



JUDGMENT OF THE COURT

10 December 2014*

(Regulation (EEC) No 95/93 – Allocation of time slots at EEA airports – Intervention by competition authorities – Accelerated procedure)

In Case E-18/14,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

Wow air ehf.

and

The Icelandic Competition Authority (*Samkeppniseftirlitið*), Isavia ohf., and Icelandair ehf.

concerning the interpretation of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- the Icelandic Competition Authority (“the Competition Authority”), represented by Gizur Bergsteinsson, Attorney at Law;
- Isavia ohf. (“Isavia”), represented by Hlynur Halldórsson, Supreme Court Attorney;
- Icelandair ehf. (“Icelandair”), represented by Helga Melkorka Óttarsdóttir, Supreme Court Attorney;

* Language of the request: Icelandic.

- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Teresa Vecchi, Folkert Wilman and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Competition Authority, represented by Gizur Bergsteinsson; Isavia, represented by Hlynur Halldórsson; Icelandair, represented by Helga Melkorka Óttarsdóttir; ESA, represented by Auður Ýr Steinarsdóttir; and the Commission, represented by Nicola Yerrell, at the hearing on 27 October 2014,

gives the following

Judgment

I Legal background

EEA law

1 Article 1(1) and (2)(e) EEA read:

1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

...

(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; ...

2 Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the

Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

...

3 Article 53(1) EEA reads:

The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement ...

4 The first paragraph of Article 54 EEA reads:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Regulation (EEC) No 95/93

5 Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1) (“the Regulation”) was incorporated into point 64b of Annex XIII to the EEA Agreement by Joint Committee Decision No 7/94 of 28 June 1994 (OJ 1994 L 160, p. 1, and EEA Supplement 1994 No 17, p. 1). The Regulation was amended by Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 (OJ 2004 L 138, p. 50) (“Regulation 793/2004”), which was incorporated into the same point by Joint Committee Decision No 154/2004 of 21 April 2005 (OJ 2005 L 102, p. 33, and EEA Supplement 2005 No. 20, p. 21).

6 The purpose of the Regulation is to ensure that where airport capacity is scarce, the available landing and take-off slots are used efficiently and distributed in an equitable, non-discriminatory and transparent manner. On the basis of objective criteria laid down in the Regulation, an airport can be designated as coordinated on the grounds that its capacity is insufficient.

7 Recitals 2, 5, 8 to 10, 12 and 15 in the preamble to the Regulation read:

[2] Whereas the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules;

...

[5] Whereas the Member State responsible for the coordinated airport should ensure the appointment of a coordinator whose neutrality should be unquestioned;

...

[8] Whereas it is Community policy to facilitate competition and to encourage entrance into the market ...;

[9] Whereas the existing system makes provision for grandfather rights;

[10] Whereas there should also be provisions to allow new entrants into the Community market;

...

[12] Whereas it is also necessary to avoid situations where, owing to a lack of available slots, the benefits of liberalization are unevenly spread and competition is distorted;

...

[15] Whereas the application of the provisions of this Regulation shall be without prejudice to the competition rules on the Treaty, in particular Articles 85 and 86;

8 Recitals 6 and 17 in the preamble to Regulation 793/2004 read:

(6) ... At coordinated airports the coordinator plays a central role in the coordinating process. Therefore, coordinators should be in a fully independent position and their responsibilities should be specified in detail.

...

(17) For the avoidance of doubt, it should be specified that the application of the provisions of this Regulation is to be without prejudice to the competition rules of the Treaty, in particular Articles 81 and 82 thereof and Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

9 Article 2(a), (g) and (j) of the Regulation read:

(a) 'slot' shall mean the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation;

...

(g) 'coordinated airport' shall mean any airport where, in order to land or take off, it is necessary for an air carrier or any other aircraft operator to have been allocated a slot by a coordinator, with the exception of State flights, emergency landings and humanitarian flights;

...

(j) 'managing body of an airport' shall mean the body which, in conjunction with other activities or otherwise, has the task under national laws or regulations of administering and managing the airport facilities and coordinating and controlling the activities of the various operators present at the airport or within the airport system concerned;

10 Article 4(1), (2) and (5) of the Regulation read:

The ... coordinator

1. *The Member State responsible for a ... coordinated airport shall ensure the appointment of a qualified natural or legal person as ... airport coordinator ... after having consulted the air carriers using the airport regularly, their representative organisations and the managing body of the airport and the coordination committee, where such a committee exists. The same ... coordinator may be appointed for more than one airport.*

2. *The Member State responsible for a ... coordinated airport shall ensure:*

...

