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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 breach of Directive 2006/123/EC on services in the internal market (the Services Directive)

EFTA SURVEILLANCE AUTHORITY

1 Introduction

1. By letter of 29 March 2011[1], the EFTA Surveillance Authority ("the Authority") informed the Icelandic Government that it had opened an own initiative case regarding the conditions for the award and renewal of authorisations for the utilisation of hydropower and geothermal energy. It also invited Iceland to provide clarification on various points concerning the applicable legal framework.

2. The Icelandic Government replied to that letter on 3 June 2011[2] and the case was consequently discussed at the package meeting in Reykjavik on 7 June 2011.

3. On 16 February 2012,[3] the Internal Market Affairs Directorate ("the Directorate") sent a pre-Article 31 letter to Iceland presenting its preliminary conclusions on the matter. The Directorate concluded that the Icelandic legislation currently applicable to the award and renewal of hydropower and geothermal licences is in breach of EEA law. More precisely, that the existing legislation is contrary to the Services Directive 2006/123/EC[4] or, alternatively, Article 31 of the Agreement on the European Economic Area ("the EEA Agreement").

4. At the package meeting in June 2012, the Icelandic Government's representatives provided the Authority with a timetable regarding the process of adoption of a new legislation concerning the award and renewal of hydropower and geothermal licences. On 18 June 2012[5], Iceland replied to the Authority's letter confirming what was agreed during the package meeting.

5. According to the timetable put forward by the Icelandic Government, a special report prepared by a working group set up by the Prime Minister was supposed to be published by the end of June 2012. On the basis of this report, a bill of law was supposed to be drafted and finalised by October 2012. However, the abovementioned report was only finalised in September 2012, and a draft bill was not presented to the Parliament.

6. In November 2012, the Directorate informally contacted the Icelandic Government to enquire about the latest developments on this issue and was informed that a draft legislation was to be presented to the Parliament during the 2013 spring session. However, this never happened.

7. In June 2013, the issue was discussed at the package meeting. The Icelandic Government's representatives indicated that no new developments had taken place since the last package meeting. Following this meeting, the Authority did not receive any new information from the Icelandic Government.

8. On 12 March 2014, the Authority issued a letter of formal notice (Doc No 660 969) concluding that the Icelandic legislation applicable to the award and renewal of

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[1] Event No 591385.
[2] Your ref. IDN11060006/7.6.2, Event No 600032.
[3] Event No 621656.
[4] The Act referred to at point 1 of Annex X to the EEA Agreement, *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, as adapted to the EEA Agreement by Protocol 1.
[5] Your ref. IDN11060006/7.6.2, Event No 638119.

hydropower and geothermal licences was in breach of the Services Directive 2006/123/EC or Article 31 EEA. To date, no reply has been received by the Authority.

9. The case was discussed in May 2014 at the package meeting. However, the Icelandic representatives did not mention any new developments.

10. In light of the silence of the Icelandic Government, the Authority considers it necessary to deliver a reasoned opinion. Following the lack of response from Iceland to the letter of formal notice, the Authority carries over most of the analysis developed previously in the letter of formal notice and fills-in only a few additional elements for the sake of completeness.

2. Relevant national law

11. Article 3a of *Act No 57/1998 on the survey and utilisation of ground resources* ("the Ground Resources Act") provides that:

> *"The State, municipalities, and their wholly owned undertakings are not permitted to transfer, directly or indirectly, on a permanent basis, ownership rights to geothermal energy and groundwater, cf. paragraph 1 of Article 10 and Article 14.*
>
> *(...)*
>
> *The State, municipalities and companies owned by them, as provided in paragraph 2, are permitted to grant temporary rights of use of the rights under paragraph 1 for a period of up to 65 years at a time. Holders of temporary rights of use shall be entitled to negotiations on an extension of the rights when half of the agreed period of use has passed.*
>
> *Decisions on to whom to grant rights of use shall be made on a non-discriminatory basis. Also, such decisions should promote use of resources and investments in facilities.*
>
> *The Minister responsible for negotiation in this field shall negotiate the consideration (rent) for the use of rights subject to the control of the State pursuant to paragraph 3. The arrangements and consideration for the use of rights on public land shall be subject to the applicable legislation."*[6]

