ANGLING CLUB
STRENGUR
ICELAND

Atvinnuveganefnd Alþingis
Alþingi við Austurvöll
150 Reykjavík
Sent með tölvupósti: nefndasvid@althingi.is

Vopnafirði, 26. febrúar 2020

Efni: Viðbótar umsögn um 251. mál 150. löggjafarþings: Frumvarp til laga um breytingu á lögum um lax- og silungsveiði, nr. 61/2006, með síðari breytingum (minnihlutavernd, gerð arðskráa o.fl.).

Þann 24. október sl. mælti sjávarútvegs- og landbúnaðarráðherra fyrir frumvarpi til laga um breytingu á lögum um lax- og silungsveiði, nr. 61/2006, með síðari breytingum. Í því sambandi er vísað til umsagnar Veiðiklúbbsins Strengs ehf. („Strengur"), dags. 6. nóvember 2019, um frumvarpið, og þeirra sjónarmiða sem þar koma fram, sem eru jafnframt áréttuð hér með.

Þann 19. nóvember 2019 barst atvinnuveganefnd minnisblað frá atvinnuvega- og nýsköpunarráðuneytinu, sem innihélt „nokkrar athugasemdir í tilefni af umsögnum til atvinnuveganefndar vegna frumvarps á þingskjali [sic] á þingskjali 272 (minnihlutavernd, gerð arðskráa)." Er þar m.a. vísað til fyrrgreindrar umsagnar Strengs. Aftur á móti er þar á engan hátt fjallað um samræmi frumvarpsins við stjórnarskrá og alþjóðlegar skuldbindingar, og þau álitaefni sem Strengur velti upp í því sambandi í umsögn sinni. Af því tilefni telur Strengur nauðsynlegt að ítreka hér með þær áhyggjur, er birtust í umsögn félagsins, hvað varðar þá staðreynd að Strengur telur að ákvæði frumvarpsins brjóti m.a. gegn 72. gr. stjórnarskrárinnar sem og 1. gr. 1. samningsviðauka Mannréttindasáttmála Evrópu um vernd og friðhelgi eignarréttar, jafnræðisreglu 65. gr. stjórnarskrárinnar sem og 14. gr. Mannréttindasáttmála Evrópu, stjórnskipulegri meðalhófsreglu, sem og ákvæðum EES-samningsins, þ.á m. um bann við mismunun á grundvelli þjóðernis og meginreglunni um frjálst flæði fjármagns.

Af því tilefni taldi félagið rétt að afla sérfræðiálits um það hvort ákvæði frumvarpsins um takmörkun á atkvæðisrétti í veiðifélögum stæðust skuldbindingar Íslands samkvæmt EES-samningnum. Vísað er til meðfylgjandi sérfræðiálits prófessors dr. Carl Baudenbacher, fv. forseta EFTA dómstólsins um þetta efni („*Capping voting rights in Icelandic River Associations – Assessment under EEA Law*"). Í sérfræðiálitinu kemst dr. Baudenbacher m.a. að þeirri niðurstöðu að samkvæmt fyrirliggjandi upplýsingum veki frumvarpið upp spurningar um hvernig það samræmist skuldbindingum Íslands samkvæmt EES-samningnum, sérstaklega hvað varðar frjálst flæði fjármagns, samkvæmt 40. gr. EES-samningsins, sem og grundvallarréttindum um jafnræði og eignarrétt. Er það

mat dr. Baudenbacher m.a. að ákvæði sem takmarka atkvæðisrétt, líkt og um ræðir í frumvarpinu, feli í sér ólögmæta takmörkun á frjálsu flæði fjármagns.

Telur Strengur nauðsynlegt að atvinnuveganefnd fái tækifæri til að rýna sérfræðiálit dr. Baudenbacher, og þau sjónarmið sem þar birtast, og hafi þannig sem best tækifæri til að eiga upplýstar umræður um efni frumvarpsins. Er sérfræðiálitið af þeim sökum meðfylgjandi bréfi þessu.

Strengur vísar að öðru leyti til áður fram kominna sjónarmiða félagsins.

Virðingarfyllst,
f.h. Veiðiklúbbsins Strengs ehf.,

Gísli Stefán Ásgeirsson,
framkvæmdastjóri og stjórnarmaður

Fylgiskjal:

1. Capping voting rights in Icelandic River Associations – Assessment under EEA Law. Sérfræðiálit prófessor dr. Carl Baudenbacher, dags. 27. janúar 2020.

Professor Dr Dr h.c. Carl Baudenbacher
Former President of the EFTA Court
Professor em. University of St. Gallen
BCNB Consultants AG
Sonnenstrasse 5
CHE-9004 St. Gallen

27 January 2020

Juris slf.
Borgartúni 26
IS 105 Reykjavík
Attn: Mr. Simon Knight, Solicitor (England & Wales), Attorney (Iceland, District Courts)

Capping voting rights in Icelandic River Associations - Assessment under EEA Law

Expert Opinion

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A. Facts[1]

I. Halicilla's activities

Halicilla Limited is a company registered in England and Wales ("Halicilla"). Halicilla's sole owner is Sir James Arthur Ratcliffe who has fished in the rivers of North East Iceland for many years. In 2015 Halicilla acquired a 34% stake in the Icelandic fishing club Veiðiklúbburinn Strengur ehf. ("Strengur"). The company has since then continued to invest by acquiring a number of properties with fishing rights in North East Iceland. Halicilla has also increased its stake in Strengur to 86.67%. The property acquisitions have been made variously through the acquisition of Icelandic companies owning property and through the direct acquisition of properties by Halicilla's Icelandic subsidiaries.