(b) *the independence of the coordinator at a coordinated airport by separating the coordinator functionally from any single interested party. The system of financing the coordinators' activities shall be such as to guarantee the coordinator's independent status;*

(c) *that the coordinator acts according to this Regulation in a neutral, non-discriminatory and transparent way.*

...

5. *The coordinator shall be the sole person responsible for the allocation of slots. He shall allocate the slots in accordance with the provisions of this Regulation and shall make provision so that, in an emergency, slots can also be allocated outside office hours.*

11 Article 5(1) of the Regulation reads:

Coordination committee

1. At a coordinated airport, the Member State responsible shall ensure that a coordination committee is set up. The same coordination committee may be designated for more than one airport. Membership of this committee shall be open at least to the air carriers using the airport(s) in question regularly and their representative organisations, the managing body of the airport concerned, the relevant air traffic control authorities and the representatives of general aviation using the airport regularly.

The tasks of the coordination committee shall be:

(a) to make proposals concerning or advise the coordinator and/or the Member State on:

...

- local guidelines for the allocation of slots or the monitoring of the use of allocated slots, taking into account, inter alia, possible environmental concerns, as provided for in Article 8(5);*

...

- serious problems encountered by new entrants, as provided for in Article 10(9);*

...

(b) to mediate between all parties concerned on complaints on the allocation of slots, as provided for in Article 11.

12 Article 8(1) to (3) and (5) of the Regulation read:

Process of slot allocation

1. Series of slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool as set up according to the provisions of Article 10.

2. Without prejudice to Articles 7, 8a, 9, 10(1) and 14, paragraph (1) of this Article shall not apply when the following conditions are satisfied:

- a series of slots has been used by an air carrier for the operation of scheduled and programmed non-scheduled air services, and*
- that air carrier can demonstrate to the satisfaction of the coordinator that the series of slots in question has been operated, as cleared by the*

coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which it has been allocated.

In such case that series of slots shall entitle the air carrier concerned to the same series of slots in the next equivalent scheduling period, if requested by that air carrier within the time-limit referred to in Article 7(1).

3. Without prejudice to Article 10(2), in a situation where all slot requests cannot be accommodated to the satisfaction of the air carriers concerned, preference shall be given to commercial air services and in particular to scheduled services and programmed non-scheduled air services. In the case of competing requests within the same category of services, priority shall be given for year round operations.

...

5. The coordinator shall also take into account additional rules and guidelines established by the air transport industry world-wide or Community-wide as well as local guidelines proposed by the coordination committee and approved by the Member State or any other competent body responsible for the airport in question, provided that such rules and guidelines do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity. These rules shall be communicated by the Member State in question to the Commission.

13 Article 8a(1) and (2) of the Regulation read:

Slot mobility

1. Slots may be:

(a) transferred by an air carrier from one route or type of service to another route or type of service operated by that same air carrier;

(b) transferred:

(i) between parent and subsidiary companies, and between subsidiaries of the same parent company,

(ii) as part of the acquisition of control over the capital of an air carrier,

(iii) in the case of a total or partial take-over when the slots are directly related to the air carrier taken over;

(c) exchanged, one for one, between air carriers.

2. The transfers or exchanges referred to in paragraph 1 shall be notified to the coordinator and shall not take effect prior to the express confirmation by the coordinator. ...

14 Article 8b of the Regulation reads:

Exclusion of compensation claims

... This Regulation shall not affect the powers of public authorities to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law or to Articles 81 or 82 of the Treaty or Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. These transfers can only take place without monetary compensation.

15 Article 10(1), (6) and (9) of the Regulation read:

Slot pool

1. The coordinator shall set up a pool, which shall contain all the slots not allocated on the basis of Article 8(2) and 8(4). ...

...

6. Without prejudice to Article 8(2) of this Regulation and without prejudice to Article 8(1) of Regulation (EEC) No 2408/92, slots placed in the pool shall be distributed among applicant air carriers. 50 % of these slots shall first be allocated to new entrants unless requests by new entrants are less than 50 %. The coordinator shall treat the requests of new entrants and other carriers fairly, in accordance with the coordination periods of each scheduling day.

