Case No: 75004
Document No: 1154422
Decision No: 131/21/COL

ESA | EFTA Surveillance Authority

EFTA SURVEILLANCE AUTHORITY DECISION

of 23 June 2021

closing a complaint case arising from an alleged failure by Iceland to comply with the principle of State liability for judicial breaches of EEA law

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Introduction

On 29 January 2014, the EFTA Surveillance Authority ("the Authority") received a complaint against the Icelandic Government[1], alleging that Iceland was in breach of the principle of State liability for judicial breaches of EEA law. The complainant maintained that he had sustained damages as a result of a wrong interpretation of EEA law by the Supreme Court of Iceland. However, his application for damages had been 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, unless the case had been re-opened.

2 The Authority's action and Iceland's reaction

On 17 June 2015, the Authority sent a letter of formal notice to Iceland,[2] concluding that by excluding, under national provisions, State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance, Iceland had failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement.

Iceland replied by letter dated 18 September 2015,[3] where it objected the Authority's findings. The Icelandic Government argued, *inter alia*, that liability for judicial breaches was not part of the general principle of State liability under the EEA Agreement. The Icelandic Government, however, also pointed out that Icelandic procedural law did allow for re-opening of cases already decided on the merits provided that certain conditions were met.

On 20 January 2016, the Authority issued a reasoned opinion to Iceland, with the same conclusions as in the letter of formal notice.[4]

By letter dated 27 May 2016,[5] Iceland replied to the reasoned opinion and reiterated its position and arguments put forward in its letter of 18 September 2015.

[1] Doc No 697778.
[2] Doc No 752617.
[3] Doc No 773921.
[4] Doc No 775380.
[5] Doc No 806321.

The case was discussed at the package meetings in Iceland in 2016, 2017 and 2018.

At the package meeting in 2016, the representatives of the Authority acknowledged that the lack of State liability for judicial breaches in Iceland might be remedied by extending the possibility of re-opening of cases already decided by the Icelandic courts.[6]

At the package meeting in 2017, the representatives of the Icelandic Government presented the content of a draft proposal widening the conditions for the re-opening of cases. According to the draft proposal, a case could be re-opened if there was high probability that new documents might lead to a different conclusion in important aspects of the case. The comments to the draft proposal further clarified the notion of *"new documents"*:

> "New documents does not only mean new evidence that pertain to the facts of the case, such as written documents or witness testimonies, but also other documents that could lead to a different conclusion of a case, including judgments of international courts such as the European Court of Human Rights."[7]

The representatives of the Authority welcomed the draft proposal as a step in the right direction, but expressed doubts as to whether it was sufficient to comprise all aspects of the principle of State liability for breaches of EEA law.[8]

By letter dated 20 October 2017,[9] the Icelandic Government reiterated its view that the draft proposal met the requirements of the principle of State liability for judicial breaches. The Icelandic Government further clarified that if a case is re-opened on these grounds, it would be entirely possible that a domestic court would reach a different conclusion on the merits, which would entail that the party to the case could subsequently claim damages from the State and thereby obtain a ruling on whether or not the judiciary had manifestly erred in its application of EEA law.

At the package meeting on 6 June 2018, the representatives of the Icelandic Government informed that a draft legislative bill had been submitted to the Parliament on 23 March 2018. Following the discussions at the package meeting in 2017, the draft bill and the comments to the bill had been amended to include a reference to *"new information"*, in addition to *"new documents",* as well as a reference to the EFTA Court.[10]

The legislative bill was not adopted during the 2017-2018 parliamentary session but was re-submitted to the Parliament in September 2018.[11] The relevant provisions and comments to the bill remained identical to the one submitted on 23 March 2018.

