

Case No: 85304  
Document No: 1193181  
Decision No: 291/21/COL

## **REASONED OPINION**

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's breach of Articles 3, 11 and 36 EEA by its involvement in a promotional campaign encouraging consumers to purchase Icelandic products and services**

## 1 Introduction

By letter dated 22 June 2020,<sup>1</sup> the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case regarding the campaign “*Íslenskt, gjörið svo vel*”<sup>2</sup> and its compliance with Article 11 of the Agreement on the European Economic Area (“EEA Agreement” or “EEA”).

Having assessed the case, the Authority has come to the conclusion that by its involvement in a promotional campaign encouraging consumers to purchase Icelandic products and services, Iceland has failed to fulfil its obligation arising from Articles 3, 11 and 36 of the EEA Agreement.

## 2 Correspondence

By letter dated 22 June 2020,<sup>3</sup> the Authority asked the Icelandic Government for certain information regarding the campaign “*Íslenskt, gjörið svo vel*” and its compliance with Article 11 EEA.

By letter dated 12 August 2020,<sup>4</sup> the Icelandic Government replied to the request for information. In its letter, the Icelandic Government stated that the campaign was not named “*Íslenskt, gjörið svo vel*”, as set out in the Authority’s letter, but derived its name from the title of an Agreement of 24 April 2020 “*On joint campaign for the promotion of increased value creation and job creation*”<sup>5</sup> (“the Agreement” or “the Agreement of 24 April 2020”), which was enclosed with the letter.<sup>6</sup> The Agreement was signed by the Minister of Fisheries and Agriculture and the Minister of Tourism, Industry and Innovation, on behalf of the Icelandic Government, and by the representatives of eight federations from the private sector.<sup>7</sup>

In addition, in the same letter the Authority was informed that none of the private federations involved in the campaign received any financial contributions from the Icelandic State. However, it was noted that some of the Icelandic banks and power companies, parties to the respective federations, were State owned. The Icelandic Government did not have any influence on how the federations were governed and they were not entrusted by the State with any administrative functions.

As regards the Authority’s request for information on why the procurement of promotional services for the campaign was considered to fall outside the scope of Directive 2014/24/EU<sup>8</sup> (“Directive 2014/24”), the Icelandic Government replied that the

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<sup>1</sup> Doc No 1138602.

<sup>2</sup> The Icelandic term “*gjörið svo vel*” does not have a direct translation into English and its translation depends much on the context of the phrase in general. In the context of the campaign, the unofficial translation by the Authority of the slogan is “Icelandic, yes please”.

<sup>3</sup> Doc No 1138602.

<sup>4</sup> Doc No 1147934.

<sup>5</sup> Unofficial translation by the Authority. The title in Icelandic reads: “*Samning[ur] um sameiginlegt kynningarátak um að verja störf og auka verðmætasköpun*”. The Agreement was signed by the Minister of Fisheries and Agriculture and the Minister of Tourism, Industry and Innovation, on behalf of the Icelandic Government, and by the representatives of eight federations from the private sector.

<sup>6</sup> Doc No 1147932.

<sup>7</sup> Doc No 1147934 According to the Agreement those federations include: SA Confederation of Icelandic Enterprise (*Samtök atvinnulífsins*), the Federation of Icelandic Industries (*Samtök iðnaðarins*), the Federation of Trade and Services (*Samtök verslunar og þjónustu*), the Travel Industry Association (*Samtök ferðaþjónustunnar*), Fisheries Iceland (*Samtök fyrirtækja í sjávarútvegi*), the Financial Services Association (*Samtök fjármálafyrirtækja*), the Federation of Energy and Utility Companies in Iceland (*Samorka*) and the Farmer’s Association (*Bændsamtök Íslands*); Doc No 1147934

<sup>8</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65), act referred to at point 2 of Annex XVI to the EEA Agreement.

procurement fell within the scope of the “light regime” in Chapter VIII of the Icelandic Public Procurement Act No 120/2016 (implementing Article 74 of Directive 2014/24). According to Article 4 of the Icelandic Regulation 260/2020 it was mandatory to tender out services like the one in the case at hand when the contract amount reached ISK 97.7 million. The budget for this contract was ISK 90 million.

The Icelandic Government noted that while some of the services included in the contract might not fall within the “light regime”, Article 5 of Act 120/2016 (implementing Article 3(2) of Directive 2014/24) provided that under such circumstances the main subject should be determined in accordance with the highest of the estimated values of the respective services or supplies.

As regards the campaign’s compliance with Article 11 of the EEA Agreement, the Icelandic Government stated in its letter that the case law of the Court of Justice of the European Union (“CJEU”) had been taken into account when the Agreement was signed. The campaign in question was in the Icelandic Government’s view not a “Buy Icelandic” campaign. It was a general economic measure due to COVID-19 with the aim of increasing economic activity within Iceland as such.

Further, the Icelandic Government maintained that if the campaign was found to constitute a restriction under Article 11 of the EEA Agreement, the measure was in any event justified under Article 13 of the EEA Agreement. The campaign did not constitute a means of arbitrary discrimination or a disguised restriction on trade between the EEA States. The background of the Agreement was the unprecedented situation in the world due to the COVID-19 pandemic and the impact of the pandemic in Iceland with increased unemployment numbers, decline in the number of tourists and other economic consequences. The purpose of the Agreement was to fight against the economic recession caused by the pandemic and limit its economic impact in Iceland as a part of the general measures put in place by the Icelandic Government.

On 9 December 2020, the Authority issued a letter of formal notice<sup>9</sup> to Iceland where it concluded that, by its involvement in a promotional campaign encouraging consumers to purchase Icelandic products and services, Iceland had failed to fulfil its obligation arising from Articles 3, 11 and 36 of the EEA Agreement. The Authority noted that while the measure also concerned the rules on public procurement, that aspect of the case would not be assessed, as the Authority had not received sufficient information regarding the procurement procedure.

By letter dated 23 March 2021,<sup>10</sup> Iceland replied to the letter of formal notice. In its reply the Icelandic Government maintained that its involvement in the campaign did not breach its obligations under Articles 3, 11 and 36 of the EEA Agreement. In any case, under the circumstances that the Icelandic Government’s involvement in the campaign would be regarded as a restriction under either Article 11 or 36 EEA, such restrictions would be justified under Articles 13 EEA and/or Article 33, cf. Article 39 EEA.

Lastly, the Icelandic Government stated that in terms of the public procurement aspect of the case, which was not assessed in the Authority’s letter of formal notice, Directive 2014/24 had been correctly applied in the procurement of the campaign.

The case was discussed at the Package meeting in Iceland in June 2021. In its follow-up letter to the Package meeting dated 1 July 2021,<sup>11</sup> the Authority invited the Icelandic Government to provide it with further information as regards its reference to the justifications under Article 13 and 33 EEA and how they are applicable under the circumstances of this case. The Icelandic Government did not reply to that letter.

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<sup>9</sup> Doc No 1162045.

<sup>10</sup> Doc No 1190894.

<sup>11</sup> Doc No 1204495.

As noted in the Authority's letter of formal notice, the Authority was unable to assess the compliance of the procurement procedure with Directive 2014/24 due to missing information. The Icelandic Government has provided further information in this regard in its reply to the letter of formal notice. Nonetheless, since the public procurement aspect was not addressed in the letter of formal notice, the Authority will not assess compliance with Directive 2014/24 at this stage, but may revert to the issue at a later date.