...

9. If serious problems continue to exist for new entrants, the Member State shall ensure that a meeting of the airport coordination committee is convened. The purpose of the meeting shall be to examine possibilities for remedying the situation. The Commission shall be invited to that meeting.

16 Article 11(1) of the Regulation reads:

Complaints and rights of appeal

1. Without prejudice to rights of appeal under national law, complaints regarding the application of Articles 7(2), 8, 8a, 10 and 14(1) to (4) and (6) shall be submitted to the coordination committee. The committee shall, within a period of one month following submission of the complaint, consider the matter and if possible make proposals to the coordinator in an attempt to resolve the problem. If the complaint cannot be settled, the

Member State responsible may, within a further two month period, provide for mediation by an air carriers' or airports' representative organisation or other third party.

National law

- 17 Regulation No 1050/2008 of 30 October 2008 on the allocation of time slots at airports (*Reglugerð um úthlutun afgreiðslutíma flugvalla*), adopted on the basis of the Aviation Act No 60/1998 of 10 June 1998 (*Lög um loftferðir*), was intended to implement the Regulation into Icelandic law.
- 18 In March 2014, ESA informed Iceland that some of the provisions of the Regulation seemed not to have been correctly implemented into Icelandic law. In particular, ESA was concerned that Icelandic law did not safeguard the coordinator's independence from the airport managing body, as required.
- 19 Following communication between ESA and Iceland on this subject, Regulation No 1050/2008 was replaced by Regulation No 858/2014 of 30 September 2014 on the allocation of time slots at airports. According to Article 5 of Regulation No 858/2014, the Regulation, along with amendments and additions, was implemented as such into the Icelandic legal order. Moreover, Regulation No 858/2014 contains a section on temporary provisions which states that the nomination of a coordinator in accordance with Regulation No 1050/2008 shall continue to be valid, and that the Icelandic Transport Authority is authorised to take over the rights and obligations according to the current contract with the coordinator.
- 20 The first and second paragraphs of Article 16 of the Competition Act No 44/2005 of 19 May 2005 (*Samkeppnislög*) read:

The Competition Authority may take measures against:

- a. agreements, terms and any actions constituting infringement of the prohibition provisions of this Act, settlements or decisions that have been made pursuant to this Act;*
- b. acts of public entities to the extent that they may have detrimental effects on competition, provided that no special legislation contains any specific provisions regarding authorisation or obligation for such acts;*
- c. circumstances or conduct which prevents, limits or affects competition to the detriment of the public interest. Circumstances means among other things, factors connected to the attributes of the market concerned, including the organisation or development of companies that operate in it. Conduct means all forms of behaviour, including failure to act, that are in some way detrimental to market competition without being in violation of the Act's ban provisions.*

The actions of the Competition Authority may include any measure that is necessary to enhance competition, put an end to violations or respond to actions of public entities that may adversely affect competition. The

Competition Authority can apply necessary remedies to amend conduct or structure relating to the issues specified in the first paragraph that are proportionate to the violation that has been committed or to the circumstances or conduct concerned. However, structural remedies may only be imposed if it is shown that no effective behavioural remedy exists or if an equally effective behavioural remedy will be more burdensome for the party in question than a structural remedy.

