



E-18/14-30

REPORT FOR THE HEARING

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 (“SCA”) by 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.

I Introduction

1. By letter of 4 September 2014, revised on 22 September 2014, Reykjavík District Court requested an Advisory Opinion in a case pending before it between Wow air ehf. (“the plaintiff”), and the Icelandic Competition Authority (*Samkeppniseftirlitið*) (“the Competition Authority”), Isavia ohf. (“Isavia”) and Icelandair ehf. (“Icelandair”) (collectively “the defendants”).

2. The case before the national court concerns an action for annulment of a decision of 27 February 2014 by the Competition Appeals Board (*Áfrýjunarnefnd samkeppnismála*), whereby a decision of the Competition Authority instructing Isavia to provide to the plaintiff certain slots for take-off and landing at Keflavík International Airport for the summer schedule of 2014, was annulled.

II Legal background

EEA law

3. Article 3(1) EEA reads:

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

4. Article 7(a) 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;

5. Article 47(2) EEA reads:

2. Annex XIII contains specific provisions on all modes of transport.

6. 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).

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

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

...

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

...

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;

...

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 schedules facilitated airports the schedules facilitator should act in an independent manner. 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 reads:

(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), (5) and (8) of the Regulation reads:

The schedules facilitator and the coordinator

1. The Member State responsible for a schedules facilitated or coordinated airport shall ensure the appointment of a qualified natural or legal person as

schedules facilitator or airport coordinator respectively 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 schedules facilitator or coordinator may be appointed for more than one airport.

2. The Member State responsible for a schedules facilitated or coordinated airport shall ensure:

(a) that at a schedules facilitated airport, the schedules facilitator acts under this Regulation in an independent, neutral, non-discriminatory and transparent manner;

(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.

...

8. The coordinator shall on request and within a reasonable time make available free of charge for review to interested parties, in particular to members or observers of the coordination committee, either in written form or in any other easily accessible form, the following information:

(a) historical slots by airline, chronologically, for all air carriers at the airport,

(b) requested slots (initial submissions), by air carriers and chronologically, for all air carriers,

(c) all allocated slots, and outstanding slot requests, listed individually in chronological order, by air carriers, for all air carriers,

(d) remaining available slots,

(e) full details on the criteria being used in the allocation.

11. Article 5 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:

- the possibilities for increasing the capacity of the airport determined in accordance with Article 3 or for improving its usage;*
- the coordination parameters to be determined in accordance with Article 6;*
- the methods of monitoring the use of allocated slots;*
- 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);*
- improvements to traffic conditions prevailing at the airport in question;*
- serious problems encountered by new entrants, as provided for in Article 10(9);*
- all questions relating to the capacity of the airport;*

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

2. Member State representatives and the coordinator shall be invited to the meetings of the coordination committee as observers.

3. The coordination committee shall draw up written rules of procedure covering, inter alia participation, elections, the frequency of meetings, and language(s) used. Any member of the coordination committee may propose local guidelines as provided for in Article 8(5). At the request of the coordinator, the coordination committee shall discuss suggested local guidelines for the allocation of slots as well as those suggested for the

monitoring of the use of allocated slots. A report of the discussions in the coordination committee shall be submitted to the Member State concerned with an indication of the respective positions stated within the committee.

12. Article 8(1), (2) and (5) of the Regulation reads:

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).

...

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 reads:

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. The coordinator shall decline to confirm the transfers or exchanges if they are not in conformity with the requirements of this Regulation and if the coordinator is not satisfied that:

(a) airport operations would not be prejudiced, taking into account all technical, operational and environmental constraints;

(b) limitations imposed according to Article 9 are respected;

(c) a transfer of slots does not fall within the scope of paragraph 3.

14. Article 8b of the Regulation reads:

Exclusion of compensation claims

The entitlement to series of slots referred to in Article 8(2) shall not give rise to any claims for compensation in respect of any limitation, restriction or elimination thereof imposed under Community law, in particular in application of the rules of the Treaty relating to air transport. 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), (2), (6) and (9) of the Regulation reads:

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). All new slot capacity determined pursuant to Article 3(3) shall be placed in the pool.