12. Article 16 of the *Water Act No 15/1923* ("the Water Act") provides that:

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[6] *"Ríki, sveitarfélögum og fyrirtækjum, sem alarið eru í eigu þeirra, er óheimilt að framselja beint eða óbeint og með varanlegum hætti eignarrétt að jarðhita og grunnvatni umfram heimilis- og búsþarfir, sbr. 1. mgr. 10. gr. og 14. gr.*
(...)
Ríki, sveitarfélögum og félögum í þeirra eigu, sbr. 2. mgr., er heimilt að veita tímabundið afnotarétt að réttindum skv. 1. mgr. til allt að 65 ára í senn. Handhafi tímabundins afnotaréttar skal eiga rétt á viðræðum um framlengingu réttarins þegar helmingur umsamins afnotatíma er liðinn.
Við ákvörðun um það hverjum skuli veittur afnotaréttur skal gæta jafnræðis. Þá skal gæta þess að ákvörðunin stuðli að hagkvæmri nýtingu auðlinda og fjárfestinga í mannvirkjum.
[Sá ráðherra er fer með samningagerð á því sviði skal semja um endurgjald (leigu) fyrir afnotarétt réttinda undir yfirráðum ríkisins skv. 3. mgr. Um ráðstöfun og endurgjald fyrir nýtingu réttinda í þjóðlendum fer samkvæmt ákvæðum laga þar að lútandi."

"The State, municipalities, and their wholly owned undertakings are not permitted to transfer, directly or indirectly, on a permanent basis, the right to possess and use water that has hydroelectric power above 10MW.

(...)

The State, municipalities and companies owned by them, as provided in paragraph 2, are permitted to grant temporary rights of use of the rights under paragraph 1 for a period of up to 65 years at a time. Holders of temporary rights of use shall be entitled to negotiations on an extension of the rights when half of the agreed period of use has passed.

Decisions on to whom to grant rights of use shall be made on a non-discriminatory basis. Also, such decisions should promote use of resources and investments in facilities.

The Minister responsible for negotiation as regards consideration for the use of resources owned and controlled by the Icelandic State shall negotiate the consideration (rent) for the use of rights subject to the control of the State pursuant to paragraph 3. The arrangements and consideration for the use of rights on public land shall be subject to the applicable legislation." [7]

3. Relevant EEA law

13. Article 2(1) of *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*[8] (the "Services Directive") provides that:

"This Directive shall apply to services supplied by providers established in a Member State."

14. According to Article 37 of the EEA Agreement:

"Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include :

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[7] *"Ríki, sveitarfélögum og fyrirtækjum sem alfarið eru í eigu þeirra er óheimilt að framselja beint eða óbeint og með varanlegum hætti rétt til umráða og hagnýtingar á því vatni sem hefur að geyma virkjanlegt afl umfram 10 MW.*
(...)
Ríki, sveitarfélögum og félögum í þeirra eigu, sbr. 2. mgr., er heimilt að veita tímabundið afnotarétt að réttindum skv. 1. mgr. til allt að 65 ára í senn. Handhafi tímabundins afnotaréttar skal eiga rétt á viðræðum um framlengingu réttarins þegar helmingur umsamins afnotatíma er liðinn.
Við ákvörðun um það hverjum skuli veittur afnotaréttur skal gæta jafnræðis. Þá skal gæta þess að ákvörðunin stuðli að hagkvæmri nýtingu auðlindanna og fjárfestinga í mannvirkjum.
Sá ráðherra er fer með samningagerð um endurgjald fyrir nýtingu auðlinda í eigu og á forræði íslenska ríkisins skal semja um endurgjald (leigu) fyrir afnotarétt réttinda undir yfirráðum ríkisins skv. 3. mgr. Um ráðstöfun og endurgjald fyrir nýtingu réttinda í þjóðlendum fer samkvæmt ákvæðum laga þar að lútandi.]"

[8] Act referred to at point 1 of Annex X to the EEA Agreement.

(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) *activities of the professions.*"

15. Article 4(6) of the Services Directive provides that:

> "*'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;*"

16. As stated in Recital 39 of the Services Directive:

> *The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions (...).*

17. Article 12 of the Services Directive provides that:

> "*1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.*
>
> *2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.*
>
> *3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.*"

18. Indeed, as indicated in Recital 62 of the Services Directive:

> "*Where the number of authorisations available for an activity is limited because of scarcity of natural resources or technical capacity, a procedure for selection from among several potential candidates should be adopted with the aim of developing through open competition the quality and conditions for supply of services available to users. Such a procedure should provide guarantees of transparency and impartiality and the authorisation thus granted should not have an excessive duration, be subject to automatic renewal or confer any advantage on the provider whose authorisation has just expired. In particular, the duration of the authorisation granted should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested. This provision should not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These*

authorisations should remain in any case subject to the other provisions of this Directive relating to authorisation schemes."