Presently Halicilla owns, through its investments in Icelandic companies (including Strengur), interests in 39 estates in Iceland and 2 pasture lands in the common highlands. The company is the ultimate sole owner of 22 of the estates. The other 17 estates and the 2 pasture lands are owned jointly with other co-owners (either through joint ownership of the company that holds the property or through joint ownership of the property itself).

In general, the properties owned by Halicilla's Icelandic companies adjoin, and hold fishing rights in, six salmon rivers in North East Iceland: Selá, Hofsá, Miðfjarðará, Vesturdalsá, Hafralónsá and Svalbarðsá. Unless otherwise stated, when I refer to Halicilla in this opinion, I am referring to Halicilla jointly with its group of Icelandic companies.

Halicilla is engaged in the Six Rivers Conservation Project which aims at ensuring the sustainability of the North Atlantic salmon stocks in the rivers. Part of the project involves an international research project with Imperial

[1] Unless otherwise stated, the information in this Section A is generally taken from my instructions and communications with Juris.

College London and the Icelandic Marine & Freshwater Research Institute. The project also includes egg planting and construction of salmon ladders to increase the length of the rivers in which the salmon can spawn. At the same time, the conservation project seeks to improve the conditions for the salmon stocks by improving the surrounding ecosystem and encouraging biodiversity, including revegetation on the riverside properties. In connection with this, Halicilla seeks to ensure that properties it acquires remain farmed in a traditional manner, and that the properties remain occupied.

Halicilla has stated that its proceeds from the rivers in which it holds fishing rights will be reinvested into the Six Rivers Conservation Project. Halicilla's stated aim is that the Six Rivers Conservation Project will become self-funding and generate a sustainable revenue long-term for the benefit of the salmon, the region's ecosystem and the local community.

II. Act No. 61/2006 on Salmon and Trout Fishing

Salmon and trout fishing, and the management of fishing rivers, is currently governed by Act No. 61/2006 on Salmon and Trout Fishing. Pursuant to Article 1, the aim of that Act is to promote the "sensible, efficient and sustainable use of freshwater fish stocks and their conservation"[2]. I note that this is essentially the same goal as Halicilla is pursuing. One of the elements of the Act is that a river association is to be formed for each freshwater system (i.e. a river or lake). Chapter VI sets out the rules applicable to river associations. All holders of fishing rights in the freshwater system are required to become a member of the river association. In general, the holders of fishing rights in a freshwater system are the landowners or tenants of the properties adjoining the river or lake as fishing rights generally cannot be separated from the property. However, where a property is leased to a tenant, the landowner and the tenant can decide which of them will hold the fishing rights.

[2] Emphasis added.

Acquisitions of, and investments in, fishing rights must generally therefore be done through the acquisition of the property to which the fishing rights attach, and, conversely, acquisitions of a riverside property generally entail the acquisition of that property's fishing rights and mandatory participation in the river association. By virtue of their property ownership described above, Halicilla's Icelandic companies hold fishing rights in and are members of various river associations.

Pursuant to Article 37 of Act No. 61/2006, the role of the river associations includes the management of fishing in the river and the distribution of dividends to the holders of the fishing rights. According to my instructions, the river association will often lease the river for a certain number of years to a fishing club, such as Strengur, for an agreed sum. The fishing club will then rent out rods to fishermen on a daily basis and handle the day-to-day operations of the fishing in the river.

The river association's income from leasing out the river is, unless the river association decides to reinvest the income (for instance in a fishing lodge or other infrastructure), distributed to the members of the river association in proportion to their properties' stake in the dividends as set out in the dividend register. The dividend register and each property's stake in the dividends is determined having regard to various factors including the properties' respective lengths of banks and fishing conditions, and the spawning grounds. Different properties on a river may therefore have different size stakes in the dividends from the river association.

Article 40 of Act No. 61/2006 contains the provisions for voting in river associations. The general rule is that each estate which has fishing rights in the water system, and which fulfilled the conditions to be a registered farm in 1976 (including deserted farms), has one vote, regardless of the size of that property's stake in the dividend register. However, if there is a proposal that a river association should undertake development and the cost will be 25% or more of the river association's income for that year, a member of the river

association can request that voting is done on the basis of stakes in the dividend register, with each unit in the dividend register carrying one vote. A river association's articles of association may also specify other matters where voting is to be done on the basis of stakes in the dividend register. In general, regardless of which method of voting is to be used, matters are determined by a simple majority of votes, although changes to a river association's articles of association and dividend register require a two-thirds majority, and the articles of association may also specify other matters that require an increased majority.

III. Public debate

I understand that Halicilla's investments have attracted attention and led to discussion, in part due to their extent. There have in the past few years been debates in the Icelandic media and politics about purchases of Icelandic land. A commission was formed to explore options for maintaining agricultural land and agricultural communities, and a draft resolution was laid before Parliament calling for changes in property law including limits on acquisitions of agricultural properties and a requirement that a purchaser of an agricultural property have a specific connection to Iceland.

IV. New draft legislation

On 16 October 2019, the Minister of Fisheries and Agriculture laid a legislative bill before the Icelandic Parliament: legislative document 272 of the 150th Parliamentary Session (the "Draft Legislation"). The Draft Legislation seeks to make three changes to Act No. 61/2006. I have been asked to give my view on the change set out in Article 1 of the Draft Legislation.