2. *A series of slots that has been allocated to an air carrier for the operation of a scheduled or a programmed non-scheduled air service shall not entitle that air carrier to the same series of slots in the next equivalent scheduling period if the air carrier cannot demonstrate to the satisfaction of the coordinator that they have been operated, as cleared by the coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which they have been allocated.*

...

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.*

Among requests from new entrants, preference shall be given to air carriers qualifying for new entrant status under both Article 2(b)(i) and (ii) or Article 2(b)(i) and (iii).

...

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 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.*

2. *Member States shall take appropriate measures, in accordance with national law, to protect coordinators with regard to claims for damages relating to their functions under this Regulation, save in cases of gross negligence or wilful misconduct.*

National law

17. Regulation No 1050/2008 of 30 October 2008 on the allocation of slots at airports (*Reglugerð um úthlutun afgreiðslutíma flugvalla*) (“Icelandic Regulation 1050/2008”) was adopted to implement the Regulation into Icelandic law. The legal basis for Icelandic Regulation 1050/2008 is Articles 57c(3), 76(3) and 145 of the Aviation Act No 60/1998 of 10 June 1998 (*Lög um loftferðir*).

18. In March 2014, the EFTA Surveillance Authority (“ESA”) informed Iceland that some of the provisions of the Regulation seemed not to have been fully or correctly implemented into Icelandic law. In particular, ESA was concerned that Icelandic Regulation 1050/2008 did not safeguard the coordinator’s independence from the airport managing body, as required by the Regulation.

19. Following the communication between ESA and Iceland on this subject, Icelandic Regulation 1050/2008 was replaced by Regulation No 858/2014 of 30 September 2014 on the allocation of slots at airports (“Icelandic Regulation 858/2014”), which entered into force on the same day. By Article 5 of Icelandic Regulation 858/2014, the Regulation (as amended by Regulation 793/2004) was incorporated into Icelandic law.

20. Article 16(1) and (2) of the Competition Act No 44/2005 of 19 May 2005 (*Samkeppnislög*) reads:

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.

III Facts and procedure

21. The plaintiff and Icelandair are both air carriers operating scheduled flight services to and from Iceland. 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 Eiriksson Air Terminal (*Lög um samruna opinberu hlutafélaganna Flugstoða og Keflavíkurlugvallar*).

22. On 1 April 2006, Keflavík International Airport was designated as a coordinated airport in accordance with Article 2(g) of the Regulation. ACD/Frank Holton, Managing Director of ACD was appointed as coordinator of Keflavík International Airport by an agreement of 11 September 2007 between Keflavík International Airport and Airport Coordination Denmark.

23. In March 2013, the plaintiff filed a complaint with the Competition Authority regarding the allocation of 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 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 slots.

24. The decision from the Competition Authority was appealed by Isavia and 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 slot allocation had been given to the coordinator. The Appeals Board gave the following reasons for this view:

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 Appeals Board's decision. The District Court granted an accelerated procedure under national rules. In May 2014 the District Court dismissed the plaintiff's action. However, in June 2014 the Supreme Court of Iceland (*Hæstiréttur Íslands*) quashed this decision and the case was resumed.

26. The defendants asked the District Court to seek an advisory opinion from the Court according to Article 34 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 nevertheless were to be addressed to the Court. The case was then remitted to the District Court.

27. By letter of 4 September 2014, revised on 22 September 2014, Reykjavik 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. In its letter, the District Court requested the Court to apply an accelerated procedure pursuant to Article 97a of the Rules of Procedure (“RoP”). This request was granted by order of the Court’s President of 30 September 2014.

IV Written observations

29. Pursuant to Article 20 of the Statute of the Court and Articles 97 and 97a RoP, written observations have been received from:

- The Competition Authority, represented by Gizur Bergsteinsson, Attorney at Law;
- Isavia, represented by Hlynur Halldórsson, Supreme Court Attorney;
- Icelandair, represented by Helga Melkorka Óttarsdóttir, Supreme Court Attorney;
- 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.