### 3 Relevant national framework

Article 1 of the Agreement "On joint campaign for the promotion of increased value creation and job creation" provides as follows (footnote omitted):

*The background of the Agreement is the unprecedented situation in the world due to the COVID-19 pandemic and the impact of the pandemic in Iceland.*

*The objective of the Agreement is to form and implement a joint campaign that aims to ensure economic activities (production and services activities) within the country, protect jobs, enhance fiscal stability and increase value creation. Emphasis will be placed on encouraging people living in Iceland, the general public, and companies to do business with domestic companies in various fields, when choosing production, products and services.*

*The aforementioned will counteract the economic contraction due to the COVID-19 pandemic with the aim of minimising its impact on the economy, both in the short and long term.*

*The Agreement is part of the Government's economic measures due to the pandemic.<sup>12</sup>*

Article 2 of the Agreement provides the following:

*The project involves that messages and encouragement is conveyed to the general public and companies in accordance with the aim of the campaign, cf. Article 1. That entails the publication of promotional material and advertisements that will be communicated by various channels. For that purpose social media, online media, newspapers, radio and television and possibly other media will be used. Part of the message concerns the importance of chain reaction and the cycle that is created, e.g. by the selection of domestic production, products, services and solutions. The message will be presented in a lively, accessible and clear manner.<sup>13</sup>*

<sup>12</sup> Unofficial translation by the Authority. The Icelandic text provides as follows (footnote omitted):

*"Bakgrunnur samningsins er það fordæmalausa ástand sem uppi er í heiminum vegna útbreiðslu COVID-19 og þau áhrif sem það hefur haft hér á landi.*

*Markmið samningsins er að móta og hrinda í framkvæmd sameiginlegu kynningarátaki sem miðar að því að halda atvinnustarfsemi (framleiðslu- og þjónustustarfsemi) gangandi í landinu, verja störf almennings, stuðla að efnahagslegum stöðugleika og auka verðmætasköpun. Áhersla verður lögð á að hvetja landsmenn, almenning og fyrirtæki til viðskipta við innlend fyrirtæki á fjölbreyttum sviðum, við val á framleiðslu, vörum og þjónustu.*

*Með framangreindu verði unnið gegn efnahagslegum samdrætti vegna heimsfaraldurs COVID-19 með það að markmiði að lágmarka áhrif hans á atvinnulíf, bæði til skemmri og lengri tíma.*

*Samningurinn er hluti af efnahagsáðgerðum stjórnvalda vegna heimsfaraldursins."*

<sup>13</sup> Unofficial translation by the Authority. The Icelandic text provides as follows:

*"Verkefnið felur í sér að koma á framfæri skilaboðum og hvatningu til almennings og fyrirtækja í samræmi við markmið verkefnisins, sbr. 1. gr. Það felst í birtingu kynningarefnis og auglýsinga sem miðlað verður eftir ólíkum boðleiðum. Í því skyni verða notaðir samfélagsmiðlar, vefmiðlar, dagblöð, útvarp og sjónvarp og hugsanlega aðrir miðlar. Hluti af skilaboðunum lítur að mikilvægi keðjuverkunar og þeirri hringrás sem verður til m.a. við val á innlendri framleiðslu, vörum, þjónustu og lausnum. Skilaboðin verða sett fram á lifandi, aðgengilegan og skýran hátt."*

Article 3(1) of the Agreement prescribes that the eight federations party to the Agreement will provide the material that already existed under the slogan “Icelandic, yes please” (“Íslenskt, gjörið svo vel”) which was utilised in other campaigns run independently from Icelandic government by at least some of the federations, as a basis for the joint promotional campaign. In addition, the private sector will finance the design, production and publication of the promotional material until 1 June 2020; it was also foreseen that the publication of the material would start in the beginning of May 2020.

Article 3(2) of the Agreement provides that the contribution of the Icelandic State consists of the financing of design, production and publication of promotional material within the Icelandic media as off 1 June 2020.

Article 4 of the Agreement provides as follows:

*The promotional campaign is divided into phases as follows.*

*In the first phase, use will be made of the material that already exists under the slogan "Íslenskt, gjörið svo vel" and it will be adapted and published with the aim that it can be used to achieve the goals of the promotional campaign.*

*In the second phase, Ríkiskaup will initiate a procurement process for the design, production and publication of promotional material as off 1 June 2020.*

*In the third phase, agreements are entered into for the purchase of design, production and publishing services following the procurement process.*

*In the fourth phase, the promotional material is published and made accessible, in accordance with the publication plans prepared by the project board and approved by the steering group.*

*In the fifth phase and at the end of the project, the results are evaluated, see further Article 8.<sup>14</sup>*

Article 5 of the Agreement deals with the financing of the promotional campaign. According to the provision, the Icelandic State provides the project with ISK 100 million. The eight federations provide the project with ISK 40 million in addition to the cost of financing of the promotional campaign until 1 June 2020. The cost of the latter was estimated at ISK 22.5 million.

The administration of the campaign is twofold. According to Article 6(1) of the Agreement, management of the campaign is in the hands of a steering group composed of four representatives. Two of the representatives are appointed by the Icelandic Government,<sup>15</sup> one of which is the chair of the group, and two are appointed jointly by the other parties to the Agreement<sup>16</sup>. Working for the steering group is a project management group (verkefnisstjórn), the role of which is to further carry out the campaign. The project management group is composed of representatives of the parties to the agreement together with others involved in the project.

<sup>14</sup> Unofficial translation by the Authority. The Icelandic text provides as follows:

“Kynningarátakinu er áfangaskipt sem hér segir.

Í fyrsta áfanga verður unnið með það efni sem þegar er til undir slagorðinu „Íslenskt, gjörið svo vel“ og það aðlagð og birt með það fyrir augum að það nýtist til að ná markmiðum kynningarátaksins.

Í öðrum áfanga mun Ríkiskaup standa að innkaupaferli varðandi hönnun, framleiðslu og birtingu á kynningarefni frá og með 1. júní 2020.

Í þriðja áfanga er gengið til samninga um kaup á hönnun, framleiðslu og birtingarþjónustu í kjölfar innkaupaferlis.

Í fjórða áfanga er kynningarefnið birt og gert aðgengilegt, í samræmi við birtingaráætlanir sem verkefnisstjórn vinnur og stýrihópur samþykkir.

Í fimmta áfanga er við lok verkefnis lagt mat á árangur þess, sjá nánar 8. gr.“

<sup>15</sup> By the Minister of Tourism, Industry and Innovation and by the Minister of Fisheries and Agriculture.

<sup>16</sup> It is noted that in the Icelandic Government’s letter of 12 August 2020 it is stated that these representatives are three, but according to the Agreement on 24 April 2020 they said to be two.

Finally, Article 9 of the Agreement sets out that the duration of the campaign is one year from the signature of the Agreement.

On 9 September 2020, a promotional campaign under the slogan “Íslenskt, láttu það ganga”<sup>17</sup> was launched in Iceland. According to a news item from the Ministry of Industries and Innovation on the webpage of the Icelandic Government, the objective of the campaign is to encourage people living in Iceland, the general public, and companies to do business with domestic counterparts when choosing production, products and services.<sup>18</sup> Quoting the Icelandic Minister of Fisheries and Agriculture and the Minister of Tourism, Industries and Innovation, it is stated that “with this campaign we recall the excellence of Icelandic production and services and join hands with the private sector in order to counteract the effects of COVID-19”.<sup>19</sup> Finally, it is noted that Icelanders are encouraged to choose Icelandic commerce, production, innovation and experiences. By choosing domestic production and services a chain reaction is created that conduces towards new jobs, value creation and economic stability.

Different marketing materials are available for companies on the campaign’s webpage <https://www.gjoridsvovel.is/>. On the webpage, it is further stated that when you choose Icelandic services, that benefits you in return. You support Icelandic industry, production and ingenuity and by doing so value and jobs are created, for the benefit of society at large.

