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EFTA SURVEILLANCE
AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's failure to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement

1 Introduction

1. By letter dated 24 February 2014 (Doc. No 699832), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had received a complaint against Iceland concerning State liability for breach of EEA law.
2. The complainant claimed, *inter alia*, that he sustained damages as a result of a wrong interpretation of EEA law by the Supreme Court of Iceland. However, his application for damages was rejected by the Icelandic courts, *inter alia*, on the ground that, under Icelandic procedural law, it was not possible to re-examine a case already decided by the Supreme Court.
3. On 17 June 2015 (Doc. No 752617), the Authority issued a letter of formal notice to Iceland in which it concluded that, by excluding, under national provisions, such as the provisions in Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*) and Article 24(1) of Act no. 15/1998 on the Judiciary (*lög um dómstóla*), any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance, Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement¹.
4. After an extension of the deadline, Iceland replied to the letter of formal notice by letter of 18 September 2015 (ref. IRR14090024/2.13.0, Doc. No 773921).
5. In the reply, the Icelandic Government objects to the Authority’s findings that Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law and claims that there is no ground to draw such conclusions from the EEA Agreement and case law of the EFTA Court.
6. Nothing in the reply from the Icelandic Government however has changed the view of the Authority. The Authority has decided therefore to maintain its conclusions drawn in the letter of formal notice and to deliver this reasoned opinion to Iceland.
7. The reasoned opinion relies on the letter of formal notice and follows in essence its structure. The arguments provided in the reply from the Icelandic Government are discussed in the parts of the reasoned opinion to which, in the view of the Authority, they are related.

2 Relevant national law – reply of the Icelandic Government

8. As regards the relevant national law, in the letter of formal notice the Authority referred to Article 24(1) of Act no. 15/1998 on the Judiciary (*lög um dómstóla*) and Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*).
9. The Icelandic Government specifies in its reply² that Article 24(1) of Act no. 15/1998 on the Judiciary (*lög um dómstóla*) is based on Article 2 of the Constitution of the Republic of Iceland (Act no. 33/1944), according to which the powers are divided between the Legislature, the Executive and the Judiciary, whereas each party is autonomous, and

¹ For the account of the correspondence preceding the letter of formal notice see the letter of formal notice, Part 2 “Correspondence”.

² Part 2 “The legal framework” of the reply, first paragraph.

Section V of the Constitution, according to which the Judiciary is independent, its organisation shall be established by law and that judges appointed shall base their decisions merely on the law. The Icelandic Government asserts that the independence of the national courts would be severely compromised if their judgments could be directly or indirectly overruled³.

10. The Authority refers however to paragraphs 32-35 of the letter of formal notice discussing the independence of the national courts and the principle of *res judicata* in the context of State liability in damages caused to individuals for breaches of EEA law by a court adjudicating at last instance. The Authority maintains its conclusion that the possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to EEA law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

11. The Authority notes moreover that the judgment of *Héraðsdómur Reykjavíkur* (“the District Court”), confirmed on appeal by the Supreme Court, in the complainant’s case rejecting his claim that the Supreme Court has wrongly interpreted EEA law in its judgment of 20 December 2005 was based not on the Constitution, but rather on Icelandic procedural law⁴.

12. Furthermore, the Icelandic Government refers⁵ to a possibility of re-opening of cases already decided on the merits on certain grounds established by law. According to Article 167 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*), a case which has already been decided by the courts, can be re-opened by the same court, or a court of the same instance, if certain conditions are met. The same applies for cases decided by the Supreme Court. According to the Icelandic Government, a committee, “*Endurupptökunefnd*”, which is an independent body, composed of three members (one member elected by *Althing*, Parliament of Iceland, one member appointed by the Supreme Court and one member appointed by the Committee on Judicial Functions), examines requests for re-opening of cases. A decision to re-open a case is based on the subject matter of each case.