V Summary of the arguments submitted

The Competition Authority

30. As regards the first question, the Competition Authority submits that an EEA State responsible for a coordinated airport shall, pursuant to Article 4 of the Regulation, ensure the appointment of a qualified natural or legal person as an airport coordinator. The coordinator shall act in an independent, neutral, non-discriminatory and transparent manner. Moreover, the EEA State is responsible for providing a legal framework that separates the functions of the coordinator from those of any interested party. In addition, the system of financing the coordinators' activities shall guarantee the coordinator's independent status.

31. The Competition Authority contends that the Regulation does not require an EEA State to provide the coordinator with a specific legal status under national law. Such a requirement can hardly be reconciled with Article 4(1) of the Regulation

which, according to the Competition Authority, allows for the same coordinator to be appointed for airports in more than one EEA State.

32. In the view of the Competition Authority, the fact that EEA States have different arrangements for the appointment of coordinators illustrates that the determination of the legal status of the coordinator is within the discretion of the EEA States as long as the requirements in Article 4 of the Regulation are fulfilled.

33. As for the second question the Competition Authority submits that the procedure described in Article 11 of the Regulation does not prevent national competition authorities from exercising their powers under national competition law to require the transfer of slots between air carriers and to direct how these are allocated. Both the coordinator's role and the complaint procedure described in Article 11 are substituted by national competition authorities when they decide to exercise their powers under national law. This interpretation is supported by the explicit reservation in Article 8b and the amendments introduced in Regulation 793/2004.

34. As regards the third question, the Competition Authority submits that, since Article 8b of the Regulation substitutes the coordinator's role when national competition authorities decide to adopt remedies under national competition law, decisions on complaints in respect of the coordinator must be addressed to the airport managing body, not the coordinator.

35. The Competition Authority recalls that, pursuant to Article 2(j) of the Regulation, the airport managing body has the task 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. In this regard it is not only logical, but necessary, for national competition authorities to address their decisions to the managing body.

36. According to Article 4(5) of the Regulation, the coordinator shall allocate the slots in accordance with the provisions of the Regulation. The Competition Authority argues that slot allocation according to the Regulation does not occur when a national competition authority, on the basis of national competition law and in accordance with Article 8b of the Regulation, issues instructions regarding slots. Consequently, the Competition Authority argues that the coordinator is not authorised under the Regulation to comply with such instructions.

37. The Competition Authority proposes that the Court should answer the questions as follows:

1. Regulation 95/93 does not require Member States to grant a coordinator independent administrative power under national law. The Member States have discretion as to a coordinator's legal status provided that the conditions laid down in Article 4 of the Regulation are fulfilled.

2. Article 11 of Regulation 95/93, as amended with Regulation 793/2004, does not affect the powers of national competition authorities to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law.

3. Regulation 95/93 presumes that national competition authorities' decisions in respect of slot allocations should be addressed to the managing body of an airport.

Isavia

38. As to the first question, Isavia argues that the purpose of the Regulation indicate that the coordinator is fully independent in his work and cannot receive instructions or orders from interested parties. The coordination committee can only make proposals to or advice the coordinator on various issues and has no authority to instruct him.

39. Furthermore, Isavia submits that that the Regulation shall ensure that the coordinator is autonomous and neutral in his work. The coordinator allocates slots within a specific legal framework and should be considered to possess independent administrative powers enabling him to allocate slots in full conformity with the rules set out in the Regulation. EEA States have no discretion to change the status of or interfere with the independence of the coordinator as prescribed in the Regulation and cannot deviate from the allocation rules of the Regulation.

40. Isavia argues that an EEA State must make sure that slot allocation rules are correctly and strictly transposed into domestic legislation in accordance with the Regulation. Each EEA State is further obliged to grant the coordinator sufficient administrative power to allocate the slots in accordance with the provisions of the Regulation. Isavia submits that an EEA State has some discretion as to the legal form of the undertaking appointed under Article 4(1) of the Regulation (for example natural person, public company or private company), provided that the independence, autonomy and neutrality of the coordinator is not compromised.

41. As for the second question, Isavia submits that there is no indication that domestic competition rules are to be taken into account in the process of allocating slots under the Regulation. Thus, an EEA State cannot allow competition authorities to interfere with the allocation process or change the allocation of slots to air carriers, for example by means of an administrative decision such as the decision of the Competition Authority in the present case. According to Isavia, this would contradict the aim of the Regulation, which is to apply the same slot allocation rules at all EEA airports. There are provisions in the Regulation that directly address competition matters with a balanced approach, for example the provisions concerning new entrants.

