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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Inês MELO SAMPAIO and Eulalia SANFRUTOS CANO, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 01/093, 1049 Bruxelles* and consenting to service by e-EFTA Court,

in Case E-7/25

Ólafur Þór Jónsson and others c/ The National Energy Authority of Iceland (Orkustofnun) and Benchmark Genetics Iceland hf.

in which the District Court (Reykjavik) (**‘the Referring Court’**) has requested an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of Article 4(1)(b)(i) to (iii) and (7), of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (**‘the Water Framework Directive’**) ⁽¹⁾.

⁽¹⁾ OJ L 327, 22.12.2000, p. 1–73, <http://data.europa.eu/eli/dir/2000/60/oj>.

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1. INTRODUCTION

1. This request for an Advisory Opinion from the EFTA Court concerns the interpretation of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (**‘the Water Framework Directive’**).
2. The Request is made in the course of proceedings between Ólafur Þór Jónsson, Sigríður Sólrún Jónsdóttir, Særún Jónsdóttir, and Reykjaprent ehf. (**‘the applicants’**) on the one hand, and Benchmark Genetics Iceland hf. and the National Energy Authority of Iceland (**‘the Energy Authority’**), both respondents, on the other hand, concerning the granting of a licence to Benchmark Genetics Iceland hf. authorising abstraction of up to 426 L/s of fresh groundwater, with salinity <0.4‰, and 946 L/s of saline groundwater, with salinity $\geq 30\text{‰}$, at the plot of land of Benchmark Genetics Iceland hf.
3. The applicants challenge the validity of the licence, contending, in particular, that Article 4 of the Water Framework Directive precludes the granting of a licence for a project where the potential impact on the status of the groundwater body has not been assessed, or where such an assessment has not been included in the relevant river basin management plan.

2. LEGAL FRAMEWORK

4. Article 4(1) (a), (b)(i)(ii),(iii)) and (c) of the Water Framework Directive read as follows:

‘1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

[..]

(b) for ground water

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and

without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(iii) Member States shall implement the measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order progressively to reduce pollution of groundwater. Measures to achieve trend reversal shall be implemented in accordance with paragraphs 2, 4 and 5 of Article 17, taking into account the applicable standards set out in relevant Community legislation, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

[..]

(c) for protected areas''

5. Article 4(7)(a), (b), (c) and (d) of the Water Framework Directive, reads as follows:

‘Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.’’

6. Article 5 of the Water Framework Directive, reads as follows:

‘‘1. Each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

— an analysis of its characteristics,

— a review of the impact of human activity on the status of surface waters and on groundwater, and

— an economic analysis of water use

is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of this Directive.

2. The analyses and reviews mentioned under paragraph 1 shall be reviewed, and if necessary updated at the latest 13 years after the date of entry into force of this Directive and every six years thereafter.’’

7. Article 8 of the Water Framework Directive, reads as follows:

“1. Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district:

— for surface waters such programmes shall cover:

—

(i) the volume and level or rate of flow to the extent relevant for ecological and chemical status and ecological potential, and

(ii) the ecological and chemical status and ecological potential;

— for groundwaters such programmes shall cover monitoring of the chemical and quantitative status,

— for protected areas the above programmes shall be supplemented by those specifications contained in Community legislation under which the individual protected areas have been established.

2. These programmes shall be operational at the latest six years after the date of entry into force of this Directive unless otherwise specified in the legislation concerned. Such monitoring shall be in accordance with the requirements of Annex V.

3. Technical specifications and standardised methods for analysis and monitoring of water status shall be laid down. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 21(3).”

3. FACTS AND THE QUESTION ASKED

8. Benchmark Genetics Iceland hf., an undertaking active in the aquaculture genetics sector, planned to increase production at the undertaking's plots of land, located in the Municipality of Vogar. These plans entailed, among other things, an increased need for utilisation of groundwater, which at the time totalled 972 L/s.