The case was discussed again at the package meeting in Iceland on 4 June 2019, where the representatives of the Icelandic Government noted that the legislative bill on the Re-opening Court had not been adopted yet.[12] In the Authority's follow-up letter to the meeting, the Icelandic Government was asked to provide an estimated timeline on the adoption of the legislative bill by 19 July 2019.[13] The Icelandic Government only

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[6] See the Authority's follow-up letter, Doc No 808361.
[7] Authority translation. The original text in Icelandic reads as follows:"*Með nýjum gögnum er ekki aðeins átt við sönnunargögn sem lúta að atvikum málsins á borð við skjöl eða framburð vitna, heldur önnur gögn sem leitt gætu til breyttrar niðurstöðu þess, svo sem úrlausna alþjóðlegra dómstóla eins og Mannréttindadómstóls Evrópu, sbr. lög nr. 62/1994 um mannréttindasáttmála Evrópu.*"
[8] See the Authority's follow-up letter, Doc No 861615.
[9] Doc No 879074.
[10] See the Authority's follow-up letter, Doc No 918168.
[11] https://www.althingi.is/altext/149/s/0070.html
[12] See the Authority's follow-up letter, Doc No 1076000.
[13] Idem.

responded by letter dated 21 February 2020,[14] where it confirmed that the bill had not been passed into law during the 2018-2019 parliamentary session, but that it had been re-submitted to the Parliament in December 2019 and was expected to be adopted as law no later than May or June 2020. The relevant provisions on the conditions for the re-opening of court cases remained identical in substance to the previously submitted legislative bill.

By letter dated 28 May 2020,[15] the Icelandic Government confirmed that the legislative bill on the Re-opening Court had been adopted as law on 19 May 2020 and would enter into force as Act No 47/2020 on 1 December 2020.[16]

At the online package meeting on 28 May 2020, the representatives of the Authority welcomed this important step and noted that the legislative amendments on the re-opening of court cases would be reviewed, in order to assess whether the case could be closed.[17]

3 Assessment

3.1 The principle of State liability for judicial breaches in EEA law

The principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of EU law for which the State is responsible was first established by the Court of Justice of the European Union ("CJEU") in its judgment in *Francovich*.[18]

In its judgment in *Köbler*, the CJEU confirmed that this principle applies also for infringements of EU law stemming from a decision of a court adjudicating at last instance and that such principle is not precluded by the principle of *res judicata*.[19]

With regard to the conditions for State liability, the CJEU had already held that these are threefold: first, the infringed rule must be intended to confer rights on individuals, second, the breach must be sufficiently serious, and third, there must be a direct causal link between the breach of the obligation and the damage suffered by an injured party.[20]

As regards more particularly the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, the CJEU acknowledged in *Köbler* that regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty. State liability for an infringement of EU law by a decision of a national court adjudicating at last instance can therefore be incurred *"only in the exceptional case where the court has manifestly infringed the applicable law"*.[21] Thus, the condition "*manifestly infringed*" provides for a higher threshold than the criterion of a "*sufficiently serious breach*", which applies in other cases of State liability for breaches of EU law.

[14] Doc No 1116196.
[15] Doc No 1135209.
[16] https://www.althingi.is/altext/150/s/1464.html
[17] See the Authority's follow-up letter, Doc No 1133598.
[18] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428.
[19] Case C-224/01 *Gerhard Köbler v Republik Österreich*, EU:C:2003:513, paragraphs 36 and 40.
[20] Case C-224/01 *Köbler*, cited above, paragraph 51, and case law cited therein.
[21] Case C-224/01 *Köbler*, cited above, paragraph 53. See also Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana*, EU:C:2006:391, paragraph 32; Case C-379/10 *European Commission* v *Italian Republic*, EU:C:2011:775, paragraph 41; and Case C-168/15 *Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR, Pohotovosť s.r.o.*, EU:C:2016:602, paragraph 24.