I understand from my instructions and the translation provided to me that Article 1 provides that if seven or more farms have votes in a river association, the voting rights of a single party, together with the connected parties, are to be capped at 30% for both methods of voting, regardless of the number of

farms they own or their stake in the dividends. The votes of other members of the river associations are increased proportionately, subject again to a cap of 30%.

I understand that in practice this would mean that if a party owns seven out of eight farms in a river association (and therefore currently has 87.5% of the votes on the basis of the one vote per farm rule), that party's share of the votes would be reduced to 50%, and the owners of the single other farm would have their share of the votes increased from 12.5% to 50%. Likewise, if a party owns seven out of nine farms (and therefore currently has 77.8% of the votes on the basis of the one vote per farm rule) and two other unconnected owners each have one farm, the majority party's share of the votes would be reduced to 33.3%, and the owners of the two other farms would each have their share of the votes increased from 11.1% to 33.3%. Further, if a party owns seven out of ten farms (and therefore currently has 70% of the votes on the basis of the one vote per farm rule) and three other unconnected owners each have one farm, the majority party's share of the votes would be reduced to 30%, and the owners of the three other farms would each have their share of the votes increased from 10% to 23.3%.

According to the explanatory notes to the Draft Legislation, the purpose of Article 1 is to protect the interests of minority participants in river associations.

If the Draft Legislation becomes law, it will have an impact on the voting rights of Halicilla's Icelandic companies, as in a number of river associations they currently have, either solely or by virtue of co-ownership of properties, over 30% of the votes. Halicilla is not aware that any other landowner may be significantly adversely affected by the Draft Legislation, as no other landowner has made any objections to the Draft Legislation to date.

The legislation in question would also mean that, if companies in Halicilla's group were to acquire additional properties on certain rivers, they would not

get the benefit of the voting rights in the river association attached to those properties.

Following a first reading in the Icelandic Parliament on 24 October 2019, the Draft Legislation was referred to the Parliament's Industrial Affairs Committee. On the same day, that Committee sent out requests for submissions to ten associations and institutions, with a deadline for responses of 7 November 2019. Neither Halicilla nor Strengur received such a request. Strengur nevertheless made a submission on behalf of itself, Halicilla and related parties, setting out its concerns with the Draft Legislation.

Four other parties (three of whom had received a request for submissions and one Icelandic lawyer) also made submissions to the Committee. A representative of Strengur met the Industrial Affairs Committee in person at its meeting on 12 November 2019.

On 19 November 2019, the Ministry of Industry and Innovation sent a memorandum to the Industrial Affairs Committee responding to Strengur's submission and the other submissions made to the Industrial Affairs Committee.

V. Halicilla's group as the main target?

I understand from the documents provided to me that there are currently 152 river associations with seven or more farms. According to my instructions, Halicilla believes that it may well be the only subject that currently holds over 30% of the votes in any of those 152 river associations. It appears, therefore, that Halicilla may be the only operator who would be immediately affected by the bill if it became law, whereas the effect on other subjects may depend on their willingness to invest in Icelandic fishing properties in the future.

I am informed that there has not been any explanation as to why river associations with fewer than seven farms should be excluded from the scope

of the bill. No justification has been given for why the vote of a person holding one farm out of seven on a river should be given increased voting weight but not a person holding one farm out of five on a river.

B. Excursion: Product Coverage of the EEA Agreement

Act No. 61/2006 concerns "Salmon and Trout Fishing". In view of the limited product coverage of the EEA Agreement, one may ask the question of whether this activity falls within the scope of the EEA Agreement. But that is undoubtedly the case.

It follows from Article 8(3) EEA that fish products are, in general, not subject to the provisions of the EEA Agreement on free movement of goods, "unless otherwise specified". Such a specification could have been made by Protocol 9 EEA on trade in fish and other marine products. There is practice of ESA and case law of the EFTA Court on Protocol 9 EEA. However, it is not necessary to go into this in detail. The planned bill does not concern the trade of fish, but the organisation of the Icelandic river associations. This is, as such, not related to trade in fish. The properties that have votes in river associations are not fish farms, but agricultural farms (normally sheep and dairy) or former farms whose lands adjoin a river. The river associations do not catch fish with the aim of entering the fish trade. The relevant activity is sport fishing, a recreational activity. According to my instructions, Strengur implements a catch-and-release policy on the rivers it leases. I therefore conclude that the proposed legislation is unrelated to the trade in fish and must therefore be analysed under the provisions of the EEA Agreement.

C. Expert questions

The questions I have been asked to answer are the following:

"In your opinion, based on the information provided, does the Draft Legislation raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 and Article 4 thereof?

If your answer to the preceding question is yes, please provide details of the issues that are raised."

D. EEA law

I. Infringement of the free movement of capital

1. General

National legislation is capable of falling within the scope of the EEA Agreement's provisions on the fundamental freedoms as far as they apply to situations connected with trade between EEA States[3]. Since the case at hand concerns investment from another EEA Contracting Party, there is undoubtedly a cross-border element.

2. Relevant legal provisions

Article 40 EEA reads:

"Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

Article 4 EEA reads

"Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

[3] Case E-9/14 *Kaufmann* [2014] EFTA Ct. Rep. 1048, paragraph 31.

As far as the relationship of Article 4 EEA to the individual fundamental freedoms is concerned, the EFTA Court has followed the approach taken by the ECJ in EU law. Accordingly, the general rule of Article 4 EEA only applies to situations covered by the EEA Agreement if no specific prohibition of discrimination is relevant. Specific prohibitions of discrimination are laid down in the fundamental freedoms and in the prohibition of discriminatory taxation[4].

