

---

# EFTA SURVEILLANCE AUTHORITY

---

COLLEGE

Brussels, 4 July 2001  
Doc. No: 01-4892-D ✓  
Dec. No. 237/01/COL  
Ref. No: CFS 083.300.001

Dear Sir,

**Subject: Letter of formal notice concerning restrictions to the acquisition of real estate in Iceland**

## **1. Introduction and relevant Icelandic Law**

In January 2000, the EFTA Surveillance Authority received a complaint against Iceland alleging that provisions concerning pre-emptive rights in the Icelandic Act on Land (*Jarðalög*) No. 65/1976, with later amendments, were contrary to the provisions of the EEA Agreement on capital movements.

According to Article 1 of the Icelandic Act on Land, the objective of the Act is to ensure that the use of land outside planned urban areas is normal and viable from an economic point of view. It is also required that the legal control of the land and its occupancy be in conformity with the economic interests of the municipality in question and of those who practice agriculture.

The scope of the Act extends, in particular, to land and parts of land pursuant to Article 3 of the Act.

According to Article 6, paragraph 1, of the Act on Land, when there is an intention to transfer rights on real estate or to create such rights, e.g. by acquisition, gift, exchange, forced sale, allocation of assets, joint property, advance payment of inheritance, loan or rent, it is obligatory to notify the municipal authority and the land committee and gain their approval for the transaction. Paragraph 2 indicates that when the municipal authority or the land committee are of the opinion that the transfer of rights is contrary to the interests of the municipality it is proper that they refuse approval of the intended transfer. Paragraph 3 provides that when the municipal authority and the land committee disagree on the subject, either body can refer the dispute to the Minister of Agriculture, who rules

Icelandic Mission to the European Union  
Rue de Trèves, 74  
1040 Brussels

on the matter after having received the recommendation of the Farmers' Association of Iceland.

According to Article 6, paragraph 4, of the Act on Land, an approval is not necessary, if, among other things, the owner transfers the rights over the real estate to someone coming under Article 35, paragraph 1 of the Act.

Article 35, paragraph 1, of the Act states that the provision regarding prior authorisation shall not apply "when the landowner sells or gives the landholding in question to one's spouse, child, grandchild, adopted child, foster child, brother or sister or parent provided that the recipient shall occupy the land and fully utilise it".

Pursuant to Article 6, paragraph 6, of the Act on Land, the municipal authority and the land committee may make their approval conditional upon the person who acquires the rights over real estate taking up residence for two years on the property or within acceptable distance of it in order to use it.

According to Article 6, paragraph 7, of the Act on Land, where a person does not fulfil the conditions set according to paragraph 6, the municipality, having the approval of the Minister, can give the person a certain time to either fulfil the conditions or to assign the real property to a person who fulfils the said conditions. If the conditions have not been fulfilled within the time limit set, the municipality, with the approval of the land committee and the Minister, can acquire the property.

Pursuant to Article 11 of the Act on Land, the approval required according to Article 6 of the Act shall not be given unless the person seeking this approval has worked in agriculture for two years in Iceland. The Minister can make an exemption from this provision following the opinion of the municipal authority and the land committee.

Should the property rights that the Act covers be sold, Article 30, paragraph 1, of the Act provides that the municipal authority of the municipality on the territory of which the landholding in question is situated shall hold pre-emptive rights unless it is a matter of the disposition of family property within the family (cf. Article 35, paragraph 1, of the Act). Moreover, according to Article 30, paragraph 2, a lessee who has rented the land for more than 10 years has pre-emptive rights over to the municipality if he intends to continue to occupy the property.

On 17 February 2000, the Authority informed Iceland of the complaint and requested information from the Icelandic authorities concerning provisions of the Act on Land, in particular, its Article 30 (Doc. 00-1387-D).

Iceland replied by a letter which arrived at the Authority on 27 April 2000 (ref. LAN00030124/072.2).

Following the so-called "package meeting" between the Authority and Iceland, which took place on 25-26 May 2000, the Authority, by letter of 7 June 2000, invited Iceland to submit further information in respect of Article 6 of the Act on Land (Doc. 00-4089-D).

The Authority received Iceland's reply on 29 August 2000 (ref. LAN00030124/072.2).