II Facts and procedure

- 21 The plaintiff and Icelandair are both air carriers which operate scheduled flight services to and from Iceland. Icelandair is the incumbent flagship air carrier. It holds the leading position on the market for commercial air transport and has had that position for a long time. The plaintiff only entered the market in 2012. Isavia is a public limited company established pursuant to Act No 153/2009 of 29 December 2009 on the merger of the public companies operating Keflavík International Airport and Leifur Eiríksson Air Terminal (*Lög um samruna opinberu hlutafélaganna Flugstoða og Keflavíkurflugvallar*). Following this merger, the provisions of Act No 76/2008 of 11 June 2008 on the establishment of a public company for the operation for Keflavík International Airport etc. (*Lög um stofnun opinbers hlutafélags um rekstur Keflavíkurflugvallar o.fl.*) became applicable to Isavia.
- 22 In April 2006, Keflavík International Airport was designated a coordinated airport in accordance with Article 2(g) of the Regulation. On 11 September 2007, Frank Holton, Managing Director of Airport Coordination Denmark, was appointed coordinator of Keflavík International Airport. The coordinator seems to have been reappointed in the context of the implementation of the Regulation by Regulation No 858/2014. It is not clear from the case file whether the procedure specified in Article 4(1) of the Regulation for such appointments was followed.
- 23 In March 2013, the plaintiff filed a complaint with the Competition Authority regarding the allocation of time slots at Keflavík International Airport. In November 2013, the Competition Authority decided that the allocation procedure had a detrimental impact on competition and instructed Isavia to provide certain time slots to the plaintiff for the summer schedule of 2014. The Competition Authority also instructed Isavia to adopt guidelines for the coordinator's allocation of time slots.
- 24 Isavia and Icelandair appealed against the Competition Authority's decision. In February 2014 the Competition Appeals Board annulled the decision. The Appeals Board found that the contested decision should not have been addressed to Isavia, since independent administrative powers in the field of time slot allocation had been given to the coordinator. The Competition Appeals Board found that:

Although under Article 4 of Act No 76/2008 the objectives of [Isavia] are defined as including ‘functions that are directly related to air services, the operation of airports and an air terminal and other activities’, and although the responsibilities of the managing body of an airport include ‘the coordination and direction of the functions of air carriers operating at the airport’ (cf. item j of Article 2 of Regulation No 1050/2008), the Appeals Board is unable, for the same reason, to concur with the view that these provisions can be interpreted in such a way that the appellant is to some extent responsible for the coordinator’s task of allocating slots and that it is able, relying on such a responsibility or its administrative authority, to instruct the coordinator to transfer slots between air carriers. Such a conclusion would be completely incompatible with the aforementioned provisions of Regulation No 1050/2008 and the European Regulations discussed above. The Competition Authority’s reference to Article 10 of the Regulation is of no significance in this regard as it does not provide that the appellant should have an intermediary role in transferring slots following government intervention on the basis of competition provisions. Nor is it of any significance that the appellant is entrusted, under the aforementioned Regulation, with ensuring that an airport coordinator is appointed and that the appellant is obliged to pay him a remuneration for his work. The board finds that if the appellant was to have a role such as the one the Competition Authority maintains that it does have in the present case, the authority to intervene directly in slot allocations by the coordinator, then the legislature, and the minister by issuing Regulation No 1050/2008, should have included clear provisions to this effect.

- 25 In March 2014, the plaintiff brought an action against the defendants before Reykjavík District Court, seeking the annulment of the Competition Appeals Board’s decision. The District Court granted a request for an accelerated procedure in accordance with national rules.
- 26 In May 2014, Reykjavík District Court dismissed the plaintiff’s action. However, in June 2014 the Supreme Court of Iceland (*Hæstiréttur Íslands*) quashed this judgment and the case was remitted to the District Court. Isavia and Icelandair requested Reykjavík District Court to seek an advisory opinion from the Court in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”). This request was rejected in July 2014. In August 2014, on appeal from Icelandair and Isavia, the Supreme Court decided that certain questions of interpretation should be addressed to the Court. The case was then remitted to Reykjavík District Court.
- 27 By letter of 4 September 2014, Reykjavík District Court referred the following questions to the Court:

1. *Does Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports oblige the Member*

States to ensure that a coordinator appointed under the provisions of the Regulation is, as regards the execution of his tasks, granted independent administrative power under domestic legislation as part of the executive of the Member State, or does the Member State have discretion to decide the status of the coordinator under domestic legislation?

2. Is it assumed, in the instructions on the handling of complaints concerning the allocation of slots in Articles 8(7) and 8(8) of Council Regulation (EEC) No 95/93, that all complaints, including complaints based on competition considerations, will be subject to the procedure prescribed therein, or is recital 15 of the preamble to the Regulation to be understood as meaning that the Regulation is to be applied without prejudice to the competition rules of the Treaty, in particular Articles 85 and 86, in such a way that complaints based on competition considerations shall be subject exclusively to the jurisdiction of the competition authorities in the relevant Member State and are therefore to be submitted directly to them?