3. Discrimination and restriction

Article 40 EEA prohibits both discriminations on grounds of nationality and restrictions on the free movement of capital. If the presumption that the Draft Legislation is directed specifically against Halicilla is correct, then there is a discrimination on grounds of nationality. Otherwise, there is still a restriction.

4. Identity in substance of EEA and EU law

After the conclusion of the EEA Agreement in 1992, the Treaty on European Union introduced new provisions on "capital and payments" in the EC Treaty (and later in the Treaty on the Functioning of the European Union, TFEU). The provisions of the EEA Agreement remained unchanged. The two EEA courts, the ECJ and the EFTA Court, therefore faced the question of whether the basic principles of the free movement of capital were still identical. This question had been answered positively in an intensive judicial dialogue. In fact, both the

[4] See, in particular, Cases E-5/98 *Fagtún ehf v Byggingarnefnd Borgarholtsskóla, íslenska ríkinu, Reykjavíkur og Mosfellsbær*, [1999] EFTA Ct. Rep., paragraph 51 (free movement of goods); E-1/00 *State Debt Management Agency v Íslandsbanki-FBA*, [2000-2001] EFTA Ct. Rep., 8, paragraphs 35 and 36 (free movement of capital); E-10/04 *Paolo Piazza v Paul Schurte AG*, [2005] EFTA Ct. Rep., 76, paragraph 31 (free movement of capital); E-7/07 *Seabrokers AS v The Norwegian State*, [2008] EFTA Ct. Rep., 172, paragraph 27 (freedom of establishment); E-1/01 *Hörður Einarsson v The Icelandic State*, [2002] EFTA Ct. Rep., 1, paragraph 38 (discriminatory taxation); generally E-5/10 *Dr. Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung*, [2009-2010] EFTA Ct. Rep. 320, paragraphs 18-20.

ECJ and the EFTA Court have made significant contributions to securing a homogeneous development of the case law by way of mutual reference.

As stated above, Article 40 EEA provides:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

Article 56 EC (now: Article 63 TFEU) states:

> "1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
>
> 2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

The question arose whether the two provisions were still identical in substance. The courts went step by step. The EFTA Court made the opening in E-1/00 *Islandsbanki* where it found that Articles 40 EEA and Article 56(1) (now: Article 63[1] TFEU) EC were similar[5]. In C-452/01 *Ospelt*, the ECJ held that Article 40 of and Annex XII to the EEA Agreement possessed the same legal scope as that of Article 73b of the Treaty (later: Article 56 EC, now: Article 63 TFEU), which is identical in substance[6]. Advocate General *Geelhoed* had observed that the EFTA Court had in E-1/00 *Íslandsbanki* concluded that Articles 40 EEA and 56(1) EC (now: Article 63 TFEU) used comparable

[5] Case E-1/00 *Íslandsbanki* [2000-2001] EFTA Court Report 8.
[6] Case C-452/01 *Ospelt* [2003] I-9743, paragraph 32.

language[7]. In E-1/04 *Fokus Bank*, the EFTA Court, referring, *inter alia*, to ECJ *Ospelt* and to AG *Geelhoed's* opinion in that case, held that the rules governing the free movement of capital in the EEA Agreement were essentially identical in substance to those in the EC Treaty[8]. In C-452/04 *Fidium Finanz AG*, the ECJ did not even discuss the question of substantive identity of EC and EEA law in the field of free movement of capital when referring to the center of gravity test used by the EFTA Court in E-1/00 *Íslandsbanki* in order to demarcate the free movement of capital from the freedom to provide services.

This means that the case law of both the EFTA Court and the ECJ on the free movement of capital must be considered.

5. Relevant case law

a. EFTA Court

In Case E-1/04 *Fokus Bank ASA v Norway*, which involved discriminatory taxation of outbound dividends, the EFTA Court held at paragraph 26:

> „As concerns the question of whether the national legislation at issue restricts the free movement of capital, it should be noted that the national provisions at issue may adversely affect the profit of non-resident shareholders and may thereby have the effect of deterring them from investing capital in companies having their seat in Norway. The application of provisions such as those at issue in the main proceedings impedes the freedom of companies and individuals resident in another Contracting Party to invest in Norway. Those provisions are also capable of having the effect of impeding Norwegian companies from raising capital outside Norway. Therefore, the legislation at issue affects market access of both the distributing companies and the foreign shareholders,

[7] 2003 ECR, I-9743, footnote 32.
[8] E-1/04 *Fokus Bank ASA*, [2004] EFTA Court Report, 11, paragraph 23.

and thereby constitutes a restriction within the meaning of Article 40 EEA."[9]

Specifically with regard to ownership limitations and voting rights restrictions in stock exchanges and central securities depositories, the EFTA Court held in Case E-9/11 *ESA v Norway* („Regulated Markets"):

„79 According to established case-law, Article 31 EEA prohibits all restrictions on the freedom of establishment within the European Economic Area, whereas Article 40 EEA generally prohibits all restrictions on the free movement of capital between EEA States (compare, to that effect, Case C-483/99 Commission v France [2002] ECR I-4781, paragraphs 35 and 40, and Case C-98/01 Commission v United Kingdom [2003] ECR I-4641, paragraphs 38 and 43).

80 The Court holds that, having regard to Heading I "Direct investments", items (1) and (2), set out in Annex I to Directive 88/361/EEC, the national measures at issue must be regarded as "restrictions" within the meaning of Article 40 EEA, since they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other EEA States from investing in their capital (compare to that effect, in particular, Commission v France, cited above, paragraph 41, and Case C-174/04 Commission v Italy [2005] ECR I-4933, paragraphs 30 and 31).

