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Efni: Observations concerning possible State liability for breach of EEA law by a court adjudicating at last instance

1. Introduction

Reference is made to EFTA Surveillance Authority's letter of formal notice, dated 17 June 2015 and the correspondence referred in section 2 of the letter.

In the letter the Icelandic Government is notified that the Authority concludes that by excluding under national provisions, such as the provisions in Art. 116 of Act no. 91/1991 on Civil Procedure *(lög um meðferð einkamála)* and Art. 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 fulfill its obligations arising from the general principle of state liability for breaches of EEA law under the EEA Agreement.

The case has arisen due to a complaint where the complainant claims *inter alia* that he sustained damages as a result of a wrong interpretation of EEA law by the Supreme Court of Iceland. The complainant had filed a lawsuit against the State claiming damages, which were rejected by the Icelandic courts since under national procedural law it was not possible to re-examine a case already decided by the Supreme Court.

Reference is made to the Icelandic Government's observations of 2 December 2014 where a principle of state liability for breaches of EEA law by the judiciary was rejected. The Government reaffirms its standing on this subject.

2. The legal framework

According to Art. 2 of the Icelandic Constitution, Act no. 33/1944, the powers are divided between the Legislature, Executive and the Judiciary, whereas each party is autonomous. According to Section V of the Constitution the Judiciary is independent, its organization shall be established by law and most importantly, the judges appointed shall base their decisions merely on the law. The Act no. 15/1998, referred to by the Authority is based upon this provision of the Constitution, reaffirming in Art. 24(1) that the judges shall discharge their judicial functions independently and on their own responsibility. Subject to this, a judicial resolution cannot be revised except by appeal to a higher court.

Article 116 of Act no. 91/1991 on Civil Procedure, as referred to by the Authority, states that judgments are binding as to the outcome of a case between the parties regarding claims that have been decided on their merits and, it follows, that a claim that has already been decided on its merits shall not be submitted to the same court or a court of same instance, except to the extent prescribed by law. In Art. 116 of said Act, the principle of *res judicata* is established.

However, despite the fact that a case has already been decided on the merits and cannot be submitted to the same court or a court of same instance, the Icelandic procedural law allows for reopening of cases already decided on the merits on certain grounds established by law. The Authority does not refer to these provisions in the letter of formal notice, however the Icelandic Government did point out this right conferred on individuals. According to Art. 167 of the Act on Civil Procedure, a case which has already been decided by the courts, can be reopened by the same court, or a court at the same instance, if certain conditions are met. Same applies for cases decided by the Supreme Court. 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 reopening of cases. According to the provisions of said law, a decision to reopen a case is based on the subject matter of each case. The EEA Agreement is an international agreement, admittedly an agreement *sui generis,* however the interpretation of rights and duties under this agreement has its limitations.

When the agreement was signed by the parties, the Constitution did not provide for transfer of sovereignty to international institutions. The Constitution, still unamended in this regard, creates the framework which the national courts must follow. As reiterated in the preamble to the EEA Agreement, paragraph 15, that in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of the Agreement. Furthermore this is reaffirmed in the preamble to the Surveillance and Court Agreement. Protocol 35 cemented the fundamental principle of legislative powers not being transferred to the institutions. The principles of supremacy and direct effect do not apply and the EEA Agreement provides for in Art. 7 how new legislation becomes part of the legal systems of the EFTA states. Since it must be uncontested that within the EEA regime, transfer of legislative does not exist, there is no doubt that the there exists no transfer of judicial powers either.

In light of the foregoing it was obvious that the Contracting parties did neither transfer legislative nor judiciary powers to the EEA institutions. The Contracting Parties and the Authority must respect these limitations. The Advisory Opinion procedure under Art. 34 of was established allowing national courts to request the EFTA Court to give an opinion on interpretation of EEA law.

It must be noted that Advisory Opinions are *de jure* not legally binding upon the national court requesting the advisory opinion and a national court is under no obligation to seek an advisory opinion, even though the case concerns interpretation of EEA law. It follows, it will be for the national courts to decide whether and to what extent advisory opinions will affect the outcome of a case. Preliminary rulings of the Court of Justice of the EU must be distinguished from the advisory opinion procedure since national courts of the EU are under an obligation to seek preliminary ruling, which are legally binding upon the courts. In EU the legal status of the Member States are different from the EFTA states since within the EU the Member States have transferred a part of their legislative, judicial and executive powers, which the EFTA states have not. Independence of the courts is one of the fundamentals of the Constitution of Iceland. The Government of Iceland cannot under any circumstances accept any limitation on it's sovereignty not provided for in constitutional law.

Furthermore, the Agreement establishes what case law of the Court of Justice the Contracting Parties are to take into consideration, cf. Art. 6 of the EEA Agreement and Art. 3(2) of the ESA/Court Agreement. According to Art. 3(2) the ESA/Court Agreement the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and

which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement. Hence, it must be carefully scrutinized whether a ruling given by ECJ, will have any effect on the development of the EEA Agreement. As alleged in the Authority's letter, the Authority considers that the principles of the judgment in Köbler shall be taken into consideration, which is a case decided post signature of the EEA Agreement.

