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EFTA SURVEILLANCE
AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's failure to fulfil its obligations arising from *Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment*

1 Introduction

By letter of 20 April 2015 (Document No 754248), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case concerning issues regarding the implementation of *Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment*¹ (“the Directive”).

In its letter of 20 April 2015, the Authority invited the Icelandic Government to provide information on three issues relating to the implementation of the Directive. In the first place, concerning significant delays in the appeals process before the Ruling Committee on issues relating to the environment and natural resources (*úrskurðarnefnd umhverfis- og auðlindamála*) (“the Ruling Committee”). Secondly, regarding the reviewability and scope of review of environmental impact assessments before the Ruling Committee. Finally, on the issue of whether the Icelandic Government considered that, in light of the fact that the omissions of the National Planning Agency (*Skipulagsstofnun*) (“the NPA”) could not be challenged before the Ruling Committee, Icelandic law was in conformity with the obligations under the Directive, in particular the provisions of Article 11(1) of the Directive.

By letter of 19 May 2015 (Document No 757845), the Icelandic Government replied to the Authority’s letter.

The case was subsequently discussed with the Icelandic Government at the package meeting which took place in Reykjavík on 27 May 2015. At that meeting, the issue of delays before the Ruling Committee was clarified and new information was presented to the Authority on the reviewability and scope of review of environmental impact assessments before the Ruling Committee. However, the issue of the possibility to challenge the NPA’s omissions before the Ruling Committee was left unresolved. The representatives of the Icelandic Government explained that the current procedure did not allow for the possibility to challenge an omission of the NPA.

A follow-up letter was sent to the Icelandic Government on 11 June 2015 (Document No 760020).

By letter dated 15 July 2015, the Icelandic Government replied to the Authority’s follow-up letter (Document No 765425). The reply set out the details of the Icelandic Government’s response to the questions posed by the Authority at the meeting in Reykjavík on 27 May 2015.

On 28 October 2015 (Document No 759966), the Authority issued a letter of formal notice to Iceland concluding that by not adopting the necessary implementation measures in order to provide for the possibility to challenge the substantive or procedural legality of certain omissions, as stipulated in Article 11(1) of the Directive, Iceland had failed to fulfil its obligations arising from the Directive.

By letter of 12 January 2016 (Document No 787604), the Icelandic Government replied to the letter of formal notice.

¹ The act referred to at point 1a of Annex XX to the EEA Agreement, incorporated into the EEA Agreement by Joint Committee Decision No 230/2012, which entered into force on 8 December 2012. The Directive codified existing legislation, repealed Directives 85/337/EEC and 97/11/EC, and partially repealed Directives 2003/35/EC and 2009/31/EC.

Following a careful examination of the information and arguments provided by Iceland, the Authority maintains the conclusion that Iceland has failed to correctly implement Article 11(1) of the Directive.

2 Relevant national law

Article 4(3) of Act No 130/2011 on the Ruling Committee on issues relating to the environment and natural resources (*lög nr. 130/2011 um úrskurðarnefnd umhverfis- og auðlindamála*) (“the Ruling Committee Act”), which implements Article 11 of the Directive, reads as follows:

“An administrative decision can only be appealed to the Ruling Committee by those who fulfil the requirements of standing (locus standi). Environmental NGOs consisting of at least 30 members may, however, appeal the following decisions without having to fulfil the requirement of standing in relation to the decisions, as long as it conforms to the purpose of that organization to safeguard the interests relating to the appeal:

- a) decisions by the National Planning Agency on whether a project is subject to an assessment, decisions on conducting a joint environmental impact assessment and decisions on revising environmental impact assessment in accordance with the Act on Environmental Impact Assessments, including decisions of municipalities on whether projects are subject to an assessment.*
- b) decisions granting development consent for projects which fall within the scope of the Act on Environmental Impact Assessments*
- c) decisions on granting permits in accordance with the Act on genetically modified organisms to release or distribute genetically modified organisms”²*

Article 9(4) of the Administrative Act No 37/1993 (*stjórnsýslulög nr. 37/1993*) (“the Administrative Act”) reads as follows:

“If there is undue delay in the conclusion of a case a complaint to this effect may be lodged with the authority to which a decision in the case may be appealed.”³

² Working translation by the EFTA Surveillance Authority. In Icelandic: *„Þeir einir geta kært stjórnvaldsákvæðanir til úrskurðarnefndarinnar sem eiga lögvarða hagsmuni tengda ákvörðun sem kæra á. Umhverfisverndar-, útivistar- og hagsmunasamtök með minnst 30 félagi geta þó kært eftirtaldir ákvæðanir án þess að sýna fram á lögvarða hagsmuni enda samrýmist tilgangi samtakanna að gæta þeirra hagsmuna sem kæran lýtur að:*

a. ákvæðanir Skipulagsstofnunar um matsskyldu framkvæmda, sameiginlegt mat á umhverfisáhrifum og endurskoðun matsskýrslu samkvæmt lögum um mat á umhverfisáhrifum, sem og ákvæðanir sveitarstjórna um matsskyldu framkvæmda.

b. ákvæðanir um að veita leyfi vegna framkvæmda sem falla undir lög um mat á umhverfisáhrifum,

c. ákvæðanir um að veita leyfi samkvæmt lögum um erfðabreyttar lífverur til sleppingar eða dreifingar erfðabreyttra lífvera.“

³ In Icelandic: *“Dragist afgreiðsla máls óhæfilega er heimilt að kæra það til þess stjórnvalds sem ákvörðun í málinu verður kærð til.”* Translation available on the website of the Prime Minister’s Office: <https://eng.forsaetisraduneyti.is/media/English/AdministrativeProceduresAct.pdf> .

3 Relevant EEA law

Article 1(2)(e) of the Directive reads as follows:

“(e) ‘public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;”

Article 11 of the Directive reads as follows:

“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.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

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 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”

4 The Authority’s assessment

4.1 The requirements of Article 11(1) of the Directive

The Directive lays down a procedure for the assessment of the effects of certain public and private projects on the environment. It provides for extensive public participation in decision-making relating to the environment, access to information and wide ranging

access to justice. It constitutes a codification of Directive 85/337/EC⁴ and its later amendments. Those amendments included Directive 2003/35/EC,⁵ which was specifically adopted in order to implement the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”).⁶

Article 11 of the Directive provides for access to a review procedure and lays down further provisions on the specific requirements for that procedure. This Article of the Directive is based on Article 9(2) of the Aarhus Convention. Article 11(1) of the Directive requires that EEA States ensure that members of the public concerned 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 which fall within the Directive’s scope.⁷

The public concerned must therefore be able to challenge not only positive acts, where a national body has acted or taken a decision, but also negative acts, where a national body has failed to do something that is legally required. The Directive requires that omissions, falling within the scope of the Directive, by national bodies can also be challenged following the prescribed review procedure.

The provisions of the Directive must be implemented with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.⁸

4.2 Assessment of the Icelandic implementation measures

4.2.1 *The Ruling Committee Act*

The Ruling Committee Act established the Ruling Committee, whose purpose is to decide on appeals of administrative decisions and certain other disputes in the fields of the environment and natural resources. According to the *travaux préparatoires* for the Ruling Committee Act, it was adopted in order to implement the Aarhus Convention, in particular Article 9 of that Convention. Neither the *travaux préparatoires* nor the Ruling Committee Act itself mention the Directive, Directive 85/337/EC or Directive 2003/35/EC, which introduced the requirements now found in Article 11 of the Directive. However, the Ruling Committee Act is included among the notified national implementation measures contained in the Form 1 for Directive 2003/35/EC (Document No 671508).

The jurisdiction of the Ruling Committee is limited to cases where legislation contains a specific reference, granting the Ruling Committee jurisdiction with regard to particular decisions. Article 4(3) of the Ruling Committee Act further states that an administrative

⁴ Directive 85/337/EC on the assessment of the effects of certain public and private projects on the environment.

⁵ The Act referred to at point 1k of Annex XX to the EEA Agreement (*Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC*).

⁶ See Article 1 of Directive 2003/35/EC and *Proposal for a Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending council Directives 85/337/EEC and 96/61/EC*, COM(2000) 839 final, Brussels 2001, p. 6.