13. The Authority did not refer to Article 167 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*) as part of the relevant national law, because, as set out in paragraph 27 of the letter of formal notice, the fact remains that Icelandic law excludes any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance. The possibilities existing under Articles 167-169 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*) are not relevant for the current infringement proceedings, because they are too limited and, in any case, as can be seen from the judgment in the complainant’s case⁶, they do not ensure the protection of the rights of individuals to receive, under certain conditions, damages for the breaches of EEA law occasioned by the judiciary, as required under EEA law. Moreover, the Authority notes that the existence of a committee, being part of the Executive and deciding on the re-opening of a case which has been already decided on the merits by the Supreme Court speaks against the independence of the Judiciary more than the possibility that under

³ Part 2 “*The legal framework*” of the reply, seventh paragraph and Part 3.2 “*State liability for breaches of EEA law under the Icelandic legal order*” of the reply, second paragraph.

⁴ See the letter of formal notice, paragraph 27.

⁵ Part 2 “*The legal framework*” of the reply, third paragraph and Part 3.2 “*State liability for breaches of EEA law under the Icelandic legal order*” of the reply, eighth paragraph.

⁶ The letter of formal notice, paragraph 27.

certain conditions the State may be rendered liable for judicial decisions contrary to EEA law, which does not as such undermine the finality of the judicial decision in question.

3 The Authority's Assessment

3.1 General principle of State liability for breaches of EEA law under the EEA Agreement

14. As regards the general principle of State liability for breaches of EEA law under the EEA Agreement and its content, the Authority maintains its conclusions in the letter of formal notice, Part 4.1 “*General principle of State liability for breaches of EEA law under the EEA Agreement*”.

15. First, the EFTA Court in its judgments in Cases E-9/97 *Sveinbjörnsdóttir*⁷, E-4/01 *Karlsson*⁸, E-8/07 *Nguyen*⁹, E-2/12 *HOB-vín ehf*¹⁰ recognised the principle of State liability for breaches of EEA law.

16. Second, the general principle of State liability under the EEA Agreement extends to liability for judicial breaches and that this was confirmed in Case E-2/10 *Kolbeinsson*¹¹.

17. The Icelandic Government objects to the Authority's conclusions regarding the scope of the general principle of State liability for breaches of EEA law under the EEA Agreement. It refers, in essence, first¹², to the limitations of the EEA Agreement compared to the founding treaties of the European Union in general (no transfer of legislative, judicial and executive powers to international institutions; no principles of supremacy and direct effect; advisory opinions are *de jure* not legally binding upon the national court requesting the advisory opinion; no obligation to seek advisory opinions). Second¹³, it states that there is a difference in legal importance for the EEA of the judgments of the Court of Justice of the European Union (“the Court of Justice”) adopted before and after the date of signature of the EEA Agreement, and that judgment in *Köbler*¹⁴ was adopted post signature. Third¹⁵, the methodology of the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir* implies that the EFTA Court had at least some reservations as regards the future development of the rule on State liability and, based on that methodology, the Supreme Court of Iceland further based its reasoning for State liability on the fact that the main part of the EEA Agreement was implemented in Icelandic law by Act no. 2/1993 (*lög um Evrópska Efnahagssvæðið*), and thus the principle of State liability for incomplete implementation of EEA secondary legislation, which was inherent in the EEA Agreement, had sufficient legal basis in Icelandic law. Fourth¹⁶, in Case E-4/01 *Karlsson* the EFTA Court stated that the principle of State liability within the EU and the EEA was not

⁷ Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

⁸ Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240.

⁹ Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224.

¹⁰ Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092.

¹¹ In particular, in Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraph 77.

¹² Part 2 “*The legal framework*” of the reply, from the last sentence of the third paragraph to the end of the fifth paragraph and Part 3.2 “*State liability for breaches of EEA law under the Icelandic legal order*”, fourth, fifth and sixth paragraphs.

¹³ Part 2 “*The legal framework*” of the reply, sixth paragraph.

¹⁴ Judgment in *Köbler*, C-224/01, EU:C:2003:513.