The Authority and Iceland further discussed this matter during a meeting held in Reykjavik on 8 May 2001. During that meeting, Icelandic authorities confirmed that property rights transferred between persons falling within Article 35, paragraph 1, of the Act on Land do not need any approval. On 6 June 2001, the Authority, following its

request, received more information from Iceland concerning cases where a municipality and the land committee disagreed in respect of issue of an authorisation to acquire land (ref. LAN00030124/072.2 SN).

## **2. Relevant EEA Law**

Pursuant to Article 31, paragraph 1, of the EEA Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. According to paragraph 2, freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, paragraph 2, under the conditions laid down for its own nationals by the law of the country where such establishment is effected. This right is subject to the provisions of Chapter 4 of the EEA Agreement.

According to Article 33 of the EEA Agreement, the provisions on the right of establishment and measures taken in pursuance thereto shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security, or public health.

Article 40 of the EEA Agreement provides that there shall be no restrictions on the movement between the Contracting Parties of capital belonging to persons resident in EC Member States or EFTA States. Moreover, discrimination based on the nationality of or on the place of residence of the parties or on the place where such capital is invested shall be prohibited. Annex XII to the EEA Agreement contains provisions necessary to implement Article 40 of the EEA Agreement.

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, as adapted by way of Protocol 1 to the EEA Agreement is referred to in point 1 of Annex XII to the EEA Agreement. Article 1 of the Directive recalls the obligation of the EFTA States to abolish restrictions on movements of capital taking place between persons resident in the EEA States. Annex 1 to the Directive lays down a non-exhaustive nomenclature of operations which constitute capital movements.

## **3. The Authority's assessment**

### **3.1. Unjustified restrictions to the free movement of capital**

It should first be emphasised that investments in real estate on the national territory of an EEA State by non-residents, in particular, the acquisition of land, falls within the scope of the provisions of the EEA Agreement on capital movements. Although the list of Annex 1 to Council Directive 88/361/EEC is purely indicative, this is demonstrated by the fact that Heading II of the nomenclature annexed to this Directive is entitled "investments in real estate on national territory by non-residents". Consequently, the provisions of the Act on Land regulating investment in real estate fall within the scope of application of Article 40 of the EEA Agreement and Council Directive 88/361/EEC.

In these circumstances, it should be assessed whether Articles 6, 11 and 30 of the Act on Land are contrary to Article 40 of the EEA Agreement and to Article 1 of Council Directive 88/361/EEC.

### 3.1.1. As regards the double authorisation procedure

Article 40 of the EEA Agreement encompasses all restrictions on the free movement of capital.<sup>1</sup>

Article 6, paragraph 1, of the Act on Land provides for a double authorisation procedure prior to the acquisition of real estate not located in urban areas in Iceland. As a matter of principle, a person wishing to acquire land in such areas will need the prior approval of the municipality in which the land is located, as well as the approval of the land committee.

In the light of the case law of the Court of Justice of the European Communities, the Authority is of the opinion that such a system of prior authorisation for the acquisition of real estate entails, by its very purpose, a restriction on the free movement of capital.<sup>2</sup> This is *a fortiori* the case as regards a double authorisation procedure as laid down by Article 6 of the Act on Land.

In the letter received by the Authority on 28 August 2000, Iceland indicated that Article 6 of the Act on Land is intended to have restraining influence on dealings in real estate which are considered to be disadvantageous for the municipality in question. It is also to ensure that these dealings do not contravene the objective laid down in Article 1 of the Act. According to Iceland, no less restrictive measure would enable the authorities to prevent the disposition of landholdings.

The Authority cannot accept these arguments.

First, what is meant to be "in conformity with the interests" of an Icelandic municipality, as enshrined in Article 1 of the Act, might, even in the light of the definition of the municipalities' discretionary power given by the Icelandic Supreme Court,<sup>3</sup> leave a very large discretionary power to refuse the acquisition of land for purposes falling outside the scope of the Act on Land. This might render the exercise of the free movement of capital, as provided in Article 40 of the EEA Agreement, illusory.

