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Efni: Umsögn um 715. mál 150. löggjafarþings: Frumvarp til laga um breytingu á ýmsum lögum er varða eignarráð og nýtingu fasteigna (aðilar utan Evrópska efnahagssvæðisins, landeignaskrá, ráðstöfun landeigna, aukið gagnsæi o.fl.).

I. Samantekt

Í þessari umsögn er að finna umfjöllun Strengs um framangreint frumvarp til laga um breytingu á ýmsum lögum er varða eignarráð og nýtingu fasteigna.

Eftirfarandi er samantekt helstu athugasemda félagsins.

Markmiðsákvæði. Strengur fagnar breytingum á markmiðsákvæði jarðalaga í þá átt að taka aukið mið af þeim samfélagslegu hagsmunum sem lögunum er ætlað að vernda og telur að slíkar breytingar fari vel saman við starfsemi Strengs. Í þessu sambandi vill Strengur benda á eftirfarandi atriði:

- Strengur stendur fyrir umfangsmiklu og metnaðarfullu langtíma verndunarverkefni til verndar Norður-Atlantshafslaxinum, m.a. með styrkingu laxastofna ánna, stækkun hrygningarsvæða og seiðasleppingum. Fram að þessu hefur Strengur fjárfest verulegum fjárhæðum í verndunarverkefninu, sem og styrkt alþjóðlegt rannsóknarverkefni.
- Strengur leitast við að áfram fari fram búskapur á jörðum félagsins og hvetur og styrkir bændur til búskapar. Þannig stuðlar félagið að varðveislu landbúnaðarlands og nýliðun í landbúnaði, samfélaginu öllu til hagsbóta. Engin jörð sem félagið hefur keypt hefur eftir það farið í eyði.
- Stengur hefur með gróðurrækt unnið að bætingu landgæða og styrkingu vistkerfa í og við árnar með átaki um gróðursetningu úrvals innlendra trjáa og annars gróðurs við árnar þar sem gróðursettar hafa verið yfir 10.000 plöntur.
- Strengur leitast við að ráða fólk og kaupa þjónustu af aðilum á svæðinu eftir því sem framast er unnt, auk þess sem veiðimenn skila tekjum til rekstraraðila á svæðinu. Á síðustu þremur árum hafa bein ársverk á vegum Strengs að jafnaði

verið yfir tíu. Starfsemin stuðlar þannig beint og óbeint að fjölgun starfa og auknum umsvifum í nærsamfélaginu.
- Allur hagnaður Strengs, þ.m.t. af landareignum, vegna veiðileyfasölu, og arður greiddur frá veiðifélögum sem Strengur á aðild að, rennur inn í verndunarverkefnið aftur og helst þannig í nærsamfélaginu til stuðnings hagsmuna komandi kynslóða.

Þak á eignarhlut. Strengur gerir alvarlegar athugasemdir við ákvæði frumvarpsins sem setja, í raun, 10.000 hektara þak á heildarstærð fasteigna sem aðilum er heimilt að eignast eða öðlast afnot af til lengri tíma en fimm ára.

- Strengur telur að fella beri ákvæðið brott.
- Þetta ákvæði myndi enda fela í sér verulegt inngrip í starfsemi Strengs með því að koma í veg fyrir að Strengur gæti keypt frekari jarðir og jafnframt virðist það í raun koma í veg fyrir að Strengur gæti tekið á leigu veiðiréttindi til meira en 5 ára til að stunda veiðileyfasölustarfsemi sína, sem aftur myndi þýða að Strengur hefði minni hagnað til að ráðstafa í verndunarverkefni sitt.
- Ákvæðið felur í sér takmarkanir á grundvallarréttindum sem EES-samningurinn tryggir, án þess að þau skilyrði, sem EES-réttur setur, séu uppfyllt. Sér í lagi uppfyllir ákvæðið ekki kröfur EES-réttar um meðalhóf enda er ákvæðið hvorki vel til þess fallið að ná markmiðum jarðalaga né er það nauðsynlegt. Önnur vægari úrræði eru til, sbr. dæmi hér á eftir.
- Ákvæðið brýtur einnig gegn ákvæðum sjórnarskrárinnar, Mannréttindasáttmála Evrópu sem og grundvallarreglum EES-réttar m.a. um vernd eignarréttar og atvinnufrelsi, m.a. með því að koma í raun í veg fyrir að Strengur geti stundað veiðileyfasölu á sama hátt og aðrir.
- Ákvæðið brýtur jafnframt gegn jafnræðisreglu 65. gr. stjórnarskrárinnar sem og 14. gr. Mannréttindasáttmála Evrópu og grundvallarreglum EES-réttar.

Skylda til að afla samþykkis fyrir ráðstöfun eignarréttar. Strengur gerir athugasemdir við ákvæði sem áskilur í mörgum tilvikum samþykki ráðherra fyrir ráðstöfun eignarréttinda.

- Strengur telur að endurskoða þurfi ákvæðið.
- Strengur telur að ákvæðið í þessari mynd standist ekki kröfur EES-réttar auk þess sem ýmislegt sem lýtur að framkvæmd þess sé gagnrýnivert.
- Sjónarmið sem ráðherra skal líta til við mat á umsókn eru fjölmörg, afar matskennd og innbyrðis vægi þeirra óljóst. Raunverulegt inntak ákvæðisins er því óljóst og veruleg hætta á að framkvæmd laganna verði ófyrirsjáanleg.
- Ákvæðið fer þannig í bága við kröfur EES-réttar um hlutlæg og nákvæm skilyrði, sem feli ekki í sér mismunun, takmarki nægjanlega svigrúm stjórnvalda til mats og leyfi ekki handahófskennda ákvarðanatöku.

- Einnig er sérstakt áhyggjuefni er að ekki virðist vera sérstaklega gert ráð fyrir því að úrskurðir ráðherra samkvæmt lögunum verði birtir opinberlega.
- Strengur telur óheppilegt að ákvarðanataka um réttindi og skyldur aðila í einstökum málum sé hjá ráðherra.
- Verði skylda til að afla samþykkis stjórnvalda fyrir tilteknum ráðstöfunum lögfest, bendir Strengur á aðra möguleika, svo sem að annar aðili færi með ákvarðanatöku, t.d. óháð nefnd eða hlutaðeigandi sveitarfélag.

Önnur úrræði. Almennt telur Strengur að önnur vægari úrræði gætu vel komið til skoðunar til að ná markmiðum laganna um yfirsýn yfir og stjórn á landnotkun, sem og að tryggja fæðuöryggi og sporna gegn spákaupmennsku. Hér má nefna sem dæmi:

- kröfu um að jarðir skuli byggðar sé þess kostur,
- forkaupsréttur sveitarfélaga,
- fyrirkomulag um öflun samþykkis fyrir ráðstöfun eignarréttar (sem standist þó kröfur EES-réttar),
- kvöð um lágmarkstíma eignarhalds,
- kvöð um að land verði notað á tiltekinn hátt,
- reglur um skipulag og landnotkun.

Flest þessara úrræða virðast annaðhvort vera fyrirhuguð eða í lögum nú þegar. Væri því að mati Strengs rétt að skoða nánar, á heildstæðan hátt, hvaða úrræði eru best fallin til að ná þeim markmiðum sem stefnt er að, án þess að í bága fari við stjórnarskrá og alþjóðlegar skuldbindingar íslenska ríkisins.

Hér á eftir er að finna nánari umfjöllun um sjónarmið Strengs. Strengur hefur einnig aflað sérfræðiálits prófessor dr. Baudenbacher, fyrrverandi forseta EFTA dómstólsins, varðandi atriði sem varða EES-rétt. Sérfræðiálitið fylgir umsögn þessari sem viðauki.

II. Inngangur

Þann 2. apríl sl. var á Alþingi lagt fram af hálfu forsætisráðherra frumvarp til laga um breytingu á ýmsum lögum er varða eignarráð og nýtingu fasteigna (aðilar utan Evrópska efnahagssvæðisins, landeignaskrá, ráðstöfun landeigna, aukið gagnsæi o.fl.) og mælti forsætisráðherra fyrir frumvarpinu þann 28. s.m. Áður hafði samnefnt frumvarp verið kynnt í samráðsgátt stjórnvalda, sbr. mál nr. 34/2020, og skiluðu ýmsir hagsmunaaðilar inn umsögnum við það. Hið nýja frumvarp, sem nú er lagt fram, er að stórum hluta sambærilegt, svo sem hér greinir nánar að neðan. Aftur á móti er þar að finna viðbótar takmarkanir á ráðstöfun fasteigna, sem nauðsynlegt er að fjalla nánar um.

Samkvæmt frumvarpinu eru nánar tiltekið í I. kafla lagðar til breytingar á lögum um eignarrétt og afnotarétt fasteigna, nr. 19/1966; í II. kafla lagðar til breytingar á þinglýsingalögum, nr. 39/1978; í III. kafla lagaðar til breytingar á lögum um skráningu og mat fasteigna, nr. 6/2001; og í IV. kafla lagðar til breytingar á jarðalögum, nr. 81/2004.

Breytingarnar sem lagðar eru til á ákvæðum jarðalaga fela í sér grundvallarbreytingu á reglum sem gilda um kaup á fasteignum sem ákvæði jarðalaga taka til með því að áskilja, í ákveðnum tilvikum, fyrirfram samþykki ráðherra fyrir viðskipum með fasteignir. Auk þess er kveðið á um að samþykki skuli að jafnaði ekki veitt ef viðtakandi réttar, og tengdir aðilar, eiga fyrir fasteign eða fasteignir sem eru alls 10.000 hektarar eða meira, nema umsækjandi sýni fram á sérstaka þörf fyrir meira landrými vegna fyrirhugaðra nota fasteignarinnar, en þessa reglu varðandi hámarkshlut var ekki að finna í þeim drögum, sem birt voru í samráðsgátt. Þessar breytingar, verði þær að lögum, takmarka verulega heimildir til fasteignaviðskipta.

Veiðiklúbburinn Strengur ehf., kt. 630269-6529, og önnur félög í beinu og óbeinu eignarhaldi Halicilla Limited, eiga nokkurn fjölda jarða á Norð-Austurlandi. Ákvæðin hafa þannig veruleg áhrif á hagsmuni þeirra. Umsögn þessi er unnin og sett fram á vegum Veiðiklúbbsins Strengs ehf., bæði fyrir sitt leyti og fyrir hönd Halicilla Limited, sem móðurfélags Veiðiklúbbsins Strengs ehf., sem og annarra félaga í beinu og óbeinu eignarhaldi Halicilla Limited og eiganda Halicilla Limited. Þegar vísað er til „Strengs“ eða „félagsins“ í þessari umsögn, felur það í sér vísun til Veiðiklúbbsins Strengs ehf. sem og Halicilla Limited og annarra félaga í beinu og óbeinu eignarhaldi Halicilla Limited auk eiganda Halicilla Limited, nema annað sé tekið fram sérstaklega.

Í umsögn þessari er ætlun Strengs að varpa fram sjónarmiðum, sem félagið telur afar brýnt að fram komi í tengslum við málið, en athugasemdir félagsins beinast einkum að ákvæðum IV. kafla frumvarpsins. Þess ber að geta að Strengur skilaði einnig umsögn um mál nr. 34/2020 í samráðsgátt, með bréfi dags. 27. febrúar sl., og vísast jafnframt til hennar, eftir því sem við á.

III. Tilgangur Strengs og áhrif verndunarverkefnis á nýtingu lands og byggðaþróun

Samhengis vegna telur Strengur nauðsynlegt að útskýra í upphafi stuttlega hlutverk og tilgang félagsins. Strengur stendur fyrir verndun Norður-Atlantshafslaxins með skynsamlegri, hagkvæmri og sjálfbærri nýtingu þeirra áa sem Strengur á veiðirétt í, enda hefur laxastofninum í Norður-Atlantshafi hnignað verulega undanfarna áratugi og er víða í útrýmingarhættu.[1] Það liggur í eðli verndunarverkefna að þau eru hugsuð til langs tíma, en Strengur, og fyrirrennarar félagsins, hafa komið að verndun laxastofna á Norð-Austurlandi í 60 ár og Strengur mun halda þeirri vinnu áfram, með langtímamarkmið um verndun og sjálfbærni fyrir augum. Liður í verndunarverkefninu er styrking laxastofnanna í ánum með byggingu laxastiga, sem stækka hrygningarsvæði ánna, og með sleppingum seiða af laxastofnum viðkomandi áa. Jafnframt er Strengur aðili að umfangsmikilli alþjóðlegri rannsókn á þeim ám sem Strengur fer með veiðirétt í, en rannsóknin er unnin í samstarfi við Hafrannsóknarstofnun.

Strengur stefnir að því að land og réttindi í eigu félagsins séu nýtt í samræmi við landkosti og með það langtímamarkmið að tryggja að slík nýting sé ávallt í samræmi við hagsmuni

[1] Verkefnið ber heitið Six Rivers Project, og má finna frekari upplýsingar á www.sixrivers.is.

samfélagsins alls. Verndunarverkefni Strengs tekur af þeim sökum m.a. tillit til samspils milli ánna og þess lands sem þær renna um. Leitast Strengur í þessu sambandi við að tryggja að áfram fari fram búskapur á þeim jörðum, sem félagið á, þannig að land, sem er vel fallið til búvöruframleiðslu, verði varðveitt til slíkra nota. Má þannig nefna að engin þeirra jarða sem Strengur hefur eignast hefur eftir það farið í eyði, enda hefur Strengur lagt sig fram um að hvetja og styðja bændur til þess að halda áfram búskap, m.a. með hagstæðum leigusamningum, en með því vill félagið stuðla að nýliðun í búskap og landbúnaði.

Jafnframt hefur Strengur hvatt til og staðið að gróðurrækt með það að markmiði að styrkja vistkerfi í og við árnar. Auk þess að bæta landgæði almennt er þetta lykilatriði í því að styðja við langtíma vöxt laxastofna ánna með því að auka fæðu fyrir laxaseiði. Strengur stendur þannig að umtalsverðu gróðursetningarverkefni, sem felst í því að gróðursetja úrval innlendra trjáa, og annars gróðurs, á völdum svæðum við árnar. Strengur nýtur til þessa liðsinnis hóps heimamanna, sem lýtur forystu sérfræðings. Nú þegar hefur verið plantað yfir 10.000 plöntum og áætlanir gera ráð fyrir að 10.000 plöntum verði plantað árlega.

