Nefndasvið Alþingis

Reykjavík, 3. maí 2019

Umsögn um frumvarp til breyting á lögum um mat á umhverfisáhrifum – 775. þingmál (EES-reglur, stjórnvaldssektir o.fl.)

I Ekki hreint innleiðingarfrumvarp

Í greinargerð með frv. kemur ítrekað fram að það sé lagt fram til innleiðingar á tilskipun 2014/52/ESB einvörðungu. Þrátt fyrir þetta eru eftirtalin ákvæði frv. ekki innleiðing á tilskipuninni:

1. Undanþáguheimildir frá umhverfismati í 6. gr. frv. eiga rætur eiga að rekja til heimilda er verið hafa í 3. mgr. 1. gr. og 4. mgr. 2. gr. tilskipunar 2011/92/ESB en hafa ekki áður verið nýttar í íslenskum lögum nema sú sem er í 3. mgr. 5. gr. núg. laga og varðar almannaheill og öryggi. Í athugasemd með frumvarpsákvæðinu er ekki gerð nein grein fyrir tilefni þess að nýta þessar heimildir einmitt nú. Ljóst er að efni tilskipunar 2014/52/ESB er ekki tilefnið.
2. C-liður 2. tl 25. gr. frv. um breytingu á skipulagslögum nr. 123/2010 til lengingar á gildistíma framkvæmdaleyfis úr 12 mánuðum í tvö ár. Enginn sérstakur rökstuðningur fylgir ákvæðinu.

Heildarendurskoðun er nú gerð á lögum um umhverfismat framkvæmda. Starfshópur sem það verk hefur með höndum á einnig að skoða nauðsynlegar breytingar á skipulagslögum og lögum um umhverfismat áætlana. Af þessum sökum leggjum við eindregið til að breytingartillögurnar hér að ofan verði felldar úr frumvarpinu, en hvor um sig er alveg ónauðsynleg til innleiðingar tilskipunarinnar, auk þess sem sú síðari hefur enga tengingu við tilskipun 2011/52/ESB svo sem henni var breytt með tilskipun 2014/92/ESB enda fjallar EES löggjöf um umhverfismat ekki um gildistíma framkvæmdaleyfa.

II Röng og ófullnægjandi innleiðing

Eftirtalin ákvæði fela í sér annað hvort ófullnægjandi eða ranga innleiðingu á tilskipun 2014/52/ESB:

1. 11. gr. frv. um endurskoðun umhverfismats er engan vegin rétt innleiðing hinnar nýju 6. mgr. 8 gr. a tilskipunar 2011/92/ESB sem tilskipun 2014/52/ESB bætti við. Hið nýja tilskipunarákvæði fjallar um að það yfirvald sem framkvæmdaleyfi veitir skuli áður en það gerir það, hafa fullvissað sig um að rökstutt álit þess yfirvalds sem lögbært er til að gefa slíkt út skv. ákvæðinu eigi enn við. Um rökstuðning vísum við til meðfylgjandi draga að kvörtun til Eftirlitsstofnunar EFTA, sem send verður stofnuninni verði frv. óbreytt að lögum. Um er að ræða frumskyldu sem liggur á herðum leyfisveitanda skv. tilskipuninni og þarf að koma fram í lögunum. Réttaröryggið krefst skýrleika.
2. Í a-lið 1. mgr. 1. gr. tilskipunar 2014/52/ESB er í fyrsta sinn sett fram skilgreining á mati á umhverfisáhrifum, í nokkrum stafliðum. Í frv. er ekki sett fram ákvæði sem endurspeglar að hluti umhverfismats séu viðbótarrannsóknir er lögbæra yfirvaldið kunni að láta gera, sbr. g-liður (iv) 2. mgr. 1. gr. tilskipunarinnar: „and, where appropriate, its own supplementary examination". Skv. gildandi rétti er Skipulagsstofnun veitt sérstök heimild til að leita eftir sérfræðiskýrslum til viðbótar frummatsskýrslu framkvæmdaraðila, sbr. 4. mgr. 24. gr. rgj. nr. 660/2015. Það er hluti umhverfismats. Innleiðing skilgreininga krefst nákvæmni. Bæta þarf þessu atriði við 3. gr. frv. 2.a Við bendum einnig á að innleiðing síðasta stafliðar skilgreiningarinnar þarf með skýrum hætti að ná yfir „the integration of the competent authority's reasoned conclusion [...]".
3. Í 3. gr. tilskipunar 2014/52/ESB segir að um verkefni sem málsmeðferð er hafin vegna fyrir 16. maí 2017 skuli farið eftir áður gildandi ákvæðum tilskipunar 2011/92/ESB. Af því leiðir að málsmeðferð verkefna sem hefst síðar fer að núgildandi ákvæðum tilskipunarinnar. 21. gr. frv. um lagaskil er ekki í samræmi við þetta. Lagaskilin þurfa að samræmast tilskipun 2014/52/ESB, sem varð bindandi fyrir Ísland á áðurnefndum degi. Á þetta við um allar málsgreinar 21. gr. frv.

