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EFTA SURVEILLANCE AUTHORITY

Ministry for the Environment and Natural Resources
Skuggasund 1
101 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Complaint against Iceland concerning the application of Directive 2011/92/EC to fish farming

1 Introduction

By letters dated 30 November and 4 December 2018 (Doc No 1039774 and 1041102), the EFTA Surveillance Authority ("the Authority") informed the Icelandic Government that it had received two complaints concerning the application of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive")[1] in Iceland.

The background to the complaints is the granting of temporary operating licenses and temporary exemptions to hold operating licenses (together the "temporary operating licenses") to two fish farms, Arctic Sea Farm and Fjarðalax. The Icelandic Government granted the temporary operating licenses after the Judicial Committee in Environmental and Natural Resources Cases (*úrskurðarnefnd umhverfis- og auðlindamála*, "ÚUA") declared the initial operating licenses invalid because of certain flaws in the environmental impact assessments ("EIA").

Based on the information and documents provided by the Icelandic Government, the Internal Market Affairs Directorate ("the Directorate") is of the preliminary view that Iceland has failed to fulfil its obligations under Article 2, Articles 4 to 9 and Article 11 of the EIA Directive.

The present letter sets out the Directorate's reasoning for this preliminary view.

2 Correspondence and meetings

On 7 December 2018, the Directorate sent a request for information inviting the Icelandic Government to explain *inter alia* the national legal instruments and related administrative practice on which the granting of temporary operating licenses to Arctic Sea Farm and Fjarðalax were based, as well as whether and if so, to what extent, the two fish farms had started their operations (Doc No 1041313).

[1] The Act referred to at point 1a of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 230/2012 of 7 December 2012.

The Icelandic Government answered by two letters dated 17 April 2019 and received by the Directorate the same day (Doc No 1065562, 1065564 and 1065566) and on 26 April 2019 (Doc No 1066398, 1066400, 1066402 and 1066404).

The Icelandic Government explained the procedure it followed when granting the temporary operating licenses to Artic Sea Farm and Fjarðalax. It notably explained that the decisions granting said licenses (i) require the fish farms to either rectify the flawed EIAs or to challenge the ÚUA's decisions that annulled their initial license; (ii) are only interim measures based on the initial licenses and are thus part of the same administrative procedure; and (iii) can be challenged in courts of law by an interested party. The Icelandic Government added that the initial licenses were declared invalid only with regard to procedural aspects of the EIAs, and not their substance. Finally, it confirmed that Artic Sea Farm and Fjarðalax had started their operations.

The Directorate and the Icelandic Government discussed the information provided by the Icelandic Government at the Package Meeting held on 4 June 2019, as stated in the follow-up letter (Doc No 1076000). The Icelandic Government also provided information on the work carried out by Arctic Sea Farm and Fjarðalax to rectify the EIAs carried out in respect of their initial licenses.

On 6 September 2019 (Doc No 1085341), the Directorate sent a second request for information. It invited the Icelandic Government to indicate whether Arctic Sea Farm and Fjarðalax had been granted new operating licenses and to provide information about the fish farms' legal actions against the ÚUA's decisions.

By letter of 7 October 2019 (Doc No 1091349), the Icelandic Government provided the requested information. It confirmed that the relevant authorities had granted Arctic Sea Farm and Fjarðalax new operating licenses. It sent copies of these licenses and links to the updated EIAs. It also explained that the two fish farms withdrew their legal actions against the ÚUA's decisions.

3 Relevant provisions of law

3.1 EEA law

The EIA Directive, as amended by Directive 2014/52/EU[2], requires that an EIA be carried out for projects that are likely to have significant effects on the environment.

Under Article 2 of the EIA Directive, Member States are required to "*adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment*".

Article 4 of the EIA Directive lists the projects that are subject to an EIA.

[2] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 *amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*. The act referred to at point 1a of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 117/2015 of 30 April 2015.

Projects subject to an EIA in accordance with Article 4 of the Directive have to be made subject to an assessment with regard to their effects on the environment in accordance with Articles 5 to 9 of the EIA Directive.

Article 5 of the EIA Directive requires a project developer to prepare and submit an EIA report. Article 5 of the EIA Directive non-exhaustively lists the information to be contained in the report, including a description of: the project, the likely significant effect on the environment, and the measures envisaged to mitigate the effects on the environment and of considered alternatives.

Article 6 requires an EEA State to ensure that authorities likely to be concerned by the project and the public participate in the decision making procedure and are given the opportunity to voice their opinion on the project. Public participation has to be effective and timely, and thus allow for comments when all options are still open or before the decision on the request for consent is taken.