42. Furthermore, Isavia submits that no local guidelines have been approved by the Icelandic Government. In any case, local guidelines need prior approval by ESA or the Commission to ensure that they do not compromise or distort unified and harmonised slot allocations at EEA airports. Authorities within an EEA State can therefore not

interfere with the slot allocation executed by the coordinator by giving instructions or request allocation of slots on other grounds than those expressly spelled out in the Regulation.

43. Isavia argues that the above indicates that complaints based on considerations of competition (cf. Article 8b of the Regulation) and complaints regarding allocation of slots executed by the coordinator (cf. Article 11 and Article 5(1)(b) of the Regulation) are entirely separate issues. To maintain a common and harmonised market, allocation rules contain exhaustive sets of instructions, among them instructions based on competition concerns. These rules need to be homogenous across EEA and implemented strictly in accordance with the Regulation by each EEA State.

44. However, Isavia observes that, according to Article 8b of the Regulation, the Regulation does 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 domestic competition law or to Articles 53 or 54 EEA. In Isavia's view, this could indicate that a national competition authority could intervene in the utilisation of slots by air carriers already allocated to them, on the basis that the air carrier in question is in breach of competition rules.

45. Isavia thus claims that competition authorities can require air carriers to transfer slots allocated to them by the coordinator in accordance with the Regulation, presumably on the basis of anti-competitive behaviour on the relevant market. This would in effect mean that the competition authorities could require the air carrier in question to return slots allocated to it by the coordinator to the slot pool pursuant to Article 10 of the Regulation, and, possibly, to transfer allocated slots to another air carrier negatively affected by the anti-competitive behaviour. Therefore, Isavia concludes that Article 8b can only refer to slots already allocated to air carriers and instructions to air carriers, but can neither refer to slots held by the coordinator in the slot pool nor justify instructions to the coordinator to allocate slots.

46. Isavia contends that the complaint procedure described in Article 11 of the Regulation clearly indicates that the coordination committee does not address competition issues. The coordination committee can only make proposals to the coordinator and/or try to mediate between parties involved. It is however clear that the coordination committee does not have any power to instruct the coordinator or change his allocations.

47. Consequently, Isavia submits, on the one hand, that the handling of complaints concerning allocation of slots under Article 11 and Article 5(1)(b) of the Regulation and, on the other hand, complaints based on competition considerations are separate issues. Complaints regarding competition should be handled by domestic competition authorities, or by ESA or the Commission if there is an appreciable effect on competition between EEA States. The handling of complaints under Article 11 of the Regulation cannot lead to changes in the allocation of slots, as the coordination committee has no powers of instruction over the coordinator.

48. As regards the third question, Isavia claims that if a competition authority issues instructions based on domestic legislation, such instructions must be addressed to the relevant air carrier. It is clear from the provisions of the Regulation that the competition authorities of an EEA State cannot issue instructions that interfere with the coordinator's allocation of slots. Neither can such instructions be directed to the airport managing body, as the latter neither allocates slots under the Regulation nor has any authority to instruct the coordinator in this respect.

49. Isavia proposes that the Court should answer the questions as follows:

1. EU and EFTA Member States are obligated to make sure that slot allocation rules are correctly and strictly transposed into the domestic legislation in accordance with Regulation 95/93. Each EU and EFTA Member State is further obligated to grant the coordinator sufficient domestic legal authority in a form of administrative power to allocate the slots in accordance with the subjective rules of Regulation 95/93. In this respect the Member State has no discretion to deviate from rules of the Regulation intended to protect the autonomy and independence of the coordinator. Member States have further no discretion to deviate from or change the slot allocation rules under Regulation 95/93. Member States can have some discretion as to the legal form of the undertaking which is appointed under Article 4(1), e.g. natural person, public or private company, provided that it does not compromise the above.