19. Article 13(1) of the Services Directive provides that:

"Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially."

20. Article 31(1) of the EEA Agreement provides that:

"Within the framework of the provisions of this 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."

21. Article 6 of *Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC*[9] (the "Electricity Directive"), which concerns "*Authorisation procedure for new capacity*" provides that:

"1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non discriminatory criteria.

2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. These criteria may relate to:

(a) the safety and security of the electricity system, installations and associated equipment;
(b) protection of public health and safety;
(c) protection of the environment;
(d) land use and siting;
(e) use of public ground;
(f) energy efficiency;
(g) the nature of the primary sources;
(h) characteristics particular to the applicant, such as technical, economic and financial capabilities;
(i) compliance with measures adopted pursuant to Article 3.

3. Member States shall ensure that authorisation procedures for small and/or distributed generation take into account their limited size and potential impact.

4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. The reasons must be objective, non discriminatory, well founded and duly substantiated. Appeal procedures shall be made available to the applicant."

22. Article 13 d) of *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and*

[9] Act referred to at point 22 of Annex IV to the EEA Agreement.

amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC[10] (the "Renewable Directive") provides that:

> *"rules governing authorisation, certification and licensing are objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies;"*

4. The Authority's assessment

23. Article 3a of the Ground Resources Act sets up an authorisation procedure for the right to harness geothermal energy and groundwater owned by the State, municipalities and the companies owned by them. Article 16 of the Water Act sets up the same authorisation procedure regarding the right to occupy and harness water resources owned by the State, municipalities or companies owned by them, that contain exploitable energy in excess of 10 MW.

4.1 Services Directive

24. According to Article 2 of the Services Directive, the Directive applies to services supplied by providers established in an EEA State.

25. The economic activity at stake in the present case is the harnessing of energy resources located on public land, for production of electricity and heat. This is an activity "*of an industrial character*", which, in accordance with Article 37 of the EEA Agreement, falls within the scope of "*services*" and thus within the scope of the Services Directive.

26. According to Article 4(6) of the Services Directive, "*authorisation schemes*" are procedures under which a service provider is in effect required to take steps in order to obtain from a competent authority a formal decision concerning access to a service activity or the exercise thereof. The definition is wide and covers all administrative procedures for granting authorisations, licences, approvals or concessions[11].

27. The Icelandic authorisation schemes fall under this definition. Indeed, under the above-mentioned Icelandic provisions, undertakings that want to harness the energy contained in geothermal, groundwater or water resources located on public land to produce electricity or heat must obtain from the competent authority a formal decision in order to exercise that activity[12].

28. As the Icelandic provisions constitute authorisation schemes within the meaning of Article 4(6) of the Services Directive, they must comply with the requirements imposed upon such schemes by the Directive. More specifically, as the number of authorisations available is limited because of the scarcity of available natural resources, this authorisation scheme falls within the scope of Article 12 of the Services Directive. It must thus comply with the specific requirements set out in that Article, as well as with any other relevant provisions of the Directive relating to authorisation schemes[13].

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[10] Act referred to at point 41 of Annex IV to the EEA Agreement.
[11] Recital 39 of the Services Directive.
[12] The production of electricity is an activity "*of an industrial character*", which, according to Article 37 EEA, falls within the scope of "services".
[13] See, in particular, Recital 62 of the Services Directive.

29. This implies the following obligations on Iceland:
(1) The procedures and formalities for the authorisation must be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially (Article 13(1) of the Services Directive).
(2) The selection procedure applied to potential candidates must provide full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure (Article 12(1) of the Services Directive).
(3) The authorisation must only be granted for an appropriate limited period of time, in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested (Article 12(2) of the Services Directive, read in light of Recital 62 of the Services Directive).
(4) The authorisation must not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider (Article 12(2) of the Services Directive).

4.1.1 First requirement

30. The first requirement, provided for in Article 13(1) of the Services Directive, is that the *procedures and formalities* for the authorisation must be *clear* and *made public in advance*.