9. On 19 February 2019, the National Planning Agency (**‘the Planning Agency’**), found that an environmental impact assessment examining the impact of the total water extraction was required in accordance with national law (Article 5 of the then applicable Act No 106/2000 on Environmental Impact Assessment).
10. On 3 January 2020, the Planning Agency received a proposal from Benchmark Genetics Iceland hf. for the planned expansion, after which the Planning Agency solicited comments from various parties, including the Environment Agency. The Planning Agency accepted the proposal, subject to certain conditions. One of these conditions required that different arrangements and impacts of groundwater utilisation needed to be addressed and compared in the light of the existing uncertainty as to the Municipality of Vogar's obtaining of water for human consumption.
11. On 20 August 2020, a preliminary environmental impact assessment report was submitted and made publicly available on 2 September 2020. This stated that the proposed plans would have no to negligible consequences to the chemical content of freshwater at Vogar, the present rate of extraction and the groundwater flows in the vicinity of Vogavík and the planned water source for the population of Vogar.
12. On 10 May 2021, the Planning Agency published its opinion on the executed environmental impact assessment. The Planning Agency concluded, *inter alia*, that
1) the planned expansion would have limited negative environmental effect, and that
2) the increased water consumption was unlikely to negatively affect groundwater to any material extent.
13. Therefore, Benchmark Genetics Iceland hf. applied to the Energy Authority for a utilisation licence for water abstraction over a term of 20 years, where the total water use, including the additional amount, would be 1372 L/s. On 1 October 2021, the Energy Authority made various comments on the application.
14. On 3 January 2022, Benchmark Genetics Iceland hf. submitted a newly updated application for a utilisation licence. On 4 May 2023, the Energy Authority granted the contested licence authorising the utilisation of up to 426 L/s of fresh groundwater, with salinity <0.4‰, and 946 L/s of saline groundwater, with salinity ≥ 30‰, at the plot of land of Benchmark Genetics Iceland hf. The effective term of the licence extends until 4 May 2043.

15. On 18 of June 2024, the applicants initiated judicial proceedings, in the context of which the current Request has been made, contesting the validity of the licence granted to Benchmark Genetics Iceland hf. by the Energy Authority. According to the applicants, in deciding on an application for a water utilisation licence, the Energy Authority as the licensing authority, is obliged to ensure that the authorisation is in conformity with the water protection policy set out in the river basin management plan, in accordance with Article 4 of the Water Framework Directive.
16. The Water Framework Directive was incorporated into Annex XX of the EEA Agreement by Decision of the EEA Joint Committee No 125/2007 ⁽²⁾. The national law provision Article 28(3) of Act No 36/2011 constitutes the transposition into Icelandic law of part of the obligations in making operational the programmes of measures specified in the river basin management plans, as laid down in Article 4 of the Water Framework Directive.
17. In the present proceedings, the Referring Court states in point 23 of its Request that it is undisputed that the status assessment had not been incorporated into the river basin management plan. Nor, however, is it contested that a status assessment of the groundwater body had been carried out, as had various studies by, inter alia, the Energy Authority.
18. It is against this background that the Referring Court decided to refer the following question to the EFTA Court:

Whether the provisions of Directive 2000/60/EC, in particular the provisions of that Directive's Article 4, must be interpreted as precluding the granting of authorisation for a project which may potentially affect the status of a groundwater body for which classification and status assessment in the river basin management plan are required under that directive, prior to such assessment having been conducted and its results set forth in a river basin management plan in accordance with that directive's provisions. That the provision bars the authorisation of a project, irrespective of whether a status assessment has been conducted, if the assessment results have not been set forth in the river basin management plan.

⁽²⁾ Decision of the EEA Joint Committee No 125/2007 of 28 September 2007 amending Annex XX (Environment) to the EEA Agreement, OJ L 21.2.2008, p. 47 – 53, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007D0125.

