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EFTA Court 1,
rue du Fort Thüngen
L-1499 Luxembourg

Request for an Advisory Opinion

15 April 2025

Case No E-3628/2024

Ólafur Þór Jónsson, Sigríður Sólrún Jónsdóttir, Særún Jónsdóttir and Reykjaprent ehf.
(Flóki Ásgeirsson, Attorney at Law)
v
The National Energy Authority of Iceland (*Orkustofnun*) and
(Þorvaldur Hauksson, Attorney at law)
Benchmark Genetics Iceland hf.
(Einar Brynjarsson, Attorney at Law)

Judge: Helgi Sigurðsson, District Court Judge

Ruling

1. The present proceedings were initiated by the service of a writ of summons on 18 June 2024. The plaintiffs are Ólafur Þór Jónsson, Sigríður Sólrún Jónsdóttir, Særún Jónsdóttir, and Reykjaprent ehf., and the defendants are Orkustofnun (the National Energy Authority of Iceland, "the Energy Authority") and Benchmark Genetics Iceland hf. On 4 April 2025, the case was taken under adjudication for a ruling on the plaintiffs' request that an advisory opinion be sought from the EFTA Court under Article 1 of Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EFTA Agreement. That Act provides that a court may deliver a ruling to the effect that an advisory opinion will be sought from the EFTA Court.

2. The plaintiffs' claims in the proceedings are that utilisation licence No OS-2023-L009-01, granted to defendant Benchmark Genetics Iceland hf. on 4 May 2023, be annulled. In the alternative, the plaintiffs request that the ruling of the Environment and Natural Resources Board of Appeal of 20 September 2023 in Case No 72/2023 be set aside. In the further alternative, the request is made that it be declared that defendant Energy Authority was legally prohibited from granting to defendant Benchmark Genetics Iceland hf. a licence to utilise up to up to 426 L/s of fresh groundwater, with salinity <0.4‰, and 946 L/s of saline groundwater (*jarðsjór*, marine groundwater), with salinity ≥ 30‰, at a plot of land at Stapavegur 1 and 1 a in the Municipality of Vogar. Legal costs are claimed in each instance. The defendants claims are that they be acquitted of the plaintiffs' claims and awarded legal costs.

3. The present case was taken under adjudication for a ruling after counsel had been given an opportunity to express their positions as to whether an opinion should be sought in a court session on 4 April 2025. The defendants' counsel considered it unnecessary to obtain the EFTA Court's opinion but declared that they did not oppose seeking such an opinion, submitting for the court's assessment whether this was needed, also leaving it to the court to decide on the wording of any questions that might be referred to the EFTA Court.

4. As entered in the court record, the plaintiffs requested that the EFTA Court's Advisory Opinion be sought on the following:

1) 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.

2) Whether the provisions of Directive 2011/92/EU, as subsequently amended, in particular its Articles 3 and 6, must be interpreted as meaning that the information there referred to must, in instances where a project may because of its scope, nature or location affect the status of a groundwater body for which classification and status assessment are required under the provisions of Directive 2000/60/EC, be sufficient to enable conclusions to be drawn from that information about the water body's quantitative and chemical status as understood in the latter directive, and about the planned project's impact on these aspects.

I

5. The dispute under litigation in the present proceedings concerns the utilisation licence for groundwater abstraction at Vogavík in the Municipality of Vogar granted to defendant Benchmark Genetics Iceland hf., formerly Stofnfiskur hf., by defendant Energy Authority on 4 May 2023. The licence authorised the utilisation of up to 426 L/s of fresh groundwater, with salinity <0.4‰, and 946 L/s of saline groundwater (*jarðsjór*, marine groundwater), with salinity ≥ 30‰, at the defendant's plot of land at Stapavegur 1 and 1 a in the Municipality of Vogar. The effective term of the licence extends until 4 May 2043.