⁷ See, to that effect, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* ECLI:EU:C:2009:631, at paragraph 33.

⁸ See, to that effect, Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] EFTA Ct. Rep. 534, at paragraph 51.

decision can only be appealed to the Ruling Committee by those who fulfil the requirement of standing in relation to that decision. The same Article also provides for an exception to the general requirement of standing for non-governmental environmental organisations that meet certain criteria. This exception is limited to the possibility to challenge only those types of decisions specified in points (a) to (c) of Article 4(3) of the Ruling Committee Act. The effect of this exception is that it only includes decisions to the extent that they constitute positive acts.

4.2.2 *The lack of possibility to challenge omissions before the Ruling Committee*

In its letter of 20 April 2015 (Document No 754248), the Internal Market Affairs Directorate (“the Directorate”) set out its understanding of the scope of review under the Ruling Committee Act. Based on the information provided, the Directorate took the view that an appeal to the Ruling Committee was only possible in cases where a decision had been taken. In contrast, in the event of an omission by the NPA, such as a failure to take a decision, there was no possibility under the Ruling Committee Act for the public concerned and non-governmental environmental organisations to raise a challenge. The Directorate enquired whether the Icelandic Government considered this to be in conformity with the obligations under the Directive, in particular Article 11(1) of the Directive.

In its reply of 19 May 2015 (Document No 757845), the Icelandic Government explained that an appeal to the Ruling Committee is only possible in cases where a decision has been taken. Should the NPA not take a decision, such an omission could not be challenged by the public concerned and non-governmental environmental organisations. The Icelandic Government did, however, point out that, as a matter of general administrative law, the public can submit observations to the Icelandic authorities regarding their procedures. Under this process the Icelandic authorities are then obliged to respond to any such enquiries made by the public. In this respect, the Icelandic Government referred to Opinion No 3540/2002 of the Parliamentary Ombudsman (*umboðsmaður Alþingis*) (“the Ombudsman”).⁹

Should the person making the enquiry not be satisfied with the response of the Icelandic authorities, that person may file a complaint with the Ombudsman. The Icelandic Government asserted that the Ombudsman’s competence covers the public administration as a whole.¹⁰ Moreover, the Ombudsman has substantial powers to access information and other material that may be relevant to its investigation. After concluding an investigation, the Ombudsman can adopt an opinion and request that the public authority in question improve its conduct, if considered necessary by the Ombudsman. Although the opinions of the Ombudsman are neither legally binding nor formally binding upon the public authorities, it is common practice to follow the Ombudsman’s opinions and requests. In its letter of 19 May 2015, the Icelandic Government stated that it considered that this additional possibility to file a complaint with the ombudsman meant that Icelandic law was in conformity with the obligations under the Directive and the provisions of Article 11(1) of the Directive.

At the meeting with the Icelandic Government, held in Reykjavik on 27 May 2015, the representative of the Icelandic Government explained that this reasoning originated from a

⁹ See the Opinion of the Parliamentary Ombudsman in Case No 3540/2002.

¹⁰ The scope of the Ombudsman’s competence is defined in Article 3 of the Icelandic Act No 85/1997 on the Parliamentary Ombudsman.

report on the implementation of the Aarhus Convention into Icelandic law¹¹ (“the Aarhus Report”).

4.2.3 *The Ombudsman Procedure and the requirements of Article 11(1) of the Directive*

The Ombudsman procedure referred to by the Icelandic Government, is, by their own admission, not legally binding. An opinion of the Ombudsman does not produce any legal effects *vis-à-vis* the parties concerned by that opinion. It does not constitute a binding conclusion of a dispute referred to it. As such, the Authority takes the view that the possibility to file a complaint with the Ombudsman cannot be considered to satisfy the requirements of Article 11(1) of the Directive. Article 11(1) of the Directive expressly provides for a review procedure, and in that respect, refers to a review procedure before a court of law or another independent and impartial body established by law. This review procedure, which is effectively a judicial remedy,¹² must provide for the possibility for members of the public concerned and non-governmental environmental organisations to challenge the substantive and procedural legality of decision, acts or omissions which fall within the scope of the Directive.