81 Depending on the size of the shareholding and the shareholder structure, the restrictions at issue may concern the freedom of establishment under Article 31 EEA (see Case E-2/06 ESA v Norway [2007] EFTA Ct. Rep. 167, paragraph 64 et seq., and, for comparison, Case C-524/04 Test Claimants in the Thin Cap Group Litigation [2007] ECR I-2107, paragraph 27). An acquisition of a shareholding exceeding 20 percent of the share capital may or may not give definite influence

[9] Loc. cit., emphasis added.

on the decisions of the stock exchange or securities depository and may or may not allow the shareholder to determine its activities.

82 National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the contested rules, are an encroachment upon these freedoms requiring justification (see ESA v Norway, cited above, paragraph 64 et seq.)."

b. ECJ

Since 2000, the ECJ has handed down countless rulings on "golden shares". Golden shares in their classic form accord governments special rights that give them control over the ownership and critical decisions of privatised companies. The special rights may be linked to a single share of the company (or may be based on statutory regulation, without the owner having to hold shares in the company at all). A priority position in favour of certain shareholders may, however, also be created through the weighting of voting rights. Since maximum and multiple voting rights privilege individual shareholders over the majority, they produce the same effect as golden shares. Whether in the one form or the other, such special powers may be reflected in rights of approval, opposition and veto in fundamental business decisions including the right to elect members of the board.

Generally speaking, the ECJ has concluded that these special rights restrict the free movement of capital in the EU[10].

This case law is relevant in the case at hand for the following reason: According to the draft legislation there is no golden shareholder as defined by the case law of the ECJ. But since the voting rights of a single party, together with the connected parties, are to be capped at 30%, regardless of the number of farms

[10] See, for example, *Benjamin Werner*, National responses to the European Court of Justice case law on Golden Shares: the role of protective equivalents, Journal of European Public Policy, May 2016.

they own or their stake in the dividends, if seven or more farms have votes in a river association, the votes of other members of the river associations attain a quality that at least shines golden, even if they are themselves also subject to a 30% cap. Their vote is worth more than they are entitled to on the basis of their ownership.

In the ECJ's Grand Chamber *VW Law I* judgment of 23 October 2007, the question arose, *inter alia*, whether certain provisions of the German Law of 21 July 1960 on the privatisation of equity in the *Volkswagenwerk* limited company ("*Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand*"), the 'VW Law' were compatible with the free movement of capital. Paragraph 2(1) of the VW Law concerning the exercise of voting rights and the limitations on that right provided:

> "The voting rights of a shareholder whose par value shares represent more than one fifth of the share capital shall be limited to the number of votes granted by the par value of shares equivalent to one fifth of the share capital."

Paragraph 3(5) of the VW Law, concerning representation for the exercise of voting rights, provided:

> "At the general meeting, no person may exercise a voting right which corresponds to more than one fifth of the share capital."

Paragraph 4(3) of the VW Law stated:

> "Resolutions of the general meeting which, under the Law on public limited companies, require the favourable vote of at least three quarters of the share capital represented at the time of their adoption, shall require the favourable vote of more than four fifths of the share capital represented at the time of that adoption."

Paragraph 134(1) of the Law on public limited companies (*Aktiengesetz*) of 6 September 1965, as amended by the Law on the monitoring and transparency of companies (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*) of 27 April 1998 provided:

> "Voting rights shall be exercised by reference to the par value of shares or, in the case of no par value shares ('*Stückaktien*'), the number of shares held. In the case of unquoted companies, where one shareholder holds a large number of shares, the articles of association may restrict its voting rights by an absolute or progressive ceiling."

The Commission brought an action against Germany and asserted, *inter alia*, that by limiting, "in derogation from the general law, the voting rights of every shareholder to 20% of Volkswagen's share capital" and "by requiring a majority of over 80% of the shares represented for resolutions of the general assembly, which, according to the general law, require only a majority of 75%" the disputed provisions of the VW Law were "liable to deter direct investment" and for that reason constituted restrictions on the free movement of capital within the meaning of Article 56 EC (now Article 63 TFEU)[11].

The Commission argued, in particular, that this was

> "at variance with the requirement that there be a correlation between shareholding and the related voting rights. Even if the capping of voting rights is a common instrument of company law, also used in other Member States, there is a considerable difference between the State making it possible to insert such an instrument into a company's articles of association, as is the case in German law for non-quoted public companies, and the State adopting, in its capacity of legislator, a

[11] Emphasis added.

provision to this end for one undertaking alone, and ultimately, for its own benefit, as is the case with Paragraph 2(1) of the VW Law"[12].

The ECJ found in favour of the Commission holding that although the capping of voting rights is a recognised instrument of company law,

> "there is a difference between a power made available to shareholders, who are free to decide whether or not they wish to use it, and a specific obligation imposed on shareholders by way of legislation, without giving them the possibility to derogate from it" (paragraph 40).

The ECJ also held that by capping voting rights at the level of 20%, the VW Law supplemented a legal framework which enabled the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment[13].

According to settled ECJ case law, national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC (now Article 63[1] TFEU)

> "if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital"[14].

Since it limited the possibility for other shareholders to effectively participate in the management of the company or in its control, this situation was found to be liable to deter direct investors from other Member States[15].