4. LEGAL ANALYSIS

19. The Referring Court seeks, in essence, to determine, first, whether Article 4 of the Water Framework Directive precludes the authorisation of a project where the potential impact of that project on the status of a groundwater body has not been assessed prior to authorisation; and, second, whether that same provision precludes authorisation where such an assessment has not been incorporated into the relevant river basin management plan.
20. Regarding the first question, it should be recalled that the Court of Justice of the European Union has held that Article 4(1)(a)(i) to (iii) of the Water Framework Directive requires Member States to refuse authorisation for an individual project where it may cause, among other things, a deterioration of the status of a body of surface water, by the date laid down by the Water Framework Directive, unless the view is taken that the project is covered by a derogation under Article 4(7) of that directive ⁽³⁾. The Court has confirmed that the same applies to projects potentially deteriorating the status of groundwater bodies ⁽⁴⁾.
21. As a derogation from this obligation, in case a project is liable to have adverse effects on water of the kind stated in Article 4(7) of that directive, consent may be given to it, at the very least if the conditions set out in Article 4(7)(a) to (d) of that directive are satisfied. Nevertheless, Article 4(7) of the Water Framework Directive requires Member States to ensure an assessment of a project to the status of groundwater. Consequently, in case any negative impact is detected, that Article obliges Member States to provide a justification for the authorisation of the project in light of the criteria set out subparagraph (a) to (d). In particular, Article 4(7)(b) of the Water Framework Directive requires Member States to include these reasons motivating the justification in the river basin management plans.
22. In this regard, the Court of Justice has already held that the national competent authority must carry out the necessary assessments to establish whether the requirements laid down in the Water Framework Directive have been met, prior the

⁽³⁾ Judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 50 and 51.

⁽⁴⁾ Judgment of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, ECLI:EU:C:2020:391.

authorisation of a project falling within the scope of Article 4 of the Framework Directive ⁽⁵⁾.

23. Also, in the context of the Habitats Directive ⁽⁶⁾, the Court of Justice has held that an appropriate assessment of a plan or project required under Article 6(3) of the Habitats Directive must be carried out based on the most up-to-date information, leaving no scientific doubts about the impact of the project in question at the date of the authorising decision ⁽⁷⁾.
24. The Commission submits that, considering the resembling objectives of the Habitats Directive and the Water Framework Directive, and in light of the environmental policy of the Union in general, the interpretation of the Court of Justice of Article 6(3) of the Habitats Directive must be applied in analogy to Article 4(7) of the Water Framework Directive. Therefore, the national competent authority, when granting an authorisation on the basis of Article 4(7) of the Water Framework Directive, is obliged to carry out an assessment based on the most up-to-date information, leaving no scientific doubts about the impact of the project in question.
25. Regarding the second question, it follows from the judgement of the Court of Justice in case C-346/14, *Commission v Austria* ⁽⁸⁾ that where a project is planned to take place in between two cycles, it is not deemed necessary to wait for the publication of the River Base Management Plans prior to granting such authorisation; the reasons that justify authorising a project which will cause deterioration to the status of bodies of groundwater, as required by Article 4(7) of the Water Framework Directive, can be included in the subsequent plan.
26. This has also been confirmed in guidance developed under the Common Implementation Strategy for the Water Framework Directive and the Floods

⁽⁵⁾ Judgment of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, ECLI:EU:C:2020:391, paragraph 90.

⁽⁶⁾ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50, ELI: <http://data.europa.eu/eli/dir/1992/43/oj>.

⁽⁷⁾ Judgment of 17 April 2018, *European Commission v Republic of Poland*, C-441/17, ECLI:EU:C:2018:255, paragraphs 114 and 120; judgment of 10 November 2022, *Dansk Akvakultur*, C-278/21, ECLI:EU:C:2022:864, paragraphs 51, 53 and 56; judgment of 14 January 2016, *Grüne Liga Sachsen eV and Others*, C-399/14, ECLI:EU:C:2016:10, paragraphs 61–62.

⁽⁸⁾ See in this sense the Judgment of 4 May 2016, *Commission v Austria*, C-346/14, ECLI:EU:C:2016:322, paragraph 79.