In addition, the webpage maintains that we all belong to the cycle that drives the economy. By choosing domestic services, buying domestic products and doing business with domestic companies there is a chain reaction that is created that maintains economic activity, protects jobs and creates new ones. Further, value creation is increased and economic stability promoted. Finally, the general request is made to all Icelanders to choose Icelandic industry, Icelandic commerce, Icelandic production, and Icelandic ingenuity.<sup>20</sup>

The campaign has been prominent in the Icelandic media since its launch. In addition, it has been covered by the Icelandic newspapers<sup>21</sup> and a reference is made to it on the relevant federations’ webpages.<sup>22</sup> Both in the promotional material as well as in other coverage of the campaign the Icelandic Ministry of Industries and Innovation is listed as one of the parties behind it.

#### 4 Relevant EEA law

Article 3 of the EEA Agreement reads:

*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They*

<sup>17</sup> Unofficial translation by Authority of the slogan is “Icelandic, make it work”.

<sup>18</sup> See <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2020/09/09/IsIenskt-lattu-thad-ganga/> (last accessed on 9 November 2021).

<sup>19</sup> Unofficial translation by the Authority. The Icelandic text provides as follows:

“Með þessu átaki minnum við á ágæti íslenskrar framleiðslu og þjónustu og tökum höndum saman við atvinnulífið við að sporna gegn áhrifum COVID-19”.

<sup>20</sup> In Icelandic the request is set forth with these words: “Við biðjum Íslendinga, alla sem einn, að velja íslenskan iðnað, íslenska verslun, íslenska framleiðslu og íslenskt hugvit.”

<sup>21</sup> See for example <https://www.visir.is/g/20202010400d> (last accessed on 14 November 2021), <https://www.mbl.is/frettir/innlent/2020/09/09/stjornvold-fara-i-kynningaratak/> (last accessed on 14 November 2021) and <https://www.dv.is/fokus/2020/09/11/kynningaratak-stjornvalda-og-islensks-atvinnulifs-til-ad-verja-storf-og-auka-verdmaetaskopun/> (last accessed on 14 November 2021).

<sup>22</sup> See for example <https://samorka.is/islenskt-lattu-thad-ganga/> (last accessed on 13 December 2021), <https://www.si.is/frettasafn/islenskt-lattu-thad-ganga-1> (last accessed on 13 December 2021), <https://sff.is/islenskt-lattu-thad-ganga/> (last accessed on 13 December 2021) and <https://www.bondi.is/frettir-og-tilkynningar/islenskt---lattu-thad-ganga/2803> (last accessed on 13 December 2021).

*shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.*

Article 4 of the EEA Agreement reads:

*Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

Article 8 of the EEA Agreement reads:

- 1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
- 2. Unless otherwise specified, Articles 10 to 15, 19,20 and 25 to 27 shall apply only to products originating in the Contracting Parties.*
- 3. Unless otherwise specified, the provisions of this Agreement shall apply only to:  
(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;  
(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

Article 11 of the EEA Agreement reads:

*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.*

Article 13 of the EEA Agreement reads:

*The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.*

Article 33 of the EEA Agreement reads:

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

Article 36 of the EEA Agreement reads:

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

Article 39 of the EEA Agreement reads:

*The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.*

## 5 The Authority's Assessment

### 5.1 Introduction

Having assessed the information submitted by the Icelandic Government as well as the Agreement and taking into consideration the features of the promotional campaign, it is the Authority's opinion that the measure raises issues both under the provisions on the free movement of goods, in particular Article 11 EEA, and under Article 36 EEA on the freedom to provide services. These two assessments will follow below in the order mentioned.

As a general note, it is the Authority's opinion that the measure is attributable to the Icelandic Government through its direct contribution of funding and its involvement in concluding relevant agreements in relation thereto.<sup>23</sup> Icelandic Government was not only a party to the Agreement on the campaign itself, but also procurement procedure was carried out on behalf of the Icelandic Government where the Government concluded a contract on certain campaign materials. The Government's financial contribution of ISK 100 million to cover purchase of design, production and publication of campaign material make up more than half of the total funding of the campaign, with the other parties to the Agreement contributing in total an amount of ISK 62.5 million.<sup>24</sup> Even more so, Article 1 of the Agreement explicitly states that it forms part of the Government's economic measures.

Furthermore, it is the Authority's view that through signing by the Minister of Fisheries and Agriculture and the Minister of Tourism, Industry and Innovation the agreement of 24 April 2020, the Icelandic Government endorsed the message of the campaign "*Íslenskt, gjörið svo vel*" which is a campaign that prior to that time was run independently from the Icelandic Government. That view, is based on the fact that Article 3(1) of the Agreement clearly states that the material of that campaign is provided by the eight federations parties to the Agreement to serve as a basis for the joint promotional campaign.

In addition, on the front page of the webpage of the campaign the slogan for "*Íslenskt, gjörið svo vel*" is presented and below that slogan the Icelandic Ministry of Industries and Innovation is mentioned as one of the benefactors.



The Authority is of the opinion that this infers that the Icelandic Government has been publicly recognised as a benefactor of the campaign "*Íslenskt, gjörið svo vel*".

<sup>23</sup> See for comparison as regards the setup Case 249/81 *Commission v Ireland* ("*Buy Irish*"), EU:C:1982:402.

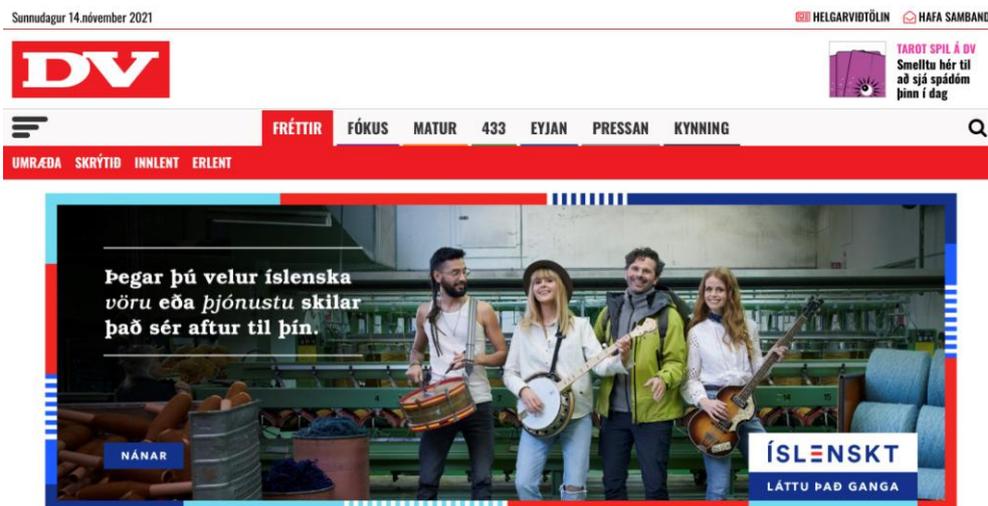
<sup>24</sup> In that regard, the Authority notes, as stated in the Icelandic Government's letter of 12 August 2020, some of the Icelandic banks and energy companies that are parties to the relevant private federations are owned by the Icelandic State. The Authority does not find it necessary – at this point – to assess whether such a participation in a private federation should lead to the conclusion that the contributions made by those federations should be considered as being directly attributable to the Icelandic State.

## 5.2 The duration of the Agreement of 24 April 2020

According to Article 9 of the Agreement, the duration of the campaign was set to be one year from its signature. Accordingly, the campaign should have ended on 24 April 2021. However, the webpage of the campaign is still operational and contains all of the campaign material, including material that economic operators can use for the promotion of their products and services. To the Authority's knowledge, there are examples of Icelandic companies using the material to promote Icelandic products after the end date indicated in the Agreement. An example is the following advertisement published in *Fréttablaðið* on 2 October 2021.<sup>25</sup>



In addition, the following advertisements that pertain to the campaign were published on the website of *DV* (dv.is) on 14 and 15 November 2021:<sup>26</sup>



<sup>25</sup> Advertisements with the logo from the same company were also published in *Fréttablaðið* in August and September 2021.