Auk þess að eiga jarðir sem tengjast ánum og framangreint verkefni, felst aðalstarfsemi Strengs í því að selja veiðileyfi í ánum sem það hefur á leigu frá veiðifélögum, sem og þjónustu sem því tilheyrir, þ.m.t. gistingu og veitingar í veiðihúsunum og leiðsögn við veiði. Viðskiptavinir Strengs eru bæði innlendir og erlendir veiðimenn. Skipulag veiða af hálfu Strengs er ávallt með verndunarverkefnið að leiðarljósi, t.d. með því að styðja við svokallaða veiða-sleppa aðferð. Er því um sjálfbæra ferðaþjónustu að ræða, en það hugtak hefur verið skilgreint sem:

> *Sjálfbær ferðaþjónusta mætir þörfum ferðamanna og heimamanna en stuðlar um leið að verndun og auknum markaðstækifærum til framtíðar. Þetta felur í sér að auðlindum er stjórnað með þeim hætti að efnahagslegum, félagslegum og fagurfræðilegum þörfum er fullnægt, á sama tíma og viðhaldið er menningu, nauðsynlegum vistfræðilegum ferlum, líffræðilegri fjölbreytni og nauðsynlegum lífsskilyrðum.*[2]

Strengur vill einnig benda á að hagnaður félagsins, bæði af veiðileyfasölu sem og af landareignum, rennur inn í verndunarverkefnið aftur. Mun Strengur nánar tiltekið endurfjárfesta allan hagnað félagsins (þ.e. Veiðiklúbbsins Strengs ehf. og allra félaga í eigu móðurfélags þess, Halicilla Limited), en ekki til að mynda tekjur veiðifélaga sem Strengur er aðili að. Væntir Strengur þess að þessi endurfjárfesting af hálfu félagsins muni stuðla að framtíðar velsæld ánna og umhverfis þeirra. Er það eindregin von Strengs að til að mynda veiðifélögin, sem félagið kemur að, skapi góðar tekjur og verði sem arðbærust til framtíðar, og verði þannig kleift að halda áfram að greiða út arð til allra félagsmanna. Í tilviki Strengs yrði sá arður síðan aftur allur nýttur til fjármögnunar verndunarverkefnis Strengs, líkt og verið hefur, og ávallt mun verða, með allan hagnað Strengs. Tekjur af

[2] Sjá t.d. reglugerð nr. 300/2020 um Vatnajökulsþjóðgarð.

fjárfestingum í verndunarverkefninu haldast þannig í nærsamfélaginu til framtíðar til stuðnings hagsmuna komandi kynslóða.

Markmið Strengs er því að verndun Norður-Atlantshafslaxins og verndunarverkefnið styðji við byggðaþróun í kringum árnar. Starfssemi Strengs fylgja yfir tíu ársverk, auk þess sem aðkeypt þjónusta t.a.m. iðnaðarmanna er veruleg. Strengur leggur ríka áherslu á að ráða fólk og kaupa þjónustu af aðilum í nærsamfélaginu eftir því sem framast er unnt. Til viðbótar þessu má nefna þær tekjur sem veiðimenn á vegum Strengs skilja eftir sig hjá öðrum rekstraraðilum á svæðinu. Í samfélagi sem ekki er stærra en Vopnafjarðarhreppur og nágrenni munar því um þessa starfsemi. Í þessu sambandi er ekki úr vegi að rifja upp orð umhverfis- og auðlindaráðherra úr grein hans frá 25. apríl 2020 þar sem hann segir að „rannsóknir sýna að friðlýst svæði eru aðdráttarafl sem skilar efnahagslegum ávinningi sem að hluta til verður eftir heima í héraði í gegnum kaup á margvíslegri gisti- og veitingaþjónustu, auk afþreyingar“[3].

Með hliðsjón af öllu framangreindu telur Strengur að hið umfangsmika og metnaðarfulla verndunarverkefni muni leiða til sjálfbærrar nýtingar ánna, og með því að láta arð, bæði af veiðileyfasölu sem og af landareignum, renna inn í verndunarverkefnið aftur, verði fjármögnun verndunarverkefnisins sjálfbær. Þannig muni árnar til framtíðar halda áfram að skapa tekjur sem styrkja laxastofnana, vistkerfi svæðisins og samfélagið, bæði aðra landeigendur sem eiga veiðirétt, sem og samfélagið í heild. Þá verði stuðlað að sjálfbærri landnýtingu, samfélaginu öllu til hagsbóta.

IV. Almennt um frumvarpið

Í frumvarpinu eru lagðar til breytingar á fjórum lagabálkum, en í IV. kafla frumvarpsins eru lagðar til breytingar á jarðalögum nr. 81/2004, sem athugasemdir Strengs lúta einkum að.

Markmiðsákvæði jarðalaga (5. gr. frumvarpsins)

Í 5. gr. frumvarpsins eru lagðar til breytingar á markmiðsákvæði jarðalaga í þá átt að gera það fyllra og ítarlegra þannig að tekið sé mið af þeim samfélagslegu hagsmunum sem lögunum er ætlað að vernda, sem eru að mati Strengs jákvæðar. Ákvæðið er svohljóðandi:

> *Markmið þessara laga er að stuðla að því að nýtingu lands og réttinda sem því tengjast sé hagað í samræmi við landkosti og með hagsmuni samfélagsins og komandi kynslóða að leiðarljósi, að teknu tilliti til mikilvægis lands frá efnahagslegu, félagslegu og menningarlegu sjónarmiði. Markmið laganna er þannig m.a. að stuðla að fjölbreyttum og samkeppnishæfum landbúnaði, náttúruvernd, viðhaldi og þróun byggðar og um leið þjóðfélagslega gagnlegri og sjálfbærri landnýtingu. Stefnt skal*

[3] https://www.visir.is/g/2020511536d/stefnumot-vid-natturu-islands. Þá má einnig í þessu sambandi nefna skýrslu Hagfræðistofnunar nr. C19:05, Náttúruvernd og byggðaþróun: Áhrif verndarsvæða á grannbyggðir, frá desember 2019, sjá: https://www.stjornarradid.is/library/02-Rit--skyrslur-og-skrar/Ahrif_fridlystra_svaeda_5.pdf.

að því svo sem kostur er við framkvæmd laganna að land sem er vel fallið til búvöruframleiðslu sé varðveitt til slíkra nota og að fæðuöryggi sé tryggt til framtíðar.

Að mati Strengs fara tilgangur og markmið félagsins, sem áður var lýst, vel saman við þetta markmiðsákvæði jarðalaga, enda stefna bæði m.a. að félagslegri og gagnlegri landnýtingu, sem og notkun og varðveislu lands til landbúnaðar, sem kostur er.

Aukið gagnsæi

Ef marka má greinargerð sem fylgir frumvarpinu er eitt helsta markmið frumvarpsins að auka gagnsæi um eignarhald og nýtingu fasteignar, sbr. t.d. ný grein 10. gr. b jarðalaga nr. 81/2004 sem er lögð til í 8. gr. frumvarpsins, sem og breyting á 21. gr. þinglýsingalaga nr. 39/1978. Strengur styður tillögur um aukið gagnsæi, og telur rétt að það sé gert með lögum til að tryggja jafnræði á þessu sviði.

Ákvæði um skyldu til að afla samþykkis ráðherra fyrir ráðstöfun fasteignar (8. gr. frumvarpsins) – almennt

Að mati Strengs eru stærstu breytingarnar aftur á móti að finna í 8. gr. frumvarpsins þar sem lagt er til að ný grein, 10. gr. a., bætist við jarðalög, þar sem mælt er fyrir um skyldu, í ákveðnum tilvikum, til að afla samþykkis ráðherra fyrir ráðstöfun fasteignar, en fyrsta málsgrein greinarinnar er svohljóðandi:

Skylt er að afla samþykkis ráðherra fyrir ráðstöfun beins eignarréttar yfir fasteign, eða afnota réttar til lengri tíma en fimm ára, ef:

1. *fasteign er lögbýli og viðtakandi réttar og tengdir aðilar eiga fyrir fimm eða fleiri fasteignir sem eru skráðar í lögbýlaskrá enda nemi samanlögð stærð þeirra 50 hektörum eða meira, eða*

2. *viðtakandi réttar og tengdir aðilar eiga fyrir fasteign eða fasteignir sem eru samanlagt 1.500 hektarar eða meira að stærð.*

Í öðrum málsgreinum greinarinnar er svo fjallað nánar um samþykki ráðherra og útfærslu þess, þ.m.t. er í 9. og 10. mgr. fjallað um sjónarmið sem ráðherra skal líta til við mat á því hvort samþykki skuli veitt, þar sem eftirfarandi kemur fram:

[…] Við mat á því hvort samþykki skuli veitt skal ráðherra einkum líta til þess hvort ráðstöfun fasteignar og áformuð nýting hennar samrýmist markmiðum þessara laga skv. 1. gr., skipulagsáætlunum viðkomandi sveitarfélags, landsskipulagsstefnu og annarri stefnu stjórnvalda um landnýtingu eftir því sem við á. Enn fremur skal ráðherra í þessum efnum líta til þess hvort áformuð nýting fasteignar sé í samræmi við stærð, staðsetningu og ræktunarskilyrði hennar, sem og gæði og fasteignaréttindi sem fylgja henni. Þá skal ráðherra líta til þess hvort ráðstöfun sé fallin til að styrkja landbúnað og búsetu á viðkomandi svæði, þ.m.t. hvort viðtakandi

réttar hyggist hafa fasta búsetu á fasteign eða byggja hana hæfum ábúanda og þá á hvaða kjörum.

Við mat á því hvort samþykki skv. 1. og 2. mgr. skuli veitt ber ráðherra einnig að líta til þess hvernig viðtakandi réttar og tengdir aðilar nýta fasteignir og fasteignaréttindi sem þeir eiga fyrir eða hafa afnot af og hvernig sú nýting fellur að þeim atriðum sem greinir í 9. mgr. […]

Í 10. mgr. kemur einnig fram að:

Samþykki skal að jafnaði ekki veitt ef viðtakandi réttar og tengdir aðilar eiga fyrir fasteign eða fasteignir sem eru samanlagt 10.000 hektarar eða meira að stærð nema umsækjandi sýni fram á að hann hafi sérstaka þörf fyrir meira landrými vegna fyrirhugaðra nota fasteignar.

Helstu athugasemdir Strengs lúta að þessum ákvæðum 10. gr. a., um skyldu til að afla samþykkis ráðherra fyrir ráðstöfun eignarréttar yfir fasteignum og reglum hvað varðar hámark á eignarhald, en ákvæðið verður, að mati Strengs, vart skilið öðruvísi en svo að það feli í raun og veru í sér hámark á eignarhlut sem aðila er heimilt að eignast (*e. acquisition cap*).

V. EES-samningurinn og takmarkanir á grundvallarréttindum

Í 40. gr. EES-samningsins er fjallað um frjálst flæði fjármagns, en þar stendur:

Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar fé er notað til fjárfestingar.

Umrædd réttindi eru meðal grundvallarréttinda skv. EES-samningnum.

Almennt eru takmarkanir á grundvallarréttindum samkvæmt samningnum einungis leyfðar ef þær (i) fela ekki í sér mismunun, (ii) stefna að lögmætu markmiði í þágu veigameiri almennra hagsmuna, (iii) eru til þess fallnar að ná því markmiði sem stefnt er að, (iv) ganga ekki lengra en þarf til að ná því markmiði og (v) ekki er hægt að beita minna íþyngjandi úrræðum. Enn fremur þarf að virða m.a. sjónarmið um réttarvissu (*e. legal certainty*) og lögmætar væntingar (*e. legitimate expectations*), auk þess sem þeir, sem um ræðir, þurfa að hafa tiltæk réttarúrræði (*e. legal redress*).

VI. Hámark á eignarhaldi

Almennt um ákvæðið

Í 10. mgr. fyrirhugaðrar 10. gr. a jarðalaga, sbr. 8. gr. frumvarpsins, kemur m.a. fram að „[s]amþykki [skuli] að jafnaði ekki veitt ef viðtakandi réttar og tengdir aðilar eiga fyrir

fasteign eða fasteignir sem eru samanlagt 10.000 hektarar eða meira að stærð". Í greinargerð sem fylgir frumvarpinu segir hvað þetta varðar að „[r]étt [sé] að svigrúmi ráðherra til mats á því hvort samþykki samkvæmt greininni skuli veitt verði sniðinn þrengri stakkur í tilvikum þar sem viðtakandi réttar og tengdir aðilar eiga fyrir umtalsvert landflæmi". Undantekning frá þessu er ef „umsækjandi sýni fram á að hann hafi sérstaka þörf fyrir meira landrými vegna fyrirhugaðra nota fasteignar", en fram kemur í greinargerðinni að ráðgert er „að ráðherra veiti aðeins samþykki í undantekningartilfellum". Eina dæmið sem er raunar nefnt í greinargerðinni er ef „viðtakandi réttar hygðist nýta fasteign til búrekstrar eða byggja hana hæfum ábúanda og aðrar eignir í eigu viðkomandi hæfðu ekki þeim þörfum". Ekki er til dæmis sérstaklega nefnd náttúrvernd eða ferðaþjónusta sem annars konar landnýting sem gæti komið til greina.

Ákvæðið verður því vart skilið öðruvísi en svo að það feli í raun og veru í sér hámark á eignarhlut sem aðila er heimilt að eignast.

Strengur telur einnig rétt að benda á að í ákvæðinu er einfaldlega talað um 10.000 hektara, án tillits til þess hvers konar land er um að ræða, þannig að ákvæðið gerir ekki greinarmun milli til dæmis ræktunarlands og annarra tegunda af landi, þótt aðstæður og landgæði geti verið gjörólík.

Þótt upplýsingar um nákvæma stærð jarða vanti enn á Strengur (í heild og að hluta) fasteignir sem eru samanlagt meira en 10.000 hektarar að stærð. Ákvæðið virðist því fela í sér, verði það að lögum, að Strengur mun ekki eignast beinan eignarrétt eða afnotarétt til lengri tíma en fimm ára nema í undantekningartilfellum sem er mjög óljóst hvort myndu eiga við í tilfelli starfsemi Strengs. Þá hefur Strengur ekki upplýsingar um hversu margir aðrir aðilar yrðu fyrir áhrifum ákvæðisins, en gera má ráð fyrir að aðeins yrði um að ræða fáa aðila.