The ECJ thus concluded that

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[12] Paragraph 31.
[13] Paragraph 51.
[14] Paragraph 19.
[15] Paragraph 52,

"the combination of Paragraphs 2(1) and 4(3) of the VW Law constitutes a restriction on the movement of capital within the meaning of Article 56(1) EC"[16].

That there would be a national measure in the matter on which my opinion has been sought if the Draft Legislation would be passed is obvious.

II. Justification

1. General

Discriminations and restrictions on the free movement of capital may be justified by overriding reasons relating to the general interest. However, it may be noted that in the vast majority of the "Golden Share" cases, the ECJ found that the restrictions caused by these special rights could not be justified. One may deduce from this that national rules which deviate from the normal provisions of company law with regard to voting rights must be viewed critically in principle.

2. Legitimate aim

For a national measure to be justified, it must, firstly, pursue a legitimate aim. In the present case the stated aim of the Draft Legislation is to "better protect the minority members in river associations".

For an outside observer, it cannot be excluded that this objective would be recognised as a legitimate aim. Indeed, minority protection provisions are generally known in company law. The question can, however, remain open because the restriction is disproportionate as I explain further below.

[16] Paragraph 56.

3. Lack of proportionality

That a national measure pursues a legitimate aim is not enough. It must also meet the EEA law proportionality test. This means that the measure must be suitable to achieve the intended aim and consistent with other measures already taken. Moreover, it must be necessary to achieve the aim. The proportionality test is firmly anchored in the EFTA Court's case law.

Whether the requirement of suitability is fulfilled, may be left open. A meaningful consistency test cannot be carried out in the present case because the measure seems only to affect a particular investor from another EEA contracting party. The necessity requirement means that a restrictive measure must not go beyond what is necessary in order to achieve the intended objective. Turned another way, it must not be possible to reach the same result by a less restrictive measure.[17]

In the aim of protecting the minority, there are other less restrictive measures than turning the majority into the minority through the imposition of a blanket voting cap. In this context it is also evident that having a majority vote does not necessarily equal "bad" decision for the management of rivers, in particular since the very goal of Halicilla is "to protect rivers and surrounding environment and ensure the sustainability of the rivers' salmon stocks".

It is of interest that the ECJ in the *VW Law I* case did not accept a justification based on the protection of minority shareholders. It stated:

> "While the desire to provide protection for such shareholders may also constitute a legitimate interest and justify legislative intervention [....], even if it were also liable to constitute a restriction on the free movement

[17] See, for example, Case E-14/15 *Holship Norge AS vs Norsk Transportarbeiderforbund*, [2016] EFTA Ct. Rep. 240, paragraph 130.

> of capital, it must be held that, in the present case, such a desire cannot justify the disputed provisions of the VW Law"

because Germany had not shown why, in order to protect the general interests of minority shareholders, it was appropriate or necessary to maintain such a regulation[18].

In the *VW Law I* case, the Federal Republic of Germany also argued (in the alternative) that the disputed provisions of the VW Law were justified by overriding reasons in the general interest. Following the Commission also on this point, the Grand Chamber of the ECJ held that the free movement of capital may be restricted by national measures justified on the grounds set out in Article 58 EC or by overriding reasons in the general interest and that whilst it is in principle for the Member States to decide on the degree of protection they wish to afford to such legitimate interests and on the way in which that protection is to be achieved:

> "They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it" (paragraph 73).

4. Implementation of the EEA law proportionality test in Icelandic law

a. Preliminary remarks

The principle of proportionality originates from the German legal system. After the Second World War, it spread throughout Europe and also found its way into EU law and EEA law.

[18] Paragraphs 77 and 78.

b. Constitution and statutory law

In Iceland both the legislature and the courts have made great efforts to ensure that the EEA law proportionality test is correctly applied[19].

Article 71 of the Icelandic Constitution states that

> "freedom from interference with privacy, home and family life may be otherwise limited by statutory provisions if this is urgently necessary for the protection of the rights of others."

Article 72 provides:

> "No one may be obliged to surrender his property unless required by public interests."

The provision on freedom of expression, Article 73, accepts the existence of restrictions

> "by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions."

In view of Iceland's accession to the EEA, the principle of proportionality was incorporated in various statutes, in particular in the Administrative Procedures Act.

In the *Icelandic Air Passenger Tax* case (E-1/03), the EFTA Court held, following proportionality assessment, that the tax could not be justified. Icelandic law

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[19] See for details *Carl Baudenbacher*, Judicial Independence. Memoirs of a European Judge, Springer 2019, Chapter 15.

was subsequently amended. The explanatory notes on the proposal to amend the relevant statute expressly refer to the Court's judgment[20].

c. Case law

In the free movement of goods matter E-5/98 *Fagtún ehf. v Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær*, the Supreme Court of Iceland followed the EFTA Court's ruling without conducting a proportionality assessment of its own[21].

The Supreme Court of Iceland held on 15 December 2016 in *Matvælastofnun v þrotabú Beis ehf.* that an authority may only reach an adverse decision if it pursues a legitimate aim, the objective cannot be achieved by another, less restrictive, measure, and the measure does not go beyond what is necessary to achieve the objective. The case concerned a restriction on the import of certain goods, which the competent authority adopted by referring to the aim of preventing the consumption of caffeine in an amount that is, or could be, harmful. The Supreme Court rejected the authority's argument, finding that labelling, for example, would be sufficient to achieve the legitimate aim, while also being less onerous on the importer[22].