Second, the Authority recalls that, in any case, the restrictive measure inherent in a prior authorisation procedure can only be accepted, provided that:

- (i) the EFTA State concerned pursues a legitimate non-economic aim in the general interest;
- (ii) the restrictive measure is not *applied* in a discriminatory manner; and
- (iii) the same aim cannot be achieved by other less restrictive procedures.<sup>4</sup>

As regards the first condition, although the aim of Act on Land, as laid down in Article 1 of the Act, seems vague, the Authority does not dispute that a rural planning objective such as maintaining a permanent population and economic activity in certain parts of Iceland, in the general interest, could be a legitimate non-economic aim to be protected.

<sup>1</sup> See Case E-1/00 *State Debt Management Agency and Íslandsbanki-FBA hf.* [2000] not yet reported, paragraphs 25-28. See also in respect of the EC Treaty, Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-7041, paragraph 18.

<sup>2</sup> See Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECR I-3099, paragraph 39.

<sup>3</sup> Supreme Court decisions Hrd. 1997: 2025 and Hrd. 1998: 601.

<sup>4</sup> See e.g. Case C-302/97, cited above, paragraph 40 [emphasis added].

However, the Authority fails to understand how a double authorisation procedure may constitute the appropriate means to secure that aim.

In this respect, as regards the second condition laid down above and in the light of the case law of the Court of Justice, municipalities and the land committee have a discretionary power in determining the probative value of the information received by future potential acquirers which might entail, when practiced, potential discrimination. Furthermore, the mere fact that, in some circumstances, the Act provides that persons wishing to acquire land in Iceland would need to be resident in Iceland for two years prior to the acquisition may reveal the intention of the authorities to subject applications from individuals other than persons residing in Iceland to a more thorough check than for the latter individuals.<sup>5</sup>

Finally, as regards the third condition emphasised above, the Authority is of the opinion that less restrictive measures other than a double authorisation procedure, in combination with a wide scope of discretion for the municipalities and the land committee, may be at the disposal of the Icelandic authorities. In any case, the Act on Land provides for specific remedies and sanctions in case that the owner or another holder of real estate rights has transferred those rights contrary to the provisions of the Act (cf. Article 33 of the Act on Land) or in case of a breach of the Act (cf. Article 70 of the Act on Land).<sup>6</sup>

Furthermore, the fact that the Act acknowledges that dealings between the landowner and his relatives, in accordance with Articles 6 and 35 of the Act on Land are not subject to prior double authorisation procedure provides a sufficient indication that other less restrictive means than a double authorisation procedure may be available in order to supervise adequately the usage of land.

Consequently, in the Authority's opinion, Iceland has not demonstrated that the double authorisation procedure, as provided for in Article 6, paragraph 1, of the Act on Land, would be necessary and proportionate to attain the aims pursued by the Act on Land. Therefore, the Authority concludes that Article 6, paragraph 1, of the Act on Land is contrary to Article 40 and Article 1 of Directive 88/361/EEC.

### **3.1.2. As regards persons exercising agriculture and wishing to acquire land in Iceland**

According to Article 11 of the Act on Land if it is the intention of the person who needs an approval according to Article 6 of the Act in order to gain rights over a real estate to use it for agriculture, the approval shall not be given unless the person has worked in agriculture for two years in Iceland.

Pursuant to settled case law of EFTA Court and the Court of Justice, the principle of non discrimination precludes a Member State from making the grant of a right to a person from another Member State subject to the condition that he/she resides on the territory of the first State.<sup>7</sup> This principle extends to the EEA Agreement. This is so because national rules which draw a distinction on the basis of residence are liable to operate mainly to the detriment of nationals of other Contracting Parties, as non-residents are in the majority of cases foreigners.<sup>8</sup>

<sup>5</sup> See Case C-302/97, cited above, paragraph 41.

<sup>6</sup> Article 70 of the Icelandic Act on Land provides that a breach of the Act is subject to fine and criminal prosecution.

<sup>7</sup> Case 186/87, *Ian William Cowan v Trésor Public* [1989] ECR 195, paragraph 10.

<sup>8</sup> Case E-3/98, *Herbert-Rainford Towning* [1998] EFTA Court Rep. 205, paragraph 27.