Hugsanleg áhrif á veiðileyfasölu Strengs

Veiðileyfasala tilheyrir, eins og áður segir, aðalstarfsemi Strengs, auk þess að vera þáttur í verndunarverkefni félagsins. Starfsemi Strengs felst þannig m.a. í því að taka á á leigu frá viðkomandi veiðifélagi. Það tíðkast að slíkir leigusamningar eru oft til lengri tíma en fimm ára, enda er auðveldara að fara í framkvæmdir, til dæmis við veiðihús, þegar um lengri samning er að ræða. Miðað við orðalag fyrirhugaðrar 1. mgr. 10. gr. a verður aftur á móti ekki annað séð en að Strengur þyrfti að afla samþykkis ráðherra til að taka á á leigu til lengri tíma en fimm ára, en svo er alls ekki ljóst að ráðherra mætti yfir höfuð veita slíkt samþykki, vegna fasteigna sem félagið á fyrir. Yrði það staðan væri um að ræða mikið og íþyngjandi inngrip í réttindi Strengs, sem gæti raskað stöðu félagsins gagnvart samkeppnisaðilum og möguleikum á að halda starfseminni áfram með þeim hætti sem verið hefur. Má gera ráð fyrir að fæstir, ef nokkrir, samkeppnisaðilar Strengs falli undir ákvæðið og verði því áfram mögulegt fyrir þá að taka ár á leigu til lengra tíma en fimm ára.

Í þessu sambandi vill Strengur einnig benda á að í þessu tilfelli er um að ræða veiðirétt sem tilheyrir jörðum þar sem eigendurnir gætu m.a. verið Strengur sjálfur. Hins vegar er skipulag veiði skylt að vera í höndum veiðifélags, sbr. VI. kafla laga nr. 61/2006 um lax- og silungsveiði. Því má segja að í raun sé verið að tvítelja eignarréttindi, og jafnvel koma í veg fyrir að aðili geti nýtt eignarréttindi sem hann á nú þegar, þ.e. veiðirétt. Ef það yrði niðurstaðan vekur það spurningar m.a. um samræmi veiðifélagsfyrirkomulags við félagafrelsisákvæði stjórnarskrárinnar og Mannréttindasattmála Evrópu, sem og atvinnufrelsis- og eignarréttarákvæði stjórnarskrárinnar.

Samræmi við alþjóðlegar skuldbindingar og stjórnarskrá

Í frumvarpinu er fullyrt að efni þess sé í samræmi við stjórnarskrá og alþjóðlegar skuldbindingar sem íslensk stjórnvöld hafa undirgengist. Af hálfu Strengs er því aftur á móti haldið fram að þær umfangsmiklu takmarkanir sem 10. mgr. fyrirhugaðrar 10. gr. a felur í sér, séu í ekki slíku samræmi við stjórnarskrá og alþjóðlegar skuldbindingar.

Hvað varðar samræmi við EES-samninginn er ótvírætt að hámark á heildarstærð fasteigna sem aðila er heimilt að eignast, eða ákvæði um að aðila sé ekki heimilt að eignast meira án leyfis, sem einungis verður veitt í undantekningartilfellum, felur í sér takmörkun á grundvallarréttindum samkvæmt EES-samningnum, þá sérstaklega réttindum samkvæmt 40. gr. samningsins. Eins og fyrr greinir, eru takmarkanir á grundvallarréttindum einungis leyfðar samkvæmt EES-rétti að uppfylltum nokkrum skilyrðum sem ekki verður séð að séu uppfyllt hér.

Samhengi hámarksins, sem frumvarpið felur í sér, við markmið jarðalaga virðist jafnframt afar óljóst. Að svo miklu leyti sem athugasemdir með frumvarpinu hafa yfir höfuð að geyma rökstuðning fyrir hámarkinu, þá er sá rökstuðningur óskýr. Í túlkunarleiðbeiningum framkvæmdastjórnar ESB[4] sem vísað er til í frumvarpsdrögunum er ljóst að samræmi laga um hámarks eignarhald við meðalhófssjónarmið getur verið vafasamt (e. „may be questionable“) og þarf að skoða vel markmið og meðalhóf í hverju tilviki fyrir sig. Ekki verður séð að þess hafi verið gætt í tilviki frumvarpsins.

Eins og áður er nefnt, er í ákvæðinu einfaldlega talað um 10.000 hektara, án tillits til þess hvers konar land er um að ræða eða tilgangs ráðstöfunar, að undanskildu einu dæmi um búrekstur. Við þetta bætist síðan að hvorki í frumvarpinu sjálfu né athugasemdum með því er að finna nokkra umfjöllun um það hvort eða með hvaða hætti hámarkið er fallið til þess að ná þeim markmiðum sem stefnt virðist að og þaðan af síður er þar að finna umfjöllun um hvort önnur vægari úrræði væru tiltæk til þess að ná markmiðunum.

Í þessu sambandi bendir Strengur á að óljóst er hvers vegna samþykkisfyrirkomulag sem greinin annars gerir ráð fyrir, teljist það yfir höfuð standast kröfur EES-laga, myndi ekki

[4] Túlkunarleiðbeininga framkvæmdastjórnar ESB varðandi kaup á landbúnaðarlandi og reglur Sambandsréttar (e. „Commission Interpretative Communication on the Acquisition of Farmland and European Union Law“)

vera fullnægjandi eitt og sér, jafnvel þótt viðtakandi réttarins eigi fyrir stórt landssvæði; annaðhvort styður ráðstöfun eignarréttinda markmið laganna eða ekki. Ætti þannig umfang eignarhlutar viðkomandi ekki að skipta nokkru máli.

Þá má sömuleiðis benda á að í framsöguræðu forsætisráðherra kom fram að jafnframt væri verið að skoða aðrar ráðstafanir samhliða þessu, s.s. ábúðarskyldu o.fl.[5] Að mati Strengs sýnir þetta glöggt að sú framsetning hámarks á eignarhlut, sem birtist í frumvarpsdrögunum, hafi einfaldlega ekki verið skoðuð nægilega vel, s.s. m.t.t. afleiðinga og áhrifa hennar. Hvað sem líður þeim markmiðum sem stefnt er að, þá sýna þessar fyrirætlanir um fleiri úrræði sem til skoðunar eru, til viðbótar við þau sem er að finna í frumvarpinu, vel að úrræðin sem umrædd ákvæði frumvarpsins gera ráð fyrir, og hér hafa verið rakin, uppfylla ekki kröfur um meðalhóf, enda ljóst að þau ganga mun lengra en þörf er á og að ekki hafi allir kostir verið skoðaðir. Þá virðist raunar að hér hafi það úrræði sem hvað lengst gengur verið valið, án þess að fyrir því séu málefnalegar ástæður eða að sýnt hafi verið fram á að önnur vægari úrræði hafi ekki verið fullnægjandi.

Til viðbótar bendir Strengur á að takmarkanir á grundvallarréttindum mega ekki fela í sér mismunun, jafnvel þótt skilyrðin um meðalhóf o.fl. væru uppfyllt. Telur Strengur ákvæðið óhjákvæmilega fela í sér ólögmæta mismunun og að brotið sé á jafnræði aðila. Virðist þessi takmörkun líkleg til að koma einungis niður á örfáum eigendum, án þess að málefnaleg rök standi til þeirrar skerðingar. Enn fremur er hér höfð hliðsjón af mismunun sem Strengur gæti orðið fyrir í starfsemi sinni, sbr. umfjöllun að framan, þótt mismununaráhrif ákvæðisins takmarkist ekki við þá mismunun.

Telur Strengur þannig að ákvæði frumvarpsins brjóti jafnframt gegn jafnræðisreglu 65. gr. stjórnarskrárinnar sem og 14. gr. Mannréttindasáttmála Evrópu.

Að mati Strengs brjóta ákvæði fyrirhugaðrar 10. mgr. 10. gr. a einnig gegn öðrum reglum stjórnarskrárinnar, sem og Mannréttindasáttmála Evrópu eftir því sem við á, þ.m.t. 72. gr. um friðhelgi eignarréttar og 75. gr. og atvinnufrelsi, enda kunna ákvæði frumvarpsins m.a. að koma í veg fyrir að Strengur (en ekki samkeppnisaðilar) geti stundað veiðileyfisölu í starfsemi sinni, eins og gert hefur verið, sbr. umfjöllun að framan, án þess að almannahagsmunir krefjist slíkrar takmörkunar. Einnig bendir Strengur á að þótt haldið sé fram í greinargerðinni sem fylgir frumvarpinu að ákvæði stjórnarskrárinnar veiti ekki rétt til að eignast eignarréttindi, hefur ákvæði fyrirhugaðrar 10. mgr. 10. gr. a engu að síður áhrif á núverandi eignarrétt aðila. Sem dæmi mun aðili sem á þegar fasteignir sem eru meira en 10.000 hektarar að stærð ekki geta selt fasteignir sem hann á og fjárfest andvirðinu í annarri fasteign, nema að fenginni undanþágu sem er mjög óljóst hvort hægt verði að fá yfirhöfuð.

Til þess að leggja mat á það hvort, og þá að hvaða leyti, umrætt ákvæði frumvarpsins færi í bága við skuldbindingar íslenska ríkisins samkvæmt EES-samningnum hefur Strengur aflað sérfræðiálits frá prófessor dr. Carl Baudenbacher, fyrrverandi forseta EFTA-

[5] Sama kemur fram í skýrslu forsætisráðuneytisins um niðurstöðu samráðs sem birtist í samráðsgáttinni.

dómstólsins.[6] Niðurstaða dr. Baudenbacher, sem er ítarlega rökstudd, er í aðalatriðum sú að 10.000 hektara hámarkið feli í sér takmarkanir á frjálsu flæði fjármagns og frelsi til atvinnurekstrar sem ekki verði réttlættar og séu ekki í samræmi við meðalhóf, þar sem vægari úrræði virðist tiltæk og þær forsendur sem ráðherra er ætlað að horfa til eru ekki nægilega nákvæm. Auk þess fari ákvæðin gegn meginreglum um fyrirsjáanleika laga og jafnræði.[7]

Samantekt

Í ljósi alls framangreinds telur Strengur að ákvæði umræddsmálsliðar 10. mgr. fyrirhugaðrar 10. gr. a jarðalaga samrýmist hvorki EES-samningnum né stjórnarskránni né heldur öðrum alþjóðlegum skuldbindingum sem íslensk stjórnvöld hafa undirgengist. Telur Strengur því að eftirfarandi málslið *„Samþykki skal að jafnaði ekki veitt ef viðtakandi réttar og tengdir aðilar eiga fyrir fasteign eða fasteignir sem eru samanlagt 10.000 hektarar eða meira að stærð nema umsækjandi sýni fram á að hann hafi sérstaka þörf fyrir meira landrými vegna fyrirhugaðra nota fasteignar.“* eigi að fella brott úr 10. mgr. fyrirhugaðrar 10. gr. a jarðalaga (8. gr. frumvarpsins).

VII. Skylda til að afla samþykkis ráðherra fyrir ráðstöfun eignarréttar

Almennt um ákvæðið

Eins og rakið er hér að framan er mælt fyrir um það í 8. gr. frumvarpsins að ný grein, 10. gr. a., bætist við jarðalög, þar sem mælt er fyrir um skyldu, í ákveðnum tilvikum, til að afla samþykkis ráðherra fyrir ráðstöfun fasteignar. Tilvikin og undantekningar frá þeim eru rakin í 1.-4. mgr. greinarinnar, en í 9. og 10. mgr. er fjallað um sjónarmið sem ráðherra skal líta til við mat á því hvort samþykki skuli veitt.

Þótt 1. tölul. 1. mgr. greinarinnar vísi til lögbýla, vísa viðmið í 2. tölul. 1. mgr. greinarinnar eingöngu til hektarafjölda, án tillits til þess hvers konar land er um að ræða.

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[6] Álitið er dagsett 15. maí 2020 og er að finna í viðauka við umsögn þessa. Spurningin sem lögð var fyrir dr. Baudenbacher var svohljóðandi: „In your opinion, based on the information provided, does paragraph 10 of Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights? If your answer to the preceding question is yes, please provide details of the issues that are raised.“

[7] Niðurstaða dr. Baudenbacher um ákvæðið er svohljóðandi: „Based on the information provided, paragraph 10 of Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) does raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights. Under the given circumstances, the 10'000 hectares threshold constitutes a restriction of the free movement of capital and an infringement of the freedom to conduct a business. The general aims pursued by the Draft Legislation appear to be legitimate. However, no justification seems possible. Other, less restrictive measures appear to be available. The criteria on which the minister decides are furthermore not precise enough. The rules in question are therefore disproportionate. They also violate the principles of legal certainty and generality or equal treatment.“

Samræmi við alþjóðlegar skuldbindingar og stjórnarskrá

Í frumvarpsdrögunum er fullyrt að efni þeirra sé í samræmi við stjórnarskrá og alþjóðlegar skuldbindingar sem íslensk stjórnvöld hafa undirgengist. Af hálfu Strengs er því aftur á móti haldið fram að engan vegin sé augljóst að fyrirkomulag það sem mælt er fyrir í fyrirhugaðri 10. gr. a jarðalaga, sé í slíku samræmi.

Hvað varðar samræmi við EES-samninginn er ótvírætt að slíkt fyrirkomulag er takmörkun á grundvallarréttindum samkvæmt EES-samningnum, þá sérstaklega réttindum samkvæmt 40. gr. EES-samningsins, sbr. m.a. framangreindar túlkunarleiðbeiningar framkvæmdastjórnar ESB. Eins og fyrr greinir, eru takmarkanir á grundvallarréttindum einungis leyfðar skv. EES-rétti að uppfylltum nokkrum skilyrðum. Í sambandi við fyrirkomulag sem áskilur *fyrirfram gefið samþykki fyrir landakaupum,* eins og hér er gert ráð fyrir, þarf, er jafnframt lögð áhersla á að slíkt fyrirkomulag *„verði […] að byggjast á hlutlægum skilyrðum, sem fela ekki í sér mismunun, og eru fyrirfram gefin þannig að þau takmarki nægjanlega það svigrúm til mats sem stjórnvöld hafa“*[8] og má það ekki *„leyfa handahófskennda ákvörðunartöku af hálfu stjórnvalda“*.[9] Skilyrðin verða enn fremur að vera nákvæm.