¹⁵ Part 3.1 “*General principles of state liability for breaches of EEA law under the EEA Agreement*” of the reply, second and third paragraphs.

¹⁶ Part 3.1 “*General principles of state liability for breaches of EEA law under the EEA Agreement*” of the reply, fourth and sixth paragraphs.

necessarily the same. According to the Icelandic Government, if it were the same, it could come close to direct effect of EEA law. Finally, the Icelandic Government does not agree that Case E-2/10 *Kolbeinsson* confirmed that the general principle of State liability under the EEA Agreement extended to liability for judicial breaches. According to the Icelandic Government¹⁷, the EFTA Court's reference to judgment in *Köbler* is unclear and the subject matter falls outside the scope of the questions referred to the Court.

18. The arguments from the Icelandic Government mainly reiterate the arguments provided for in the letter from Iceland of 2 December 2014 (ref. IRR14090024/2.13.0, Doc. No 732385)¹⁸ and they were all addressed by the Authority in the letter of formal notice, Part 4 "*The Authority's assessment*".

19. In particular, first, as regards the differences of the EEA Agreement compared to the founding treaties of the European Union in general, the Authority refers to paragraphs 36-43 of the letter of formal notice concerning the impact of the lack of the obligation to request advisory opinions on the content of the general principle of State liability for breaches of EEA law under the EEA Agreement.

20. The Icelandic Government does not agree with the analysis made by the Authority and states¹⁹ that if the general principle of State liability under the EEA Agreement extended to liability for judicial breaches it would entail that Icelandic courts are forced to refer all cases involving possible interpretation of EEA law to the EFTA Court.

21. The Authority does not see that the general principle of State liability would in any way create an obligation on the part of the national courts to refer questions to the EFTA Court, especially in the light of the condition that the breach by the Judiciary must be manifest in character²⁰. Only where there is genuine doubt as to the proper interpretation of EEA law could a failure to refer, followed by an incorrect application of EEA law, give rise to any liability.

22. According to settled case law, Article 34 of the Agreement between the EFTA States on establishment of a Surveillance Authority and a Court of Justice ("SCA") establishes a special means of judicial cooperation between the EFTA Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them²¹. This system of cooperation is intended primarily as a means of ensuring a homogenous interpretation of the EEA Agreement²².

23. The judicial cooperation under Article 34 SCA, as well as under Article 267 the Treaty on the Functioning of the European Union ("TFEU"), not only enables a national court to request opinions or rulings on the questions which are necessary to enable it to give judgment, and receive answers which will be of use²³, but also gives a possibility to

¹⁷ Part 3.1 "*General principles of state liability for breaches of EEA law under the EEA Agreement*" of the reply, fifth paragraph and Part 3.2 "*State liability for breaches of EEA law under the Icelandic legal order*", third paragraph.

¹⁸ See the letter of formal notice, paragraph 8.

¹⁹ Part 3.2 "*State liability for breaches of EEA law under the Icelandic legal order*", seventh paragraph.

²⁰ See, for the account, what this condition entails, the letter of formal notice, paragraphs 22-25.

²¹ See Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 61, and case law cited.

²² See Case E-10/12 *Harðarson* [2013] EFTA Ct. Rep. 204, paragraph 38.

²³ See, to this effect, for example, judgment in *Pohotovost'*, C-470/12, EU:C:2014:101, paragraph 27 and case law cited; judgment in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 38; judgment in *Rohm Semiconductor*, C-666/13, EU:C:2014:2388, paragraph 38.

the States and other parties concerned to submit observations. The interpretation of EEA law therefore is raised to the level where all the parties concerned may participate and contribute instead of leaving the interpretation solely for the national level. The Court of Justice has stated that Article 267 TFEU is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community²⁴.

24. Therefore, it is important that questions regarding the interpretation of the EEA Agreement are referred to the EFTA Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity. Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured²⁵.