<sup>26</sup> The latter advertisement was also published on the same website on 19 August 2021, 21 October 2021, 10 November and 13 November 2021.



From the context of advertisements, that provide that when you choose Icelandic product or services that benefits you in return, it must be deducted that they form a part of the campaign itself and thus stem from its organisers, including the Icelandic Government. The same applies to the following advertisement that was published in *Fréttablaðið* on 30 October 2021 and *Morgunblaðið* on 19 November 2021.<sup>27</sup>



Similarly, in August, September and November 2021 a shortened version of the main video advertisement was shown several times on three TV Channels in Iceland, namely *Stöð 2*,<sup>28</sup> *Sjónvarp Símans*<sup>29</sup> and *RÚV*.<sup>30</sup> When the advertisement has been shown on *Stöð 2* at the hour of the news reading it has also been broadcasted on the radio station *Bylgjan*.

Further, on a Facebook page under the slogan “*Íslenskt, gjörið svo vel*”<sup>31</sup>, videos promoting Icelandic products have been published after the end date to the campaign indicated in the Agreement. Those videos all contain one of the logos for the campaign

<sup>27</sup> The same advertisement was also published on the website of DV on 11 November 2021.

<sup>28</sup> As an example, the advertisement was aired on 5 September 2021.

<sup>29</sup> As an example, the advertisement was aired on 27 September 2021.

<sup>30</sup> As an example, the advertisement was aired on 8 November 2021.

<sup>31</sup> <https://www.facebook.com/islensktgjoridsvovel/>

“Íslenskt, láttu það ganga” at the end of the video.<sup>32</sup> In that regard, it is noted that the page also contains other campaign material. In addition, in the information about the Facebook page it is stated that “Íslenskt, gjörið svo vel” is a joint publicity campaign of the Icelandic Government and the business community that aims to protect jobs and increase value creation in Iceland.<sup>33</sup>

In that regard, it should also be noted that for example the videos referred to above have been aired as advertisements on the Icelandic TV channel *Hringbraut* in full length in September 2021.

From the above, it appears that the promotional activities have in fact not ceased even though the duration of the campaign set out in the Agreement has come to an end. Therefore, it must be concluded that the campaign is still ongoing.

### 5.3 The free movement of goods under Article 11 EEA

#### 5.3.1 Product scope of the EEA Agreement

At the outset, the Authority notes that some of the products advertised under the auspices of this campaign fall outside the product scope of the EEA Agreement (see Article 8(3) of the EEA Agreement). The Authority recognises that there would be no infringement of Article 11 EEA if the campaign were to apply exclusively to products outside the scope of the EEA Agreement.

However, the Authority considers it clear, that the campaign concerns products falling within the general products scope of the EEA Agreement, as the campaign applies to all Icelandic products.

Accordingly, it is emphasised that insofar as the campaign covers products falling within the scope of the EEA Agreement, assessment as regards whether Article 11 EEA is infringed is in order.

#### 5.3.2 The campaign constitutes a measure having equivalent effect to quantitative restrictions

The Icelandic Government maintains that the campaign does not constitute a measure having equivalent effect to quantitative restrictions and as such does not fall under the scope of Article 11 EEA.

According to the Icelandic Government, there is a threshold for triggering Article 11 EEA, which is not met by the Government's involvement in the campaign.

In the Icelandic Government's view, the campaign does not entail a measure that has limited or hindered EEA trade during an indefinite time period nor could it have. The Icelandic Government sets out three reasons for this. First, the Government's participation in the campaign is limited in scope, financial support and time. Second, the campaign was promotional in nature and included no actual or possible restrictions on certain products. Third, the measure was intended to promote consumption and uphold the purchase *inter alia* of imported products.<sup>34</sup>

At the outset, the Authority notes that it is established case law of the EFTA Court and the CJEU that all trading rules enacted by Member States which are capable of hindering,

<sup>32</sup> The last video was published on the Facebook page of the campaign on 21 July 2021.

<sup>33</sup> The text in Icelandic states the following: “Íslenskt gjörið svo vel er sameiginlegt kynningarátak stjórnvalda og atvinnulífs sem hefur það að markmiði að verja störf og auka verðmætasköpun á Íslandi”

<sup>34</sup> See Icelandic Government's reply of 23 March 2021 to LFN, Doc No 1190894.

directly or indirectly, actually or potentially, intra-Community trade must be considered measures having an effect equivalent to quantitative restrictions.<sup>35</sup>

As noted in *Restamark*, it is not necessary to establish that the measure in question actually restricts imports. To the contrary, it is sufficient that a measure in question potentially has an effect on trade for it to fall under Article 11 EEA.<sup>36</sup>

Similarly, in *Astra*, the EFTA Court concluded that there is no *de minimis* rule under Article 11 EEA.<sup>37</sup> That means that a measure may be considered to be contrary to Article 11 EEA “even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.”<sup>38</sup>

The Authority recalls that according to the established case law of the CJEU, measures which encourage the purchase of domestic products are considered measures having equivalent effect to quantitative restrictions and come, therefore, within the ambit of Article 11 of the EEA Agreement, provided that the measures are attributable to the State.<sup>39</sup>

It follows, that it needs to be asserted whether the activities and content of the campaign set out in the Agreement amount to practice infringing Article 11 of the EEA Agreement.

The CJEU in *Buy Irish* ruled that a publicity campaign promoting domestic products could come within the ambit of Article 30 EEC (now Article 34 TFEU), if the campaign was supported by the authorities, a condition that is clearly fulfilled in the case of the Icelandic campaign. In *Apple and Pear Development Council*, the CJEU confirmed that such a campaign falls within the ambit of Article 30 EEC also when it is run by bodies set up and financed by the State or by the charges that government allows them to impose.

With regard to the activities pursued by the publicity campaign in its judgment in *Apple and Pear Development Council* the CJEU stressed that there is:

*“[...] a duty not to engage in any advertising intended to discourage the purchase of products of other Member States or to disparage those products in the eyes of the consumers. Nor must it advise consumers to purchase domestic products solely by reason of their national origin.”*<sup>40</sup> (emphasis added).

The CJEU came to the conclusion that Article 28 EC (now Article 36 TFEU) did not prevent publicity that was used to draw attention to the specific qualities of fruit grown in the Member State in question or from organizing campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national productions.<sup>41</sup>

It follows from the case law of the CJEU that the EEA States cannot, directly or through bodies attributable to them, engage in the promotion of domestic products solely by the reason of their national origin.

In its letter of 12 August 2020, the Icelandic Government referred to the campaign as being an economic measure due to COVID-19, with the aim of increasing economic

<sup>35</sup> Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 47. For comparison see e.g. Case 8/74 *Dassonville*, EU:C:1974:82, paragraph 5.

<sup>36</sup> Case E-1/94 *Restamark*, cited above, paragraph 47.

<sup>37</sup> Case E-1/98 *Astra* [1998] EFTA Ct. Rep. 140, paragraph 23.

<sup>38</sup> Joined Cases 177/82 and 178/82 *Van de Haar*, EU:C:1984:144, paragraph 13.

<sup>39</sup> Case 249/81 *Buy Irish*, cited above, paragraph 29; Case 222/82 *Apple and Pear Development Council*, EU:C:1983:370, paragraph 17 and Case C-325/00 *Commission v Germany*, EU:C:2002:633, paragraphs 18 and 21.