Telur Strengur ljóst að þessi skilyrði séu hér einfaldlega ekki uppfyllt. Sjónarmið þau sem fram koma í 9. og 10. mgr. fyrirhugaðrar 10. gr. a eru fjölmörg, afar matskennd, vísa mörg til samræmis við önnur skjöl „eftir því sem við á“, auk þess sem innbyrðis vægi þeirra virðist óljóst, sbr. orðalag 2. málsliðar 9. mgr. „skal ráðherra *einkum* líta til...“. Sjónarmiðin eru þannig ekki sett fram sem hlutlæg skilyrði, þau eru fjarri því að vera nákvæm og byggja alfarið á mati ráðherra án þess að því mati séu settar nokkrar skorður sem einhverju nemi.

Fyrirkomulagið, sem lagt er til, felur þannig í sér að efnislegt inntak ákvæðisins mun í reynd ráðast af því hvernig ráðherra kemur til með að beita reglunum í framkvæmd. Telur Strengur að þetta leiði óhjákvæmilega til þess að beiting þessara ákvæða, verði þau að lögum, og þar með raunverulegt inntak þeirra, verði lítt fyrirsjáanlegt. Þá býður þetta fyrirkomulag jafnframt heim hættu á að samræmis og jafnræðis verði ekki gætt. Slíkt fyrirkomulag telur Strengur ekki vera í samræmi við framangreindar kröfur EES-réttar, auk þess sem það skapar möguleika á handahófskenndri ákvörðunartöku. Í þessu sambandi er sérstakt áhyggjuefni, og vekur reyndar furðu, að ekki virðist vera sérstaklega gert ráð fyrir því að úrskurðir ráðherra samkvæmt lögunum verði birtir opinberlega.

Þannig er það afstaða Strengs að ákvæði 10. mgr. a. liðar 8. gr. frumvarpsins, þ.e. hinnar nýju 10. gr. a, standist engan veginn kröfur EES-réttar, til að réttlætanleg geti verið sú takmörkun grundvallarréttinda sem í því felst. Þaðan af síður er ljóst hvort og þá hvernig

[8] Þýðing undirritaðs á enska textanum í túlkunarleiðbeiningum framkvæmdastjórnar ESB: „it must be based on objective, non-discriminatory criteria known in advance, in such a way to adequately to circumscribe the exercise of the national authorities' discretion.“

[9] Þýðing undirritaðs á enska textanum í túlkunarleiðbeiningum framkvæmdastjórnar ESB: „render legitimate discretionary conduct on the part of the national authorities“.

kröfum um meðalhóf er fullnægt og vísað er til umfjöllunar í VI. kafla hér að framan um hvort skoðað hefur verið hvort önnur vægari úrræði væru tiltæk til þess að ná markmiðunum.

Í fyrrgreindu sérfræðiáliti dr. Baudenbacher, er að finna niðurstöðu hans um hvort, og þá að hvaða leyti, umrætt ákvæði frumvarpsins fari í bága við skuldbindingar íslenska ríkisins samkvæmt EES-samningnum.[10] Niðurstaða dr. Baudenbacher, sem er ítarlega rökstudd, er í aðalatriðum sú að jafnvel þótt fyrirkomulag sem áskilur fyrirfram samþykki fyrir fasteignakaupum kunni að vera lögmætt, almennt séð, þá þurfi þær forsendur, sem ráðherra skal nota til grundvallar ákvörðun sinni, að vera nægilega nákvæmar til að gera aðila kleift að leggja fyrirfram mat á réttarstöðu sína. Það er niðurstaða dr. Baudenbacher að þær forsendur sem er að finna í umræddu ákvæði frumvarpsins séu tæplega nægilega nákvæmar og því byggist þær ekki á hlutlægum skilyrðum sem hægt sé að sannreyna, og gangi því lengra en nauðsynlegt er. Þetta sé ekki aðeins líklegt til að brjóta gegn reglum EES-samningsins um frjálst flæði fjármagns heldur einnig meginreglum um fyrirsjáanleika laga.[11]

Endanleg ákvörðun á stjórnsýslustigi

Telur Strengur einnig nauðsynlegt að benda á, að miðað við fyrirliggjandi frumvarpsdrög er ákvörðun ráðherra, um hvort samþykki sé veitt, endanleg á stjórnsýslustigi. Í því felst að slík ákvörðun verður þar með ekki endurskoðuð á stjórnsýslustigi, heldur verður henni eingöngu skotið til dómstóla, sem þó er óheimilt við slíka endurskoðun að taka nýja stjórnvaldsákvörðun. Málaferli, sem geta tekið einhver ár, eru auk þess ekki mjög hagnýt leið þegar um er að ræða skilyrði fyrir fasteignaviðskiptum. Telur Strengur þetta fyrirkomulag því ekki fela í sér fullnægjandi réttaröryggi. Réttaröryggi aðila í samskiptum við hið opinbera er grundvallaratriði í íslenskum rétti. Þar er heimild til stjórnsýslukæru til að mynda mikilvægt réttarúrræði, en slíkar heimildir grundvallast einkum á sjónarmiðum um aukið réttaröryggi. Enn fremur telur Strengur óheppilegt að slík ákvarðanataka, um réttindi og skyldur aðila í einstökum málum, svo sem hér um ræðir, sé yfir höfuð á

[10] Spurningin sem lögð var fyrir dr. Baudenbacher var svohljóðandi: „In your opinion, based on the information provided, do other changes proposed in Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) requiring ministerial approval to certain land purchases raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights? If your answer to the preceding question is yes, please provide details of the issues that are raised."

[11] Niðurstaða dr. Baudenbacher um ákvæðið er svohljóðandi: „Based on the information provided, the requirement of prior ministerial approval proposed in Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) for certain land purchases may raise issues of compatibility with Iceland's obligations under the EEA Agreement. As a matter of principle, a prior authorisation system may be lawful. However, the criteria according to which the Minister decides must be defined precisely enough to enable an applicant to assess their legal position in advance. The criteria used in the Draft Legislation are hardly sufficiently precise. They are not, therefore based on objective, verifiable conditions. For that reason alone, they go beyond what is necessary This may not only violate the EEA freedom of capital movement, but also the principle of legal certainty."

höndum ráðherra, sem einkum hefur það hlutverk að framfylgja pólitískri stefnumótun, og spurning er hvort ákvörðunartakan ætti ekki fremur að vera hjá öðrum aðila.

Samantekt

Í ljósi alls framangreinds telur Strengur að skoða beri fyrirhugaða 10. gr. a jarðalaga ítarlega, m.a. með tilliti til þess hvort meðalhófs hafi verið gætt.

Yrði slíkt fyrirkomulag um skyldu til afla samþykkis ráðherra fyrir ráðstöfun fasteignar í tilfellunum sem eru tilgreind í greinarinnar talið vera viðeigandi úrræði, telur Strengur að a.m.k. ætti að gera eftirfarandi breytingar:

1. Að skoða sjónarmiðin sem ber að taka mið af við ákvörðunartöku svo að ferlið verði m.a. fyrirsjáanlegt, byggt á hlutlægum skilyrðum sem fela ekki í sér mismunun eða leyfa handahófskennda ákvörðunartöku, og réttarvissa tryggð. Hér er einnig vísað til VI. kafla hér að ofan að því leyti sem skilyrðin fælu í sér hámark varðandi eignarhald.

2. Að ákvörðunartaka sé í höndum annarra aðila en ráðherra. Hér kæmi t.d. til greina óháð nefnd, eða jafnvel viðkomandi sveitarfélag, en skoða þyrfti vel kosti og ókosti við báða möguleika.

VIII. Niðurlag

Með hliðsjón af því sem að framan er rakið er að mati Strengs ljóst að ákvæði frumvarpsins samrýmast hvorki stjórnarskrá né alþjóðlegum skuldbindingum íslenska ríkisins, auk þess sem þau standast m.a. ekki sjónarmið um réttaröryggi og fyrirsjáanleika laga.

Af hálfu Strengs er þó ítrekað að félagið er í grundvallaratriðum sammála, og fagnar, þeim markmiðum sem stefnt er að með breytingum á jarðalögum í þá átt að taka aukið mið af þeim samfélagslegu hagsmunum sem lögunum er ætlað að vernda og telur að slíkar breytingar fari vel saman við starfsemi Strengs. Strengur telur aftur á móti að til þess að ná markmiðum laganna um stjórn á landnotkun, sem og að tryggja fæðuöryggi og sporna gegn spákaupmennsku, væri rétt að skoða úrræði sem ekki væru jafn íþyngjandi og þau úrræði sem lögð eru til í frumvarpinu. Ýmis dæmi um slík úrræði má nefna en þeirra á meðal eru; krafa um að jarðir séu byggðar sé þess kostur; fyrirkomulag sem áskilur samþykki fyrir ráðstöfun eignaréttinda en stenst kröfur EES-réttar; forkaupsréttur sveitarfélaga; kröfur um lágmarks eignarhaldstíma; kvöð um að land sé nýtt á tiltekinn hátt og reglur um skipulag og landnotkun. Ákvæði um einhver þessara úrræða eru þegar í lögum og, líkt og fram hefur komið í máli forsætisráðherra, er lagasetning um einhver þeirra fyrirhuguð. Að mati Strengs væri rétt að skoða nánar, á heildstæðan hátt, hvaða úrræði eru best fallin til að ná þeim markmiðum sem stefnt er að. Nauðsynlegt er þó að tryggja að þetta sé gert án þess að í bága fari við stjórnarskrá og alþjóðlegar skuldbindingar íslenska ríkisins. Eðlilegt væri að þessi vinna ætti sér stað í opnu samráði við alla hagaðila. Stengur myndi fagna tækifæri til að taka þátt í slíkri vinnu.

Að lokum áskilur Strengur sér allan rétt til að koma á framfæri frekari athugasemdum á síðari stigum, eftir því sem þörf krefur.

Virðingarfyllst,
f.h. Veiðiklúbbsins Strengs ehf.,

Gísli Stefán Ásgeirsson,
framkvæmdastjóri og stjórnarmaður

Meðfylgjandi:

1. Sérfræðiálit prófessor dr. Carl Baudenbacher, fyrrverandi forseta EFTA-dómstólsins, dags. 15. maí 2020.

Professor Dr. Dr. h.c. Carl Baudenbacher
Former President of the EFTA Court
Visiting Professor LSE
Sonnenstrasse 5
CHE-9004 St. Gallen

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

Legal Opinion on Draft Amendments to Various Laws Relating to Ownership and Use of Property in Iceland,

150th Parliamentary session 2019–2020,

Parliamentary document 1223 — 715th case,

Governmental bill.

15 May 2020

Table of Contents

A. Facts

I. Draft new legislation

1. The proposed amendments

In the spring of 2020, new legislation concerning ownership and use of property was submitted to the Icelandic Parliament ("Draft Legislation").

Article 5 of the Draft Legislation would amend Article 1 of Act No. 81/2004 (the "Estates Act") setting out the aims of the Estates Act, and defines as aims, first

> "to promote that the use of lands and related rights are organised consistently with the features of the land and with the interests of society and future generations as guiding principles, having regard to the importance of land from economic, social and cultural perspectives".

Therefore, the aim of the Estates Act as to be amended by the Draft Legislation is also

> "to promote diverse and competitive agriculture, conservation, maintenance and development of rural communities and at the same time nationally useful and sustainable land use".

Third, the Estates Act as to be amended by the Draft Legislation is aimed

> "to the extent possible in the implementation [...] that land which is well suited to agricultural production is preserved for such use and that food security is preserved for the future".

Article 8 of the Draft Legislation proposes to insert a new Article 10a into the Estates Act. This provision introduces an obligation to obtain ministerial

approval for transfer of direct property rights or usage rights for a period longer than five years, if:

> "(1) the property is a registered farm (i. lögbýli) and the recipient of the rights and their connected parties already own five or more properties which are registered in the register of registered farms, provided that their combined size is 50 hectares or more, or
>
> (2) the recipient of the rights and their connected parties already own property or properties which are together 1'500 hectares or more in size."

It is furthermore compulsory to obtain ministerial approval for changes to control of a legal entity, which owns one or more properties, if items 1 or 2 apply to the person acquiring control over the legal entity and their connected parties.

When assessing whether approval should be granted, the minister should look in particular to whether the transfer of property and its intended use are consistent with the aims of the Estates Act as defined in Article 1, the relevant municipality's planning plan, the national planning policy and other governmental policy as applicable (paragraph 9). Furthermore, the minister should look to whether the intended use of the property is consistent with its size, location and agronomic conditions, as well as its quality and the property rights that accompany it. The minister shall also look to whether the transfer is suited to strengthening agriculture and occupation in the relevant region, including whether the recipient of the rights intends to have permanent residence at the property or lease it to a competent tenant and, if so, on what terms.

When assessing whether approval should be granted pursuant to paragraphs 1 and 2, the minister must also look to how the recipient of the rights and their connected parties use properties and property rights they already own or have the use of, and how that use relates to those issues listed in paragraph 9.

Pursuant to paragraph 10 of the draft Article 10a, the minister should in general not approve a transfer if the recipient of the rights and related parties already own land of 10'000 hectares or more, unless the applicants can show that they have a special need for more land because of its intended use. The Explanatory Notes state that it must be considered that 10'000 hectares represent approximately 0.4% of the total Icelandic lowlands. Under these circumstances, it is the intention of the Draft Legislation that the minister will only grant approval in exceptional circumstances, i.e. when the recipient of the rights can provide valid, substantive arguments as to why they have a real need for more land than they and connected parties already own or control. According to the Explanatory Notes, this could be the case where, for example, the recipient intends to use the land for agricultural purposes or to lease it to a competent tenant, and other land in their ownership fails to meet these needs. Otherwise, the land already owned by the recipient of the rights and connected parties should generally be considered sufficient, particularly if its size significantly exceeds the size references mentioned above.