31. This goes beyond the general requirement that authorisation procedures must be transparent and carried out on the basis of objective criteria. The requirement of advance publicity of procedures and formalities entails that the details of the procedures that will need to be followed and the formalities that will need to be carried out before a given authorisation is issued, must be spelled out in the applicable national provisions. The requirement of clarity entails that the procedures be unambiguous and easily understandable.

32. In other words, on the basis of the applicable national provisions, interested parties must be in a position to understand which rules will apply to the authorisation process and which steps are going to be followed in order to issue the authorisation.

33. It is submitted that this is not the case for the authorisation schemes foreseen by Articles 3a of the Ground Resources Act and 16 of the Water Act which are in breach of Article 13(1) of the Services Directive.

34. In the Water Act and the Ground Resources Act, the only indications as to the procedures and formalities to be followed are that the decision must be taken on a non-discriminatory basis, that the decision should promote use of resources and investments in facilities and that the competent minister will negotiate the consideration for the authorisation.

35. In its letter of 3 June 2011[14], Iceland also points to the Administrative Procedures Act No 37/1993 and to "*general administrative customs and practices*", which would set out the applicable procedures.

[14] Your ref. IDN11060006/7.6.2, Event No 600032.

36. Concerning the Administrative Procedures Act No 37/1993, the Authority notes that it simply requires public authorities to comply with the general principle of equality, by stating that "*in deciding cases a public authority shall make every effort to ensure that, legally, it is consistent and observes the rule of equal treatment*"[15]; and the principle of proportionality, by stating that "*a public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by less stringent means. Care should then be taken not to go further than necessary*[16]". Iceland has not explained how this is sufficient to comply with the requirements of Article 13(1) of the Services Directive.

37. As regards the "*general administrative customs and practices*" outlined in the letter of 3 June 2011, Iceland indicates that when a public body awards a licence, it must do so "*in a transparent and non-discriminatory way based on objective criteria*". According to Iceland, this entails that "*public authorities must award the licences transparently and treat all potential tenderers equally. This requires an adequate advertising to enable the market to be opened up to competition and ensuring that all potential tenderers will be provided with the same information. The decision making must be transparent in order for the authority in question to be able to demonstrate the impartiality of the procedure*".[17]

38. Firstly, Iceland does not demonstrate that those general principles have been given the necessary publicity.

39. Secondly, they remain at a very general level and constitute little more than general principles. They do not allow interested parties to know which actual procedures will be followed and which formalities will be carried out before the authorisations are awarded.

40. The applicable national legal framework leaves considerable discretion to public authorities as to what procedures and formalities they will need to apply and is insufficient for the authorisation scheme to comply with the requirement that the procedure and formalities be clear and made public in advance.

41. As a result, the Authority concludes that the authorisation schemes foreseen by Articles 3a of the Ground Resources Act and 16 of the Water Act are in breach of Article 13(1) of the Services Directive.

4.1.2 Second requirement

42. The second requirement, provided for in Article 12(1) of the Services Directive, is that the selection procedure applied to potential candidates must provide full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

43. Again, according to the information provided by Iceland, national law only requires that the procedure be non-discriminatory and comply with the principles of equality and proportionality. Iceland does not demonstrate that "*full guarantees*" are provided for the transparency of the procedure and for adequate publicity for the launch, conduct and completion thereof.

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[15] Article 11 of the Administrative Procedures Act No 37/1993.
[16] Article 12 of the Administrative Procedures Act No 37/1993.
[17] Ref. IDN11060006/7.6.2, event no 600032, page 2.

44. As a result, the Authority has come to the conclusion that Articles 3a of the Ground Resources Act and 16 of the Water Act are also in breach of Article 12(1) of the Services Directive.

4.1.3 Third requirement

45. The third requirement, provided for in Article 12(2) of the Services Directive, is that the authorisation is only to be granted for an appropriate limited period of time, in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested.

46. According to the Water Act and the Ground Resources Act, the authorisations are to be granted for a duration of up to 65 years. However, there is no requirement that the duration of the licence be shorter should less time be sufficient for a given authorisation holder to recoup the cost of his investment and make a fair return on the capital he has invested. Nothing in Icelandic legislation provides that the competent authority is authorised to grant a licence for a duration of less than 65 years, even if, for a given project, this would prove to be more time than justified.

47. As a result, the Authority concludes that the authorisation schemes foreseen by Articles 3a of the Ground Resources Act and 16 of the Water Act are in breach of Article 12(2) of the Services Directive.