In order to determine whether the condition "*manifestly infringed*" is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional and whether the error of law was excusable or inexcusable.[22]

In its judgment in *Traghetti del Mediterraneo*, the CJEU further stated:

> "[…] it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the relevant case-law of the Court on the subject (see, in that regard, *Köbler*, paragraph 56), or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law."[23]

It should be noted that it is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to reparation of damages caused to individuals as a result of infringements of EU law by national courts adjudicating at last instance.[24] Moreover, a State liability claim is governed by the principle of national procedural autonomy. The CJEU has thus held that it is on the basis of national law that the State must make reparation for the consequences of the damage caused (principle of national procedural autonomy), provided that the conditions laid down by national law in respect of reparation of damage are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness).[25]

In that context, the CJEU stated in *Köbler*:

> "It should be added that, although considerations to do with observance of the principle of res judicata or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damages caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility."[26]

It can further be inferred from the CJEU's conclusions in *Traghetti del Mediterraneo* that limitations that are drawn up for State liability in the case of EU law infringements by national courts adjudicating at last instance cannot be interpreted in such a manner that State liability would become virtually impossible to achieve.[27]

As regards the EEA Agreement, the principle of State liability for breaches of EEA law was established by the EFTA Court in its judgments in *Sveinbjörnsdóttir,*[28] *Karlsson,*[29] *Nguyen*[30] and *HOB-vín ehf.*[31]

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[22] Case C-224/01 *Köbler*, cited above, paragraphs 54 and 55.
[23] Case C-173/03 *Traghetti del Mediterraneo*, cited above, paragraph 35.
[24] Case C-224/01 *Köbler*, cited above, paragraph 50.
[25] Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others against Estado português,* EU:C:2015:565, paragraph 50; Case C-168/15 *Tomášová*, cited above, paragraphs 38-39.
[26] Case C-224/01 *Köbler*, cited above, paragraph 48.
[27] Case C-173/03 *Traghetti del Mediterraneo*, cited above, paragraph 46. See also Case C-160/14 *Ferreira da Silva e Brito and Others*, cited above, paragraph 60, where the CJEU concluded that the principle of State liability for judicial breaches precluded national law from requiring, as a precondition for awarding damages, the setting aside of the decision given by a court adjudicating at last instance which caused the loss or damage, when such setting aside was, in practice, impossible.
[28] Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland,* [1998] EFTA Ct. Rep. 95.
[29] Case E-4/01 *Karl K. Karlsson hf. v The Icelandic State,* [2002] EFTA Ct. Rep. 240.
[30] Case E-8/07 *Celina Nguyen and The Norwegian State,* [2008] EFTA Ct. Rep. 224.
[31] Case E-2/12 *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins,* [2012] EFTA Ct. Rep. 1092.

In *Sveinbjörnsdóttir*, the EFTA Court held that the EEA Agreement is an international treaty *sui generis* that contains a distinct legal order of its own. The EFTA Court further stated that, although the depth of integration of the EEA Agreement is less far-reaching than under EU law, the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.[32] The EFTA Court thus concluded that the principle of State liability must be seen as an integral part of the EEA Agreement and that an EEA State is obliged to provide for compensation for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible.[33]

With regard to State liability for judicial breaches in EEA law, the Authority has already maintained, in its written observations to the EFTA Court in *Kolbeinsson*,[34] that the general principle of State liability under the EEA Agreement extends to liability for judicial breaches. In its letter of formal notice of 17 June 2015 in this case,[35] the Authority moreover put forward its view that this was confirmed at paragraph 77 of the judgment in *Kolbeinsson,* where the EFTA Court stated:

> "The Court notes that it must answer the second question based on the premise spelled out by the national court, namely that the infringement of EEA law, if indeed there is any, has been caused by incorrect implementation of EEA law, i.e. a breach on the part of the legislature. The issue of State liability for losses resulting from incorrect application of EEA law by national courts falls outside the scope of this question. 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."[36]

In light of the above, the Authority takes the view that State liability for breaches of EEA law, including by national courts adjudicating at last instance is a general principle of EEA law. However, the conditions for this principle are applied in a strict manner and the possibilities for its practical application have thus been limited.