Having considered the arguments set out by the Icelandic Government,¹³ the Authority considers that the possibility of submitting enquiries to Icelandic authorities and the subsequent recourse to the Ombudsman procedure, does not satisfy the requirement to the review procedure envisaged by Article 11 of the Directive. The non-binding nature of the procedure does not provide for the possibility to challenge decisions, acts or omissions. Therefore, the Ombudsman procedure does not satisfy the requirements of Article 11(1) of the Directive. For the sake of completeness, the Authority recognises the importance of the Ombudsman institute in Icelandic administrative law. This present finding is limited to that the Ombudsman procedure is insufficient to constitute implementation of Article 11(1) of the Directive.

The Authority notes that the Aarhus Report, from which the aforementioned reasoning of the Icelandic Government originates, mentions the possibility of submitting enquiries and subsequent recourse to the Ombudsman procedure, only in relation to Article 9(3) of the Aarhus Convention.¹⁴ However, this is not the Article of the Aarhus Convention that corresponds to Article 11(1) of the Directive. As previously stated, it is Article 9(2) of the Aarhus Convention that corresponds to Article 11(1) of the Directive.

Furthermore, as stated in Article 9(3) of the Aarhus Convention, it is without prejudice to the review procedures referred to in Article 9(1) to (2) of the Aarhus Convention.¹⁵ Consequently, the Authority considers that the reasoning in the Aarhus Report, which is

¹¹ *Árósasamningurinn um aðgang að upplýsingum, þátttöku almennings í ákvarðanatöku og aðgang að réttlátri málsmeðferð í umhverfismálum. Greining á íslenskri löggjöf með hliðsjón af ákvæðum Árósasamningsins. Niðurstaða nefndar. Umhverfissráðuneytið, 28. september 2006 (available under: http://www.umhverfissraduneyti.is/media/PDF_skrar/Arosarskyrsla.pdf) („the Aarhus Report“).*

¹² See, to that effect, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, cited above, at paragraph 45.

¹³ Letter of 19 May 2015 (Document No 757845).

¹⁴ The Aarhus Report, p. 11.

¹⁵ Article 9(3) of the Aarhus Convention reads as follows: “*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*”

limited to Article 9(3) of the Aarhus Convention,¹⁶ does not apply to Article 11(1) of the Directive.

4.2.4 Article 9(4) of the Administrative Act

In the Icelandic Government's reply to the letter of formal notice,¹⁷ it referred to Article 9 of the Administrative Act, in relation to the possibility to challenge omissions before the Ruling Committee. In the reply, it explained that Article 9 of the Administrative Act deals with the prompt handling of cases by Icelandic Authorities. If it becomes evident that a decision in a case will be delayed, the parties to the case shall be duly informed. According to Article 9(4) of the Administrative Act, if there is an undue delay in the case, a complaint to this effect may be lodged with the authority to which a decision in the case may be appealed.

The Icelandic Government considers that Article 9(4) of the Administrative Act provides that an omission of a public authority can be challenged if it fails to take a decision. In the view of the Icelandic Government, the provision gives the public concerned a remedy to challenge a situation where a public authority has failed to take a decision that is legally required under the Directive. Therefore, the Icelandic Government considers that it is in conformity with the obligations under Article 11(1) of the Directive.

As illustrated in the sections above, Article 11(1) of the Directive requires that it is possible to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. The Authority considers that Article 9(4) of the Administrative Act is limited to allowing the public authority, to which the decision in the case may be appealed, to declare that there has been an undue delay in the case. The Authority notes that this conclusion is supported by several opinions of the Ombudsman¹⁸ and is further indicated by the *travaux préparatoires* of the Administrative Act. Therefore, Article 9(4) of the Administrative Act does not allow a public authority, to which a decision may be appealed, to take a decision, on the merits, as to whether the failure to act is illegal. Furthermore, there are no direct legal effects attached to a decision that there has been an undue delay in the case.

In light of the above, the Authority considers that Article 9(4) of the Administrative Act does not allow the public concerned to challenge the substantive or procedural legality of an omission. Therefore, the Authority must conclude that Article 9(4) of the Administrative Act does not satisfy the requirements of Article 11(1) of the Directive.