According to my instructions, it appears that the Draft Legislation is only the beginning of the Government's intended legislative changes. The report of the Prime Minister's Office summarising the results of the consultation process notes that there is ongoing review of the legal rules relating to ownership and use of property, including consideration of introducing pre-emption rights and/or obligations to occupy land or lease it to a tenant.

2. Characterisation of the proposed amendments

(1) The Draft Legislation first contains a prior approval or prior authorisation requirement for subjects that already own a certain amount of land. The competence to grant the approval lies with the minister.

(2) What is more, the Draft Legislation also fixes a de facto acquisition cap for subjects who already own land of 10'000 hectares or more, as approval may only be granted in exceptional circumstances if the applicant can show that they have a special need or a real need for more land because of the intended

use of the property. According to my instructions, whilst *Halicilla* does not have data about the extent of landownership due to the lack of publicly accessible information, *Halicilla* believes that there are not many other landowners in Iceland who would fall under this clause.

For the sake of order it may be noted that issue (1) above may also be regarded as a form of acquisition cap, given that the criteria for when approval is required are based on ownership of a certain amount of land. For the purposes of this opinion however and to differentiate between the two issues, when referring to issue (1) I refer to it as a prior authorisation requirement, and when referring to issue (2) I refer to it as an acquisition cap.

B. Expert questions

Halicilla seeks advice on the following questions:

> "1. In your opinion, based on the information provided, does paragraph 10 of Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights? If your answer to the preceding question is yes, please provide details of the issues that are raised.
>
> 2. In your opinion, based on the information provided, do other changes proposed in Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) requiring ministerial approval to certain land purchases raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights? If your answer to the preceding question is yes, please provide details of the issues that are raised."

C. Relevant legal framework

I. Preliminary remarks

The restrictions envisaged by the Draft Legislation must be examined for their compatibility with several legal norms and principles of EEA law. First, the free movement of capital under the EEA Agreement may be affected. Moreover, the Draft Legislation must also be assessed as regards its compatibility with general principles of EEA law and EEA fundamental rights. In the latter context, the question arises as to the relevance of the EU Charter of Fundamental Rights for EEA law.

II. Article 125 EEA does not exclude the application of the EEA fundamental freedoms and the prohibition to discriminate

1. General

According to its Article 125, the EEA Agreement

> "shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership".

This provision corresponds to Article 345 TFEU, formerly Article 295 EC. Article 125 EEA limits the applicability of the EEA Agreement to control the way in which the EEA/EFTA States deal with the ownership of property. But it does not exclude its applicability.

2. ECJ case law

In Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV* (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12), Delta NV (C-107/12)[1], Dutch energy law stated that the transfer of shares held in a system operator required the consent of the Minister for Economic Affairs.

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[1] EU:C:2013:677.

That consent had to be refused where the result of such a transfer was that the shares became the property of persons other than the State of the Netherlands, the provinces of the Netherlands or its municipalities, or other specified legal persons, including Essent, all of whose shares were owned, directly or indirectly, by those authorities. The ECJ's Grand Chamber summarised the legal situation in EU law with the following words:

> "29 Article 345 TFEU is an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership.
>
> [...]
>
> 31 It follows that Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.
>
> [...]
>
> 33 It follows that the prohibition of privatisation precludes ownership by any private individual of shares in an electricity or gas distribution system operator active in the Netherlands. Its objective is therefore to maintain a body of rules relating to public ownership in respect of those operators.
>
> 34 Such a prohibition falls within the scope of Article 345 TFEU.
>
> [...]
>
> 36 However, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital (see, to that effect, Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24; Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 64; Case C-271/09 *Commission* v *Poland* [2011] ECR I-13613, paragraph 44; and *Commission* v *Greece*, paragraph 16).

37 Consequently, the fact that the Kingdom of the Netherlands has established, in the sector of electricity or gas distribution system operators active in its territory, a body of rules relating to public ownership covered by Article 345 TFEU does not mean that that Member State is free to disregard, in that sector, the rules relating to the free movement of capital […]."

3. EFTA Court case law

The same principles apply in EEA law.

The EFTA Court made this clear in Norwegian Waterfalls (E-2/06 *ESA v Norway*[2]), a matter of similar relevance for Norway as *Icesave*[3] was for Iceland[4]. In this case, the EFTA Court dealt with the conditions for acquiring rights to waterfalls for energy production. According to Norwegian legislation, public companies were granted concessions for the acquisition of waterfalls for energy production without a time limit. However, other companies, including foreign ones, were only granted concessions for limited periods of time. In addition, all private and foreign companies were subject to the so-called reversion mechanism ("*hjemfall*"), whereby ownership rights to waterfalls and related installations, in particular the power plants, were transferred to the Norwegian State at the end of the concession period without compensation. Referring to alleged fundamental differences between EU law and EEA law and to the Norwegian and Icelandic travaux preparatoires to the EEA Agreement, the Norwegian Government claimed that the rules concerning the system of

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2 [2007] EFTA Ct. Rep. 164.

3 Case E-16/11, *ESA v Iceland*, [2013] EFTA Ct. Rep. 4.

4 See on the significance of the Norwegian Waterfalls case Thomas Chr. Poulsen, Article 125 EEA, in: Arnesen et al., Agreement on the European Economic Area. A Commentary, Baden-Baden 2018, paragraph 10.

property ownership fell outside the scope of the EEA Agreement. It may also be noted that Iceland supported Norway as an intervener.

The EFTA Court rejected the Norwegian position holding:

> "59 The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way. There are certain differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty which may under specific circumstances lead to a different interpretation [...]. Unilateral expressions of understanding of the kind claimed to have been made by Norway and Iceland cannot constitute such circumstances.
>
> 60 The Defendant argues that when assessing whether the contested rules fall under the EEA Agreement it must be taken into account that they govern the management of essential natural energy resources. In that regard, the Court notes that such an interpretation is not supported by the provisions of the EEA Agreement. No provision exempts such rules from the scope of the Agreement. On the contrary, Article 73(1)(c) EEA provides that the Contracting Parties shall in their actions relating to the environment pursue the objective of ensuring a prudent and rational utilisation of natural resources.
>
> 61 There are no specific circumstances in the case at hand which would warrant an interpretation of Article 125 EEA different from the interpretation of Article 295 EC. Since Articles 125 EEA and 295 EC are identical in substance for the purpose of the case at hand, the case law of the ECJ on Article 295 EC is of relevance when interpreting Article 125 EEA.

> 62 It follows from the case law of the ECJ on Article 295 EC that Article 125 EEA is to be interpreted to the effect that, although the system of property ownership is a matter for each EEA State to decide, the said provision does not have the effect of exempting measures establishing such a system from the fundamental rules of the EEA Agreement, including the rules on free movement of capital and freedom of establishment (see for comparison Cases C-452/01 *Ospelt v Schlössle Weissenberg* [2003][5] ECR I-9743, at paragraph 24; C-302/97 *Konle* [1999] ECR I-3099, at paragraph 38 and 182/83 *Fearon* [1984] ECR 3677, at paragraph 7)."

The EFTA Court thus concluded that Article 125 EEA was to be interpreted to the effect that an EEA State's right to decide whether hydropower resources and related installations are privately or publicly owned remains, as such, unaffected by the EEA Agreement. Consequently, Norway could legitimately pursue the objective of establishing a system of public ownership over these properties, provided that this was done in a non-discriminatory and proportionate manner[6]. However, for the Norwegian concession regime, with reversion to the State as an essential part of it, to qualify as aiming at establishing a "system of property ownership" within the meaning of Article 125 EEA,

> "that regime must aim at attaining a situation where, as a matter of principle, the assets at issue are owned by public entities. A regime which merely brings or keeps this class of assets predominantly under public ownership, while at the same time leaving it to the discretion of the relevant authorities whether private ownership of the assets should be re-established, cannot be said to aim at establishing a system of property ownership under Article 125 EEA. Rather, such a regime aims

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5 Recte: *Ospelt and Schössle Weissenberg.*

6 Paragraph 72.

> at achieving a certain level of public control of the relevant sector of the economy – by means of securing public ownership of most of the relevant assets."[7]

It follows that public ownership of assets is in it itself unproblematic under the EEA Agreement.

> "However, the way in which public ownership is established and conducted must be compatible with other provisions of the Agreement"[8],

that means in particular with the fundamental freedoms, the prohibitions to discriminate, the fundamental rights and the general principles.

III. Free movement of capital under the EEA Agreement

1. Identity in substance of EEA and EU law

Article 40 EEA is based on the former Article 67(1) EEC, the provision that applied in the European Community before the Maastricht Treaty entered into force on 1 November 1993. Article 67 was replaced by Article 73b EC. This provision has since been renumbered. It is now Article 56 of the Treaty on the Functioning of the European Union ("TFEU"). Thus, although the parallel provision of Article 40 EEA has been amended several times and although it was given a special context with the introduction of the EURO, both the EFTA Court and the ECJ have consistently held that the provisions are essentially identical in content[9]. Norwegian Supreme Court Justice and former EFTA Court

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7 Paragraph 73.

8 Poulsen, loc . cit., paragraph 6.

9 See for example Cases E-1/00 State Debt Management Agency v Íslandsbanki-FBA hf., [2000-2001] EFTA Ct. Rep. 8, paragraph 16; C-452/01 Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, EU:C:2003:493, paragraphs 28, 29 and 32; C-244/15 Commission v Greece, EU:C:2016:359, paragraph 48; E-1/04 Fokus Bank ASA and The Norwegian State, represented by Skattedirektoratet

Judge *Henrik Bull* speaks very graphically of the fact that it has been possible to bridge the "generation gap" between the EEA Agreement and the TFEU regarding the free movement of capital[10].

2. Irrelevance of the absence of a CAP under the EEA Agreement

Agriculture is in principle excluded from the scope of the EEA Agreement. There is no Common Agricultural Policy ("CAP") in the EEA. However, this does not alter the fact that trade in agricultural land is subject to the fundamental freedoms of the EEA Agreement and the general principles of EEA law. In ECJ C-452/01 *Margarethe Ospelt*, a case involving the transfer of agricultural land in Austria from a Liechtenstein national to a legal person, the Austrian Government argued that the EEA Agreement was not relevant because agricultural policy did not fall within the scope of the EEA Agreement[11]. The ECJ did not address the issue, but just applied the provisions on free movement of capital of the EEA Agreement to a cross-border case involving a Liechtenstein citizen and Austrian authorities. In the present context, this means, *inter alia* that the Interpretative Communication of the European Commission on the Acquisition of Farmland in EU law of 12 October 2017 is, under the principle of homogeneity, also relevant for the interpretation of EEA law[12].

(the Directorate of Taxes), [2004] EFTA Ct. Rep. 11, paragraph 23; E-10/04 Paolo Piazza, [2004] EFTA Court Report, 76, paragraph 33.

10 Article 40 Free movement of capital, in: Arnesen et al., Agreement on the European Economic Area. A Commentary, Baden-Baden 2018, paragraphs 1 et seqq.; see also *Dirk Buschle*, The Free Movement of Capital in the EEA – A *Lehrstück* in Homogeneity, in Monti/von Liechtenstein/Vesterdorf/Westbrook/Wildhaber, Eds., Festschrift for Carl Baudenbacher, 2007, 75 et seqq., 82 et seqq.

11 See Opinion of Advocate General *Ad Geelhoed*, EU:C:2003:493, point 64.

12 O.J. C 350/5 of 18 October 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1018(01)&from=EN.

IV. EEA law general principles and fundamental rights

1. General

According to recital 1 of the preamble, the Contracting Parties to the EEA Agreement were convinced

> "of the contribution that a European Economic Area will bring to the construction of a Europe based on peace, democracy and human rights".

Human rights are synonymous with fundamental rights. At the first available opportunity, the EFTA Court in Case E-8/97 *TV 1000 Sverige AB v The Norwegian Government represented by the Royal Ministry of Cultural Affairs* acknowledged the existence of EEA fundamental rights. The EFTA Court noted that the European Convention on Human Rights and the case law of the European Court of Human Rights are important sources of knowledge in this regard[13]. It should not be omitted here that the Icelandic EFTA Court Judge and later President *Thór Vilhjálmsson*, who (with the consent of the EEA/EFTA governments) was at the same time a Judge at the European Court of Human Rights, acted as a Judge Rapporteur in this.

In paragraph 123 of its landmark judgment in Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*, the EFTA Court summarised its case law on fundamental rights in the following way:

> "Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the

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[13] [1998] EFTA Ct. Rep. 68; see also Cases E-2/03 Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson, [2003] EFTA Ct. Rep. 185, paragraph 23; E-15/10 Posten Norge AS v EFTA Surveillance Authority, [2012] EFTA Ct. Rep. 246, paragraphs 85 et seqq.; Case E-14/11 DB Schenker v EFTA Surveillance Authority, [2012] EFTA Ct. Rep. 1178, paragraph 78; Joined Cases E-3/13 and E-20/13 Fred. Olsen and Others v the Norwegian State Olsen and Others, [2014] EFTA Ct. Rep. 400, paragraph 226.

scope of these fundamental rights [...]. The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights."[14]

2. Legal certainty in particular

The principle of legal certainty requires that those subject to the law must know what the law is in order to plan their actions accordingly. The aim of the principle is to ensure that situations and legal relationships governed by EEA law remain predictable. Legal rules must be sufficiently clear and precise so that citizens and economic operators can determine their legal position[15]. Legal certainty protects those subject to the law from arbitrary exercise of public authority. Former European Court of Human Rights Judge and Vice-President *András Sajó* and Professor *Renáta Uitz* have aptly stated in that regard:

"Lack of legal certainty equals arbitrariness."[16]

In Case E-1/04 *Fokus Bank ASA*, an imputation tax credit for withholding tax on dividends was only granted to tax payers resident in Norway, but not to tax payers resident in other EEA Contracting Parties (in the case at hand Germany and the UK). The EFTA Court held that

"Article 40 EEA precludes legislation whereby shareholders resident in a specific Contracting Party are granted a tax credit on dividends

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14 [2016] EFTA Ct. Rep. 240.

15 See *Páll Hreinsson*, General Principles, in: The Handbook of EEA Law (Baudenbacher Ed.), Springer 2016, 349 et seqq., 371 et seqq.