4.1.4 Fourth requirement

48. The fourth requirement, also provided for in Article 12(2) of the Services Directive, is that the authorisation must not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

49. According to Article 16(3) of the Water Act and Article 3a(3) of the Ground Resources Act, the authorisation holder is entitled to negotiations on an extension of the authorisation when half of the agreed period of use has passed.

50. This clearly confers advantage on the authorisation holder as concerns the renewal of his authorisation. Indeed, the existing concession holder is given the possibility to negotiate the renewal years before it expires, thus avoiding having to compete with third parties to obtain the authorisation through a transparent, impartial and non-discriminatory procedure.

51. For that reason, the Authority maintains that the authorisation schemes foreseen by Articles 3a of the Ground Resources Act and 16 of the Water Act are in breach of Article 12(2) of the Services Directive.

4.2 Article 31 EEA

52. Should the above-mentioned authorisation schemes be considered to fall outside the scope of the Services Directive, they would need to comply, in any event, with the provisions of the main part of the EEA Agreement.

53. In the alternative therefore, the Authority would conclude that the conditions under which the authorisations are awarded and renewed would be in breach of the freedom of establishment provided for under Article 31 EEA.

4.2.1 Non discrimination and transparency

54. It is settled case-law that Article 31 EEA confers on nationals of one EEA State who wish to pursue activities as self-employed persons in another EEA State the benefit of the same treatment as the host State's own nationals and prohibits any discrimination based on nationality which hinders the taking up or pursuit of such activities[18]. The rules regarding equal treatment "*forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.*"[19]

55. In the context of an authorisation scheme in which the authorities of an EEA State award the pursuit of an economic activity to one or more economic operators in particular, this principle of non-discrimination implies, in turn, an obligation of transparency.

56. Indeed, without adequate transparency, the principle of equal treatment would be disregarded. Undertakings established in other EEA States and potentially interested in the licensed activity would not be able to express their interest and, therefore, exercise their right under Article 31 EEA. The obligation of transparency is thus a concrete and specific expression of the principle of equal treatment, which enables undertakings to exercise effectively the rights conferred upon them by Article 31 EEA[20].

57. As a consequence and as held by the Court of Justice in *Sporting Exchange Ltd*, the obligation of transparency therefore appears to be a mandatory prior condition of the right of an EEA State to award to one (or more) private operators the exclusive right to carry on an economic activity, irrespective of the method of selecting the operator (or operators)[21].

58. That obligation of transparency, which is imposed on the authority granting the authorisation, consists in ensuring, for the benefit of any potential applicant, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procedures to be reviewed[22].

59. Moreover, as any prior administrative authorisation scheme, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Finally, the decision must be capable of being made subject to judicial proceedings[23].

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[18] See, in particular, to that effect, Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraph 17 and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 27.

[19] Case C-330/91 *Commerzbank* [1993] ECR I-4017 paragraph 14, Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 33.

[20] See opinion of Advocate General Bot in Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695, paragraph 153-154.

[21] Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695, paragraphs 39-47.

[22] See, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46-49, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 44 and Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 36.

[23] Case C-389/05 *Commission v France* [2008] ECR I-5397, paragraphs 93-94.

60. These principles must be explicitly guaranteed in the internal legal system of the EEA State. Indeed, the States must implement their obligations under EEA law with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements flowing from the principle of legal certainty. Individuals must have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts[24].

61. It follows from the above that EEA States cannot maintain in force national provisions, which permit the award of special and exclusive rights without them being put out to competition, on the basis of objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Indeed, such legislation would infringe Article 31 EEA and the ensuing principles of equal treatment, non-discrimination, transparency and legal certainty.

62. The Authority concludes that under Icelandic law, compliance with the principle of transparency for the award of authorisations for the right to harness the energy contained in geothermal, groundwater or water resources located on public land to produce electricity or heat, would not be guaranteed.

63. Indeed, as demonstrated above, Icelandic law only requires that the procedure be non-discriminatory and comply with the principles of equality and proportionality. Iceland has not demonstrated that the application of those principles is sufficient to guarantee that the award procedure will be carried out with a degree of advertising sufficient to enable the market to be opened up to competition.

4.2.2 The renewal procedure

64. As established by the case-law of the Court of Justice, the above-mentioned principles of non-discrimination and transparency must apply both to the initial grant of the authorisation and to any renewal procedure[25].