<sup>40</sup> Case 222/82 *Apple and Pear Development Council*, cited above, paragraph 18.

<sup>41</sup> Case 222/82 *Apple and Pear Development Council*, cited above, paragraph 19.

activity within Iceland as such. It also made a reference to the fact that if a store in Iceland (irrespective of ownership) imports goods from Belgium and sells in Iceland, that store will be a part of the campaign even though it is not selling an Icelandic product.<sup>42</sup>

In its reply to the Authority's letter of formal notice, the Icelandic Government reiterated that the campaign encourages consumers' general consumption and expenditure, with the intention of upholding the economy during the extraordinary times due to the COVID-19 pandemic. In the Icelandic Government's opinion, it cannot be overlooked that the majority of products sold in Iceland are of foreign origin.<sup>43</sup>

The Authority does not agree with the Icelandic Government's assessment of the nature of the campaign. In the Authority's view neither the campaign itself nor its webpage put any emphasis on the general benefits of consumption.

Indeed, if the intention of the Icelandic Government was to engage in a commercial campaign to encourage consumption in general there would not have been the need to underline the Icelandic origin of the products and services as is done in the present case. This is for example apparent from the slogans of the two advertisement campaigns, "*Íslenskt, láttu það ganga*" and "*Íslenskt, gjörið svo vel*", which explicitly mention and thus emphasise the Icelandic origin of the products and services.

In addition, the Icelandic flag colours play a significant role in the advertisement material under the slogan "*Íslenskt, láttu það ganga*" available for everyone to use on the campaign's website. The same also goes for the campaign "*Íslenskt, gjörið svo vel*" which message is endorsed by the Icelandic Governments as its involvement is set out in the Agreement of 24 April 2020.

Furthermore, the website of the campaign contains a specific section on the history of the product (*saga vörunnar*) where the history of several Icelandic products are introduced with videos. The introduction text provides that with joint efforts domestic production and ingenuity can be safeguarded and that there is plenty to choose from, as the Icelandic product range is both diverse and high-quality.<sup>44</sup>

In the Authority's view, the campaign sends the clear message that if the choice of a consumer is between a domestic and foreign product then they are encouraged to buy the domestic one. That intention is manifestly shown by the advertisement below which was prominent in the Icelandic online media.

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<sup>42</sup> Icelandic Government reply to RQI of 12 August 2021, Doc No 1147934

<sup>43</sup> See Icelandic Government reply of 23 March 2021 to LFN, Doc No 1190894

<sup>44</sup> The Icelandic text provides: "Með samtakamætti getum við staðið vörð um innlenda framleiðslu og hugvit – og það er úr nógu að velja, enda er íslenskt vöruúrval bæði fjölbreytt og vandað." See: <https://www.gjoridsvovel.is/saga-vorunnar> (last accessed on 9 November 2021).



The advertisement states that when you choose an **Icelandic** product or services that benefits you in return. In other words, the consumer benefits in the end from choosing Icelandic products. If a consumer chooses a foreign product it is implied in the advertisement that it must be from an Icelandic service provider for that beneficial effect.<sup>45</sup>

In that regard, it is the Authority's view that the purchase of foreign goods referred to by the Icelandic Government's is merely incidental and directly linked to the fact that the campaign also includes promotion of Icelandic services as referred to in Section 5.4 below. This does not alter the fact that Icelandic consumers are encouraged specifically by the campaign to buy Icelandic products.

In addition, the setup of the campaign in general discourages the purchase of products of other EEA States by emphasizing the Icelandic origin of the supported products. That applies irrespective of the fact that majority of products sold in Iceland are of non-Icelandic origin. Further, no attempt is made to draw attention to particular qualities that might be special to Icelandic products.

Thus, when applying the criteria of the case law referred to above to the facts of the case at hand, the Authority must conclude that the aim of the campaign, as well as the advertising material associated with it, demonstrate that the campaign is only concerned with emphasizing the Icelandic – *i.e. domestic* – origin of the products and to encourage consumers to buy them solely on the basis of their origin.

<sup>45</sup> It is also noted that in a Christmas broadcasting on the Icelandic channel 2 (*Stöð 2*) in December 2020, called "*látum jólin ganga*" a special challenge was enacted on where two teams had to go to a supermarket and shop products for a meal by choosing only Icelandic products. During the broadcast, the teams used the products purchased to prepare a Christmas meal and one was chosen as the better one. It was clearly stated throughout the challenge that foreign products could not be chosen even if the service provider was an Icelandic super market. Due to the nature of the challenge, many of the products it involved fall outside of the scope of the EEA Agreement. However, the clear message was conveyed as regards the origin of the products related to the campaign. In the beginning of the broadcasting it was clearly mentioned that the broadcasting was part of the campaign "*Láttu það ganga*" and the Minister of Tourism, Industry and Innovation was present discussing the campaign and how it has put the spotlight on all the great things that are being done in Iceland. In the news Article covering the broadcast it is stated that it was sponsored by the Icelandic Ministry of Industries and Innovation. The news article can be found at: <https://www.visir.is/g/20202047976d/svona-var-skemmti-thatturinn-latum-jolin-ganga> (last accessed on 9 November 2021).

The statements of the Icelandic Minister of Fisheries and Agriculture and the Minister of Tourism, Industries and Innovation referred to in Section 3 above that the campaign recalls the excellence (*ágætti*) of Icelandic production and services does not change that assessment. The same applies to the statement on the campaign's website that the Icelandic product range is both diverse and high-quality. As far as the information available to the Authority currently stands, no attempt has been made by the campaign, nor in the statements of the ministers referred to in Section 3 above, to further elaborate upon the particular qualities in that regard. To the contrary, the campaign is focused on the economic benefits of choosing Icelandic products simply on the basis of their origin.

Thus, the campaign reflects the Icelandic Government's intention to substitute domestic products for imported products on the Icelandic market.<sup>46</sup>

Further, it is settled case law that it is sufficient that the measure in question may encourage consumers to buy domestic products solely on the basis on its origin, or that it is likely to do so.<sup>47</sup> Those conditions must be considered to be fulfilled in the case at hand. As set out by the case law, it is irrelevant for that assessment whether the encouragement results in increased consumption of domestic products.<sup>48</sup>

In the light of the information currently available, the Authority's conclusion is that the campaign constitutes a measure having equivalent effect to quantitative restrictions and, therefore, infringes Article 11 EEA insofar as products covered by the EEA Agreement are concerned.

### 5.3.3 *Justification under Article 13 EEA*

The Icelandic Government maintains that even if the campaign were to be considered contrary to Article 11 of the EEA Agreement, it is a restriction justifiable under Article 13 EEA in light of the impact of the COVID-19 pandemic in Iceland.

In its reply to the Authority's letter of formal notice, the Icelandic Government provided that both public policy and public security justify the measure due to the COVID-19 pandemic. In addition, the Icelandic Government maintained that the CJEU has acknowledged in its case law that other justifications are available, such as effectiveness of fiscal supervision, the fairness of commercial transactions and the defence of the consumer.<sup>49</sup>

Further in its reply the Icelandic Government stressed that the campaign was not intended to serve as a traditional economic measure to meet common economic concerns, but rather as one of many extraordinary measures taken by the government to respond to the unprecedented pandemic. The foundations of the State were at stake, with huge increases in bankruptcies and unemployment threatening fiscal and societal stability. The situation was therefore of extreme gravity for the Icelandic economy and severely jeopardised stability in Iceland.

Moreover, the Icelandic Government maintained that in the era of an unprecedented crisis, the overriding requirements of general interests "developed both inside and outside the explicit scope or wording of Article 13 EEA", such as securing stability and financial basis of the population, and those interests must be considered reasonable and justified

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<sup>46</sup> See to this end the judgment of the CJEU in *Buy Irish*, cited above, paragraph 23.