Having regard to this legal framework, it is obvious that the independence of national courts in Iceland would be severely compromised if their judgments could be overruled, directly or indirectly in an infringement case. The Authority must assess the case against this background.

3. Regarding the Authority's assessment on state liability

3.1. *General principles of state liability for breaches of EEA law und the EEA Agreement*

The general principle of state liability for breaches of EU law was first established in the *Francovich* judgment in 1991 (*Francovich v. Italy, Joined Cases C-6/90 and C-9/90)* , a ruling by the Court of Justice, before the date of signature of the EEA Agreement. In Case E-9/97 *Sveinbjörnsdóttir* (*E-9/97, Sveinbjörnsdóttir [1998] EFTA Ct. Rep. 95.),* cited by the Authority, the EFTA Court for the first time held that the principle of state liability should be seen as an integral part of the EEA Agreement as such, and the EEA States should provide for compensation for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement.

In this ruling the EFTA Court did not base its reasoning on Art. 6 of the EEA Agreement which would more clearly have incorporated the *Francovich* ruling into EEA law. It is submitted that this methodology implies that the EFTA Court did have at least some reservations as regards future development of the rule on state liability. As noted in the Authority's assessment, the EFTA Court based its reasoning on the principles of homogeneity, effectiveness, duty of loyal cooperation and the objective of the EEA Agreement.

The Supreme Court of Iceland resolving the case and having received the advisory opinion of the EFTA Court in *Sveinbjörnsdóttir,* based its reasoning for state liability on the fact that the main part of the Agreement was legalised by Act no 2/1993 (*lög um Evrópska Efnahagssvæðið),* and thus the principle of state liability for incomplete incorporation of EEA secondary legislation, which was inherent in the Agreement, had sufficient legal basis in Icelandic law.

In Case E-4/01 *Karlsson (Case E-4/01, Karlsson [2002] EFTA Ct. Rep. 240.),* the EFTA Court held that state liability extended to alleged breach of the main part of the EEA Agreement as well as secondary legislation. It must be noted that in paragraph 30 of the judgment, the EFTA Court clearly states that the principle of state liability within the EU and EEA is not necessarily the same. The Court held that *"[t]he finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive."* Read in conjunction with Case E-7/97 *Sveinbjörnsdóttir,* it is obvious that the EFTA Court draws distinction between the state liability rules within the EU and under the EEA Agreement. Apparently and in the light of the Constitution, the Authority must take this into account in its assessment of the case.

The Government objects strongly to the conclusion the Authority draws from paragraph 77 of the judgment in Case E-2/10 *Kolbeinsson,* where the EFTA Court, in answering the second question referred to it, in an *obiter dictum,* states that *"The Court observes, however, that if States are to incur liability under EEA law for such an infringement as alleged by the Plaintiff, the infringement would in any case have to be manifest in character, see for comparison Köbler, cited above, paragraph 53."* The EFTA Court was not called upon to answer questions regarding possible state

liability for alleged losses resulting from incorrect application of EEA law by national courts, as it fell out of the scope of the question which the national court had referred to the EFTA Court for advisory opinion.

The Government points out that it follows from the case law of the EFTA Court in *Sveinbjörnsdóttir* and *Karlsson* that the principle of state liability is not necessarily as extensive within the EEA as within the EU. On the contrary, even though there may be similarities, the basis for state liability differs between EU law and EEA law. If the Authority would follow the path of the ECJ in this development, state liability could come close to direct effect of EEA law which would in turn not be compatible with the EEA Agreement and entail transfer of legislative and judiciary powers, powers which would run contrary to the Constitution. Such a situation cannot be upheld. This is further supported by the fact that the EFTA Court in *Karlsson* endorsed the principle of non-transfer of legislative powers that this implies that directives under EEA law do not have direct effect (*Karlsson* para. 30 and para 31. See also observation of the Government of Norway in *Kolbeinsson,* Report for the Hearing at para 96.).

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

As stated in the letter to the Authority of 2 December 2014 the Icelandic Government reaffirms its opinion that it does not share the view that the liability for judicial breaches is part of the general principle of state liability under the EEA Agreement. According to Icelandic law, judgments of the Supreme Court are final. The judicial system is based on this principle, a different approach would cause legal uncertainty and undermine the system. If a party maintains the Supreme Court has misinterpreted legal rules it may request reopening of the case according to Art. 169 of Act no. 91/1991 on Civil Procedure. Thus, within the Icelandic judiciary system it is possible to re-examine a case, already decided by the courts. In case 532/2012 decided by the Supreme Court, the court upheld the District Court's view that the subject matter of *Kolbeinsson* case had been finally decided and the formal validity of that judgment remained unaltered in accordance with Art. 116(1) of the Act on Civil Procedure (*res judicata).* However, it must be noted that the Supreme Court's reasoning is, in addition to the District Court's reasoning, that the Plaintiff in the case could not seek compensation on these grounds. This way of reasoning could be interpreted in such a way that the Court is referring to the system of reopening cases, under Art. 169 of the Civil Procedure. It must be noted that in the proceedings in the *Kolbeinsson* case as it was put before the national courts, the plaintiff did not base his reasoning for state liability on Act 15/1998, but merely on general rules of state liability and state liability for breach of EEA law as established in the *Sveinbjörnsdóttir* case, the scope of which does not extend to state liability for misconduct of the judiciary. It must be noted that court procedure before national courts must be considered to fall within national procedural autonomy.