Directive, and in particular in Guidance Document No. 36 “Exemptions to the Environmental Objectives according to Article 4(7)”.

27. In the present case, it is apparent from the file submitted to the EFTA Court that the groundwater body potentially affected by the new project has not been formally classified in accordance with Article 5 and Annexes II and V of the Water Framework Directive, or at least that such information was not included in the river basin management plan.
28. In order to assess the impact of a project on a body of water and its status, as required by Article 4(7) of the WFD, it is logical that such body of water must first be classified, and its status known. At the same time, as confirmed by the Court of Justice, it must be noted that the obligations to prevent deterioration of the status of a body of water and achieve the environmental objectives under Article 4 of the Water Framework Directive, bind the Member States at each stage of the procedure prescribed by the Directive ⁽⁹⁾.
29. The Court of Justice has also held that, in order to ensure that Member States attain the qualitative objectives pursued by the EU legislature, the Water Framework Directive lays down a series of provisions, including Articles 5 and 8 and Annexes II and V, establishing a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and the characteristics of the bodies of water identified in their territories ⁽¹⁰⁾. All the stages in this process must be duly completed to ensure full effectiveness of the Directive and its provisions.
30. Therefore, to comply with the obligation to carry out a prior assessment, Member States must also comply with the obligation to classify all water bodies. If, contrary to the obligations of the Directive, a classification of a water body did not take place for whatever reason, such omission should first be rectified before an assessment under Article 4(7) can be carried out and thus a project authorised.

⁽⁹⁾ Judgement of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, para. 43.

⁽¹⁰⁾ See *supra*, paragraphs 41 and 42.

31. Thus, the Commission considers that the lack of classification of a water body, in accordance with the applicable provisions under the Water Framework Directive, prevents a competent authority from carrying out an appropriate impact assessment of the potential impact of a project on the status of that water body and, therefore, from authorising such project in accordance with Article 4(7) Water Framework Directive.
32. However, when it comes to the issue on whether Article 4 of the Water Framework Directive must be interpreted as barring the authorisation of a project, irrespective of whether a status assessment has been conducted, if the assessment results have not been set forth in the river basin management plan, the Commission proposes to apply the abovementioned consideration in case C-346/14, *Commission v Austria* ⁽¹¹⁾. In view of the Commission, in this judgement the Court of Justice implicitly recognized the possibility of including the reasons of justification for authorizing a project, as required by Article 4(7) of the Water Framework Directive, in between river basin management plan cycles in the subsequent river basin management plan, without the necessity to update the river basin management plan in force at the time of assessment.
33. The same approach should apply in the case of a classification of a body of water. In practice, such an interpretation would mean that the results of a classification of a water body can be included in the subsequent river basin management plan and therefore such classification can be done ad hoc, without the need to wait for the next river basin management plan update. Nevertheless, such classification has to be done in accordance with the parameters and procedures as set out in the Water Framework Directive.
34. Therefore, the Commission submits that Article 4 of the Water Framework Directive must be interpreted as not barring the authorisation of a project, if the assessment results have not been set forth in the river basin management plan, as long as an assessment in line with Article 4(7) of the Water Framework Directive has been carried out, which includes prior classification of the water body in question, and its results will be set forth in the subsequent river basin management plan.

⁽¹¹⁾ See above C-346/14 *Commission v Austria*, paragraph 79.

5. CONCLUSION

35. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court for a, Advisory Opinion by the District Court (Reykjavik) should be answered as follows:

‘Article 4 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be interpreted as precluding the granting of an authorisation for a project which may potentially affect the status of a groundwater body for which classification and status assessment in the river basin management plan are required under that directive, prior to such assessment having been conducted. Article 4 of the Water Framework Directive must be interpreted as not barring the authorisation of a project, if the assessment results have not been set forth in the river basin management plan, as long as an assessment in line with Article 4(7) of the Water Framework Directive has been carried out, which includes prior classification of the water body in question, and its results will be set forth in the subsequent river basin management plan.’

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