25. As regards the independence of the national courts and the principle of *res judicata* the Authority refers once more to paragraphs 32-35 of the letter of formal notice. The Authority does not see how its conclusions in these paragraphs could be altered by the fact that the respective institutions in the EEA “*are not supranational in the same sense as within the EU legal order*”.

26. Concerning the non-legally binding character of advisory opinions it suffices to recall that it does not negate the obligation to take due account of the principles laid down by relevant rulings of the EFTA Court and the Court of Justice and to arrive at as uniform an interpretation as possible of the provisions of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in the EEA Agreement. As mentioned before, the system of cooperation in Article 34 is intended primarily as a means of ensuring a homogenous interpretation of the EEA Agreement. It is not excluded that the non-fulfilment by an EEA State of its obligations under the EEA Agreement might be the result of non-compliance by its national law with an interpretation of EEA law provided for in, *inter alia*, a judgment of the EFTA Court or the Court of Justice. The legal character of advisory opinions cannot therefore exclude State liability for breaches of EEA law under the EEA Agreement.

27. Second, as regards the difference in legal importance of the judgments of the Court of Justice adopted before and after the date of signature of the EEA Agreement, it is true that Article 6 EEA and Article 3(2) SCA use slightly different formulations for the rulings of the Court of Justice given prior to the date of signature of the EEA Agreement and after the date of signature of the EEA Agreement.

28. The fact remains however that there is an obligation under EEA law to pay due account to the principles laid down by these rulings, irrespective of when they were given. Moreover, when interpreting EEA law, the EFTA Court widely uses the case law of the Court of Justice, irrespective of whether it was adopted before or after the signing of the EEA Agreement.

29. There is no indication in the case law of the EFTA Court that any difference is made between case law of the Court of Justice delivered before and after the signing of the EEA Agreement.

²⁴ Judgment in *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 2.

²⁵ See Case E-3/12 *Jonsson* [2013] EFTA Ct. Rep. 136, paragraph 60, and case law cited.

30. The Authority therefore does not share the reservations with the Icelandic Government as to the relevance of judgment in *Köbler* to the EEA Agreement.

31. Third, concerning the methodology of the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir*, the Authority refers to paragraphs 14 and 15 of the letter of formal notice where it summarised the main arguments from the EFTA Court to reach the conclusion that the principle of State liability is inherent to the EEA legal order. In particular, according to the EFTA Court, the principle of State liability under the EEA Agreement stems from the principles of homogeneity, effectiveness, the duty of loyal cooperation and the objective of the EEA Agreement of establishing the right of individuals and economic operators to equal treatment and equal opportunities.

32. In other words, the Authority referred to the fact that the methodology of the EFTA Court to establish the principle of State liability for breaches of EEA law differed from that of the Court of Justice in its judgment in *Francovich*²⁶.

33. The Authority however does not agree with the Icelandic Government that the methodology employed by the EFTA Court implies that the Court had at least some reservations as regards future development of the rule on State liability. On the contrary, the subsequent case law, which was described by the Authority in paragraphs 16-21 of the letter of formal notice, does not show any reservations on the part of the EFTA Court as to the extent of the principle of State liability for breaches of EEA law.

34. Fourth, the Authority agrees that in Case E-4/01 *Karlsson* the EFTA Court stated that the application of the principle of State liability within the EU and the EEA may not necessarily be in all respects coextensive and, moreover, referred to paragraph 30 of Case E-4/01 *Karlsson* in paragraph 42 of the letter of formal notice.

35. The Authority does not however see any indications in Case E-4/01 *Karlsson* and the subsequent case law of the EFTA Court that if the general principle of State liability under the EEA Agreement were extended to liability for judicial breaches, it could come close to direct effect of EEA law.

36. Finally, the Icelandic Government questions the conclusions of the EFTA Court in paragraph 77 in Case E-2/10 *Kolbeinsson*, on the ground that the reference to judgment in *Köbler* is unclear and, in any case, the subject matter falls outside the scope of the questions referred to the Court.