2. Handling of complaints concerning allocation of slots under Article 8(7) and Article 8(8) [Article 11 and Article 5(1)(b)] and complaints based on competition considerations are separate issues falling under different articles of Regulation 95/93. Complaints regarding competition considerations should be handled by domestic competition authorities, or if the consideration has an appreciable effect on competition between EEA Member States, by EFTA Surveillance Authority or the Commission. Rules on allocation of slots are exhaustive and finite set out instructions which cannot be changed with interference by competition authorities of a Member State. Handling of complaints concerning slots under Article (7) and Article 8(8) [Article 11] do not lead to changes in allocation of slots as the coordination committee has no instructive powers over the coordinator.

3. Competition authority of a Member State cannot issue instructions on the basis of domestic competition legislation towards the managing body of an airport/competent authority or to the coordinator. A competition authority of Member State can only issue instructions on the basis of domestic competition legislation towards air carrier(s) which have been allocated slots under Regulation 95/93, and require them to either transfer allocated slot(s) between air carriers or return slot(s) to the slot pool after being found in breach of domestic competition legislation. Reference to "domestic

competition legislation" entails that the subjective rules of domestic competition legislation will have to correspond to the subject matter of Articles 53 or 54 of the EEA Agreement (Art. 101 or 102 TFEU) and applicable rules on mergers.

Icelandair

50. As regards the first question, Icelandair submits that the coordinator is entrusted with an administrative role within the governmental system and to perform certain public service activities clearly defined in the Regulation and distinct from any other activities of the coordinator¹. The coordinator's independence is an essential requirement for him to properly carry out his tasks under the relevant legislation. The functional separation provided for in the Regulation means that the coordinator shall act autonomously from, and not be instructed by or have any reporting duties towards the airport managing body, a service provider or any air carrier. Furthermore, to safeguard that independence the coordinator shall be financially autonomous from any single party directly affected by - or having interest in - its activities.

51. Icelandair submits that it follows from Icelandic Regulation 858/2014 that the Icelandic authorities have acknowledged that Icelandic Regulation 1050/2008 did not ensure the independence of the coordinator from the airport managing body, Isavia.

52. According to Icelandair, the Regulation must be interpreted in a way that obliges the EEA State to ensure that a coordinator appointed is, as regards the execution of his tasks, granted independent administrative power under domestic legislation as part of the executive of the EEA State. However, as long as the coordinator's independence is protected in law and in fact under the domestic legislation of the relevant EEA State, its specific status under the same legislation is irrelevant.

53. As to the second question, in Icelandair's view, it is clear that the procedure provided for in the Regulation is set out, inter alia, to protect competition.² Although the Regulation does not prevent the public authorities from intervening with the slot allocation with reference to competition rules, Icelandair is of the opinion that those rules must, however, not obstruct the performance, in law or in fact, of the particular tasks assigned to the coordinator. Intervention of national competition authorities on slot allocation cannot be without boundaries.

54. Icelandair claims that the special procedure for slot allocation laid down in the Regulation prevails over national competition law in such a way that national competition authorities should not intervene unless there is clear and factual evidence that the coordinator has not respected its obligations. The fact that the Regulation provides for parameters on the allocation of slots, whose purpose is, inter alia, to

¹ Reference is made to Case T-177/04 *easyJet v Commission* [2006] ECR II-01931, paragraphs 91 and 93

² Reference is made to *easyJet v Commission*, cited above, paragraph 91.

protect competition, must be taken into consideration.

55. Icelandair further maintains that the intervention of the competition authorities should always be subject to the condition that the relevant air carrier has exhausted all reasonable efforts to obtain the necessary slots through the general slot allocation process provided for in the Regulation, unless there exists a clear and factual evidence for a breach of competition rules.

56. Icelandair also notes that the Regulation entails a total harmonisation, aiming to provide common rules on the allocation of slots in the EEA. Total harmonisation leaves an EEA State with no scope for further independent action in the field covered by the harmonising measure.³ In Icelandair's view, different methods of allocation of slots in each EEA State would jeopardise the entire system of slot allocations in Europe.

57. Accordingly, Icelandair concludes that an air carrier disputing the coordinator's slot allocation on the basis of national competition law must make all reasonable efforts to obtain the necessary slots through the general slot allocation process provided for in the Regulation. Further, any intervention by the national competition authorities must be in line with EEA law and the parameters for allocation of slots set out in the Regulation, and respect the principle of proportionality.