3. If the competition authority of a Member State issues instructions on the basis of domestic competition legislation, and with reference to Council Regulation (EEC) No 95/93, with the intention of encouraging competition, is it assumed in the Regulation that these instructions will be issued to the managing body of an airport/competent authority or should these instructions be issued to the coordinator?

- 28 On 22 September 2014, Reykjavík District Court submitted a revised version of its request. However, the questions referred remained the same.
- 29 The revised reference from Reykjavík District Court was accompanied by a request to apply an accelerated procedure pursuant to Article 97a of the Court's Rules of Procedure. Having regard, in particular, to the potential effects on competition between air carriers in the near future caused by the disputed time slot allocation, the Court's President granted the request for an accelerated procedure by order of 30 September 2014.
- 30 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

The first question

Observations submitted to the Court

- 31 All those who have submitted observations agree that the airport coordinator appointed pursuant to Article 4(1) and (2) of the Regulation shall be a qualified natural or legal person and perform his tasks in an independent, neutral, non-

discriminatory and transparent way. They also agree in the main that, as long as these requirements are met, the determination of the legal form and status of the coordinator remains at the discretion of each EEA State. The Competition Authority and ESA specifically refer to the fact that the EEA States have different arrangements for the appointment of coordinators, ranging from natural persons and non-profit organisations to private and public limited liability companies.

Findings of the Court

- 32 By its first question, the referring court asks, in essence, whether the Regulation requires that an appointed coordinator should be granted independent administrative power under domestic legislation as part of the executive of the EEA State.
- 33 Pursuant to Article 4(1) of the Regulation, an EEA State responsible for a coordinated airport shall ensure the appointment of a qualified natural or legal person as airport coordinator. The coordinator must be appointed by the EEA State, after having consulted the air carriers using the airport regularly, their representative organisations, the managing body of the airport and the coordination committee, where such a committee exists.
- 34 Article 4(2)(b) of the Regulation requires the EEA State to ensure the independence of the coordinator by separating the coordinator functionally from any single interested party. Moreover, the system of financing the coordinators' activities shall be such as to guarantee his independent status. Furthermore, according to Article 4(2)(c), the EEA State shall ensure that the coordinator acts according to the Regulation in a neutral, non-discriminatory and transparent way.
- 35 Pursuant to Article 4(5) of the Regulation, the coordinator is the sole person responsible for the allocation of time slots. The coordinator shall allocate the time slots in accordance with the provisions of the Regulation.
- 36 The Regulation does not lay down specific requirements as to the legal form or status of the coordinator. Both natural and legal persons may be appointed as coordinator.
- 37 In order for the system to be effective, the coordinator has to be independent from any vested interests and has to have the necessary financial resources to accomplish the tasks assigned to him by the Regulation. It must be ensured that neither the authorities of the EEA State concerned nor any other party can unduly influence the coordinator before, during and after the allocation process.
- 38 There must therefore be a clear separation of tasks between the coordinator, the coordination committee and the EEA State so as to avoid any conflict of interest at any time in the allocation and monitoring procedure. In other words, the coordinator must have the expertise and the integrity necessary to contribute to the objectivity, transparency and efficiency of time slot allocation.

- 39 Consequently, Article 4(1) of the Regulation requires an EEA State to appoint a qualified natural or legal person as airport coordinator after having consulted the parties indicated therein. Under Article 4(2) of the Regulation, the coordinator must be independent, both legally and factually, from all interested parties from which he must also be functionally separated. As long as these conditions are fulfilled, EEA States have discretion in determining the status of the coordinator. On the basis of those findings, it is for the national court to draw the necessary conclusions in order to ensure the effectiveness of the Regulation.