65. As indicated above, according to Article 16(3) the Water Act and Article 3a(3) of the Ground Resources Act, the authorisation holder is entitled to negotiations on an extension of the authorisation when half of the agreed period of use has passed. This means that authorisations can be renewed without a transparent, impartial and non-discriminatory procedure.

66. For that reason as well, the Authority would come to the conclusion that the Icelandic provisions are in breach of EEA law.

4.2.3 The duration of the authorisation

67. Finally, the Authority observes that the absence of any guarantee that the duration of the authorisation will be set in a proportionate manner would also be in breach of EEA law.

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[24] See Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7; Case C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18; Case C-236/95 *Commission v Greece* [1996] ECR I-4459, paragraph 13; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 50, Case C-54/99 *Association Église de Scientologie de Paris* [2000] ECR I-1335, paragraph 22, Case C-478/01 *Commission* v *Luxembourg* [2003] I-2351, paragraph 20, Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 74-75, and Case C-370/05 *Festersen*, [2007] ECR I-1129, paragraph 43.

[25] Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695, paragraphs 54-55.

68. Indeed, the principle of proportionality is recognised by the established case law of the Court of Justice as "*being part of the general principles of Community law*"[26]. It also binds national authorities when they act within the sphere of application of EEA law, even when they have a large area of discretion[27]. This is the case when States restrict the freedom of establishment through authorisation schemes.

69. In that context, the principle of proportionality requires that any measure which restricts the fundamental principles of free movement should be both necessary and appropriate in the light of the objectives sought. When an EEA State considers measures to be adopted, it must choose those which cause the least possible disruption to the pursuit of an economic activity[28].

70. The same principles apply for the EFTA States, as confirmed by the EFTA Court:

> *"The Court has consistently emphasized the importance of this principle of EEA law (see, for instance, Cases E-6/96 Wilhelmsen, at paragraph 87, and E-3/00 EFTA Surveillance Authority v Norway, at paragraph 27). Under the proportionality principle, the measure chosen by an EEA Contracting Party must be proportionate to the aim pursued. It must be established that measures taken are suited to achieve the objective sought, and that the same objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade."*[29]

71. When applied to authorisations such as the one provided for in Article 16(3) of the Water Act and Article 3a(3) of the Ground Resources Act, this principle requires that the restriction to the freedom of establishment caused by the authorisation be limited to what is strictly necessary. Concerning the duration of authorisations such as those subject to the present proceedings, the principle of proportionality requires that it be set so that it does not limit open competition beyond what is strictly required to ensure that the investment is paid off and that there is a reasonable return on invested capital, whilst maintaining a risk inherent in economic activities for the authorisation holder.

72. For the same reasons as set out above, the principle of legal certainty requires that this principle be guaranteed in a clear and unambiguous fashion in the national legal order.

73. However, the Authority submits that under Icelandic law, compliance with the principle of proportionality when setting the length of the hydropower and geothermal licences is not guaranteed.

74. For that reason as well, the Icelandic provisions are in breach of EEA law.

4.2.4 Justification

75. A restriction under Article 31 EEA may be justified by reasons referred to in Article 33 EEA or by considerations of overriding public interest.

76. The EFTA Court held that the reasons which may be invoked by an EEA State in order to justify any derogations from EEA law principles *"[...] must be accompanied by an appropriate analysis of the expediency and proportionality of the restrictive measure*

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[26] Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21.
[27] Joined Cases 41/79, 121/79 and 796/79 *Testa et al* [1980] ECR 1979, paragraph 21.
[28] See for example Case 15/83, *Denkavit Netherlands* [1984] ECR 2171 and Case T-260/94 *Air Inter SA* [1997] ECR II-997, paragraph 144.
[29] Case E-4/04 *Pedicel* [2005] EFTA Court Report 1, paragraphs 55-56.

adopted by that State, and precise evidence enabling its arguments to be substantiated."[30]

77. In its letter of 15 June 2012[31], Iceland stated that "(...) *the Icelandic authorities in general welcome the preliminary conclusion of the Authority (...)*". Therefore, Iceland does not provide any reasons which could justify the restriction imposed by the authorisation scheme on the freedom of establishment provided in Article 31 EEA.

78. The Authority therefore considers that Iceland has not provided any objective reasons of public interest to justify the restrictions on the freedom of establishment imposed by the current authorisation scheme.