58. As for the third question, Icelandair points out that Article 8(5) of the Regulation requires the coordinator to take account 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, provided that such rules and guidelines do not affect the independent status of the coordinator. That provision cannot be interpreted in such a way that the managing body of an airport should be able or obliged to provide the coordinator with guidelines on the allocation of slots, as it would clearly affect the independent status of the coordinator.

59. In the view of Icelandair, any intervention by Isavia on the coordinator's tasks appears to conflict both with the principle of functional separation and the principles of neutrality and non-discrimination, as enshrined in Article 4(2)(b) and (c) of the Regulation.⁴ It is thus Icelandair's view that any guidelines or decisions by the national competition authorities should not be directed against the managing body of an airport.

ESA

60. ESA considers it appropriate to reply to the first and the third questions

³ Reference is made to Case C-16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 01299, paragraph 13; Case C-167/01 *Kamer van Koophandel* [2003] ECR I-10155, paragraphs 62 and 65 to 72; and Case C-52/00 *Commission v France* [2002] ECR I-03827, paragraphs 16, 19 and 24.

⁴ Reference is made to the Commission decision to bring Portugal to ECJ for failing to guarantee the independence of the airport slot coordinator (European Commission Notice of 20 November 2013 - IP/13/1100 - 20/11/2013).

together.

61. As a starting point, ESA submits that it is necessary to make a distinction between the allocation of slots and the transfer of slots. Slot allocation refers to the first time a slot is established and allocated by a slot coordinator, whereas the transfer of slots refers to the transfer or exchange of slots between those air carriers holding slots and those seeking new or additional slots.

62. ESA contends that the Regulation itself does not contain any provisions relating to the status of the coordinator as a natural person or entity exercising public authority. Neither does it explicitly address the legal form of the coordinator. Article 4 of the Regulation merely requires EEA States to ensure that the coordinator is a qualified natural or legal person that acts in a neutral, non-discriminatory and transparent manner. In addition, the coordinator must be functionally separated from any interested party and the system of financing the coordinator's activities must guarantee the coordinator's independent status.

63. ESA refers to the Commission's Communication on the application of the Regulation,⁵ according to which functional separation means, inter alia, that the coordinator should act autonomously from, not be instructed by, and not have a duty to report back to the airport managing body, a service provider or any air carrier operating from the airport concerned. Furthermore, the system of financing the coordinator's activities should be set up in such a way that the coordinator is financially autonomous from any single party directly affected by, or having an interest in, its activities. The coordinator should therefore keep separate accounts and budgets and not rely for the financing of his activities only on the airport managing body, a service provider or a single air carrier.

64. ESA submits that the Regulation provides for full-harmonisation on the matter. As long as the Regulation is correctly applied so as the coordinator's full independence is guaranteed, it is a matter for national law whether the entity designated as coordinator exercises public or private law.

65. ESA observes that coordinators take various legal forms in different EEA States. This lack of uniform status and legal form of coordinators further suggests that the Regulation cannot be regarded as requiring the coordinator to have a specific status or legal form under domestic legislation. ESA therefore considers that it is for each EEA State to decide the status and legal form of the coordinator under domestic legislation as long as his full independence is guaranteed.

66. As to whether or not competition authorities can issue guidelines or instructions to the coordinator, ESA recalls that Article 4(2)(b) of the Regulation requires the coordinator to be independent, and that Article 4(5) of the Regulation confers the sole

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *On the application of Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, as amended*. COM (2008) 227, p. 3.

responsibility for allocating slots to the coordinator. Nonetheless, under Article 8(5) of the Regulation the coordinator may be required to take into account certain priority rules and guidelines. However, such rules and guidelines must comply with the conditions set out in Article 8(5) and the EEA State must notify them to ESA or the Commission.

67. Furthermore, Article 8b of the Regulation provides for the possibility for a public authority to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law. A national competition authority may thus require the transfer of slots between air carriers and to direct how these are allocated if a competition law issue has been established. However, ESA argues that this provision should be interpreted to the effect that any such action taken by a public authority should not interfere with the independence of the coordinator.