37. The Authority does not agree with the Icelandic Government. The District Court examining the complainant's application first decided to refer a question of whether the Supreme Court's interpretation of EEA law in its judgment of 20 December 2005 was a violation of EEA law. However, on appeal, the Supreme Court of Iceland, in a judgment of 23 March 2010, upheld the decision to request an advisory opinion, but also specified what questions the District Court was to refer to the EFTA Court and how the questions were to be formulated. The Supreme Court changed the question so that the EFTA Court was only asked to determine whether the legislator had breached EEA law. Furthermore, the issue of whether the general principle of State liability extended to liability for judicial breaches was discussed during the proceedings at the EFTA Court in Case E-2/10 *Kolbeinsson* by the Authority, as well as the European Commission²⁷. In paragraph 77 in

²⁶ Judgment in *Francovich*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428.

²⁷ See the written observations by the Authority in Case E-2/10 *Kolbeinsson*. See also the report for the hearing in Case E-2/10 *Kolbeinsson*, paragraphs 125 and 137.

Case E-2/10 *Kolbeinsson* the EFTA Court therefore replies to the question which was at stake in the proceedings at issue. It is not correct to state therefore that the reference to judgment in *Köbler* is unclear and (or) the subject matter falls outside the scope of the questions referred to the Court.

38. In the view of the Authority, it is, moreover, not even necessary to refer to paragraph 77 in Case E-2/10 *Kolbeinsson*. This paragraph does not establish, but rather confirms how the general principle of State liability under the EEA Agreement should be understood. The conclusions made by the Authority in the letter of formal notice and in this reasoned opinion would be the same even if paragraph 77 in Case E-2/10 *Kolbeinsson* did not mention State liability for losses resulting from incorrect application of EEA law by national courts.

3.2 State liability for the breaches of EEA law under the Icelandic legal order

39. As regards the general principle of State liability for breaches of EEA law under the Icelandic legal order, the Authority maintains its conclusions in paragraphs 26-28 of the letter of formal notice.

40. The Icelandic Government argues²⁸ however that “<...> *there is no valid ground for the Authority to act under Art. 31 SCA. Before the Authority decides to invoke Art. 31, there must be solid reasons for bringing actions against the Icelandic State. As explained above, in the Kolbeinsson decision it is submitted there is no reason to believe the Supreme Court of Iceland in its judgment of 2005 had misinterpreted relevant EEA legislation in such a manner that the plaintiff in that case suffered damages. The court’s reasoning must be seen as more or less conventional application of tort law based on the merits of the case, where the employer could not been held responsible for the accident.*

In addition, as established by the EFTA Court in Kolbeinsson, it seems the legislation in question had been incorporated sufficiently into Icelandic law and the directives concerned allowed for interpretation, thus not ruling out the total responsibility of the injured person. Hence, based on the reasons stated in this letter, there is no valid ground for the Authority to act under Art. 31 SCA.”

41. The Authority notes however that the subject matter of the letter of formal notice and the reasoned opinion is the exclusion, in the Icelandic legal order, of any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance in general, without prejudice of whether the damages are due in the particular case of the complainant.

42. The fact that any such State liability is excluded follows from national provisions, such as the provisions in Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*), as interpreted by the Supreme Court of Iceland in the complainant’s case and as confirmed by the Icelandic Government in the letter of 2 December 2014 (ref. IRR14090024/2.13.0, Doc. No 732385) and the letter of 18 September 2015 (ref. IRR14090024/2.13.0, Doc. No 773921) replying to the Authority’s letter of formal notice.

43. It seems therefore that by excluding, under national provisions, such as the provisions in Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*), any State liability for damages caused to individuals by breaches of EEA law

²⁸ Part 3.3 “Article 31 SCA” of the reply.

by a court adjudicating at last instance, Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by excluding, under national provisions, such as the provisions in Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*), any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance, Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 20 January 2016

For the EFTA Surveillance Authority

Frank Büchel
College Member

Carsten Zatschler
Director

This document has been electronically signed by Frank Buechel, Carsten Zatschler on 20/01/2016