6. The background to the proceedings is that defendant Benchmark Genetics Iceland hf., formerly Stofnfiskur hf., planned to increase production at the company's plots of land at Stapavegur 1 and 1a in the Municipality of Vogar; these plans entailed an increased need for utilisation of groundwater, which at the time totalled 972 L/s. By letter on 19 February 2019, the National Planning Agency (*Skipulagsstofnun*, "the Planning Agency") found that an environmental impact assessment examining the impact of the total water extraction would be required, cf. Article 5 of the then applicable Act No 106/2000 on Environmental Impact Assessment.

7. The Planning Agency received a proposal from defendant Benchmark Genetics Iceland hf. for the planned expansion, on 3 January 2020. The Agency solicited comments from various parties, including the defendant, the Environment Agency and others. The Planning Agency accepted the proposal subject to some specific comments. Among these was the comment that different arrangements and impacts of groundwater utilisation needed to be addressed and compared in light of the existing uncertainty as to the Municipality of Vogar's obtaining of water for human consumption.

8. A preliminary environmental impact assessment report was submitted on 20 August 2020 and was made publicly available on 2 September 2020. This stated, *inter alia,* that no changes had been detected in the chemical content of freshwater at Vogar, despite heavy pumping for years. It had to be taken to be the case, the report continued, that the present rate of extraction was sustainable and would remain so despite a 20% increase. Furthermore, the

effects of the extraction were assessed to be insignificant for groundwater flows in the vicinity of Vogavík and the planned water source for the population of Vogar.

9. The parties whose comment was solicited, including defendant Energy Authority, commented on the preliminary report, after which the opinion of Iceland GeoSurvey (*Íslenskar orkurannsóknir*) was sought as to whether any freshwater boreholes were at risk by the company's plans. The conclusion was that the plans were unlikely to affect the boreholes. Further comment was solicited, and subsequently defendant Benchmark Genetics Iceland hf. submitted an environmental impact assessment report in accordance with Article 10(6) of Act No 106/2000.

10. The Planning Agency's opinion on the environmental impact assessment became available on 10 May 2021. Its conclusion stated, *inter alia*, that negative environmental impacts of the planned expansion would be limited, and that the increased water consumption was unlikely to negatively affect groundwater to any material extent. Subsequently, defendant Benchmark Genetics Iceland hf. applied to defendant 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. By letter on 1 October 2021, defendant Energy Authority made various comments on the application.

11. The plaintiffs submitted comments to defendant Energy Authority by letter on 30 December 2021. These argued, *inter alia*, that since the environmental impact of the already existing project had never been assessed, nor had a licence for it ever been granted, it would not suffice to assess only the effects of the groundwater extraction increase; rather, a comprehensive assessment of the entire project would need to be carried out.

12. Defendant Benchmark Genetics Iceland hf. submitted a newly updated application for a utilisation licence on 3 January 2022. Defendant Energy Authority issued a utilisation licence to defendant Benchmark Genetics Iceland hf., with special conditions in accordance with Article 17 of Act No 57/1998 on the Survey and Utilisation of Ground Resources. The licence provided, *inter alia*, that among the conditions for the licence were that monitoring and an action plan be in place with the aim that there would be no change in the chemical composition of water and that its quality would be maintained. The licence set conditions concerning the volume and rate of extraction, environmental and safety considerations, site finishing, surveillance and monitoring, disclosure requirements and information handling, liability and insurance, etc.

13. The plaintiffs lodged an appeal against the issuance of the utilisation licence with the Environment and Resource Appeals Board on 8 June 2023. In a ruling delivered on 20 September 2023, the Board declined to annul the issuance of the utilisation licence.

II

14. Those of the plaintiffs' pleas that are relevant here concern the fact that Act No 36/2011 on Water Governance constitutes the transposition into Icelandic law of the rules provided for in 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, which was incorporated into Annex XX of the Agreement on the European Economic Area by Decision No 125/2007 of the EEA Joint Committee. The plaintiffs observe that pursuant to Article 28(3) of Act No 36/2011, the licensing authority shall, in deciding on an application for a water utilisation licence, and in otherwise authorising projects under the Water Act, the Act on the Survey and Utilisation of Ground Resources, and in deciding on permit applications under the Planning Act or the Construction Act, ensure that the authorisation is in conformity with the water protection policy set out in the river basin management plan. This provision, the plaintiffs continue, is based on and constitutes the transposition into Icelandic law of part of the obligations provided for in Article 4 of Directive 2000/60/EC.