4.3 Specific legislations

79. For the sake of completeness, the Authority will also consider the terms of the Electricity Directive and the Renewable Directive, altough it considers them not to be applicable.[32] According to the *lex specialis* principle, specific legislation shall be applied in favour of a more general one. However, *in casu* these two directives do not contain extensive elements regarding licencing procedures. Consequently, the *lex generali* (the Services Directive) shall be applied because it contains more detailed rules regarding licencing obligation.

4.3.1 Electricity Directive

80. The Authority will consider the terms of Article 6 of the Directive 2003/54/EC ("the Electricity Directive")[33], which concerns "*Authorisation procedures for new capacity*".

81. The procedures foreseen in Article 16(3) of the Water Act and Article 3a(3) of the Ground Resources Act do not fall within the scope of that provision. Indeed, Article 6 of the Electricity Directive concerns licences for the construction of new generation capacity. The procedures foreseen in Article 16(3) of the Water Act and Article 3a(3) of the Ground Resources Act concern access to energy resources located on public land, which is a different matter.

82. The fact that Article 6 of the Electricity Directive was not intended to cover authorisations such as those subject to these proceedings is confirmed by the list of criteria which may be used by EEA States when granting authorisations for the construction of new capacity, listed in the second paragraph of Article 6. Indeed, if that provision had been intended to cover access to energy resources, it would have included criteria such as resource management or price paid. However, this is not the case.

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[30] Case E-12/10 *EFTA Surveillance Authority v Iceland*, [2011] EFTA Court Report 117, paragraph 57.
[31] Your reference IDN 11060006/7.6.2, Event no 638119.
[32] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity OJ L 176, 15.7.2003, p. 37–56 and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources OJ L 140, 5.6.2009, p. 16–62.
[33]Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

83. The Authority therefore considers that Article 6 of the Electricity Directive is not applicable since, in the field of authorisation procedure, its content is less detailed than that of the Services Directive.

4.3.2 The Renewable Directive

84. Finally, the Authority would like consider the application of Article 13 d) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources[34] (the "Renewable Directive").

85. Article 13 d) of the Renewable Directive provides that:

> *"rules governing authorisation, certification and licensing are objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies;"*

86. The same analysis as performed under section 4.3.1 above in relation to the Electricity Directive can be undertaken in relation to the Renewable Directive. Indeed, the content of paragraph 13 d) is rather vague and does not establish any detailed guidelines concerning the way the selection procedure should be operated.

87. As a matter of consequence, the Services Directive is applicable since, in the field of authorisation procedure, its content is more detailed than that of the Renewable Directive. This interpretation is supported by the explanation and example given by the European Commission in the handbook on implementation of the Services Directive.[35]

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

By maintaining in force Article 3a(2)-(6) of the *Act No 57/1998 on the survey and utilisation of ground resources* and Article 16(2)-(6) of the *Water Act No 15/1923*, which set up an authorisation scheme for the right to harness, respectively, geothermal energy and groundwater owned by the State, municipalities or companies owned by them, and the right to occupy and harness water resources owned by the State, municipalities or companies owned by them, that contains exploitable energy in excess of 10 MW, without providing for publicised, transparent and non-discriminatory award and renewal procedures, and without

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[34] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance) OJ L 140, 5.6.2009, p. 16–62.

[35] Handbook on implementation of the Services Directive, p.24: http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf ; webpage last accessed 19 March 2015.

a requirement for a proportionate length for the authorisations, Iceland has failed to fulfil its obligations arising from Articles 12 and 13 of the Act referred to at point 1 of Annex X to the EEA Agreement, *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, as adapted to the EEA Agreement by Protocol 1 thereto.

If the Services Directive is not applicable, the Authority has reached the alternative conclusion that, by maintaining in force Article 3a(2)-(6) of the *Act No 57/1998 on the survey and utilisation of ground resources* and Article 16(2)-(6) of the *Water Act No 15/1923*, which set up an authorisation scheme for the right to harness, respectively, geothermal energy and groundwater owned by the State, municipalities or companies owned by them, and the right to occupy and harness water resources owned by the State, municipalities or companies owned by them, that contains exploitable energy in excess of 10 MW, without providing for publicised, transparent and non-discriminatory award and renewal procedures, and without a requirement for a proportionate length for the authorisation, Iceland has failed comply with its obligations arising from Article 31 EEA.

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, 7 May 2015

For the EFTA Surveillance Authority

Frank Büchel
College Member

Markus Scheider
Acting Director