16 *András Sajó/Renáta Uitz*, The Constitution of Freedom, The Constitution of Freedom: An Introduction to Legal Constitutionalism, Oxford 2017, 310, emphasis added.

paid by a company resident in that Contracting Party, whereas non-resident shareholders are not granted such a tax credit. Whether the taxpayer is resident in another Contracting Party which, in a tax agreement with the Contracting Party wherein the dividend is distributed, has undertaken to grant credit for withholding tax, or whether the taxpayer in the specific case actually is granted, or will be granted, credit for the withholding tax, is of no legal significance.[17]"

The EFTA Court added that also the principle of legal certainty

> "would require that the granting, or not, of an imputation tax credit to a non-resident shareholder, may not depend on whether a tax credit is granted in his or her state of residence in respect of dividend payments"[18].

In Case E-9/11 *ESA v Norway* ("Regulated Markets"), the EFTA Court held that where

> "the acquisition of shareholdings and the exercise of voting rights above a certain threshold are based on exceptions to main rules that provide for an outright ban, legal certainty calls for those exceptions to be sufficiently clear and precise"[19].

The principle of legal certainty does not preclude the conferral of discretionary powers on the competent authorities. However,

> "a system of prior administrative approval must be based, as a general rule, on objective, non-discriminatory criteria which are known in advance to the undertakings concerned. All persons

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17 Operative part.

18 Fokus Bank ASA and The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes), [2004] EFTA Ct. Rep. 11, paragraph 37.

19 [2012] EFTA Ct. Rep. 442, paragraph 99.

affected by a restrictive measure of that type must have a legal remedy available to them […]. In the light of those requirements, the Court holds that the latitude of the discretion and the uncertainty of the scope of the exemption laid down in the […] [relevant Norwegian legislation] entail an interference with the principle of legal certainty."[20]

3. Generality and equality

(1) General

According to my instructions, *Halicilla* believes that there are not many other landowners in Iceland who would fall under the 10'000 hectares acquisition cap in paragraph 10 of the draft Article 10a. As the provision was added to the Draft Legislation after the original draft of the Draft Legislation was presented for public consultation, one wonders if it is specifically directed against *Halicilla* notwithstanding its general wording.

Since antiquity, it is commonly accepted that a law can only exist if it is generally applicable. Generality is the essential characteristic of the law[21]. This remains unchanged today. Generality is probably the most important feature of the rule of law in a democratic constitutional state. University of Iowa constitutional law professor *Paul Gowder* has summarised this with the words:

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[20] Loc. cit., paragraph 100, emphasis added. See furthermore with regard to legal certainty Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil ASA and Finnfjord Smelteverk AS, Prosessindustriens Landsforening and others and The Kingdom of Norway v EFTA Surveillance Authority*, [2005] EFTA Ct. Rep. 117, paragraph 163; Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority*, [2011] EFTA Ct. Rep. 16, paragraph 156; Joined Cases E-10/11 and E-11/11 E-10/11 and E-11/11 *Hurtigruten ASA, The Kingdom of Norway v EFTA Surveillance Authority*, [2012] EFTA Ct. Rep. 758, paragraph 280.

[21] See, for example, *Bernard Yack*, Natural Right and Aristotle's Understanding of Justice, Political Theory, Vol. 18, No. 2 (May, 1990), 216 et seqq.

> "The principle that the law must be general — that it must apply equally to all — is often said to be a fundamental demand of legal morality, associated with the ideal of the rule of law."[22]

A law that is not characterized by generality, but that singles out individual subjects from the generality of all subjects and puts them in the line of fire, is, as a matter of principle, not a law.

(2) European perspective

The principles of generality and equality are the foundation on which the legal systems of the Council of Europe, the EU and the EEA are built.

As far as the European Human Rights Convention and the case law of the European Court of Human Rights is concerned, the Dutch lawyer *Geranne Lautenbach* wrote in 2016 in a book based on her Ph.D. thesis that generality is

> "one of the requirements of legality. Generality is a basic characteristic of law. Law consists of rules that can direct the behaviour of people, and rules must be general to fulfil this function".

The author added that generality is

> "an element of the rule of law concept in the context of the Convention, given that the ECtHR has noted that the prohibition of discrimination and equality before the law are elements of the rule of law."

Equality before the law is according to *Lautenbach*

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[22] https://lsolum.typepad.com/legaltheory/2013/01/gowder-on-the-generality-of-law-equality.html.

> "the procedural counterpart of the generality requirement, because law can only be equally applied if it is general, so as to apply in more cases."

National legislation must take differences into account, but differences must have an

> "objective and reasonable justification, pursue a legitimate aim and be proportionate and consistent with the principles normally upheld in democratic societies"[23].

Equality means absence of discrimination. The late German international law Professor *Karl Josef Partsch* called the ban on discrimination the negative formulation of the principle of equality before the law[24].

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

> "Everyone is equal before the law."

The same or a similar provision can be found in most modern Western constitutions. Moreover, Article 21(2) of the EU Charter of Fundamental Rights 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,

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[23] *Geranne Lautenbach*, The Concept of the Rule of Law and the European Court of Human Rights, Oxford 2016, 112.

[24] *Karl Josef Partsch*, Discrimination, in: Macdonald/Matscher/Petzold, Eds., The European System for the Protection of Human Rights, Dordrecht 1993, 571 et seqq., 575.

> "the principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and that different treatment is objectively justified"[25].

The equality principle is also embodied in the EEA Agreement. It is of such importance for the functioning of the EEA single market that it is protected twofold. First, equality is guaranteed in numerous written provisions of EEA law such as recitals 4 and 15 of the preamble to the EEA Agreement and Article 1 EEA. Second, the EFTA Court, following the ECJ, has recognised an unwritten general legal principle of equality. The other side of the coin is the prohibition to discriminate, which is inherent in the fundamental freedoms and has moreover been laid down in a special provision, Article 4 EEA[26].

(3) German and Austrian law

Article 19(1) of the German Basic Law ("*Grundgesetz*") states:

> "*Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muss das Gesetz allgemein und nicht nur für den Einzelfall gelten. Ausserdem muss das Gesetz das Grundrecht unter Angabe des Artikels nennen.*"
>
> "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears."

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25 C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*, EU:C:2013:598, paragraph 50 and case law cited ; see with regard to the EU Charter also infra, C. IV.

26 See, for example, *Páll Hreinsson*, General Principles, in: Baudenbacher, Ed., The Handbook of EEA law, 2016, 349 et seqq.; *Magnus Schmauch*, Equality, in: Carl Baudenbacher, ed., The fundamental principles of EEA law: EEA-ities, Springer 2017, 215 et seqq.

The German Federal Constitutional Court held in *BVerfGE* 25, 371, 399 (*Lex Rheinstahl*):

> „*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 specification 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.[27]”

The Austrian Constitutional Court held in 1956 that under Austrian constitutional law, ad hoc legislation that lacks generality 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[28].

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27 Unofficial translation, emphases added.

28 VfSlg 3118/1956.

(4) Comparison: U.S. law

From a comparative law perspective, it should be noted that the U.S. federal courts ultimately apply the same principles of non-discrimination and proportionality as EU and EEA law when it comes to the admissibility of laws that single out individuals or groups. The decisive factor is whether the different treatment is objectively justified and necessary[29].

V. Relevance of the EU Charter of Fundamental Rights in EEA law

1. The issue

EEA law contains (unwritten) fundamental rights and the European Human Rights Convention and the case law of the European Court of Human Rights are relevant for the interpretation of these rights[30]. However, the question has arisen whether the EU Charter of Fundamental Rights is applicable in EEA law. From an orthodox-dualistic point of view, it could be argued that the three EEA/EFTA States are members of the Council of Europe and have a judge in the European Court of Human Rights. In contrast, they were not involved in any way in the creation of the EU Charter. This could mean that the EU Charter would be of no relevance for the interpretation of EEA law.

However, this argument would overlook that the question of the EU Charter's relevance for the interpretation of EEA law is by no means a new problem. The EFTA Court has early on addressed the problems arising from the fact that the

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29 See, for example, *Kenneth M. Murchison*, Liability Under the Oil Pollution Act: Current Law and Needed Revisions, 2011 Louisiana Law Review, 917 et seqq.; *Wilson C. Freeman*, *Huawei v. United States*: The Bill of Attainder Clause and Huawei's Lawsuit Against the United States, Congressional Research Service 7-5700, www.crs.gov, LSB10274.; *Vicky C. Jackson*, Pockets of proportionality: choice and necessity, doctrine and principle, in: Comparative Judicial Review, ed. by Erin F. Delaney and Rosalind Dixon, Edward Elgar Publishing 2018, 357 et seqq., 362 et seqq.

30 See supra, C. III.

EU amends its treaties while the EEA Agreement remains unchanged (problem of the "widening gap"). The EFTA Court proceeded on a case-by-case basis[31]. On the one hand, it was guided by the consideration that the EEA/EFTA States want to adhere to the principle of dynamic homogeneity even in such a situation. On the other hand, despite occasional calls in this direction, it has proven impossible to adapt the EEA Agreement to new developments in the EU[32]. In Case E-4/04 *Pedicel AS and Sosial- og helsedirektoratet (Directorate for Health and Social Affairs)*, the EFTA Court held that the fundamental goal of creating a dynamic and homogeneous European Economic Area

> "may make a dynamic interpretation of EEA law necessary"[33].

2. The EFTA Court's approach

It has been suggested that a distinction should be made between Charter rights that correspond to rights guaranteed by the European Human Rights Convention ("ECHR") and Charter rights that do not correspond to rights guaranteed under the ECHR. Whereas rights of the first category may be taken over directly, the reliance on rights of the second category should be determined on a case-by-case-basis[34]. The EFTA Court has been doing just that.

Before I go into this, I would like to stress, for the sake of order, that the fundamental right of equality that is now enshrined in Article 20 of the EU

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31 See *Carl Baudenbacher*, Der EFTA-Gerichtshof, das EWR-Abkommen und die Fortentwicklung des EG-Vertrags, Festschrift für Herbert Batliner, Vaduz 2004, 97 et seqq.

32 See, for example, *Halvard Haukeland Fredriksen*, The EFTA Court, in: Robert Howse/Hélène Ruiz-Fabri/Geir Ulfstein/Michelle Q. Zang, Eds., The Legitimacy of International Trade Courts and Tribunals, Cambridge 2018, 138 et seqq., 165 et seqq.

33 [2005] EFTA Ct. Rep. 1, paragraph 28.

34 *Nils Wahl*, Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights, in: Baudenbacher/Speitler/Palmarsdóttir, Eds., The EEA and the EFTA Court. Decentred Integration, Hart Publishing 2014, 281 et seqq., 294 et seqq.

Charter – the other side of which is the prohibition of discrimination – is merely a codification of previous ECJ case law. This fundamental right naturally is also part of EEA law[35].

In E-4/11 *Arnulf Clauder*, a case on family reunification under the EU Citizenship Directive 2004/38/EC, the EFTA Court referred to the right to respect for private and family life laid down in Article 8(1) ECHR and added in *dicta*:

> "The Court notes that in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights."[36]

The Icelandic Government directly invoked Articles 31 and 34 of the Charter in E-12/10 *ESA v Iceland*, the *Icelandic Posting of Workers* case. Referring to Article 9 TFEU and Article 31 of the Charter, Iceland argued

> "that it would be unacceptable as a matter of both national policy and EEA law that workers be afforded less protection under EEA law than under EU law[37]."

Article 9 TFEU reads:

> "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."

Article 31 of the Charter, which does not appear to correspond to a comparable provision of the ECHR, states under the heading "Fair and just working conditions":

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35 See supra, C. III. 3.

36 [2011] EFTA Ct. Rep. 216, paragraph 49.

37 Case [2011] EFTA Ct. Rep. 117, Report for the Hearing, paragraphs 89 and 125.

> "1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
>
> 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

Article 34 of the Charter, which does not appear to correspond to a comparable provision of the ECHR, states under the heading "Social security and social assistance"

> "Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices."

The EFTA Court did not address the issue.

In its first *DB Schenker* judgment of 21 December 2012, the EFTA Court acknowledged a right to access to documents. It held at paragraph 118:

> "Rules on access to documents are an embodiment of the principles of transparency and good administration common to, and fostered by, the democratic traditions of the EEA/EFTA States. Furthermore, as the Court has previously held, the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA"[38].

Article 42 of the EU Charter, which states under the title "Right of access to documents":

> "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access

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[38] [2012] EFTA Ct. Rep. 1178.

> to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium",

was not even mentioned. However, an eventual gap between EU and EEA law had not only been bridged[39]. In substance, the EFTA Court went – in good Nordic tradition – even further than the ECJ[40].

3. Freedom to conduct a business in particular

In its 2017 Interpretative Communication on the Acquisition of Farmland in EU law, the European Commission observes that in EU law, in a case with the features of the present one, the EU Charter of Fundamental Rights could come into the play. With regard to acquisition caps, Article 16 of the Charter should be considered in particular, which provides that the

> "freedom to conduct a business in accordance with Union law and national laws and practices is recognised".

As the Commission emphasised, this fundamental right also protects the freedom of contract. Article 16 of the Charter has codified ECJ case law, which recognised the freedom to exercise an economic or commercial activity[41].

The relevance of Article 16 of the EU Charter in EEA law has been addressed by the EFTA Court in Case E-14/10 *Enes Deveci and Others vs. Scandinavian Airlines System Denmark-Norway-Sweden* ("*SAS*"), a transfer of undertakings case. The question arose whether the transferee was bound by a collective agreement concluded by the transferor. The ECJ had dealt with this issue in Cases C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*[42] and C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd.* In *Deveci*,

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39 *Fredriksen*, The EFTA Court, loc. cit., 165 f.

40 See Carl Baudenbacher, Judicial Independence. Memoirs of a European Judge, Springer 2019, 221 f.

41 https://fra.europa.eu/en/eu-charter/article/16-freedom-conduct-business.