3.2 Re-opening of court cases as an alternative remedy

The Authority understands that, in several EEA States, there is a possibility for an individual, whose rights have been infringed by a final judgment, to invoke the violation of EU/EEA law as a ground for re-opening of the case.

The Authority notes that, under certain circumstances, the remedy of re-opening court cases might be considered to offer a protection to individuals' rights as an alternative to State liability for judicial breaches. To that end, it is noted that re-opening of court cases and State liability for judicial breaches are not mutually exclusive remedies, as further outlined in Section 3.6 below.

With regard to the question whether the CJEU accepts alternative forms of remedies to substitute for the availability of State liability for judicial breaches, there are some indications to be found in the case law of the CJEU.

The judgment in *Stockholm Lindöpark* suggests that a liability claim against the State is not necessary if the recovery of unlawfully paid taxes is possible by other means of remedy.[37] In *Unibet*, the CJEU held that EU law does not interfere with national remedies

[32] Case E-9/97 *Sveinbjörnsdóttir*, cited above, paragraph 59.
[33] Case E-9/97 *Sveinbjörnsdóttir*, cited above, paragraphs 62 and 63.
[34] Case E-2/10 *Þór Kolbeinsson v The Icelandic State,* [2009-2010] EFTA Ct. Rep. 234.
[35] Doc No 752617.
[36] Case E-2/10 *Þór Kolbeinsson v The Icelandic State*, paragraph 77.
[37] Case C-150/99 *Svenska staten (Swedish State) v Stockholm Lindöpark AB and Stockholm Lindöpark AB v Svenska staten (Swedish State)*, EU:C:2001:34.

unless it is apparent from the overall scheme of the national legal system that no legal remedy exists to ensure, even indirectly, the respect of the individual's right under EU law.[38] The judgment in *Târşia* concerned a national remedial system that allowed re-opening of cases on the grounds of violation of EU law only in administrative proceedings. The CJEU concluded that such legal arrangements were not incompatible with EU law and added that if the rights deriving from EU law cannot be corrected, individuals have the right to compensation under the principle of State liability for judicial breaches.[39] Lastly, in *Tomášová*, the CJEU stated that the relationship between a liability claim and other actions under national law was determined by the national laws (national procedural autonomy), subject to observance of the principles of equivalence and effectiveness.[40]

In light of the above, it can be argued that the recourse to a claim of State liability for judicial breach of EEA law is unnecessary if the effectiveness of the EEA rules at issue can be assured by an alternative means of remedy. Similarly, the introduction of a new remedy into the national legal order in the form of a liability action may not be required, when proven it is unnecessary to protect an individual's rights.

Accordingly, the Authority takes the view that either re-opening of cases and/or State liability for judicial breaches, and/or another alternative remedy, need to exist in the national legal order to remedy serious judicial breaches of EEA law.

3.3 The Icelandic judicial system

As of 1 January 2018, Iceland has a three tiered court system, comprised of eight District Courts, the Court of Appeal (*Landsréttur*) and the Supreme Court.

Act No 91/1991 on Civil Procedure (*lög um meðferð einkamála*) ("the Act on Civil Procedure") sets out the general rules that govern the procedure of an individual case heard by the courts. In addition, Act No 50/2016 on the Judiciary (*lög um dómstóla)* ("the Act on the Judiciary") provides *inter alia* for the independence of judges and their obligations when performing their work.

The principle of legal certainty plays an important role in terms of the general principles of civil procedure. This can, *inter alia,* be seen in Article 43(1) of the Act on the Judiciary, which provides that a judicial resolution cannot be revised, except by an appeal to a higher court. Furthermore, the Act on Civil Procedure sets out in Article 116 the protection of the general principle of *res judicata.* According to Article 116(1), a judgment is binding as to the outcome of a case between the parties and those who, according to law, replace them, regarding claims that have been decided on their merits. In addition, Article 116(4) provides that a judgment has full evidentiary value as to the facts of that case until the opposite is proven.