III. Infringement of the freedom of establishment?

1. General

EEA law also prohibits measures which are liable to hinder or make less attractive the exercise of the freedom of establishment[23]. The Draft Legislation appears to target primarily owners of fishing rights that would have a

[20] See for details *Carl Baudenbacher*, Judicial Independence. loc. cit., Chapter 15.
[21] See *Thorgeir Örlygsson*, Iceland and the EFTA Court, in: Festschrift for Carl Baudenbacher, 2007, 225, 234.
[22] Supreme Court *Matvælastofnun* v *þrotabú Beis ehf.* 2016, 66, and Reykjavík District Court *Björgun ehf. v íslenska ríkinu*, 182/2007.
[23] See for example Case E-8/16 *Netfonds Holding ASA m.fl. v Staten v/Finansdepartementet*, [2017] EFTA Ct. Rep. 163, paragraph 108.

"definitive influence" in the river association. By capping the voting rights in the manner described, the Draft Legislation appears to prevent any landowner from reaching the capacity to exercise such a definitive influence in the river association.

One could thus argue that also the freedom of establishment is affected. Considering that the cap on the voting rights takes effect only in river associations with seven or more members and only for such members that obtained at least 30% of the voting rights, it seems unlikely that in such associations there are other members who could have an equally definitive influence over the river association.

In Case C-89/09 *Commission v France*[24], national legislation under which no more than 25% of own capital in a company operating biomedical analysis laboratories could be held by shareholders who are not professional biologists was at stake. The ECJ dealt with this national measure in the context of the freedom of establishment.

It may also be that the provisions are applied in parallel.[25]

In the final analysis, the question of whether the freedom of establishment is affected in addition to the free movement of capital can be left open. In both cases, the requirements for a justification of any restriction or discrimination are essentially the same and the statements made above regarding the freedom of movement of capital also apply to the freedom of establishment. That means that the latter freedom would also, in my opinion, be violated.

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[24] EU:C:2010:772.

[25] See, in a different context, E-2/06, *ESA v Norway* ("Norwegian Waterfalls"), [2007] EFTA Ct. Rep. 164, paragraph 68: "With reference to the above, the contested rules fall under the scope of both Articles 31 and 40 EEA. In the situation of the case at hand, they are to be examined in parallel."

IV. Infringement of EEA fundamental rights

1. General

The EFTA Court has repeatedly ruled that fundamental rights form part of the unwritten principles of EEA law.

The EFTA Court has also held:

> "that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights"[26].

2. Violation of the principle of equality

The Draft Legislation is generally worded. At first sight, the new regulation seems to equally affect all holders of fishing rights who find themselves in a situation such as the one described in Article 1 of the Draft Legislation. But against the background of the specific situation in Iceland (and also with regard to the legislative history), there is much to be said for the assumption that the new law will not have the same effect on all those who are subject to it. The latter is decisive. It appears in fact that the Draft Legislation is targeting or will affect one specific operator, namely Halicilla. In addition, as noted above, a distinction is drawn between river associations with seven or more members and those with fewer than seven, without any justification for treating these two situations differently.

Article 20 of the EU Charter of Fundamental Rights states under the title "Equality before the law":

> "Everyone is equal before the law."

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[26] *Holship*, loc. cit., paragraph 123 and case law cited.

The same or a similar provision can be found in most modern Western constitutions.

Moreover, Article 21(2) of the Charter prohibits, within the scope of application of the Treaties and without prejudice to any of their specific provisions, "any discrimination on grounds of nationality".

In EU law, these provisions constitute a codification of the general principle of equal treatment as recognised by the ECJ. According to that court's settled case law,

> "the principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and that different treatment is objectively justified"[27].

The equality principle is, in the context of market freedoms, also embodied in the EEA Agreement. The EEA Agreement prescribes the equal treatment of EEA foreigners with nationals with regard to the fundamental freedoms and thus also with regard to free movement of capital and the freedom of establishment. In addition, Article 4 EEA states that any discrimination on grounds of nationality is prohibited within the agreement's scope of application. The EFTA Court has recognised the existence of general principles of EEA law[28]. One will have to assume that the principle of equal treatment is such a maxim.

In my opinion, the principle of equality would most probably be infringed if the Draft Legislation would be passed. For the sake of order, I observe that since the principle of equality was already recognised in the EU before the Charter was created, the question of the relevance of the Charter of Fundamental Rights of the EU for EEA law can be left open.

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[27] C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*, EU:C:2013:598, paragraph 50 and case law cited.
[28] See, for example, *Páll Hreinsson*, General Principles, in: Baudenbacher, Ed., The Handbook of EEA law, 2016, 349-389.

3. Comparative law: Ad hoc legislation

a. General

If the suspicion is correct that the Draft Legislation is a measure that is specifically directed against Halicilla, one may from a comparative perspective, refer to the case law of the German and Austrian Constitutional Courts on the so-called ad hoc legislation (*Anlassgesetzgebung*). In both countries, legislation that is enacted on a single occasion, similar to an administrative act, is referred to as ad hoc legislation.

b. Case law of the German Federal Constitutional Court

The German Federal Constitutional Court held in BVerfGE 25, 371, 399:

> *„Art. 19 Abs. 1 Satz 1 GG enthält [....] eine Konkretisierung des allgemeinen Gleichheitssatzes. Er verbietet dem Gesetzgeber, aus einer Reihe gleichartiger Sachverhalte willkürlich einen Fall herauszugreifen und zum Gegenstand einer Ausnahmeregelung zu machen. Art. 19 Abs. 1 Satz 1 GG schließt dagegen die gesetzliche Regelung eines Einzelfalls dann nicht aus, wenn der Sachverhalt so beschaffen ist, dass es nur einen zu regelnden Fall dieser Art gibt und die Regelung dieses singulären Sachverhalts von sachlichen Gründen getragen wird.*"

