and a need for mandatory safety plans and revised the scheme in order to ensure effective protection.

In the Authority's view, the other requirements under the scheme in the new Tourism Act (maturity in age, financial competency, and clean criminal record) all contribute to the aim of ensuring protection of the overriding reasons sought by the Icelandic Government.

Mature service providers are likely to act more responsibly and being of legal age ensures that they are accountable under the law for any wrong-doing. Financial stability and a lack of a criminal record are closely linked to the requirements of insurance and insolvency protection, and protect tourists from unserious actors and the risk of economic damage.

The Authority cannot see how an a posteriori check of compliance with these requirements would contribute more effectively to the attainment of the objectives pursued. Furthermore, the requirements are not particularly burdensome but rather encompass characteristics fulfilled by any serious actor wishing to operate a travel agency or as a tour operator.

In light of the above, the Authority finds that the objectives pursued by the Icelandic Government cannot be attained by less restrictive means and that the authorisation scheme is therefore proportionate.

This view is not affected by the complainant's argument that other EEA States have less stringent or no authorisation schemes in the tourism sector. The fact that one EEA State imposes less strict rules than another EEA State does not mean that the rules of the latter are disproportionate.[18]

On this basis, the Authority finds that the authorisation scheme under the new Tourism Act fulfils the proportionality requirement in Article 9(1)(c) of the Services Directive.

2.2 Other provisions of the Services Directive of relevance to the complaint

Articles 10 to 13 of the Services Directive set out further requirements that an authorisation scheme would have to fulfil in order to comply with EEA law. In light of the complaint, the Authority has made a general assessment of the requirements and specifically assessed those elements that are of relevance to the complainant's argument that the authorisation scheme is overly burdensome, wholly unjustified and discriminatory.

Article 10 concerns the conditions for granting authorisations. Article 10(1) states that authorisation schemes must in general be based on criteria that preclude competent authorities from exercising their power in an arbitrary manner. Article 10(2) then specifies that the criteria must be non-discriminatory, justified, proportionate, clear and unambiguous, objective, made public in advance, and they must be transparent and accessible.

The authorisation scheme under the new Tourism Act appears to fulfil all the requirements mentioned. The assessment made under point 2.1 of non-discrimination, justification, and proportionality include the authorisation criteria. Having looked at the wording of each criterion, they are also clear and unambiguous and appear objective. In addition, the Icelandic Tourist Board offers clear guidance for tour operators and travel agencies on its website, in both Icelandic and English. The complete new Tourism Act, including all the criteria, is made publicly available on the homepage of the Icelandic Parliament and the Icelandic Tourist Board also offers an English translation on its website.

Furthermore, the Icelandic Tourist Board has a list on its website of the relevant legislation for tour operators and travel agencies that intend to apply for an operating license (available in both Icelandic and English). The Tourist Board also details the

[18] Judgment by the EFTA Court in Case E-16/10 [2011] EFTA Ct. Rep. 330, paragraph 80, and judgments by the CJEU in Case C-262/02 *Commission* v *the French Republic*, EU:C:2004:431, paragraph 37 and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51.

application procedure through separate guides and overviews of applications for travel agencies and tour operators, respectively. The application form is available online and the Tourist Board also lists the necessary enclosed documents. Should any of the applicants fail to provide all necessary documentation, the Tourist Board may require further documents where necessary, in accordance with the third paragraph of Article 8 of the new Tourism Act.

In light of the above, the Authority finds that the authorisation scheme appear to fulfil the relevant criteria in Article 10 of the Services Directive. In particular, it is non-discriminatory and also appears to be an effective measure to preclude the Tourist Board from exercising its power in an arbitrary manner, thereby excluding any potential discrimination. Furthermore, the content of the criteria and the guidance provided by the Tourist Board make the process of applying for and obtaining an authorisation easily available and thoroughly explained, ensuring that it is not overly burdensome for the applicants.

Article 11 of the Services Directive further requires that an authorisation granted shall not be for a limited period, except in given circumstances. That provision serves the aim of achieving administrative simplification, as emphasised in Article 5 and recital 43 of the Preamble to the Directive.

The authorisation scheme under the new Tourism Act fulfils this criterion. The second sentence in the first paragraph of Article 7 states that any authorisation granted is valid for an indefinite period. Continuous renewals are therefore not needed and the administrative burden on applicants and licence holders is restricted to a minimum in that regard.

Article 13 of the Services Directive concerns the authorisation procedures and requires that they are inter alia clear, easily accessible, made public in advance and such as to provide the applicants with a guarantee that their application is handled in an objective and impartial manner. They shall not be dissuasive or unduly complicate or delay the provision of service.

As described under the assessment of Article 9 of the Services Directive, the requirements and the procedures before the Icelandic Tourist Board are easily accessible and made public in advance online, both in Icelandic and English. They appear to be clear and easy to follow and the specific guidance on the procedures for travel agencies and tour operators, respectively, should remove any uncertainty the applicants may have. The accessibility and overall transparency provides sufficient guarantee that all applications are handled equally.

Furthermore, for the same reasons the procedure does not appear to be dissuasive or to unduly complicate or delay the provision of services. As regards the latter point, the first paragraph of Article 8 of the new Tourism Act states that applications should be submitted to the Icelandic Tourist Board two months prior to the intended start date of the operation. There is nothing in the complaint or in the information provided to the Authority indicating that the Tourist Board does not issue authorisations within the intended start date, given that the conditions for granting an authorisation are fulfilled.

For the sake of completeness, the Authority adds that the authorisation scheme does not appear to raise any issues under Article 23 of the Services Directive concerning liability insurance. Under that provision, the Icelandic Government is allowed to ensure that providers whose services present a direct and particular risk to the health or safety or the financial security of the recipient, subscribe to appropriate professional liability insurance.

In light of the above, the Authority concludes that the authorisation scheme under the new Tourism Act is not overly burdensome, wholly unjustified or discriminatory and it has

found no indication of a breach of any relevant obligation laid down by the Services Directive.

2.3 Concluding remarks

Having assessed the authorisation scheme in the new Tourism Act, the Authority concludes that the scheme is in compliance with Articles 9 of the Services Directive. Furthermore, the authorisation scheme is not overly burdensome, unjustified or discriminatory and it does not appear to raise any issues under other relevant provisions of the Services Directive, in particular Articles 10 to 13.

By letter dated 9 May 2018, the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment or present any new information by 11 June 2018.

The complainant did not reply to the letter within the deadline, but sent a reply on 30 September 2018 (Doc No 932018). In that reply, no new observations were submitted that would alter the conclusion of the case.

As described above, the Authority adjusted its assessment following the entry into force of the new Tourism Act. However, this revised assessment also resulted in the conclusion that the complainant's arguments could not be upheld.

There are, therefore, no grounds for pursuing this case further. The Authority may, however, revert to the matter should any new relevant factual information relating to the case come to its attention or should any relevant developments occur in EEA and EU law.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Iceland to comply with Directive 2006/123/EC is hereby closed.

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.