4.2.5 Cases before the Ruling Committee referred to by the Icelandic Government

In Iceland's reply to the letter of formal notice, reference was made to two cases before the Ruling Committee, which, in the view of the Icelandic Government, demonstrated that omissions could in fact be challenged. The Icelandic Government referred to Cases No 20/2015 (*Mosgerði*) and 78/2012 (*Lindarbraut*).

¹⁶ The Aarhus Report, p. 11.

¹⁷ Letter of 12 January 2016 (Document No 787604).

¹⁸ See the Opinions of the Parliamentary Ombudsman in Cases No 2289/1997, 4136/2004 and 4647/2006. See also academic literature on the subject, Páll Hreinsson, *Stjórnsýsluréttur: málsmeðferð*, Codex 2013, p. 458-459.

The Authority notes that in Case No 20/2015 (*Mosgerði*), the Ruling Committee based its reasoning on the fact that there was a decision in the case, not an omission.¹⁹ In Case No 78/2012 (*Lindarbraut*), the Ruling Committee annulled a resolution of a municipal committee (*skipulags- og mannvirkjanefnd Seltjarnarnesbæjar*). In the first place, the case concerned a resolution of the municipal committee, which constitutes a positive act and can be considered the equivalent of a decision. Secondly, the Ruling Committee's conclusion is based on the premise that it was, indeed, a decision. This is most obvious from the operative part of the Ruling Committee's decision, which explicitly states that “*the decision of [the municipal committee] [...] is annulled.*”²⁰

It is important to distinguish negative decisions, such as a refusal to grant a building permit, from omissions. As in the former case, there is a decision, which is in the negative, but in the latter, there is no decision to speak of.

In light of the above, the Authority considers that the decisions of the Ruling Committee in Cases No 20/2015 (*Mosgerði*) and 78/2012 (*Lindarbraut*) do not demonstrate that it is possible to challenge omissions before the Ruling Committee.

4.2.6 *The failure to fulfil the requirements of Article 11(1) of the Directive*

The lack of possibility to challenge omissions before the Ruling Committee could lead to a situation where, if a public authority in Iceland failed to take a decision that was legally required, the public concerned, including non-governmental environmental organisations, would have no remedy available under Icelandic law. The Directive acknowledges that such a situation can arise and specifically provides for the right to challenge omissions before the prescribed review procedure in Article 11(1) of the Directive.

The fact that it is not possible to challenge omissions before the Ruling Committee means that the requirements of Article 11(1) of the Directive are not fully implemented into Icelandic law.

¹⁹ See, to that effect, the decision of the Ruling Committee in Case No 20/2015 (*Mosgerði*), where it stated that: „Þá blasir við að með nefndu bréfi var tekin ákvörðun í málinu sem batt á það enda og varð þvingunarúrræðum ekki beitt að því óbreyttu. **Er sú ákvörðun** kæránleg til úrskurðarnefndarinnar skv. 59. gr. laga nr. 160/2010 um mannvirki. Verður kærán því tekin til efnislegrar meðferðar.“ (emphasis in bold added).

²⁰ See, to that effect, the decision of the Ruling Committee in Case No 78/2012 (*Lindarbraut*), where it stated that: „Ákvörðun skipulags- og mannvirkjanefndar Seltjarnarnesbæjar frá 17. júlí 2012 um að bregðast ekki við kröfu kæranda um að fjarlægja óleyfismannvirki af lóð hans er felld úr gildi.“

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

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

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by not adopting the necessary implementation measures in order to provide for the possibility to challenge the substantive or procedural legality of certain omissions, as stipulated in Article 11(1) of the Directive, Iceland has failed to fulfil its obligation arising from the Act referred to at point 1a of Chapter 1 of Annex XX (*Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment*), as adapted to the EEA Agreement by Protocol 1 thereto.

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

Done at Brussels, 4 May 2016

For the EFTA Surveillance Authority

Helga Jónsdóttir
College Member

For Carsten Zatschler
Director

This document has been electronically signed by Helga Jonsdottir, Audur Yr Steinarsdottir on 04/05/2016