<sup>47</sup> Case 249/81 *Buy Irish*, cited above, paragraph 25; Case 222/82 *Apple and Pear Development Council*, EU:C:1983:370, paragraph 18 and Case C-325/00 *Commission v Germany*, EU:C:2002:633, paragraph 23.

<sup>48</sup> Case 249/81 *Buy Irish*, cited above, paragraph 25; Case E-1/98 *Astra*, cited above, paragraph 23 and Joined Cases 177/82 and 178/82 *Van de Haar*, cited above, paragraph 13.

<sup>49</sup> See Icelandic Government reply Of 23 March 2021 to LFN, Doc No 1190894. In that regard the Icelandic Government refers to Case 120/78 *Cassis de Dijon*, EU:C:1979:42, paragraph 8.

by the Authority, in particular when those interests have spill-over effect to the benefit of other EEA States.

At the outset, the Authority notes that measures that encourage the purchase of national products rather than imported products are considered to be distinctly applicable measures as they cannot be considered to apply equally to both national and imported products. Such measures can only be justified by reference to one of the exemptions listed in Article 13 EEA but not by the mandatory requirements developed by the case law of the CJEU.<sup>50</sup>

Therefore, the Icelandic Government's reference to interests such as effectiveness of fiscal supervision, the fairness of commercial transactions and defence of the consumer cannot be relied upon as a justification for the Government's involvement in the campaign.

As regards the exemptions referred to in Article 13 EEA the Authority noted in its letter of formal notice that according to established case law, aims of an economic nature, such as unemployment rates or economic difficulties, are not considered legitimate reasons for the justification of restriction to free movement of goods<sup>51</sup>.

While the Authority acknowledges that circumstances due to the COVID-19 pandemic are unprecedented, the fact remains that Article 13 of the EEA Agreement only sets out grounds for justification for the restriction of free movement of goods that are non-economic in nature.

The unprecedented circumstances due to the COVID-19 pandemic do not change that assessment as regards a purely economic measure, such as the one in the case at hand. In Authority's assessment the Icelandic measure cannot be compared to the measures in question in the case law referred to by the Icelandic Government,<sup>52</sup> as will be further outlined below.

It is established case law that, although EEA States are in principle free to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one EEA State to another and from one era to another, the fact still remains that, in the EEA context and particularly as regards justification for a derogation from a fundamental freedom, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions.<sup>53</sup>

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<sup>50</sup> See Case 120/78 *Cassis de Dijon*, cited above, paragraph 8. In the judgment, the CJEU established that obstacles to trade between EEA States by national rules that did not discriminate against imported products but were different to national rules of the EEA State of origin had to be accepted in so far as they were recognised as being necessary in order to satisfy certain mandatory requirements. See also e.g. Case 788/79 *Gilli*, EU:C:1980:171, paragraph 6 and Case 113/80 *Commission v Ireland*, EU:C:1981:139, paragraphs 10 and 11.

<sup>51</sup> As regards the free movement of goods see, for example, Case 95/81 *Commission v Italy*, EU:C:1982:216, paragraph 27; Case C-324/93 *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith*, EU:C:1995:84, paragraph 36 and Case C-203/96 *Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer ("Evans Medical")*, EU:C:1998:316, paragraph 44. The EFTA Court has endorsed this view as regards the free movement of services, see Section 5.4 below.

<sup>52</sup> In its reply to the Authority's letter of formal notice of 23 March 2021, the Icelandic Government referred as regards the free movement of goods to the judgments in Case 72/83 *Campus Oil*, EU:C:1984:256, paragraph 34; Case C-483/99 *Commission v France*, EU:C:2002:327, paragraph 47; Case C-648/18 *Hidroelectrica*, EU:C:2020:723, paragraph 36; Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*, EU:C:2006:608, paragraph 38; Joined Cases C-388/00 and C-429/00 *Radiosistemi*, EU:C:2002:390, paragraph 44; Case C-120/95 *Decker v Caisse de maladie des employés privés*, EU:C:1998:167, paragraph 39; and Case C-145/09 *Tsakouridis*, EU:C:2010:708, paragraphs 43 and 44.

<sup>53</sup> Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 83. Case E-11/12 *STX Norway Offshore AS m.fl. v Staten v/ Tariffnemnda* [2012] EFTA Ct. Rep. 4, paragraph 99. Case E-12/10 *EFTA Surveillance Authority v The Republic of Iceland* [2011] EFTA Ct. Rep. 117, paragraph 56. Case

It is also established case law that the concept of public policy and public security refer to principles and standards regarded to be of a fundamental concern to the State and the whole of society.<sup>54</sup> Accordingly, such grounds can only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society.<sup>55</sup> The same applies as regards public security grounds.<sup>56</sup>

Furthermore, the CJEU has established that as regards free movement of goods, in particular that the concept of public security, covers both an EEA State's internal security and its external security.<sup>57</sup> In addition, the CJEU has under exceptional circumstances accepted that restrictions to the free movement of goods can be justified with reference to public security. The need to safeguard the institutions of a State, its essential public services and/or the survival of its inhabitants have been accepted as justifications in that regard.<sup>58</sup>

In its judgment in *Campus Oil*<sup>59</sup> the CJEU provided as follows:

*It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect.*

*It is true that, as the Court has held on a number of occasions, most recently in its judgment of 9 June 1982 (Case 95/81 Commission v Italy [1982] ECR 2187), Article 36 refers to matters of a non-economic nature. A Member State cannot be allowed to avoid the effects of measures provided for in the Treaty by pleading the economic difficulties caused by the elimination of barriers to intra-Community trade. However, in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security.<sup>60</sup>*

Thus, the CJEU's conclusion in *Campus Oil* was based on the fact that an oil crisis would not only endanger the economy of the State, but also all of the State's institutions and the population as a whole. The economic aim was thus secondary to the public security objective which made the restriction susceptible to justification. Indeed, the safeguarding of a State's energy supplies are imperative for the infrastructure of a State, including for example its hospitals and other institutions of general interest which would become inoperable if certain minimum level of energy is not ensured.<sup>61</sup>

For comparison, the CJEU's approach in this regard can further be demonstrated by its judgment in *Evans Medical* where the Court assessed a restriction to the free movement of goods on the grounds of the life and health of humans. In its judgment, the CJEU

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E-2/20 *The Norwegian Government v L*, judgment of 21 April 2021, not yet reported, paragraph 34. See also, for comparison, Case C-483/99 *Commission v France*, EU:C:2002:327, paragraph 48.

<sup>54</sup> Case E-5/16 *Norwegian Board of Appeal for Industrial Property Rights* [2017] EFTA Ct. Rep. 52, paragraph 94.

<sup>55</sup> *ibid*, paragraph 95. See also Case 30/77 *Regina v Bouchereau*, EU:C:1977:172, paragraph 35 and Case C-434/10 *Aladzhev*, EU:C:2011:750, paragraph 35.

<sup>56</sup> Case C-483/99 *Commission v France*, EU:C:2002:327, paragraph 48.

<sup>57</sup> Case C-367/89 *Richardt*, EU:C:1991:376, paragraph 22.

<sup>58</sup> See for example Case 72/83 *Campus Oil*, cited above and Case C-398/98 *Commission v Greece*, EU:C:2001:565.

<sup>59</sup> Case 72/83 *Campus Oil*, cited above.

<sup>60</sup> *Ibid*, paragraphs 34 and 35.