Að öðru leyti sýnist frv. í fljótu bragði vera rétt innleiðing í öllum aðalatriðum. Það vekur hinsvegar upp spurningar að samtök þeirra stjórnvalda sem að íslenskum lögum fara oftast með valdið til að veita leyfi fyrir framkvæmdum sem eiga undir löggjöf um umhverfismat, Samband íslenskra sveitarfélaga, skuli ganga í eina sæng með samtökunum sem fara fyrir framkvæmdaraðilum í landinu, Samtökum atvinnulífsins, í afstöðu sinni til þess hvernig komast skuli, að okkar mati, hjá því að innleiða EES kröfuna um að leyfisveitandi hafi fullvissað sig um að álit Skipulagsstofnunar, eins og fyrirkomulagið er hér, sé enn í fullu gildi. Þessir tveir aðilar virðast hafa afar mikil áhrif á það hvernig frumvarpið er sett fram á þessu stigi, með tillögum sem breyta í engu verulegu núverandi fyrirkomulagi að því er þetta varðar.

Höfundar eru lögfræðingar og vel kunnug umhverfismatsmálum og EES rétti.

Virðingarfyllst,

Sif Konráðsdóttir

Hörður Einarsson

FYLGISKJAL DRÖG

COMPLAINT FORM[1] PART 2/2
TO THE EFTA SURVEILLANCE AUTHORITY CONCERNING
FAILURE TO COMPLY WITH EEA LAW

N.B. Both complaint form part 1/2 and complaint form part 2/2 must be filled out and sent to the EFTA Surveillance Authority as two separate documents.

6. Field and place(s) of activity:
Environmental Law. EEA.

7. EFTA State or public body alleged by the complainant not to have complied with EEA law:
Iceland

8. Fullest possible account of facts giving rise to complaint:

According to Directive 2014/52/EU, amending Directive 2011/92/EU (the EIA Directive), Article 8a(6) of the EIA Directive now reads:

> *The competent authority shall be satisfied that the reasoned conclusion referred to in Article 1(2)(g)(iv), or any of the decisions referred to in paragraph 3 of this Article, is still up to date when taking a decision to grant development consent. To that effect, Member States may set time-frames for the validity of the reasoned conclusion referred to in Article 1(2)(g)(iv) or any of the decisions referred to in paragraph 3 of this Article.*

Iceland has not yet implemented Directive 2014/52/EU, see ESA's reasoned opinion and subsequent EFTA Court Case No E-06/18 filed against Iceland on 9 November 2018 and currently pending.

Iceland appears to aim at implementing the provision of Directive 2014/52/EU cited above by means of a new Article 12 in Act No 106/2000 (the national EIA Act) obliging the competent authority granting development consent to request to the National Planning Authority (Skipulagsstofnun) to issue an opinion as to whether the environmental impact assessment (not the reasoned conclusion see below) up to date. To this effect, the Ministry for the Environment on 30 March 2019 submitted to the Parliament a Bill of Law intended to implement Directive 2014/52/EU. The wording of the relevant provision proposed in this Bill of Law (Article 11(2) first sentence of the Bill) is as follows in our informal translation (explanations inserted by us):

> *In case an application for development consent for a project is submitted to the competent authority after more than seven years have passed from the date the reasoned conclusion for the project in question was issued by the National Planning Authority [Skipulagsstofnun], the competent authority granting the development consent shall request to the National Planning Authority to decide whether a review of the environmental impact assessment [not it's reasoned conclusion] is needed in part or as a whole before development consent is granted.*

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[1] A complaint can be sent by ordinary mail to the following address:
EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
Belgium
Alternatively, this Complaint Form, may be sent by e-mail to Registry@eftasurv.int. To be admissible, a complaint must relate to an infringement of EEA law by an EEA EFTA State, i.e. Iceland, Liechtenstein or Norway.

Hence, according to the provision proposed, a review would only be possible in cases where the developer has only applied for a development consent and more than seven years have passed after the date of the reasoned conclusion, and never before this seven-years point in time. The proposal put forward to the Parliament would therefore entail a *de facto* seven years minimum validity of the reasoned conclusion. In the complainant's view, such a limitation of the competent authority's possibilities to 'be satisfied' that the reasoned conclusion is still 'up to date' when taking a decision whether to grant development consent is not in line with the requirements Directive 2014/52/EU entail. This will be further elaborated on in the following.