Article 7 governs projects likely to have significant effects on the environment in another EEA State. It lays down the procedure to ensure participation of the authorities and public of the concerned States.

Article 8 requires that the results of consultations and the information gathered pursuant to Articles 5 to 7 are duly taken into account in the decision making procedure .

Article 8a sets out the information that must be contained in a decision to grant development consent, requires the EEA States to take such decision in within a reasonable period of time and to monitor the project subject to the development consent.

Article 9 requires the competent authorities to inform the public when a decision to grant or refuse development consent has been taken. This provides parties who consider themselves harmed by the project to exercise their right of appeal within the applicable deadlines.

Article 11 of the EIA Directive governs the right to challenge decisions that are subject to an EIA. Particularly, paragraphs 1 and 3 of this Article provide that:

> *"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
> *(a) having a sufficient interest, or alternatively;*
> *(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*
> *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."*
>
> *(...)*
>
> *3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this*

Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 to this Article."

3.2 National law

Article 4b of Act No. 71/2008 on Fish Farming (*lög um fiskeldi*) ("the Fish Farming Act") subjects the operation of fish farming to two operating licenses: one issued by the Icelandic Food and Veterinary Authority (*Matvælastofnun*) ("MAST") and another one by the Environmental Agency of Iceland (*Umhverfisstofnun*) ("UST").

The Fish Farming Act governs the operating license issued by MAST. Act No. 7/1998 on Hygiene and Pollution Control (*lög um hollustuhætti og mengunarvarnir*) ("the Hygiene and Pollution Control Act") governs the operating license issued by UST.

Article 21c of the Fish Farming Act, as amended by Act No. 108/2018,[3] allows the Ministry of Industry and Innovation ("ANR") to issue temporary operating licenses (the "temporary operating license") in the event the initial operating license is revoked due to flaws in its issuance:[4]

"If an operating license is revoked due to flaws in issuing the license, the minister can, having received the opinion of the Food and Veterinary Authority, and if supported by valid grounds, issue a temporary operating license valid for up to ten months, subject to the receipt of an application for such temporary license from the holder of the revoked license within three weeks from the date on which the operating license was revoked. The application for a temporary operating license shall be processed as quickly as possible, and no later than four weeks following the receipt of the application. The application shall describe the purpose of the temporary operating license in a clear manner, the reasons for the application, and the measures expected to be undertaken in the duration of the temporary operating license. Notwithstanding the first paragraph, the Food and Veterinary Authority shall not suspend the operation of a fish farm before the application deadline for a temporary operating license has expired. If an application is received, the operations of the applicant shall not be suspended while the application is being processed by the minister. The scope of a temporary operating license shall be the same as stipulated by the revoked operating license. The decision to grant a temporary operating license can be based on materials gathered in the process of granting the revoked operating license. The minister can subject the granting of a temporary operating license to conditions that are necessary to achieve the purpose of the license, such as reduction of the current operations, deadlines for rectification, initiation of court proceedings or other judicial actions that are available to the parties. A temporary operating license issued in accordance with this provision can be re-issued once. A temporary operating license issued in accordance with this provision is a final decision at the administrative level."

[3] Act No. 108/2018 on Amending the Act on Fish Farming No. 71/2008 with subsequent amendments (*lög um breytingu á lögum um fiskeldi, nr. 71/2008, með síðari breytingum*), entry into force on 10 October 2018.
[4] Unofficial translation by the Directorate.

Article 6(1) of the Hygiene and Pollution Control Act, as amended by Act No. 66/2017,[5] allows the Ministry for the Environment and Natural Resources to grant temporary exemptions to hold operating licenses (the "temporary exemption to hold an operating license"):[6]

> *"All business activities, in accordance with Annex I-V, shall have a valid operating license granted by the Environment Agency of Iceland or the local Board of Public Health, cf. however, Article 8. It is prohibited to start a business activity when an operating license has not been granted or it has not been registered with the Environmental Agency of Iceland. All business activities for which an operating license has been applied for shall be in accordance with a planning within the meaning of the Planning Act or the Act on Marine and Coastal Planning. The minister can, if supported by valid grounds, and having received the opinion of the Food and Veterinary Authority, and when applicable, from the local Board of Public Health, grant a temporary exemption from the requirement to hold an operating license. An operating license shall be granted for a business activity when it complies with the requirements under this Act and adopted regulations, and pursuant to other legislation."*

Article 5(4) of Regulation No 550/2018 on emissions from business operations and pollution control (*Reglugerð nr. 550/2018 um losun frá atvinnurekstri og mengunarvarnir*) (the "Emission and Pollution Control Regulation") further governs the granting of temporary exemption to hold an operating license under Article 6(1) of the Hygiene and Pollution Control Act: [7]