> "Article 19 paragraph 1 sentence 1 of the Basic Law contains [....] a concretisation of the general principle of equality. It prohibits the legislature from arbitrarily picking out a case from a series of similar circumstances and making it the subject of an exception. Article 19 paragraph 1 sentence 1 of the Basic Law, on the other hand, does not exclude the statutory regulation of an individual case if the facts of the

case are such that there is only one case of this kind to be regulated and the regulation of this singular fact is supported by objective reasons."[29]

c. Case law of the Austrian Constitutional Court

The Austrian Constitutional Court held in 1956 that under Austrian constitutional law, ad hoc legislation which lacks the generality so often demanded, is in principle permissible as long as the unequal treatment can be objectively justified in the specific case. Nor does this conflict with the principle of the separation of powers, since the legislature is not limited to enacting general abstract norms, but may also make individual-case regulations similar to an administrative act, as long as these are compatible with the principle of equality[30].

d. Result

In both countries, ad hoc lawmaking is, as a matter of principle, only permissible as long as it is compatible with the principle of equality. This must also apply in the case at hand.

4. Infringement of the right to property

The national measure at issue massively encroaches on Halicilla's property rights. One is reminded of the concept of *nuda proprietas* (naked property) in Roman law.

[29] Unofficial translation.
[30] VfSlg 3118/1956.

Article 1 of Protocol No. 1 to the European Human Rights Convention on the protection of property reads:

> "Right to property
>
> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

According to the established case law of the European Court of Human Rights, a share in a company that has an economic value and to which certain rights are attached that enable a holder of the share to exercise influence over a company can be considered a „possession"[31]. This encompasses voting rights and the right to influence the conduct of the company[32]. In the case of the Draft Legislation, there is no public interest that would justify the violation nor is paragraph 2 of Article 1 of the Protocol of any relevance.

As noted above, fundamental rights form part of the unwritten principles of EEA law and the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights[33]. In

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[31] Application no. 30417/9 *Olczak v. Poland*, paragraph 60; Application no 48553/99 *Sovtransavto Holding v. Ukraine*, paragraph 91.

[32] Application no. 46815/09 *Reisner v.Turkey*, paragraph 45; Application no. 3738/02 *Marini v. Albania*, paragraph 165.

[33] Cases E-8/97 *TV 1000 Sverige* v *Norway* [1998] EFTA Ct. Rep. 68, paragraph 26; E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23; E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 37; E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 60; E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49; E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 63;E-15/10 *Norway Post v ESA*, [2012] EFTA Ct.

particular, the EFTA Court has recognised the right to freedom of expression, the right to a fair trial within reasonable time, the right to family life and the negative freedom of association.

As the EFTA Court found in case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden*, the EEA Agreement has created a market by linking the markets of the EEA/EFTA States with the single market of the EU. The EFTA Court added:

> „The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies [...] at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices"[34].

Just as the freedom to conduct a business is a constituent element of the EEA single market, so is the guarantee of ownership. Without the right to property, no market can function[35]. All three EEA/EFTA States, Iceland, Liechtenstein and Norway, have ratified Protocol 1. There can therefore be no doubt in my opinion that the right to property, which is part of EEA law, would be violated if the Draft Legislation were to be passed.

F. Answers

In the light of the above findings, I answer the expert questions posed to me as follows:

Rep. 246, paragraphs 84-102; E-14/11, *DB Schenker* v *EFTA Surveillance Authority (Schenker I)* [2012] EFTA Ct. Rep. 1178, paragraphs. 166, 167; E-14/15 *Holship Norge AS vs Norsk Transportarbeiderforbund*, [2016] EFTA Ct. Rep. 240, paragraphs 122 and 123.

[34] [2014] EFTA Ct. Rep. 1364, paragraph 64.

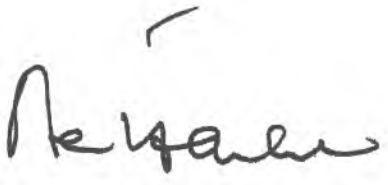
[35] See, for example, *Carl Baudenbacher*, Swiss Economic Law Facing the Challenges of International and European Law, Report to the Swiss Jurists' Day 2012, *Zeitschrift für Schweizerisches Recht* (Swiss Law Review) 131 (2012) II (2), 419, 427.

"Based on the information provided, in my opinion the Draft Legislation does raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to the free movement of capital as laid down in Article 40 EEA and the fundamental rights of equality and right to property.

A national measure which provides that if seven or more farms have votes in a river association, the voting rights of a single party, together with the connected parties, are to be capped at 30%, regardless of the number of farms they own or their stake in the dividends and that the votes of other members of the river associations are increased proportionately, subject again to a cap of 30%, is liable to deter citizens and economic operators from other EEA Contracting Parties from investing capital in Icelandic farms which have fishing rights. For that reason, such a national measure constitutes a restriction on the free movement of capital. In my opinion this restriction cannot be justified and is thus unlawful.

In my opinion the Draft Legislation also may constitute a discrimination on grounds of nationality that cannot be justified and is thus unlawful.

The Draft Legislation is also incompatible with the general principle of equality which has the status of a fundamental right under EEA law as well as with the fundamental right to property."



St. Gallen, 27 January 2020 Carl Baudenbacher