First, the wording of the provision proposed in the Bill of Law entails that it would be the environmental impact assessment (EIA) itself that is being reviewed by Skipulagsstofnun, see wording cited above. However, this would not be in line with the definition inserted by Directive 2014/52/EU, since a part of the EIA is defined as 'the integration of the competent authority's reasoned conclusion', see new Article 1(2)(g)(v) of EIA Directive as amended. Therefore, it cannot be the EIA as such that is being reviewed. This is so, because the EIA is still ongoing at the relevant point in time. Rather, in line with the wording of 1(1)(a) of Directive 2014/52/EU it is the competent authority's (in case of Iceland: Skipulagsstofnun) reasoned conclusion that shall be 'up to date' and thus be the subject of a possible review. Thus, the provision of the Bill of Law wrongfully proposes that the EIA as such can be the subject of a review procedure at this point in time. The fundamental misinterpretation that it is the EIA (umhverfismat) itself and not the reasoned conclusion that can have a 'validity' period is repeatedly found in the explanatory part of the Bill of Law.

Second, reasoned conclusions within the meaning of the EIA Directive as amended may certainly be outdated for various reasons only a few years after they have been adopted. In certain cases, the reasoned conclusion may be outdated even less than three or five years later; all depending on the nature of the project, the content and quality of the EIA and the evolution in the field in question. Furthermore, the provision proposed in the Bill of Law does not refer to or even reflect the wording of Directive 2014/52/EU; 'reasoned conclusion' that shall be 'up-to date'. Rather, neither concepts are inherent in the provision as proposed by Iceland. The provision as proposed in the Bill of Law would effectively restrict the competent authority to exercise its obligation to be 'satisfied that the reasoned conclusion' issued by another authority (see below) 'is still up to date', if it was issued less than seven years ago when the developer applied for the development consent. In the explanatory note attached to the Bill of Law put forward to implement Directive 2014/52/EU there is a mentioning of the possibility of the granting authority refusing development consent in cases where the reasoned conclusion was issued less than seven years ago, i.e. when its not possible to request the decision of Skipulagsstofnun as to whether review is needed, but the competent authority is of the view the reasoned conclusion is not 'up to date'[2]. Obviously, decision to refuse development consent can be justified in various circumstances. This reasoning however contradicts the very reason Iceland argues to stick with the 'validity' concept (which historically has been in national EIA law since the time Skipulagsstofnun granted development consent), namely that there is not sufficient expertise within the granting authority within the municipal administration. Indeed, Iceland appears in its preparation for the Bill of Law to be of the view that the competent authorities exercising the power to grant development consent, typically municipal councils (municipalities are in total 72 in Iceland), do not have the expertise required („þekking er oft af skornum skammti") to assess whether the reasoned conclusion of Skipulagsstofnun is still up to date, and therefore such assessment is to be within Skipulagsstofnun. This line of argument does clearly not add up; how can the municipal councils on the one hand assess whether a reasoned conclusion (or, as proposed by Iceland, the EIA itself) is still up to date only if its less than seven years old and, at least in theory, have the possibility to decline an application for development consent for a relevant project, but on the other hand if the reasoned

[2] In explainatory text to Article 11(2): Ef upp koma tilvik þar sem ekki eru liðin sjö ár en talið er að umhverfismatið eigi ekki lengur við mun leyfisveitandi þurfa að taka rökstudda afstöðu til álits Skipulagsstofnunar um mat á umhverfisáhrifum og mun geta synjað slíkri framkvæmd um leyfi af þeirri ástæðu. Með því að miða við sjö ár er almennt gengið út frá því að umhverfismat framkvæmdar eigi við ef styttri tími en sjö ár líða frá því að álit Skipulagsstofnunar er gefið út og þar til leyfi er veitt fyrir framkvæmdinni.

conclusion is dated more than seven years back the municipal council, being the competent authority, is not in the position to assess whether its still up to date? In the complainant's view there is no way around the obligation of the authority granting the development consent to be satisfied that the reasoned conclusion is 'up to date' and to this end the proposed national provision does not fulfil the minimum requirements Directive 2014/52/EU entails.