> *"The minister may, if supported by valid grounds, and having received the opinion of the Environment Agency of Iceland and, when applicable, from the local Board of Public Health, grant a temporary exemption from the requirement for an operating license, under paragraph 1, provided that a satisfactory operating license application has been submitted to the issuer of the operating license and, when applicable, an environmental impact assessment or conclusion of the operation assessment is available. An exemption shall be limited to necessary elements in accordance with the principle that all business operations must have a valid operating license. The operator shall comply with other provisions of the issued operating license or the authorization proposal, and the companies' supervisory report to the issuer on progress of necessary improvements related to the exemption criteria, when an exemption is granted. The issuer of an operating license shall publish the minister's exemption on its website and the companies' supervisory reports that operate on the exemption."*

4 Directorate's preliminary assessment

4.1 Failure to adopt the necessary measures to ensure that projects likely to have a significant impact on the environment are subject to an EIA

Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation set up a framework

[5] Act No. 66/2017 on Amending the Act on Hygiene and Pollution Control, No. 7/1998, with subsequent amendments (*lög um breytingu á lögum um hollustuhætti og mengunarvarnir, nr. 7/1998, með síðari breytingum*).
[6] Unofficial translation by the Directorate.
[7] Unofficial translation by the Directorate.

under which the Icelandic Government can grant temporary operating licenses and a temporary exemption from the requirement to hold licenses for the operation of fish farms. Article 21c of the Fish Farming Act provides that temporary operating licenses may be granted when the initial operating license is revoked due to flaws in issuing the license. Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation do not specify whether temporary exemptions to hold operating licenses may be granted only when the initial operating license is revoked.

In the cases underlying the complaints received by the Directorate, the Icelandic Government granted temporary operating licenses and temporary exemptions from the requirement to hold operating licenses to fish farms whose initial operating licenses were declared invalid because of flawed EIAs. The Icelandic Government requested that the fish farms rectify the flawed EIAs or/and challenge the ÚUA ruling declaring the EIAs flawed before the national court. The Directorate understands that the fish farms submitted additional reports with the missing information, and voluntarily underwent the same procedure as for the initial EIA for these additional reports. MAST and UST subsequently issued new operating licenses, based on the initial EIA and the additional reports. The fish farms did not submit new applications for a new operating license.

The EIA Directive does not set out the practical consequences of a failure to carry out an EIA or of carrying out a flawed EIA procedure. The Court of Justice of the European Union ("CJEU") has, however, on a number of occasions, considered the obligations of Member States when such situations arise.

The CJEU has ruled that under the principle of sincere cooperation in Article 4(1) of the Treaty on European Union ("TEU"), Member States must eliminate the unlawful consequences of a breach of EU law. The procedural modalities are left to the discretion of the Member States, provided that they are not less favourable than domestic situations (principle of equivalence) and do not render impossible or excessively difficult the exercise of the conferred rights (principle of effectiveness).[8]

The CJEU has also ruled that national rules may permit a regularisation *a posteriori* of an invalid EIA, provided that:

- such regularisation does not offer the persons concerned the opportunity to circumvent EU rules or to dispense with applying them;
- it remains the exception; and
- the regularisation takes into account the project's environmental impact as from its completion, and not only the future impacts.[9]

In the Directorate´s view Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation do not satisfy these requirements.

[8] Judgments of the CJEU of 7 January 2004 in Case C-201/02, *The Queen on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, EU:C:2004:12, paragraphs 64 and 67 and Judgment of 17 November 2016 in Case C-348/15, *Stadt Wiener Neustadt v Niederösterreichische Landesregierung*, EU:C:2016:882, paragraph 40.

[9] Judgments of the CJEU of 3 July 2008 in Case C-215/06 - *Commission v. Ireland*, EU:C:2008:380, paragraph 57, and cited above Case C-348/15, *Stadt Wiener Neustadt*, paragraphs 36 to 38, and Judgment of 26 July 2017 in Joined Cases C-196/16 and C-197/16, *Commune di Corridonia*, EU:C:2017:589, paragraphs 37, 38 and 41.

Article 21c of the Fish Farming Act does not explicitly subject the granting of a temporary operating license to the rectification of a flawed EIA which led to the revocation of the initial operating license. It merely states that the Minister, when granting such licenses, may impose conditions such as deadlines for rectifications. Article 21c of the Fish Farming Act therefore leaves room to circumvent the requirements set out in the EIA Directive. This provision is moreover not limited to exceptional circumstances and does not require that the regularised EIA covers both future impacts and impacts at the time of completion.

Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation require, as a condition for the granting of a temporary exemption to hold an operating license, that an EIA or a conclusion of the operation assessment is available. These conditions lack clarity and cannot be read as subjecting the granting of temporary exemption to hold operating licenses to the rectification of an invalid EIA. As is the case with Article 21c of the Fish Farming Act, these provisions are additionally not limited to exceptional circumstances and do not require that the regularised EIA covers both future impacts and impacts at the time of completion.

The fact that the temporary operating licenses are issued by the Icelandic Government as temporary and interim measures until the issuance of new operating licenses by the relevant Icelandic public authorities (namely MAST and UST) is, in the Directorate's opinion, irrelevant.

One of the key requirements of the EIA Directive is the obligation to ensure early and effective participation to non-governmental organisations ("NGOs") and interested members of the public, and thus give them the opportunity to express their opinion before a project starts.

From the Directorate's understanding of the Icelandic legislation, there is no obligation to ensure that this requirement is met when granting temporary operating licenses. The carrying out of a public consultation and opening up to receiving the views of NGOs and interested members of the public is therefore left to the discretion of the holder of the temporary operating license.

No link is additionally made between the granting of the temporary operating licenses and the issuance of the new operating licenses. As a result, there is a risk that NGOs and interested members of the public are not involved in the issuance of the new operating licenses, and that the requirements of the EIA Directive are not complied with.

The Directorate is therefore of the preliminary view that Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation are incompatible with the requirements of Articles 2 and 4 to 9 of the EIA Directive.

4.2 Failure to establish a review procedure

The objective of Article 11 of the EIA Directive is to ensure the broadest possible access to review decisions subject to EIAs, especially for environmental NGOs.

The CJEC has ruled with regard to this article that "*whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled pursuant to [Art. 10a of Directive 85/337 – now Art. 11 of the EIA Directive], to*

have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that Article".[10]

The Icelandic legislation, by its Act 130/2011 on the the Judicial Committee in Environmental and Natural Resources,[11] establishes the ÚUA as an independent review body with competence to review decisions made at the administrative level in the field of environment and natural resources, including those that relate to EIAs (see Article 4(3)). Article 4(2) of the Fish Farming Act and Article 65 of the Hygiene and Pollution Control Act foresee that decisions relating to EIAs can be challenged in an administrative procedure before the ÚUA.

Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation deviate from this approach.

Article 21c of the Fish Farming Act provides that the temporary operating licence is a final decision at the administrative level. In its letter of 17 April 2019, the Icelandic Government explained that the temporary operating license cannot be appealed on an administrative level but can be subject to judicial review under the general rules.

Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation are silent on the conditions for challenging decisions granting temporary exemptions to hold operating licenses. The Icelandic Government indicated in its letter of 17 April 2019 (Doc No 1065562) that the Ministry decisions can be challenged in court of law by a person having a legal standing. It added that the decisions granting temporary exemptions to hold operating licenses are intermediate steps in the process for the granting of the final licenses, and that the decisions granting the final licenses can be challenged before the ÚUA by persons that have legal standing and by environmental associations with more than 30 members.

In application of these provisions, complaints against the decisions granting the temporary measures could not be brought to the ÚUA, in contrast to regular challenges of decisions subject to EIAs. Complaints against the decisions granting the temporary measures have to be brought to a judicial court, requiring the applicant to demonstrate a direct interest and effect.

In the Directorate's view, this goes against the requirements of Article 11(1) and (3) of the EIA Directive.

The current provisions in the Icelandic legislation effectively limit the rights of NGOs to challenge decisions where the EIAs are subject to temporary operating licenses.

The Directorate is therefore of the opinion that Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation breach Article 11(1) and (3) of the EIA Directive.

[10] Judgment of the CJEU of 12 May 2011 in Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein- Westfalen eV v Bezirksregierung Arnsberg*, EU:C:2011:289, paragraph 42.
[11] *Lög nr. 130/2011 um úrskurðarnefnd umhverfis- og auðlindamála.*

5 Conclusion

The Directorate takes the preliminary view that Article 21c of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation violate Article 2, Articles 4 to 9 and Article 11 of the EIA Directive by not imposing sufficient requirements for rectification of flawed EIAs.

Furthermore, the Directorate is of the preliminary opinion that the Icelandic Government has infringed Article 11 of the EIA Directive by not ensuring access to a review procedure to non-governmental organisations.

In light of the above, the Icelandic Government is invited to submit its observations on the content of this letter by **14 June 2020**. After that date, the Authority will consider, in light of any observations received from the Icelandic Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Gabrielle Somers
Acting Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gabrielle Somers.