<sup>61</sup> See also Joined Cases C-105/12 to C-107/12 *Essent and Others*, EU:C:2013:677, paragraphs 51 and 52.

provided that the refusal to grant import licences to narcotic drugs could not be justified if the reason was the wish to safeguard the survival of an undertaking. However, such a restriction could be justified if the need was to ensure reliable medical supplies of the State, subject to proportionality.<sup>62</sup>

Therefore, if the considerations underlying the national measure are purely economic or commercial they cannot be relied upon as grounds of public security within the meaning of Article 13 EEA.<sup>63</sup> As noted by the CJEU in *Hidroelectrica* if such considerations were able to justify a restriction the very principle of the internal market would be undermined.<sup>64</sup>

The Icelandic Government has referred to the fact that the COVID-19 pandemic has caused an increase in bankruptcies and unemployment in Iceland. Therefore, in the Icelandic Government's view, the measure was not "merely economical in nature, nor a pure commercial consideration undermining the functioning of the internal market, but rather a measure combating the imminent danger facing the foundations of society, including fiscal stability and all economic operators in Iceland, regardless of their nationality." It is the Authority's opinion that these reasons referred to by the Icelandic Government as underlying the Icelandic campaign are purely economic, and cannot as such be relied upon as justification to the restriction to the free movement of goods in the case at hand.

In that regard, no information has been provided nor does it appear that an analysis of the appropriateness and proportionality of the measure at hand was carried out beforehand by the Icelandic Government. Accordingly, the Icelandic Government has not provided any information as regards how the case law which they refer to is applicable in the case at hand or how the circumstances in Iceland can be regarded comparable to the circumstances in those cases.

The Authority notes that the campaign could have been set up differently and without the particular emphasis on the Icelandic origin of the products and services in question. The Icelandic campaign is set forth in general and broad terms, which cover all Icelandic products and is explicitly aimed at combatting the economic consequences of the COVID-19 pandemic. Therefore, the Authority cannot agree with the Icelandic Government that its participation in the campaign can be justified by Article 13 EEA.

The Authority recalls that respect for the four freedoms set out in the EEA Agreement is essential for the economic cooperation established by the Agreement.

In any event, it is the Authority's view that the campaign was not necessary for the achievement of the aim sought by the Icelandic Government to combat the economic consequences of the COVID-19 pandemic. In its reply to the Authority's letter of formal notice of 23 March 2021, the Icelandic Government maintained that the campaign was intended to generally encourage consumption in Iceland, as consumption abroad was impossible. Taking also into consideration the Icelandic Government's statement that the purchase power of Icelandic residents was not immediately and generally affected by the COVID-19 pandemic unlike the effects of the economic crisis in 2008, the Authority does not find it plausible that such an encouragement was in fact needed under such circumstances. If it were accepted that consumption abroad was in fact impossible it should have led to the circumstances that residents in Iceland, would direct their business to Icelandic service providers without any special encouragement.

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<sup>62</sup> Case C-324/93 *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith*, cited above, paragraph 34-39.

<sup>63</sup> Case C-398/98 *Commission v Greece*, cited above, paragraph 30 and Case C-648/18 *Hidroelectrica*, cited above, paragraph 43;

<sup>64</sup> Case C-648/18 *Hidroelectrica*, cited above, paragraph 43.

Further, a less restrictive measure seems to have been available to the Icelandic Government, that could have generally encouraged consumption in Iceland by a neutral campaign which did not emphasize the Icelandic origin of the goods and services.

Lastly, it is noted that contrary to what is stated in the Agreement of 24 April 2020, the campaign is still ongoing despite the fact that the Icelandic economy was re-opened to tourists in the summer of 2021. In the Authority's view that suggests that the Icelandic Government has in fact not restricted the duration of the campaign to what was considered strictly necessary in order to combat the economic difficulties associated with the COVID-19 pandemic.

Accordingly, the restriction cannot be justified under Article 13 EEA.

#### 5.4 The freedom to provide services under Article 36 EEA

In the area of the freedom to provide and receive services, Article 36 EEA gives specific expression and effect to the general principle in Article 4 EEA on the prohibition of discrimination on grounds of nationality. According to consistent case law, the freedom to provide services in Article 36 EEA entails, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in an EEA State other than that in which the service is to be provided.<sup>65</sup>

Article 36 EEA covers both direct and indirect discrimination. It is settled case law that rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result.<sup>66</sup>

Direct discrimination arises when a situation is subject to differentiated treatment on the basis of nationality or the fact that a service provider is established in another EEA State. This is the case when no objective difference exists between the situations of national service providers and service providers from other EEA States to justify different treatment.<sup>67</sup>

Having assessed the promotional campaign and the content of the Agreement, the Authority finds that the campaign entails direct discrimination of service providers established outside of Iceland.

It is explicitly stated in the Agreement that the aim of the campaign is to promote businesses in Iceland: According to Article 1, the emphasis is on encouraging people living in Iceland, the general public, and companies to do business with *domestic companies* in various fields, when choosing production, products and services. Article 2 of Agreement further sets out different methods to convey that the campaign is intended to promote the importance of selecting domestic services. On the campaign's website, it is emphasised that choosing Icelandic industry, Icelandic commerce, Icelandic production, and Icelandic ingenuity will be to the benefit of all Icelanders. Conversely, there is an encouragement *not* to choose foreign service operators.

Furthermore, there are no objective differences between the situations of service providers in Iceland and service providers from other EEA States that would justify a difference in treatment. According to the Icelandic Government, the background for the measure is the unprecedented situation in the world due to the pandemic and the impacts of the pandemic in Iceland. However, the pandemic and the economic fallout as a

<sup>65</sup> Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraphs 36, 37 and 40.

<sup>66</sup> Case E-5/10 *Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 29, and *Granville*, cited above, paragraphs 36 and 37.

<sup>67</sup> *Granville*, cited above, paragraph 48.

consequence of measures taken in that regard have impacted service providers in the whole of the EEA in a similar way and the situation in Iceland is not objectively different from the situation in other EEA States.

In its reply to the Authority's letter of formal notice of 23 March 2021, the Icelandic Government stated that the campaign encourages consumption regardless of the service provider's nationality and that it did not discourage service providers from other EEA States providing services in Iceland or to Icelandic consumers. The campaign was a response to severely limited free movement of EEA nationals, which Iceland's economy is highly dependent on. To this end, consumers in Iceland, whose free movement was severely restricted, were encouraged to consume, inevitably locally.

In that regard, the Authority reiterates what is stated in Section 5.3.2 as regards the general encouragement for consumption; that the campaign does in fact underline the Icelandic origin of the products and services in its slogans and by its use of the Icelandic flag colours in the advertisement material.

As regards the free movement of services it is the Authority's view that the advertisement below stating "*when you chose Icelandic products or services that benefits you in return*"<sup>68</sup> demonstrates that the campaign sends the clear message to consumers to direct their business to Icelandic service providers.



The Icelandic Government also maintained in its reply to the Authority's letter of formal notice of 23 March 2021, that the campaign does not discriminate against service providers in other EEA States due to the fact that they were not in the same position as locally established service providers during the COVID-19 pandemic. According to the Icelandic Government rendering services to Icelandic consumers by providers located in other EEA States has proved difficult if not impossible due to the pandemic and travel restrictions imposed by Iceland as well as other EEA States.

Without taking a stand on this particular reasoning by the Icelandic Government, the Authority notes that depending on the sector, services can be provided in Iceland from other EEA States without the service provider in question being located in Iceland or being able to travel thereto. In any event, it is the Authority's view that this is irrelevant for the assessment of the issue at hand, namely, whether the campaign encourages consumers to choose Icelandic service providers.

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<sup>68</sup> The Authority's translation

The message sent by the campaign is that choosing domestic services instead of foreign ones will contribute to a chain reaction that creates new jobs, value creation and economic stability in Iceland alone.

On this basis, the Authority's assessment is that the campaign entails direct discrimination against EEA service providers, contrary to Article 36 EEA.