The Icelandic Government reaffirms its views as explained in the letter of 2 December 2014 that the independence of the national courts would be severely compromised if their judgments could be overruled directly or indirectly in an infringement case or an Advisory Opinion concerning possible liability for judicial breaches. The judicial system is based on independency of the judiciary and the principle of the Supreme Court being the court of last instance, the judgments of which are final. It follows that no other court has authority to re-examine or overrule the Supreme Court's rulings.

The Icelandic Government does not share the view that the decision in *Köbler (C-224/01 Köbler),* cited by the Authority is part of the general obligations on state liability under the EEA Agreement. It is submitted, that since this case was decided after the date of signature of the EEA Agreement, it must be carefully examined whether and to what extent, if any at all, this ruling does apply to the EEA Agreement, cf. Art. 6 of the EEA Agreement. In the EFTA Court's advisory opinion in Kolbeinsson, the EFTA Court's reference to Köbler is inexplicit and the subject matter outside the scope of the questions referred to the Court.

Furthermore, the Icelandic Government rejects the view taken by the Authority that recognition of a principle of state liability for a decision of a court adjudicating at last instance would not in it self

have the consequence of calling into question that decision as *res judicata.* Proceedings against the State, where an individual seeks compensation for alleged breach by the judiciary would inevitably in fact entail re-examination or overruling of the judgment in question. According to the judicial system, there is no court, other than the Supreme Court that would have to hear the case. Such a rule as the Authority advocates for is inconceivable in the Icelandic legal system. Thus the reasoning in *Köbler* cannot be applied to the EEA states since the aims of the EU and the EEA are not concurring in all instances. The Community legal order as referred to in *Köbler,* requires reparation in cases where national courts have misinterpreted EU law. This cannot apply within the EEA since the institutions are not supranational in the same sense as within the EU legal order. Thus the same arguments as put forward in *Köbler* cannot apply as regards the EEA Agreement.

In addition, the Icelandic Government reaffirms its reasons put forward in the letter of 2 December 2014 that there is no obligation under the EEA Agreement to request advisory opinions from the EFTA court and the advisory opinions are not legally binding upon national courts. As noted by the Government, the state liability within the EU for decision of national courts must be seen as a kind of sanction against national courts of last instance breaching their duty to request preliminary rulings on the interpretation of EU law. This difference between the two systems is imperative. The judiciary cannot be held responsible for judgments that would entail misinterpretation of EEA law if there is no obligation to seek advisory opinions. In *Köbler,* the Court of Justice mentioned it as one of the factors that must be taken into account in order to determine whether the condition *manifestly* infringed is satisfied. The Authority's reference to the reasoning in *Traghetti del Mediterraneo (* C-173/03 *Traghetti del Mediterraneo SpA, in liquidation v. Italy)* does not alter the view of the Government since a conduct of a national court of an EEA state, giving a manifestly incorrect meaning to EEA law in light of relevant case law is inconceivable, since the judgments are not legally binding. Thus, this reasoning cannot be applied.

The Authority admits that state liability would not arise as a result of non-referral to the EFTA Court because Art. 34 SCA does not contain an obligation to refer to the EFTA Court, but could arise from the substantive ruling of the court at issue. The Authority's suggestion is that final judgments of Icelandic courts should be open for re-examination if there was an alleged misinterpretation of EEA law. In this connection it must be noted that the EFTA Court stated in *Karlsson* that the application of the principles of state liability might not necessarily be in all respects coextensive *(Karlsson, para 30).*

In absence of an unequivocal international obligation in this regards, the view of the Authority cannot be upheld. If such a rule would be accepted by the Icelandic State, it would in fact entail the that Icelandic courts would be forced to refer all cases involving possible interpretation of EEA law to the EFTA Court and in turn follow that judgment in its entirety in order to avoid any doubt as to the interpretation of relevant EEA law. The consequences would be transfer of judiciary powers to an international organ which is incompatible with the Constitution of Iceland.

Finally it must be observed that parties are under Icelandic law not deprived of the possibility of re-examination of a case already decided by a court of last instance as explained above.

3.3. *Article 31 SCA.*

As carefully explained in this observation the Government of Iceland is of the opinion 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.

4. **Conclusion.**

The Icelandic Government objects to the Authority's findings that Iceland has failed to fulfill its obligations arising from the general principles of state liability for breaches of EEA law under the EEA Agreement. There is no ground to draw such conclusions from the EEA Agreement and subsequent case law of the EFTA Court. The Icelandic Government reserves its right to any additional observations and comments to the Authority.

Fyrir hönd ráðherra

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