15. Counsel for the plaintiffs refers to the judgment of the High Court of Ireland of 15 January 2021 in the case of Peter Sweetman v An Bord Pleanála and Bradán Beo Teoranta, where the High Court held that a decision granting permission for freshwater abstraction from a lake was to be quashed because of the lack of an available assessment of the lake's status in compliance with the provisions of Directive 2000/60/EC at the time when the authorisation was granted. That judgment was later reopened on the grounds that surface water bodies below a certain size were not covered by that directive. A preliminary ruling was sought from the Court of Justice of the European Union, which delivered its judgment on 25 April 2024 in Case C-301/22. The Court of Justice held that there was no need to answer the question whether authorities may grant consent for a project "that may affect the water body prior to it being categorised and classified," given its negative answer to the question whether there was a requirement to "characterise and subsequently classify" all water bodies, irrespective of size. As far as the plaintiffs are aware, the EFTA Court has not ruled on this issue.

16. Counsel for the plaintiffs notes that Act No 106/2006 constitutes the transposition into Icelandic law of the rules provided for in Directive of the European Parliament and Council No 2011/92/EU of 13 December 2011, on the assessment of the effects of certain public and private projects on the environment, and Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, amending the former directive, which were incorporated into Annex XX to the EEA Agreement by EEA Joint Committee Decisions No 230/2012 of 7 December 2012 and No 117/2015 of 30 April 2015. Pursuant to point c of Article 4b of Act No 106/2000, the environmental impact assessment shall identify, describe and assess, in relation to the project, the direct and indirect significant effects on, *inter alia,* water. Pursuant

to Article 11(3), the Planning Agency's opinion and the assessment report shall be easily accessible to the public. The aforementioned provisions constitute the transposition into Icelandic law of part of the obligations provided for in that directive's Articles 3 and 6.

17. Counsel for the plaintiffs refers to a ruling given by the Court of Justice of the European Union on 28 May 2020 in Case C-535/18, where the interpretation of a directive's provisions in conjunction with the provisions of Directive 2000/60/EC was at issue. In the case, a federal administrative court in Germany had referred a question concerning the interpretation of Article 6 of Directive 2011/92 in relation to information to be made available to the public. The Court of Justice replied that the information had to meet the criteria and requirements laid down in Article 4 of Directive 2000/60/EC. As far as the plaintiffs are aware, the EFTA Court has not adopted a position on comparable issues.

18. Pursuant to Article 1 of Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement, a court may, in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, deliver a ruling to the effect that an advisory opinion will be sought from the EFTA Court to clarify a point at issue in the case if, during proceedings before a court, a position needs to be taken on the interpretation of the Agreement on the European Economic Area.

19. The plaintiffs submit that justifiable doubt exists, which is of real significance for the outcome of the case, as to whether the rules of EEA law preclude the granting of authorisation for a project that may affect the status of a groundwater body, if discussion and assessment of that body's status are not available in the applicable river basin management plan as prescribed by Directive 2000/60/EC. The plaintiffs further contend that there is doubt as to specifically which information on a project that may affect a water body must be set forth pursuant to the requirements laid down in Directive 2011/92/EC, as subsequently amended, in that project's environmental impact assessment, irrespective of whether or not authorisation for such a project may be granted without an assessment of the status of the relevant water body being available in accordance with the provisions of the aforementioned Directive. The plaintiffs consider that even though the Court of Justice of the European Union has held that in conducting the environmental impact assessment of such a project it is necessary to set forth „the data that are necessary in order to assess the effects of that project on water, in the light of the criteria and requirements laid down in; *inter alia*, Article 4 (1) of Directive 2000/60", further elucidation on this point may be needed given the dispute under litigation in the present case, particularly in light of the fact that the EFTA Court's position on this point has not been established.