It follows from Article 39 EEA, applied in conjunction with Article 33 EEA, that such direct discrimination may be justified only on grounds of public policy, public security, or public health.<sup>69</sup>

In its reply to the Authority's letter of formal notice of 23 March 2021, the Icelandic Government provided that the aims of the campaign in essence amount to public security and public policy concerns. It is evident from Article 1 of the Agreement that the aim was to boost production, service provision, protecting jobs, enhancing fiscal stability and increase value creation.

The Icelandic Government further stressed that the campaign was not purely economic or commercial in nature but rather intended to work towards ensuring the economy as a whole and fiscal stability of the Icelandic State. The measure had the objective of safeguarding services in Iceland by ensuring continued operations during extraordinary times. A genuine and sufficiently serious threat to a fundamental interest of society, such as having a functioning economy, can be regarded as a public policy justification in that regard.<sup>70</sup>

Moreover, the Icelandic Government noted that business owners enjoy specific protection of their property rights. Protection of such rights can justify a restriction of the obligations under EEA law, even obligations related to the four fundamental freedoms. The Icelandic Government submitted that the campaign serves to protect business owners' right to "protection and peaceful enjoyment of property", pursuant to Article 1 of Protocol 1 to the European Convention of Human Rights.<sup>71</sup>

As reiterated by the Icelandic Government in different ways, both in its letter dated 12 August 2020 as well as in its reply to the Authority's letter of formal notice of 23 March 2021, the purpose of the campaign is to fight against economic recession due to the COVID-19 pandemic and to limit its economic impact.

According to settled case law, measures forming a restriction on the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses.<sup>72</sup>

With reference to the reasoning in Section 5.3.3 above, the unprecedented circumstances due to the COVID-19 pandemic do not change the Authority's view that the campaign is a purely economic measure. Thus, it is the Authority's opinion that due to the purely economic reasons underlying the Icelandic campaign, the unprecedented circumstances cannot justify an exception from the established case law in the case at hand.

The Icelandic Government maintains that the unprecedented effects of the pandemic, the increased unemployment numbers and decline in tourism warrant its involvement in the campaign.

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<sup>69</sup> Granville, cited above, paragraph 49.

<sup>70</sup> In that regard the Icelandic Government refers to the judgments in Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*, cited above, paragraph 38; and Case 41/74 *Van Duyn v Home Office*, EU:C:1974:133.

<sup>71</sup> Reference is made, by analogy, to Case C-112/00 *Schmidberger*, EU:C:2003:333, paragraphs 71 to 74.

<sup>72</sup> Case E-2/11 *STX* [2012] EFTA Ct. Rep. 4, paragraph 83.

To that end the Authority notes, as referred to above that all EEA States have been faced with unprecedented effects on the economy, many of which rely heavily on tourism. Any compensatory measures adopted by Iceland in order to counter the effects of the pandemic on the economy, must nonetheless be compatible with EEA law.

The Icelandic Government has not provided any information as regards how the case law to which they refer is applicable to the circumstances of the case at hand and what particularities of those circumstances that warrant the justification of the measure with reference to public policy and/or public security. In that regard, no information has been provided nor does it appear that an analysis of the appropriateness and proportionality of the measure at hand was carried out beforehand by the Icelandic Government.

In addition, the Icelandic Government has not provided any reasoning as regards the need to guarantee all services in Iceland, as opposed to certain services of a fundamental importance for Iceland's existence "since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them" which were circumstances found in *Campus Oil* to transcend purely economic considerations as regards the necessity to ensure a minimum supply of petroleum products.<sup>73</sup> For the sake of completeness, it is recalled that in that case, when assessing the proportionality of the measure, the CJEU stated that the quantities of petroleum products covered by the system in question should not exceed the minimum supply requirements of the State "without which the operation of essential public services and the survival of its inhabitants would be affected".<sup>74</sup>

As noted in Section 5.3.3 above, the Icelandic campaign is set forth in general and broad terms. It covers all Icelandic services and is explicitly aimed at combatting the economic consequences of the COVID-19 pandemic.

Moreover, the Authority cannot agree with the argument of the Icelandic Government that ensuring free movement of services during the COVID-19 pandemic can undermine the Icelandic Governments obligations under the European Convention of Human Rights.

As regards the necessity and proportionality of the measure, the Authority refers to its conclusion in Section 5.3.3 above that the campaign was not necessary to achieve the aim sought and that a less restrictive measure were indeed available to the Icelandic Government.

Further, as regards the Icelandic Governments reference that the campaign was only temporary and therefore proportionate, the Authority recalls its conclusion in Section 5.2 above that the campaign is in fact still ongoing. In any event, it is the Authority's view that even if the scope of the campaign was regarded to have ceased on 24 April 2021 (which the Authority disputes), the damaging effect of the campaign on foreign products and service providers was in fact substantial, as the year that it was set to run was at the peak of the pandemic and thus the greatest hardship period for foreign products and businesses as well as the domestic ones. Damage suffered by foreign products and business as a result of the campaign may be difficult to alter thereafter.

Since the considerations of the Icelandic Government are not permissible under EEA law, it must be held that the discrimination arising out of the campaign cannot be justified.<sup>75</sup>

In light of the above, the Authority finds that the campaign promoting domestic businesses is in breach of EEA law and that the Icelandic Government has failed to

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<sup>73</sup> Case 72/83 *Campus Oil*, cited above, paragraphs 34 and 35.

<sup>74</sup> *ibid*, paragraph 51.

<sup>75</sup> For comparison, see *Granville*, cited above, paragraphs 50 and 51.

comply with the obligations arising out of Article 36 EEA on the freedom to provide services.

## 5.5 Summary of the Authority's assessment

As outlined above, the Authority is of the view that the Agreement and the promotional campaign is in breach of EEA law, in particular Article 11 EEA on the free movement of goods and Article 36 EEA on the freedom to provide services. The campaign focuses on the Icelandic origin of the products and services and encourages consumers to choose them solely on that basis.

As noted in the sections above, the Icelandic Government's involvement in the campaign cannot be justified under Articles 13 or 33 EEA, as reasons of economic nature cannot be considered legitimate reasons for the justification of restrictions to the provisions of the EEA Agreement on free movement. The unprecedented circumstances due to the COVID 19 Pandemic does not change the assessment of the Authority in this regard, as the reasons underlying the Icelandic measure are purely economic.

Further, the Authority notes that Article 3 EEA requires EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law and also to abstain from any measure that could jeopardise the attainment of the objectives of the EEA Agreement.

A campaign of this nature appears to go against the very aim of the EEA Agreement, as set out in its Article 1(1), "*to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties*".

It is understandable that the Icelandic Government wishes to fight against economic recession due to the pandemic and to limit its economic impact. However, a campaign such as the one in question, which is aimed at protecting domestic businesses and products, will be at the expense of other EEA businesses and products and contrary to the fundamental aim of the EEA Agreement and the duty of loyalty as laid down in Article 3 EEA. Any measure should instead aim at supporting the internal market as a whole, and all EEA service operators and businesses that have suffered equally as a result of the pandemic.

Consequently, it is the Authority's view that by its involvement in the Agreement and the promotional campaign described therein, Iceland has failed to take the appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by its involvement in a promotional campaign encouraging consumers to purchase Icelandic products and services, Iceland has failed to fulfil its obligation arising from Articles 3, 11 and 36 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels,

For the EFTA Surveillance Authority

Bente Angell-Hansen  
President

Högni S. Kristjánsson  
Responsible College Member

Stefan Barriga  
College Member

Mel-po-Menie Joséphidès  
Countersigning as Director,  
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*This document has been electronically authenticated by Bente Angell-Hansen, Mel-po-Menie Josephides.*