The second question

Observations submitted to the Court

- 40 The Competition Authority submits that the procedure described in Article 11(1) of the Regulation does not prevent national competition authorities from exercising their powers under national competition law to require the transfer of time slots between air carriers and to direct how these are allocated. When competition authorities decide to exercise their powers under national law, these powers substitute for the coordinator's role and exclude the complaint procedure described in Article 11(1). In the Competition Authority's view, this interpretation is supported by the explicit competition law reservation in Article 8b of the Regulation.
- 41 The Competition Authority also contends that in the Commission's proposal for Regulation 793/2004, the right to appeal against the coordinator's decision depended on the exhaustion of the complaints procedure specified in Article 11(1) of the Regulation. However, this aspect of the proposal was not included in the final version of Regulation 793/2004.
- 42 Isavia submits that there is no indication that domestic competition rules are to be taken into account in the process of allocating time slots under the Regulation. Thus, an EEA State cannot allow its competition authorities to interfere with the allocation process or change the allocation of time slots to air carriers. According to Isavia, this would contradict the aim of the Regulation. The Regulation contains balanced provisions that directly address competition matters, for example the provisions concerning new entrants.
- 43 However, Isavia observes that Article 8b of the Regulation allows national competition authorities to intervene after time slots have been allocated to an air carrier, on the basis that the air carrier in question is operating in breach of competition rules. This implies in effect that competition authorities could require the air carrier to return time slots allocated to it by the coordinator to the slot pool established in accordance with Article 10 of the Regulation and, possibly, to transfer allocated time slots to another air carrier negatively affected by the anti-competitive behaviour.
- 44 Isavia contends that the Regulation's complaint procedure clearly indicates that the coordination committee's function is not to address competition issues. The

coordination committee can only make proposals to the coordinator and/or try to mediate between parties involved. The coordination committee may not instruct the coordinator or change allocations.

- 45 In Icelandair's view, the procedure provided for in the Regulation is established, *inter alia*, with a view to protecting competition. Although the Regulation does not prevent public authorities from intervening in the time slot allocation on the basis of competition law, Icelandair contends that such intervention may not obstruct the performance, in law or in fact, of the particular tasks assigned to the coordinator.
- 46 Icelandair claims that the special procedure for time slot allocation laid down in the Regulation prevails over national competition law. An air carrier disputing the coordinator's time slot allocation on the basis of national competition law must therefore exhaust all reasonable possibilities to obtain the necessary time slots through the general time slot allocation process provided for in the Regulation. According to Icelandair, national competition authorities should not intervene unless there is clear and factual evidence that the coordinator has not fulfilled his obligations.
- 47 Icelandair submits further that a general concern about an alleged lack of competition, without the identification of a particular breach of national or EEA competition law, cannot serve as basis for overriding the harmonised time slot allocation process. Any intervention by national public authorities, such as competition authorities, must be in line with EEA law and the parameters for allocation of time slots set out in the Regulation, and also respect the principle of proportionality.
- 48 ESA contends that the complaint procedure set out in Article 11(1) of the Regulation should be considered neither mandatory nor exhaustive. The provision does not provide for any binding dispute resolution mechanism and expressly states that the complaint procedure is without prejudice to rights of appeal under national law. ESA also refers to recital 15 in the preamble to the Regulation, which must be read in conjunction with Article 8b of the Regulation.
- 49 The Commission submits that the procedure prescribed in Article 11(1) of the Regulation is not intended to be exhaustive. As is expressly stated in the introductory phrase of that provision, the complaints procedure is without prejudice to rights of appeal under national law. The Commission also refers to recital 15 in the preamble to the Regulation, recital 17 in the preamble to Regulation 793/2004 and Article 8b of the Regulation.
- 50 In further support of this conclusion, the Commission argues, first, that under the complaints procedure specified in Article 11(1) of the Regulation, the coordination committee is not competent to make a definite ruling on competition law issues. Second, compliance with the rules of the Regulation does not preclude a breach of competition rules by an undertaking. Third, there is no

obligation under EEA competition law for potential complainants to have first exhausted all other remedies available.