68. ESA further claims that it would be incompatible with the coordinator's role and independence if instructions or decisions regarding slot allocation could be addressed to the airport managing body or the coordinator, save for circumstances where the coordinator, acting as an undertaking, has infringed competition rules and the instructions are therefore specifically meant to address that particular infringement by the coordinator.

69. With reference to the second question, ESA contends that the complaint procedure set out in Article 11(1) of the Regulation should neither be considered mandatory nor exhaustive. First, Article 11 of the Regulation explicitly addresses the issue in stating that the complaint procedure is without prejudice to rights of appeal under national law. Second, the provision does not provide for any binding dispute resolution mechanism. It merely provides that the coordination committee shall consider the matter and if possible make proposals to attempt to resolve the problem brought before it. Also, the coordination committee's other tasks laid down in Article 5(1)(a) and (b) of the Regulation are only advisory. Third, Article 11 provides that an EEA State may provide for non-binding mediation.

70. Furthermore, as regards competition rules, the preamble to the Regulation provides that the application of the provisions of that regulation is without prejudice to the competition rules of the EU Treaty. ESA claims that recital 15 in the preamble to the Regulation should be read in conjunction with its Article 8b.

71. ESA therefore concludes that Article 11(1) of the Regulation should not be construed to mean that all complaints, including complaints based on competition considerations, are subject exclusively to the procedure set out in that article. Rather, as regards competition law enforcement, it is for domestic law to determine which bodies have jurisdiction to apply national or EEA competition rules. Under the EEA legal order, these rules can be applied by both national competition authorities and national courts (and indeed must be applied by them in some circumstances).

72. ESA advises the Court to reply to the questions referred in the following

manner:

1. Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports requires that EEA States must ensure the full independence of persons or entities designated as slot coordinators. As long as this is the case, it is a matter for national law whether slot coordinators are established under public or private law.

2. On a proper construction of Regulation No 95/93, the complaint procedure described in its Article 11 is without prejudice to remedies available under national law, including competition law. It is for domestic legislation to determine which authorities or courts have jurisdiction to apply such rules.

3. Article 8b of Regulation No 95/93 should be interpreted to the effect that any action taken by a public authority should not interfere with the independence of the slot coordinator.

The Commission

73. As for the first question, it is the Commission's view that the requirement of functional separation in Article 4(2)(b) of the Regulation means that the coordinator must act autonomously, and, in particular, not be instructed by, or have a duty to report back to, the airport managing body, a service provider or any air carrier operating from the relevant airport. The Commission contends that the notion of independence normally means a status which ensures that the body/entity concerned can act completely freely, without taking instructions or being put under any pressure.⁶

74. The Commission submits that, provided that these essential requirements are met, the Regulation is otherwise silent as to the precise status or legal form the position of coordinator is to take. This accordingly remains a matter for the EEA States.

75. The Commission emphasises that one consequence of the functional separation is that the coordinator cannot be subject to instructions of for example the airport managing body. Further, the Commission argues that since it is the coordinator who bears sole responsibility for slot allocation under Article 8 of the Regulation, any instructions from the airport managing body as to how to carry out an allocation would clearly be incompatible with the Regulation.

76. As for the second question, in the Commission's view it is clear that the procedure prescribed in Article 11(1) of the Regulation is in no way intended to be exhaustive. As is expressly stated in the introductory phrase of Article 11(1), the complaints procedure is without prejudice to the rights of appeal under national law.

⁶ Reference is made to Case C-518/07 *Commission v Germany* [2010] ECR I-1885, paragraph 18.

77. The Commission contends that this conclusion is further reinforced by the terms of recital 15 in the preamble to the Regulation and recital 17 in the preamble to the amending Regulation 793/2004. Both emphasise that the application of the provisions of the Regulation is to be without prejudice to the competition rules of the Treaty. Article 8b of the Regulation also states that the regulation shall not affect the powers of the public authorities to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national or EEA competition law - reflecting the fact that this is one of the specific remedies which might be adopted in case of a breach of competition law rules.