42 EU:C:2006:168.

the defendant *SAS* argued for an interpretation of the Directive in accordance with Article 16 of the EU Charter in line with the principle of homogeneity[43]. The Commission recalled that in C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd.* the ECJ ruled that Article 3 of the Transfer of Undertakings Directive 2001/23/EC[44], which aims to safeguard the interests of employees in the event of transfer of an undertaking, must be interpreted in accordance with Article 16 of the Charter[45]. In fact, the ECJ had in paragraph 25 of the *Alemo-Herron* judgment (with regard to the previous Directive 77/187, which was identical in content in this respect) stated that the question was not only to protect the interests of employees in the event of a transfer of an undertaking. A fair balance between the interests of these employees on the one hand and those of the transferee on the other hand had also to be guaranteed. In particular, the transferee must be in a position to make the adjustments and changes necessary for the continuation of his business. In ESA's view, the right to conduct a business

> "is safeguarded in the EEA irrespective of the Charter's provisions. One of the main objectives of the EEA Agreement is to contribute to trade liberalisation and to the fullest possible realisation of the four freedoms, for which the right to conduct a business is an indispensable prerequisite"[46].

The Norwegian Government submitted that an automatic application of the Charter would challenge State sovereignty and the principle of consent as the source of international legal obligations. Article 16 of the Charter was said to provide for fundamental rights beyond those common to the EEA States. Caution was therefore warranted

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43 Paragraph 40.

44 O.J. L 82 of 22 March 2001, 16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0023.

45 EU:C:2013:521.

46 Paragraph 52.

> "in equalling the scope of Article 16 of the Charter with fundamental rights common to the EEA States[47]".

The EFTA Court held in paragraph 63 of its *Deveci* opinion:

> "In the interest of the employees, a national rule may give continued effects to a collective agreement in order to avoid a rupture of the framework governing the employment relationship. In that case, it must be assessed whether such a rule complies with the main objective of the Directive. That objective is to ensure a fair balance between the interests of the employees and those of the transferee. The transferee must be in a position to make adjustments and changes necessary to carry on its operations (compare, to that effect, Alemo-Herron and Others, cited above, paragraph 25). Since continued effects applicable after the expiration of a collective agreement limit the freedom of action of the transferee, such a national rule must be limited in its duration. Otherwise, it would bind the transferee indefinitely."

In paragraph 64, the EFTA Court added that it found

> "no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices".

Academic literature has understood the message. The current President of the Norwegian Competition Appeals Tribunal, Dr. *Karin Fløistad*, stated that

> "it may be argued that the EFTA Court gave effect to this provision [sc. Article 16] also in the EEA [...]. It is difficult to understand the

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47 Paragraph 44.

> statement made by the EFTA Court other than an implicit recognition of Article 16 of the Charter also in the EEA"[48].

University of Bergen Professor *Halvard Haukeland Fredriksen* concluded that the EFTA Court recognised the freedom to conduct a business. Mr. *Fredriksen* agrees that the final proof that the EFTA Court's approach was legitimate is that its decision has been accepted[49]. Opposition to the *Deveci* jurisprudence of the EFTA Court has in fact not formed.

The Icelandic Judge and now President of the European Court of Human Rights *Robert Spano* observed that in *Deveci*, the EFTA Court has

> "perhaps prudently, found a way to evade addressing the issue of the normative impact of the EU Charter for EEA fundamental rights".

However, President *Spano's* further remarks make it quite clear that in his view, from the point of view of homogeneity, the freedom under Article 16 of the Charter must be deemed to be part of EEA law[50].

The freedom to conduct a business is fundamental of any economic system that is based on market freedoms. There are no reasons to assume that this fundamental right should not be part of EEA law. As noted by Italian researcher *Eleonora Pettinelli,* rather than wondering why the EFTA Court should refer to EU Charter rights, it seems more appropriate to ask why not[51]. The fundamental right of freedom to conduct a business, protects: (i) the freedom

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48 The EEA Agreement in a Revised EU Framework for Welfare Services, Springer, 2018, 21.

49 The EFTA Court, in: Robert Howse/Hélène Ruiz-Fabri/Geir Ulfstein/Michelle Q. Zang, Eds., The Legitimacy of International Trade Courts and Tribunals, Cambridge 2018, 138 et seqq., 165 et seqq.

50 The EFTA Court and Fundamental Rights, European Constitutional Law Review, 13: 475 et seqq., 480 et seqq., (2017).

51 The inter-courts interaction in Europe: the fruitful dialogue between the CJEU and the EFTA Court, Master thesis LUISS, 2018/2019, 124, http://tesi.luiss.it/25399/1/634312_PETTINELLI_ELEONORA.pdf.

to exercise an economic or commercial activity, (ii) the freedom of contract, (iii) the freedom to compete[52]. These freedoms are at the core of the economies of all the Contracting Parties to the EEA Agreement, both in the EU pillar and in the EFTA pillar. It is inconceivable how the EEA could function without these freedoms. One should finally not overlook that the EFTA Court considered the freedom to run a business so important that it mentioned it as one of four indicators in the *rubrum* of its *Deveci* decision.

D. Assessment

I. General

It is generally recognised that agricultural land is a scarce and special resource, which deserves special protection for a number of reasons. EU and EEA/EFTA Member States have the right to restrict the sale of agricultural land in order to pursue legitimate goals of overriding public interest. A number of EU and EEA/EFTA States have restricted the acquisition of agricultural land. However, foreign investment is also an important source of capital, technology and knowledge that can help increase agricultural productivity and facilitate access to finance for local businesses. EU rules on the free movement of capital as well as fundamental rights apply with the aim of ensuring cross-border investment[53].

It appears that in 2015/2016, the European Commission initiated or considered initiating infringement proceedings against several "new" Member States, not only Latvia, but also Bulgaria, Hungary, Lithuania and Slovakia. These countries allegedly discriminate against investors from other EEA Contracting Parties and/or impose disproportionate restrictions on cross-border investments. These cases prompted the Commission to issue the

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52 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf.

53 See the European Commission' Interpretative Communication on the Acquisition of Farmland in EU law, foreword.

Communication of 28 October 2017 on the measures allowed to restrict the sale of agricultural land. Under the principle of homogeneity, this communication is also relevant in EEA law.

II. De facto 10'000 hectares acquisition cap

1. Restriction on the free movement of capital and the freedom to conduct a business

(1) General

By stating that those who already own 10'000 or more hectares of agricultural land can only purchase further land in exceptional circumstances (paragraph 10 of Article 10a), the Draft Legislation restricts the free movement of capital guaranteed by Article 40 EEA and the freedom to conduct a business, a fundamental freedom under EEA law. Part of the right to conduct a business is the freedom of contract. As a matter of EEA law, such a restriction is only lawful if it is not discriminatory, justified by a legitimate overriding public interest, suited to attaining the objective sought, consistent with other measures taken, does not go beyond what is necessary to achieve that objective and cannot be replaced by less restrictive alternative means[54].

Pursuant to the Draft Legislation, ministerial approval can only be granted if the applicant can demonstrate that they have a "special" or a "real need" for more land because of its intended use. The applicant must have "valid, substantive arguments" as to why they have a real need for more land. As a rule, the land already owned should be considered "sufficient", particularly if its size significantly exceeds the 10'000 hectares.

According to my instructions, *Halicilla* believes that the de facto acquisition cap may not only affect its ability to purchase more property, but also to carry out its business as it has carried it out in the past. More specifically, one of

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[54] See, for example, Case E-8/11 *ESA v Norway* ("Regulated Markets"), [2012] EFTA Ct. Rep. 442, paragraphs 79 et seqq.

Halicilla's majority-owned subsidiaries, *Strengur*, is in the business of renting rivers from river associations in order to sell fishing licences to fishermen. As *Halicilla's* group owns more than 10'000 hectares, *Strengur* may be prevented by the provision from renting rivers for longer than 5 years. *Strengur's* competitors however are unlikely to be subject to such a restriction. In other words, *Halicilla's* actual business model could be compromised.

(2) Discrimination

All over Europe, the expansion of government tasks has generally resulted in an increase in targeted legislation, which singles out individuals or group of individuals and subjects them to special treatment[55]. In EU and EEA law terms, the 10'000 hectares threshold amounts to covert discrimination. It appears to be a neutral provision affecting all legal entities in the same way. However, in reality it probably only affects a few entities. In fact, this cannot have escaped the attention of those who drafted the provision, not least because of media coverage, that it is aimed at a particular operator, namely *Halicilla*.

The prohibition of discrimination which is inherent in Article 40 EEA is relevant in respect of the 10'000 hectares acquisition cap. There is no obvious objective reason for distinguishing between purchasers who own fewer than 10'000 hectares and those who own over 10'000 hectares.

2. Justification

(1) General

In its 2017 Interpretative Communication on the Acquisition of Farmland in EU law, the European Commission has dealt with national limits on the size of land that can be acquired or held. As said before, such caps constitute restrictions on the free movement of capital and on the freedom to conduct a business. The Commission has so far taken note of two types of such measures:

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[55] See *Lautenbach*, loc. cit., 112.

— the requirement of specific authorisation by a regulatory authority for acquisitions above a certain size;

— absolute ceilings[56].

Since agricultural land is a scarce resource, acquisition caps may be justified by a legitimate public interest or policy reasons. If there were a legitimate objective, the question would arise whether the (factual) cap would be proportionate. That means, in particular, that it would have to be examined whether the measure does not go beyond what is necessary and whether it can be replaced by less restrictive alternative means. Proportionality is a general principle of EEA law. But there is no difference in substance between EU and EEA law in this respect.

The Commission has noted that the proportionality of acquisition caps "may be questionable"; the justification and proportionality of such caps must therefore be assessed in each national context and in the light of all the factual and legal circumstances of the individual case. The Commission states in this respect that

> "the assessment will also heavily depend on whether the national rules are based on objective and well-defined criteria and whether the means of judicial redress for the individuals concerned are provided for"[57].

The freedom to conduct a business is not an absolute right either. Article 52(1) of the EU Charter states that

> "rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties".

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56 Interpretative Communication on the Acquisition of Farmland in EU law, 4. h.

57 Interpretative Communication on the Acquisition of Farmland in EU law, 4. h., emphasis added.

Thus, the freedom to conduct a business may be subjected to legitimate restrictions provided they are in the general interest pursued by the EU and do not constitute disproportionate interferences in relation to the aim pursued. The test is largely the same as in the case of a restriction of a fundamental freedom.

The European Agency for Fundamental Rights has stated in that regard:

> "Such restrictions have been imposed on the freedom to conduct a business to ensure public safety, public health, in the context of the fight against terrorism, sanctions in the framework of the Common Foreign and Security Policy, but particularly often in relation to fundamental freedoms such as free movement of goods and services. More particularly, when establishing the competition rules necessary for the functioning of the internal market, the EU adopts many rules that are claimed to limit business activity by their very nature […]. Hence, to safeguard the fundamental freedom to conduct a business, it is essential that the relevant competition law as well as its application by the authorities charged with its implementation is subject to effective judicial control, to ensure that the restriction is proportionate and does not go beyond what is necessary to achieve the aim: a free internal market."[58]

These considerations will also be relevant for the freedom to conduct a business under EEA law.

(2) Legitimate overriding public interest

As far as the legitimate overriding interest is concerned, the commonplace goals stated in the Draft Legislation could theoretically be legitimate reasons, although there would have to be a connection between the specific situation in Iceland and the steps being taken. The unspoken argument that the aim

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[58] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf.

here is to prevent a wealthy foreigner who already "owns sufficient land" from acquiring even more land, is inefficient.

Furthermore, assuming that the aims stated in the Draft Legislation may be legitimate, assessment would need to be made as to whether the acquisition cap is suitable and necessary for achieving those aims, i.e. whether the measure is proportionate.

(3) Proportionality

Whether an acquisition cap is suitable to achieve the aims set out in the Draft Legislation is doubtful. There is no indication that a particular land-use or food security is guaranteed by preventing a willing buyer from acquiring land.

It is further striking that the Draft Legislation does not distinguish between different types of land, with highland pastures and long abandoned estates equally counted as cultivated farmland for purchase. Furthermore, the provision of example makes no explicit reference to circumstances other than agriculture that could be a legitimate reason for needing or wanting additional land, such as nature conservation or tourism.

On the basis of the aims to have oversight and control over land-use, and ensure food security, a drastic acquisition cap does not appear to be necessary. Less restrictive measures such as prior notification, prior authorisation requirements or obligations to use the land in a particular manner are available[59]. Indeed, it seems that such measures are already either included elsewhere in the Draft Legislation or are under consideration by the government for future legislation.

Accordingly, it cannot be seen that the acquisition cap is proportionate.

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[59] Infra, D. III.

(4) Burden of proof

According to settled case law, both in EU and EEA law, the burden of proof is primarily on the Member State to justify a restriction to a fundamental freedom. This has been summarised by Advocate General *Eleanor Sharpston* in her opinion in C-400/08 *Commission of the European Communities v Kingdom of Spain* where she stated:

> "Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question."[60]

3. Legal certainty

As noted above[61], the assessment will also heavily depend on whether the national rules are based on objective and well-defined criteria. In the present case such objective and well-defined criteria are lacking. This also undermines the available legal remedies.

The criteria given for an exception to acquire land beyond 10'000 hectares are immensely vague: There is neither an indication of what a special need is nor what a real need is. The relevant texts also fail to say what is meant by the term "far more than 10'000 hectares" and according to which standard an applicant is deemed to already own "sufficient" land. The latter notion does

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60 EU:C:2011:172, paragraph 89.

61 Supra, A. I. 1.

not fit in an economy which is based on market freedoms. It is a completely subjective criterion that opens the door to arbitrary decisions.

This vagueness is even more worrisome as the decision-making power would lie with a minister and the applicant carries the burden of proof for the existence of a special need and a real need.

4. *Halicilla's* past conduct

Justification grounds for legislation that singles out certain economic operators could be based on their past behaviour. In fact, under the Draft Legislation, an applicant's previous use of properties and property rights, i.e. the past conduct, must be taken into account by the minister under the prior authorisation requirement[62]. From an EEA law perspective there is nothing to object to that, on the contrary. For comparison, it may be added that in the case law of the U.S. American federal courts, the violation of antitrust laws, environmental pollution or criminal behaviour have, in various contexts, been deemed to justify targeted legislation[63].

In EU law, lawful limitations on the freedom to conduct a business may, at EU and Member State level, result from

> "very specific bans linked to an individual's qualifications or conduct"[64].

However, in the present case, in the context of the acquisition cap, past conduct appears not even to be a factor to be taken into account. The mere

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62 Supra, A. I. 1.