Findings of the Court

- 51 The second question of the national court refers to the complaint procedure laid down in Article 8(7) and (8) of the Regulation. However, following amendment by Regulation 793/2004, those provisions became Article 11(1) of the Regulation. The Court will therefore read the question as referring to Article 11(1) of the Regulation, as suggested by those who have submitted observations. By this question, the referring court asks, in essence, whether the procedure for the handling of complaints on the allocation of time slots specified in Article 11(1) of the Regulation is mandatory or whether complaints based on competition considerations may be submitted directly to national competition authorities.
- 52 As follows from Article 1(1) and (2) EEA, one of the principal aims of the EEA Agreement is to provide for the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected within the whole EEA. In this way, the internal market established within the European Union is extended to the EEA/EFTA States.
- 53 Article 10(6) and (9) of the Regulation seek to facilitate the allocation of time slots to new entrants, in particular by requiring that 50% of the time slots in the slot pool are reserved for them. On the other hand, Article 8(2) gives an air carrier an entitlement to the same series of time slots in the next equivalent scheduling period, on condition that it has used the allocated time slot series for at least 80% of the time (so-called grandfather rights). This provision hinders new entrants from competing for those time slots. Consequently, the fact that the Regulation contains provisions relevant to competition does not eliminate the possibility of breaches of competition rules by an undertaking.
- 54 Article 11(1) of the Regulation provides for a procedure for the handling of complaints on the allocation of time slots. According to this provision, such a complaint may be submitted to the coordination committee. In that case, the committee shall consider the matter and make proposals to the coordinator in an attempt to resolve the problem. If the complaint cannot thus be settled, the EEA State responsible may provide for a system of mediation by an air carriers' or airports' representative organisation or other third party.
- 55 It must be deduced from this provision that the coordination committee does not have the authority to intervene in the allocation of time slots or to require a transfer of allocated time slots. The coordination committee's role in this respect is merely of an advisory nature.
- 56 Moreover, Article 11(1) of the Regulation states expressly that the procedure prescribed is without prejudice to rights of appeal under national law. This must be seen in the context of Article 8b of the Regulation, which provides that the

latter shall not affect the powers of public authorities to require the transfer of time slots between air carriers and to direct how these are allocated pursuant to national or EEA competition law. Thus, the complaint procedure prescribed in Article 11(1) cannot be considered mandatory or exhaustive.

- 57 The purpose of the Regulation is to establish a fair time slot allocation system throughout the EEA. This purpose suggests that any intervention by public authorities must be supported by a decision raising specific competition concerns based on restrictive practices, abuse of a dominant position or merger rules.
- 58 Reference has been made in the questions and in the written observations to recital 15 in the preamble to the Regulation and recital 17 in the preamble to Regulation 793/2004. According to Article 1 of Protocol 1 to the EEA Agreement, the preambles of acts referred to in the Annexes to the Agreement do not form part of binding EEA law. However, they are relevant to the extent necessary for the proper interpretation and application, within the framework of the EEA Agreement, of the provisions of such acts. In the present case, the recitals do not correspond to the wording of Article 8b of the Regulation, in that they only refer to EU competition law, whereas Article 8b also refers to national competition law. The interpretative value of the recitals in this case is thus limited.
- 59 The answer to the second question must be that the complaint procedure laid down in Article 11(1) of the Regulation is not mandatory. Therefore, this complaints procedure does not preclude the possibility that complaints based on competition law considerations may be submitted directly to national competition authorities.

The third question

Observations submitted to the Court

- 60 All those who have submitted observations agree that instructions addressed directly or indirectly to the coordinator in the time slot allocation process are incompatible with the requirement for the independence of the coordinator. They also agree that instructions to transfer allocated time slots must be addressed to the air carrier who is in possession of the time slots.
- 61 However, the Competition Authority and the others disagree whether instructions to allocate new time slots may be issued to the airport managing body. The others take the view that this is not possible. The Competition Authority submits that Article 8b of the Regulation allows it to give instructions on the initial time slot allocation. Since the independence requirement established by the Regulation prevents the coordinator from complying with such instructions and having regard to the tasks of the airport managing body identified in Article 2(j) of the Regulation, it follows that instructions must be given to the airport managing body.

- 62 Isavia claims that Article 8b of the Regulation must be interpreted as referring only to time slots already allocated. Thus, if a competition authority issues instructions based on domestic legislation, such instructions must be addressed to the relevant air carrier and must not interfere with the coordinator's allocation of time slots. Nor can such instructions be directed to the airport managing body, as the latter neither allocates time slots under the Regulation nor has any authority to instruct the coordinator in this respect.
- 63 Icelandair submits that any intervention by the airport managing body in relation to the coordinator's tasks appears to conflict with the principles of functional separation, neutrality and non-discrimination, set out in Article 4(2)(b) and (c) of the Regulation. Therefore, guidelines or decisions on time slot allocation by the national competition authorities should not be directed to the managing body of an airport.
- 64 According to ESA, Article 8b of the Regulation permits a competition authority to require, pursuant to national law, the transfer of time slots between air carriers and to direct how these are allocated. However, ESA argues that this provision must be interpreted to the effect that any action of that kind should not interfere with the independence of the coordinator.
- 65 ESA further claims that it would be incompatible with the coordinator's role and independence if instructions or decisions regarding time slot allocation were addressed to the airport managing body or to the coordinator save for the situation where the coordinator, acting as an undertaking, has infringed competition rules and the instructions are therefore specifically meant to address that particular infringement.
- 66 The Commission interprets Article 8b of the Regulation to the effect that there is nothing to preclude a transfer of time slots being required as a matter of competition law. This must be distinguished from the primary allocation under Article 8 of the Regulation. Further, if such a remedy is found necessary by the competition authorities, this should properly take the form of instructions addressed to the air carriers concerned and not to the coordinator.
- 67 The Commission adds that there is nothing in the Regulation to preclude a competition authority from addressing a decision based on a breach of EEA competition law to a coordinator, provided that the coordinator is an undertaking and as such has committed a specific breach of competition rules.