78. To that end, the Commission argues, first, that it is true that Article 11(1) of the Regulation does not further define the precise nature of any complaints to be considered under the complaints procedure, other than to state that they should relate, *inter alia*, to the slots allocation process or creation of the slot pool. In the Commission's view, the primary task of the coordination committee in this context is to analyse a complaint in light of the requirements of the Regulation. Although these may themselves incorporate certain competition law considerations, it is clear that the coordination committee would not be competent to make a definite ruling on purely competition law issues, either as a matter of EEA or national competition law.

79. Second, the Commission continues, it is clear that compliance with the rules of the Regulation cannot necessarily preclude a breach of competition rules by an undertaking (indeed as is further illustrated by the wording of Article 8b of the Regulation itself). However, in the Commission's view, a decision raising specific competition concerns involving a breach of the EEA provisions on restrictive practices or abuse of a dominant position, or a decision based on the Merger Regulation,⁷ would need to be adopted before a particular remedy could be imposed. In other words, a general finding by a national competition authority of a lack of competition without the identification of a specific conduct contrary to EEA competition law provisions could not properly be used as a basis for overriding the rules laid down in the Regulation. In this regard, the Commission would in particular note that Article 8(2) of the Regulation expressly allows for the continuation of certain historical rights to slots (the so-called "grandfather rights").

80. Finally in this respect, the Commission would emphasise that there is no obligation under EEA competition law for potential complainants to have first exhausted all other remedies available (including an Article 11(1) complaint under the Regulation).

81. As the Commission understands it, the third question arises because of a particular feature of Icelandic competition law, namely that Article 16(1)(b) of the Competition Act also permits the Competition Authority to take measures against acts of public entities where they may have detrimental effects on competition - and not merely against undertakings in cases where an infringement of competition law has

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004, OJ 2004 L 24, p. 1.

been established.

82. The Commission emphasises that the independence of the coordinator, as required by Article 4 of the Regulation, is one of the key elements in ensuring the proper functioning of the slot allocation process. Consequently, in the Commission's view the possibility of instructions being addressed directly or indirectly to the coordinator in relation to this process is clearly incompatible with the requirement of independence.

83. At the same time, the Commission argues that it is true that the Regulation is without prejudice to EEA competition law rules, and that Article 8b of the Regulation expressly envisages that a competition law authority may be able to require the transfer of slots between carriers as a matter of national or EEA competition law. The Commission understands this to mean that there is nothing in the Regulation to preclude a subsequent transfer of slots being required as a matter of competition law, but this situation must be distinguished from the primary allocation under Article 8 of the Regulation. Further, if such a remedy were found necessary by the competition authorities, this should properly take the form of instructions addressed to the undertakings concerned, that is the air carriers, and not to the coordinator.

84. Finally, the Commission adds, with reference to recital 15 in the preamble to the Regulation, there is of course nothing in the Regulation to preclude a relevant competition authority from addressing a decision based on a breach of Articles 101/102 TFEU or Articles 53/54 EEA to a coordinator, provided that the coordinator can itself be classified as an undertaking and has as such committed a specific breach of competition rules by its own conduct, and not simply on the basis of a correct application of the provisions on slot allocation.

85. The Commission proposes that the Court should answer the questions referred as follows:

1. Article 4 of Council Regulation (EEC) No. 95/93 does not contain specific requirements as to the status or legal form of the coordinator to be appointed under that article. Provided that the independence of the coordinator is guaranteed in accordance with the requirements of that article, this accordingly remains a matter for the EEA States.

2. The complaints procedure laid down in Article 11(1) of Council Regulation (EEC) No. 95/93 is not exhaustive, and cannot preclude access to other available legal procedures and remedies, including those based on competition law.

3. In the context of the slot allocation process under Article 8 of Council Regulation (EEC) No. 95/93, the issuing of instructions to the coordinator is incompatible with the requirement of independence laid down in its Article 4 as well as the sole responsibility of the coordinator for that allocation process by virtue of its Article 4(5). This is however without

prejudice to the provisions of Article 8b of the Regulation, as well as the possibility for the relevant competition authorities to take measures in relation to a specific breach of competition rules committed by the coordinator by its own conduct.

Per Christiansen
Judge-Rapporteur