Indeed, the condition laid down by Article 11 of the Act on Land that, in principle, an approval shall be refused unless the person has worked in agriculture for two years in Iceland clearly indicates that persons who are not residents in Iceland prior to acquiring the land will be actually deterred from acquiring rights over real estate in that country. In other words, this means that persons having worked in agriculture in another EEA State and who possess at least equivalent professional skills than persons who have practised agriculture in Iceland would not be able to meet this condition. Contrary to the situation of residents in Iceland, the double authorisation will be refused even if non residents would be wishing and able to prove that they would occupy the land concerned and fully use it in accordance with the objective of the Act on Land.

In these circumstances, Article 11 of the Act on Land is incompatible with Article 40 of the EEA Agreement.

### 3.1.3. Pre-emptive rights

The Court of Justice of the European Communities has ruled that domestic rules which subject the free movement of capital to the discretion of the administrative authorities may render that freedom illusory.<sup>9</sup>

If the Contracting Parties to the EEA Agreement remain responsible for exercising pre-emptive rights, this freedom extends only insofar as it does not infringe EEA law.

As mentioned above, the double authorisation procedure and the condition to have worked in agriculture in Iceland for two years prior to acquiring rights over real estate constitute restrictions to the free movement of capital. If, despite these restrictions, non residents would nevertheless obtain an authorisation to acquire land, the freedom of capital movements guaranteed by the EEA Agreement may still be rendered illusory due to the wide scope of discretion at the disposal of the municipality concerned when it exercises its pre-emptive rights, in accordance with Article 30, paragraph 1, of the Act on Land. This uncertainty may, moreover, be increased given the vagueness of the wording of the objective of the Act on Land, as provided by Article 1 of the Act.

Due to the wide scope of discretion offered to municipalities, the Act on Land offers no guarantee that municipalities will dispose of the land after having exercised their pre-emptive rights, i.e. resell it, for purposes entirely grounded on objective criteria, such as, for instance, criteria irrespective of the nationality or the residence of the person previously willing to acquire the land. This uncertain situation may even be increased when the municipality does not exercise its pre-emptive rights since these rights may be transferred to the State which might therefore prevent further the possibility for acquiring the real estate concerned.

Consequently, the uncertain situation created by Article 30, paragraph 1, of the Act on Land when municipalities, and subsequently the State, exercise their pre-emptive rights is contrary to Article 40 of the EEA Agreement insofar as it subjects to the discretion of the Icelandic authorities the free movement of capital which may, therefore, be rendered illusory.

---

<sup>9</sup> See, e.g. Case C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Vicente Mari Mellado and Concepción Barbero Maestre* [1995] ECR I-361, paragraph 25; Case C-302/97, cited above, paragraph 44.



## 3.2. Unjustified restrictions to the freedom of establishment

### 3.2.1. As regards the double authorisation procedure

The freedom of establishment, as provided by Article 31 of the EEA Agreement, forbids both direct and indirect discrimination on the basis of nationality.<sup>10</sup>

In the Authority's opinion, the double authorisation procedure, insofar as the Act on Land requires the person who wants to use the land for agricultural purposes to work for two years in Iceland in order to acquire rights over real estate, as laid down in Article 11 of the Act on Land, is contrary to freedom of establishment. Indeed, this rule results in an indirect discrimination on the grounds of nationality since the great majority of Icelandic nationals are resident and domiciled in that State and therefore meet the requirement automatically.<sup>11</sup> On the contrary, nationals of the other EEA States would, in most cases, have to move their residence and domicile to Iceland in order to comply with the requirements of the Act on Land.<sup>12</sup> It follows that such a requirement is contrary to Article 31 of the EEA Agreement.

Contrary to what Iceland argues, the Authority is of the opinion that less restrictive measures than a discriminatory double authorisation procedure are at disposal of the Icelandic authorities.

First, the Icelandic authorities have provided no evidence of the need (a) to have practiced agriculture in Iceland for two years; and (b) to give proof of prior residence on the land in order to be able to acquire rights over real estate.

As regards (a), if professional skills might be necessary in order to carry on an agricultural activity, the requirement of having to acquire these skills in Iceland is grounded on the unjustified presumption that persons from other EEA States having no experience or less than two years experience in Iceland will be less able than Icelandic nationals to practice conveniently their profession in that country.