Third, there is neither a positive provision in the Bill of Law obliging the competent authority granting development consent to be satisfied the reasoned conclusion is still up to date, nor is there an inherent and effective obligation of the competent authority granting the development consent to make this assessment and to satisfy itself, should the reasoned conclusion be less than seven years old when the developer applies for a development consent, that its 'up to date'. This does not fulfil the minimum requirements in Article 8a(6) of Directive 2011/92/EU as amended. Thus, to this end it is not being incorporated into Icelandic national law even if the Bill of Law is passed by the Parliament.

Fourth, the wording of Article 8a(6) of the EIA Directive as amended clearly refers to the obligation of the competent authority granting development consent, and not the competent authority issuing reasoned conclusion within the meaning of Article 1(2)(g)(iv) of the EIA Directive as amended. The Bill of Law amending the national EIA legislation refers to a methodology by which the authority granting development consent (see Article 1(2)(g)(v) of the EIA Directive as amended) is to refer this assessment to another authority (see Article 1(2)(g)(iv) of the EIA Directive as amended); one that does not grant development consents under Icelandic legislation. However, the authority granting the development consent can only ask for the decision of the authority issuing the reasoned conclusion in case this is dated more than seven years back when the developer asks for a development consent. This methodology seems to effectively take away the responsibility of the authority responsible for granting development consent in Iceland and undermine the autonomy of the granting authority, both in cases where less than seven years have passed since the reasoned conclusion and when more than seven years have passed. This appears to seriously undermine the objectives of the EEA EIA legislation.

Fifth the final sentence of Article 8a(6) of the EIA Directive as amended providing for the possibility to set time-frames for the validity of the reasoned conclusion needs in the complainant's view to be read in conjunction with the first half-sentence. The objectives of this provision as such, as is with many other amendments in Directive 2014/52/EU, is to enhance the quality of decisions in case of projects that have significant environmental impact, and to this end ensure the 'up to date' status of the reasoned conclusion when decision is taken. In the view of the complainant, the final sentence of Article 8a(6) cannot be understood as giving the member state *carte blanche* to make the reasoned conclusion in effect and by default 'up to date' for full seven years. This would go against the objectives of the requirements but forward in the Directive and the very essence of the 'up to date' requirement. The proposed incorporation of the provision in Iceland also appears to directly contradict the objective of the paragraph and the EIA in general by fencing off all interventions from the general public to question the validity of a reasoned conclusion in the procedure and *de facto* make it impossible or overly difficult for the authorities actually granting the development consent, normally municipality councils without expert knowledge and always without any previous knowledge of the EIA and the reasoned conclusion in question, to be satisfied it is 'up to date' in cases where its dated seven years back or less.

Lastly, it is worth explaining that according to national EIA legislation as amended in 2005, the competent authority taking decision to grant development consent is always a different authority from the competent authority issuing the reasoned conclusion referred to in Article 1(2)(g)(iv), the latter authority always being Skipulagsstofnun. On the other hand, Skipulagsstofnun has no power whatsoever to grant development consent. The competent authority granting the development consent is in most cases a municipal council. Out of 72 municipals in Iceland, 39 have less than 1000 inhabitants[3]. The sparsely populated areas (i.e. with large uninhabited areas) are frequently the ones

[3] https://is.wikipedia.org/wiki/Íslensk_sveitarfélög_eftir_mannfjölda

that deal with large infrastructure and energy projects having the most irreversible impact on the environment.

9. To the extent possible, please specify the provisions of EEA law *(EEA Agreement, Protocols, Acts referred to in Annexes to the Agreement)* considered to have been infringed by the EFTA State concerned:

Article 8a(6) of Directive 2011/92/EU as amended.

10. Details of any earlier contacts with the EFTA Surveillance Authority (if appropriate and possible, please attach copies of correspondence):

Not in case of Directive 2014/52/EU

11. Contacts already made with national authorities, whether central, regional or local (if appropriate and possible, please attach copies of correspondence):

11.1. Administrative actions, such as complaints to relevant national administrative authorities (whether central, regional or local) and/or to national or regional ombudsman:

N.A.

11.2. Recourse to national courts or other legal procedures such as arbitration or conciliation. Please state whether a decision or award has already been adopted and, if appropriate, attach a copy:

N.A.

12. Specify any evidence or documents supporting the complaint, including any national measures (if possible, please attach copies):

13. Confidentiality (please tick one of the boxes):[4]

☒ 'I authorise the EFTA Surveillance Authority to disclose my identity in its contacts with the authorities of the EFTA State against which the complaint is made.'

☐ 'I request the EFTA Surveillance Authority not to disclose my identity in its contacts with the authorities of the EFTA State against which the complaint is made.'

14. Date and place of submission of complaint

[4] Please note that unless otherwise indicated, the Authority may disclose your identity in its contacts with the EFTA State against which the complaint has been lodged.