Findings of the Court

- 68 By its third question, the national court asks, in essence, which parties may be the addressee of national competition authorities' instructions on time slot allocations.
- 69 According to Article 4(5) of the Regulation, the coordinator shall be the sole person responsible for the allocation of time slots. Pursuant to Article 8(5),

account must be taken, *inter alia*, of local guidelines proposed by the coordination committee and approved by the EEA State or any other competent body responsible for the airport in question. Such rules and guidelines must respect the independent status of the coordinator, comply with EEA law and aim at improving the efficient use of airport capacity.

- 70 Pursuant to Article 8b of the Regulation, public authorities may require the transfer of time slots between air carriers and direct how these time slots are allocated. This must also apply when initial allocations are based on grandfather rights. However, public authorities may not intervene in the coordinator's initial time slot allocation.
- 71 Moreover, it would serve no purpose to issue instructions to the airport managing body in this context. The airport managing body does not allocate time slots.
- 72 Article 8b of the Regulation thus entails that, unlike the situation in relation to the initial allocation of time slots, which is the sole responsibility of the coordinator, the Regulation does not prohibit the transfer of time slots after the initial time slot allocation, if required under national or EEA competition law. Consequently, the authorities of an EEA State have the right to instruct the undertakings concerned if such a remedy is found to be necessary under applicable national or EEA competition law.
- 73 In light of the above, the answer to the third question must be that, pursuant to Article 8b of the Regulation, national public authorities' instructions on time slot allocation to encourage competition may be addressed to air carriers, but may not be directed to a coordinator. Moreover, it would serve no purpose to issue instructions to the airport managing body. Unlike the primary allocation of time slots, which is the sole responsibility of the coordinator, the Regulation does not prohibit the transfer of time slots after the time slot allocation if required under competition law. Consequently, the competition authorities of an EEA State may instruct the undertakings concerned if such a remedy is found to be necessary under applicable national or EEA competition law.

IV Costs

- 74 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Reykjavík District Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Reykjavík District Court hereby gives the following Advisory Opinion:

- 1. Article 4(1) of Regulation (EEC) No 95/93 requires an EEA State to appoint a qualified natural or legal person as airport coordinator after having consulted the parties indicated therein. Article 4(2) of Regulation (EEC) No 95/93 requires the coordinator to be independent, both legally and factually, from all interested parties from which he must also be functionally separated. As long as these conditions are fulfilled, EEA States have discretion in determining the status of the coordinator. On the basis of those findings, it is for the national court to draw the necessary conclusions in order to ensure the effectiveness of Regulation (EEC) No 95/93.**

- 2. The complaint procedure laid down in Article 11(1) of Regulation (EEC) No 95/93 is not mandatory. Therefore, this procedure does not preclude the possibility that complaints based on competition law considerations may be submitted directly to national competition authorities.**

- 3. Pursuant to Article 8b of Regulation (EEC) No 95/93, public authorities' instructions on time slot allocation to encourage competition may be addressed to air carriers, but may not be directed to a coordinator. Moreover, it would serve no purpose to issue instructions to the airport managing body. Unlike the primary allocation of time slots, which is the sole responsibility of the coordinator, Regulation (EEC) No 95/93 does not prohibit the transfer of time slots after the time slot allocation, if required under competition law. Consequently, the competition authorities of an EEA State may instruct the undertakings concerned if such a remedy is found to be necessary under applicable national or EEA competition law.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 10 December 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President