III

20. The defendants observe that the plaintiffs' first question for the EFTA Court concerns, in essence, whether a licence to utilise water may be issued when the water body's status has not been assessed in the river basin management plan. While the status of the Reykjanes water body has no more been assessed in a river basin management plan than have other Icelandic groundwater bodies, the defendants continue, an enormous amount of work pursuant to Act No 36/2011 has been carried out assessing that water body, with the involvement, among others, of defendant Energy Authority. Furthermore, numerous studies have been carried out, for other reasons, of the water body in question and the boreholes located at defendant Benchmark Genetics Iceland hf.'s plots of land.

21. The defendants argue that any questions referred to the EFTA Court should take into account what effect, if any, the work already carried out pursuant to the 2011 Act is to have, or whether that work makes no difference as long as the information is not available in the river basin management plan. The water body in question has been assessed, they maintain, along with the extraction's effect on it, as is always done when there is a plan to utilise groundwater or other types of water bodies. For the present request to be of use, it must be independent of the parties' disagreement about the facts of the case. In the present proceedings, it is undisputed that this information is not available in the river basin management plan; the question concerns what the legal effect of this will be. The defendants submit that the status of the water body has been assessed and this information has been obtained, but has not been made public in the river basin management plan.

IV

Conclusion:

22. Pursuant to Article 28(3) of Act No 36/2011, the licensing authority shall, in deciding on an application for a water utilisation licence, and in otherwise authorising projects under the Water Act, the Act on the Survey and Utilisation of Ground Resources, and in deciding on permit applications under the Planning Act or the Construction Act, ensure that the authorisation is in conformity with the water protection policy set out in the river basin management plan.

23. In the present proceedings, it is undisputed that the status assessment had not been incorporated into the river basin management plan. Nor is it contested that a status assessment of the water body had been carried out, as had various studies by, inter alia, defendant Energy Authority. The dispute concerns whether it is an unqualified requirement under Article 28(3) of Act No 36/2011 that the authorisation be in conformity with the water protection policy set forth in the river basin management plan, irrespective of whether a status assessment has been conducted.

24. Article 28(3) of Act No 36/2011 constitutes the transposition into Icelandic law of part of the obligations provided for in 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, which was incorporated into Annex XX of the EEA Agreement by Decision of the EEA Joint Committee No 125/2007.

25. Pursuant to Article 1 of Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement, a court may, in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, deliver a ruling to the effect that an advisory opinion will be sought from the EFTA Court to clarify a point at issue in the case if, during proceedings before a court, a position needs to be taken on the interpretation of the Agreement on the European Economic Area. It follows from the case law [of the Supreme Court of Iceland] that the criteria for obtaining an advisory opinion from the EFTA Court on this basis have been held to be that elucidating the interpretation of EEA law is of real significance for the outcome of the case, that the facts of the case have been established sufficiently clearly, and that justifiable doubt exists as to the interpretation of the EEA law in question in light of the matter at issue.

26. In this court's assessment, it has been sufficiently established that the interpretation of the relevant rules of EEA law may be of real significance in the present proceedings. The court also finds the facts of the case sufficiently clear for it to be justifiable to request, at this stage, an advisory opinion from the EFTA Court pursuant to Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement. Furthermore, it has not been established that any case-law of the EFTA Court, the Icelandic Court of Appeal, or the Supreme Court of Iceland is available that would eliminate doubt as to the interpretation of the EEA rules in question in light of the matter at issue in the present case. The court's conclusion is therefore that there is sufficient reason to request an advisory opinion from the EFTA Court, cf. the first paragraph of Article 1 of Act No 21/1994, by referring to the EFTA Court the first question [proposed by the plaintiffs] as set out in the operative part of this ruling.

27. As to the plaintiffs' second question, reference is made to the statement in the cited judgment of the Court of Justice of the European Union in Case C-535/18 to the effect that the information to be made available must be sufficient to enable conclusions to be drawn about the water body's quantitative and chemical status as understood in Directive 2000/60/EC. In this court's assessment, it is plain that adequate information must be made available; no particular significance of obtaining the EFTA Court's answer to such a question can be discerned. This second question is accordingly rejected.

28. District Court Judge Helgi Sigurðsson delivered the present ruling.

Operative part of the ruling:

An advisory opinion is sought from the EFTA Court regarding the following question:

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.

Helgi Sigurðsson