Moreover, in respect of (b), the Authority is of the opinion that it is not possible to require a person seeking authorisation to provide incontrovertible proof of taking residence in Iceland prior to having acquired the rights over the real estate concerned. Less restrictive measures may be at the disposal of the Icelandic authorities in order to secure the aim of the Act on Land.

Second, as admitted by Icelandic authorities in their reply to the Authority's letter of 7 June 2000, the sale of land between a land owner and his relatives, as defined by Article 35, paragraph 1, of the Act on Land, is exempted from the authorisation procedure laid down in Article 6 of the Act. The fact that the authorisation procedure does not apply in such cases suffices to indicate that, in the other cases, alternative measures which hinder less the freedom of establishment may exist which could guarantee a adequate supervision of the usage of land, in accordance with the aims of the Act on Land.

<sup>10</sup> See, e.g. Case E-3/98, cited above, paragraph 27.

<sup>11</sup> See, e.g., Case E-3/98, cited above, paragraph 27.

<sup>12</sup> See, *inter alia*, C-221/89 *The Queen v The Secretary of State for Transport, ex parte Factortame and Others* [1991] ECR I-3509, paragraph 32.

In these circumstances, the Authority concludes that Articles 6, paragraph 1 and 11 of the Act on Land are contrary to Article 31 of the EEA Agreement.

### **3.2.2. As regards the condition of taking residence on the property or within normal distance of it**

The fact that the acquisition of rights over real estate is also conditional upon the person taking residence for two years on the property or within normal distance from it in order to use it, as provided by Article 6, paragraph 6, of the Act on Land, is also contrary to Article 31 of the EEA Agreement, unless it is necessary and proportionate to achieve objective aims.<sup>13</sup> That has not been demonstrated by Iceland.

In the Authority's opinion, this condition will be more easily met by Icelandic nationals who are, in their great majority, resident and domiciled in Iceland, than by persons residing in other EEA States. The fact that Icelandic authorities may require the person to fulfil the conditions laid down in Article 6, paragraph 6, or even prevent the acquisition of rights over real estate by acquiring the property themselves, in accordance with Article 6, paragraph 7, of the Act on Land, makes it excessively difficult for non residents to acquire real estate, falling within the scope of the Act on Land, in that country.

In these conditions, the Authority concludes that Articles 6, paragraphs 6 and 7 are contrary to Article 31 of the EEA Agreement.

## **4. Conclusion**

In these circumstances, the EFTA Surveillance Authority must conclude that Iceland has infringed:

- (i) Article 40 of the EEA Agreement and Article 1 of the Act referred to in point 1 of Annex XII to the EEA Agreement (*Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty*), as adapted by way of Protocol 1 to the EEA Agreement, by maintaining in force a double authorisation procedure for the acquisition of real estate in non urban areas, as provided by Article 6, paragraph 1, of Act on Land (*Jarðalög*) No.65/1971, by establishing a difference in treatment between persons residents in EEA States and those residing in Iceland willing to acquire land for the purpose of agriculture, as provided by Article 11 of the Act on Land and by maintaining an uncertain situation in respect of the exercise of pre-emptive rights by municipalities and subsequently the State pursuant to Article 30, paragraph 1, of the Act on Land, which may further render the free movement of capital illusory because subjecting it to the discretion of these national authorities;
- (ii) Article 31 of the EEA Agreement by maintaining in force Article 6, paragraphs 6 and 7, which requires persons acquiring rights over real estate to reside on the land for two years and prevent the acquisition if proof of residence is not provided, as well as by maintaining a double authorisation procedure insofar as it requires prior residence in Iceland, as provided by Article 6, paragraph 1 and Article 11 of the Act on Land (*Jarðalög*).

<sup>13</sup> See Case 182/83 *Robert Fearon & Company Limited v Irish Land Commission* [1984] ECR 3677, paragraph 10.



Therefore, acting under Article 31 of the Surveillance and Court Agreement, the EFTA Surveillance Authority invites Iceland to submit its observations on the content of this letter within *three months* following receipt thereof.

After that time limit has expired the EFTA Surveillance Authority will proceed to consider, in the light of any observations received from Iceland, whether to deliver a reasoned opinion on the matter in accordance with Article 31 of the Surveillance and Court Agreement.

For the EFTA Surveillance Authority,

Yours faithfully,

  
Hannes Hafstein  
College Member