63 See, for example, U.S. Court of Appeals for the Fifth Circuit of Appeals *SBC Communications v. FCC*, 154 F.3d 226; U.S. Court of Appeals for the Ninth Circuit *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F.3d 662; U.S. Court of Appeals for the Second Circuit *ACORN v. United States*, 618 F.3d 125.

64 RFA European Agency for Fundamental Rights, Freedom to conduct a business: exploring the dimensions of a fundamental right, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf., emphasis added.

existence of existing ownership, regardless of conduct, precludes further acquisition of rights, except for immensely vague exceptional circumstances.

Further, according to my instructions, *Halicilla's* past conduct as an owner of land and rights is in no way objectionable. The company has never been involved in any activities that violate antitrust law, negatively affect the public fisc or harm the environment. It has never misappropriated agricultural land for non-agricultural purposes nor has it in any way violated the noble objectives of the legislature. With the Six Rivers Project, *Halicilla* is, on the contrary, aiming to be a role model in sustainable agriculture and river fishing, including contributing to ensuring food security. Consequently, there is no reason under any title to single out and punish *Halicilla* by virtually excluding the company from acquiring further land or conducting its business.

III. Prior authorisation requirement

1. Restriction on the free movement of capital

(1) General

A prior authorisation requirement for the purchase of agricultural land is a restriction on the free movement of capital as guaranteed by Article 40 EEA and Annex XII thereto. As noted, EEA law imposes conditions on when a restriction may be lawful.[65]

According to the ECJ's settled case law, exceptions to the fundamental freedoms must be interpreted strictly,

> "so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions […]. Thus, public policy and public security may be relied on only if

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65 Supra, D. II. 1.

there is a genuine and sufficiently serious threat to a fundamental interest of society [...]."[66].

This also applies in EEA law.

(2) Legitimate overriding public interest

As far as the existence of a legitimate overriding public interest for a prior authorisation requirement is concerned, the leading case is ECJ C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*. Ms. *Ospelt*, a citizen of the Principality of Liechtenstein, owned a property of approximately 43,500 m2 in the province of Vorarlberg (Austria) on which she lived. Most of this land was agricultural land that had been leased to farmers.

In April 1998, the entire property was notarised with the purpose of transferring it to a foundation established in the Principality of Liechtenstein, the primary beneficiary of which was Ms. *Ospelt*. The foundation intended to continue leasing the agricultural land to the same farmers as before. The application to the competent authorities to grant the prior authorisation required under the Vorarlberg Land Transfer Act ("*VGVG*") was rejected on the grounds that the conditions for acquisition by foreigners were not met. On appeal, the Vorarlberg Independent Administrative Senate also rejected the authorisation on the grounds that neither the foundation nor Ms. *Ospelt* were pursuing or intended to pursue an agricultural activity. Such a transaction was therefore contrary to the requirements and public interest objectives set out in the VGVG with regard to the maintenance and creation of economically viable medium-sized and small agricultural holdings. The Austrian Administrative Court asked the ECJ to rule on whether the provisions of the EC Treaty on the free movement of capital precluded a system of prior authorisation such as that provided for in the VGVG for transactions involving agricultural land.

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66 C-54/99, *Église de Scientologie* EU:C:2000:124, paragraph 17, emphasis added.

The ECJ found that the conditions laid down in the VGVG restricted the free movement of capital within the EEA. However, the VGVG pursued objectives in the general interest, which were in principle capable of justifying such restrictions. The purpose of prior control by the competent authorities was to ensure that the transfer of agricultural land did not result in the land being no longer farmed[67].

In the case at hand, the Draft Legislation is mainly motivated by the interest to have oversight and control over the use of land. But even if such objectives were laid down in the Draft Legislation or in the Explanatory Notes to the bill, there would have to be a connection between the specific situation in Iceland and the steps being taken.

Finally, as mentioned, it must not be overlooked that foreign investment in agricultural land can also have positive macroeconomic and social effects[68]. Indeed, *Halicilla* argues that its investment in Iceland has such positive consequences[69].

(3) Proportionality

In view of the absence of a clearly formulated objective of the prior authorisation rule, it is difficult to say whether the suitability requirement is fulfilled in the case at hand, i.e. whether there would be a causal link between the measure and its object. The same goes for the requirement that a measure is consistent with other legislative measures.

It is also hardly possible to tell whether the Draft Legislation fulfils the necessity requirement according to which a measure must be needed in order

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67 Supra, C. II. 2.

68 See the European Commission's Interpretative Communication on the Acquisition of Farmland in EU law, foreword and 1. d.

69 Supra, D. II. 4.

to achieve the objective. The principle of necessity requires that no equally effective, but less restrictive measure is available.

As far as the less restrictive means test is concerned, the Explanatory Note states:

> "It cannot be seen that the legitimate aims that are sought could in practice be achieved by other measures than those proposed in Article 8 of the bill. It cannot be seen that the authorities would be able to achieve them only through a simple notification of changes of ownership, cf. Article 10 of the current Estates Act No. 81/2004, or a subsequent intervention of some form. Regarding the former option, a simple notification obligation would not give the authorities the opportunity to take a position on certain transfers of property that fall within the scope of the Estates Act in the same way that Article 8 provides. A notification obligation is therefore insufficient to achieve the aims of the bill, *inter alia* improved controls for the authorities in the field of land and estate use. Regarding the latter option, that is a subsequent intervention by the authorities, such an option must generally be regarded as more onerous than the approach taken in Article 8 of the bill. The provisions of Article 8 of the bill therefore do not go further than is necessary to achieve those legitimate aims underlying the bill, and therefore are consistent with the principle of proportionality."[70]

Apart from the fact that the claim that the prior authorisation requirement will pursue objective aims may be doubtful, it is questionable whether the statements concerning the less restrictive means are compatible with the case law of the ECJ. According to homogeneity rules, this case law is relevant for the interpretation of EEA law.

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[70] Emphasis added.

According to ECJ case law, a notification requirement (and thus a less restrictive measure than a prior authorisation obligation) may be sufficient. In Joined Cases C-515/99 and C-527/99 to C-540/99 *Hans Reisch and Others v Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg* and Joined Cases C-519/99 to C-524/99 and C-526/99) v *Anton Lassacher and Others v. Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg*[71], the ECJ, referring to previous case law, held at paragraph 37

> "that restrictions on the free movement of capital resulting from the requirement of prior authorisation were able to be eliminated by means of an appropriate notification system without thereby detracting from the effective pursuit of the aims of those rules".

Still, an obligation of prior notification constitutes a restriction, which needs to be justified and must be in conformity with the principles of proportionality and legal certainty and fundamental rights.

In Case C-213/04 *Ewald Burtscher v Josef Stauderer*[72], the ECJ held at paragraph 42 that a declaration system,

> "even though it does not affect the actual carrying out of the transaction, constitutes nevertheless a mandatory formality prior to legal registration of the contract of sale in the land register, which alone can guarantee the effectiveness of that contract with regard to the public authority and third parties. Moreover, under the [...] [relevant national legislation], that declaration is coupled with the obligation not to use the land for purposes other than those declared."

In *Ospelt*, prior authorisation for the land transfer from a natural person to a foundation was refused on the ground that neither the foundation nor the

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71 EU:C:2002:135.

72 EU:C:2005:731.

natural person were engaged in agricultural activity. According to the ECJ, this went beyond what was necessary to achieve the public interest objectives pursued by the VGVG. A measure linking the transfer of agricultural land to specific obligations such as long-term leases would have been less restrictive on the free movement of capital. If the VGVG were to be interpreted by the national authorities as requiring prior authorisation to be granted to persons who are not farmers resident on the land in question but who could provide the necessary guarantees that the land would continue to be used for agricultural purposes, the VGVG would not restrict the free movement of capital beyond what is necessary to achieve its objectives.

In this case, the ECJ also held that

> "prior supervision by the competent authorities does not merely reflect a need for information but is intended to ensure that the transfer of agricultural land will not lead to their ceasing to be used as intended or to a use which might be incompatible with their long-term agricultural use"[73].

In that case, a system based on a supervision after the transfer would have been less effective than a priori authorisation requirement in that it would not prevent a transfer that was contrary to the pursued agricultural objective. That would be likely to offer less legal certainty to the land transaction than a prior authorisation requirement.

From the above cases, it can be concluded that it is not clear that a notification requirement, rather than a prior authorisation requirement, would not be proportionate.

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[73] Loc. cit., paragraph 43.

(5) Decision criteria

Regarding the criteria according to which the Minister gives authorisation, draft legislation simply repeats the general objectives:

> "to promote that the use of lands and related rights are organised consistently with the features of the land and with the interests of society and future generations as guiding principles, having regard to the importance of land from economic, social and cultural perspectives"; "to promote diverse and competitive agriculture, conservation, maintenance and development of rural communities and at the same time nationally useful and sustainable land use"; to aim "to the extent possible in the implementation [...] that land which is well suited to agricultural production is preserved for such use and that food security is preserved for the future".

It is doubtful whether these guidelines are clear enough. Vague standards fail to provide citizens and economic operators the possibility to determine their legal position. They are probably not sufficiently clear. On the contrary, they seem to give the minister practically unlimited discretion making his decisions unpredictable.

In Case C-370/05 *Criminal proceedings against Uwe Kay Festersen*, paragraph 18(4) of the Danish Law on agriculture (*landbrugsloven*) stated that the Minister for Food, Agriculture and Fisheries may authorise the acquisition of an agricultural property under certain conditions or if

> "other special circumstances mitigate in its favour".

Referring to its settled case law, the ECJ held that such criteria for the authorisation were too vague and did

> "not enable individuals to become familiar with the extent of their rights and obligations resulting from Article 56 EC (sc. the provision guaranteeing the free movement of capital), so that a system of that

nature must be regarded as being contrary to the principle of legal certainty"[74].

This case law corresponds to ECJ's overall approach when it comes to prior authorisations. In C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado*, a case involving a prior authorisation to operate a shipping line, the ECJ held at paragraph 38 that

> "if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned." [75]

In C-201/15 *AGET Iraklis*, a case on the power of a Greek public authority to refuse the authorisation of collective redundancies, the ECJ's Grand Chamber held that according to settled case law,

> "where powers of intervention of a Member State or a public authority [...] are not qualified by any condition, save for a reference to [...] criteria formulated in general terms, without any indication of the specific objective circumstances in which those powers are to be exercised, this results in serious interference with the freedom

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74 EU:C:2007:59, paragraph 43, emphasis added.

75 EU:C:2000:658, emphasis added.

concerned which may have the effect [...] of excluding that freedom altogether"[76].

In the case at hand, the Greek legislation stated that the power to deny collective redundancies

> "must be exercised by analysing the documents in the file, while taking account of the situation of the undertaking and the conditions in the labour market, and must result in a reasoned decision".

The Grand Chamber held that it was clear that,

> "in the absence of details of the particular circumstances in which the power in question may be exercised, the employers concerned do not know in what specific objective circumstances that power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality[77]."

The Grand Chamber added that,

> "as also follows from the Court's case-law, whilst the fact that the exercise of such a power of opposition may be reviewed by the national courts is necessary for the protection of undertakings in the light of the application of the rules on freedom of establishment, it cannot, however, suffice on its own to make good the incompatibility with those rules of the two aforementioned assessment criteria[78]".

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76 Paragraph 99, emphasis added.

77 Paragraph 100, emphases added.

78 Paragraph 101.

In the light of the foregoing, I tend to conclude that the criteria used in the Draft Legislation are not sufficiently precise. They are not, therefore based on objective, verifiable conditions. For that reason alone, they go beyond what is necessary and cannot therefore satisfy the principle of proportionality.

(6) Legal redress

According to established ECJ case law, persons and economic operators affected by a restriction of the free movement of capital must have a legal redress. In the above mentioned judgment C-54/99, *Église de Scientologie*[79] concerning a system of prior authorisation for certain categories of direct foreign investments in France, the Grand Plenum of the ECJ held at paragraph 17 that

> "any person affected by a restrictive measure based on such a derogation must have access to legal redress [...]."

The Draft Legislation places the competence for authorisation in the hands of the minister. The minister's decision can be challenged in court. That means that there is access to legal redress. It is true that ministers in other Contracting Parties of the EEA are also competent to make decisions on the acquisition of agricultural land, without the ECJ having objected to this[80]. However, the ministerial authorisation system must be seen in the overall context of the present case.

2. Legal certainty

It does not need further explanation that the lack of clear decision-making criteria for authorisation is also incompatible with the principle of legal certainty. Legal certainty is only safeguarded if the requirements for an

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79 EU:C:2000:124; see also Case In Case C-205/99 Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado, EU:C:2000:658, paragraph 38.

80 See the *Festersen* case, supra, D. III. 1.

encroachment on a fundamental freedom are described in a way that allows those subject to the law to make dispositions, i.e. if the limitation of rights is foreseeable[81]. This would not be the case.

E. Answers

On the strength of the above considerations, I answer the questions put to me in the following way:

> "1. Based on the information provided, paragraph 10 of Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) does raise issues of compatibility with Iceland's obligations under the EEA Agreement, in particular with reference to Article 40 thereof and to EEA law general principles, in particular fundamental rights. Under the given circumstances, the 10'000 hectares threshold constitutes a restriction of the free movement of capital and an infringement of the freedom to conduct a business. The general aims pursued by the Draft Legislation appear to be legitimate. However, no justification seems possible. Other, less restrictive measures appear to be available. The criteria on which the minister decides are furthermore not precise enough. The rules in question are therefore disproportionate. They also violate the principles of legal certainty and generality or equal treatment.
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> 2. Based on the information provided, the requirement of prior ministerial approval proposed in Article 8 of the Draft Legislation (proposed to be Article 10a of the Estates Act) for certain land purchases may raise issues of compatibility with Iceland's obligations under the EEA Agreement. As a matter of principle, a prior authorisation system may be lawful. However, the criteria according to which the minister decides must be defined precisely

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81 Supra, D. II. 3.

enough to enable an applicant to assess their legal position in advance. The criteria used in the Draft Legislation are hardly sufficiently precise. They are not, therefore based on objective, verifiable conditions. For that reason alone, they go beyond what is necessary This may not only violate the EEA freedom of capital movement, but also the principle of legal certainty.