Another general principle of Icelandic civil procedure is that the parties to a case have the autonomy to decide the causes of action (*málsástæður*) upon which they base their case. As a general rule, according to Article 111(1) of the Act on Civil Procedure, a judge may not in the judgment go beyond the claims made by the parties unless these pertain to issues that the judge must handle *ex officio.* Furthermore, it is set out in Article 111(2) of the Act on Civil Procedure that a judge may not base his/her findings on causes of action or on objections that would have been acceptable had they been presented, but were not, during the proceedings. Similarly, causes of action and objections must be submitted as soon as possible (or as soon as the occasion arises) if they are to be taken into account,

[38] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, paragraphs 40-41.
[39] Case C-69/14 *Dragoș Constantin Târșia v Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor*, EU:C:2015:662, paragraph 40.
[40] C-168/15 *Tomášová*, cited above, paragraph 40.

as stated in Article 101(5) of the Act on Civil Procedure. Late submissions can, however, be agreed to by the other party. According to Article 163(2) of the Act on Civil Procedure, the Court of Appeal can base its judgment on a claim or cause of action that a party did not submit before the District Court if (i) it was mentioned in the written submissions to the Court of Appeal; (ii) the basis of the case is not distorted by its submission; (iii) it is considered excusable that the claim or cause of action was not submitted before the District Court; and (iv) it would be to the submitting party's detriment if they would not be taken into account. The same applies before the Supreme Court as regards causes of actions that were not submitted before the lower courts, according to Article 187(2) of the Act on Civil Procedure. However, reasons of law (*lagarök*) pertaining to a cause of action can generally be submitted at any time and judges are not bound by the parties' references to reasons of law.

According to Article 53(2) of the Act on the Judiciary, the State shall be held liable for damages, under general rules of tort law, if the actions or inactions of a judge in the exercise of his judicial functions lead to loss.

3.4 Iceland's application of the principle of State liability for judicial breaches

As noted above, according to Article 53(2) of the Act on the Judiciary, the State shall be held liable for damages, under general rules of tort law, if the actions or inactions of a judge in the exercise of his judicial functions lead to loss. To the Authority's knowledge, this provision has not been interpreted or applied as such by the Icelandic courts and its further content and scope is thus unknown.

Furthermore, to the Authority's understanding, the case law regarding the principle of State liability for judicial breaches in Iceland is very limited. Indeed, the only EEA-specific case is that of the complainant. In its judgment of 18 June 2009 in Case No 604/2004, *Pétur Þór Sigurðsson* v *the Icelandic State*, the Icelandic Supreme Court dealt with a similar issue although the circumstances were not exactly the same as further described below.

The facts of the complainant's case are that, on 28 July 2001, the complainant suffered an accident at work. By judgment of 20 December 2005 in Case No 246/2005, *Þór Kolbeinsson* v *Ístak hf. and counterclaim*, the Supreme Court of Iceland dismissed the complainant's claim for compensation from his employer, on the ground that, in light of the factual situation, the obligation to take safety measures at the workplace should have been considered to be within the complainant's own sphere of responsibility, because he was a qualified and experienced worker.

On 1 October 2009, the complainant brought an action before Reykjavík's District Court, claiming compensation from the Icelandic State for losses sustained as a result of the dismissal of his claim in the Supreme Court's judgment of 20 December 2005. According to the complainant, that judgment was mainly a consequence of the Icelandic State's failure to fulfil its obligations under the EEA Agreement to implement Directives 89/391/EEC[41] and 92/57/EEC[42] ('the Directives') into Icelandic law. In the alternative, the complainant argued that the losses were a consequence of the Icelandic Supreme Court's failure to interpret the relevant Icelandic legislation in conformity with EEA law. The claim for damages due to judicial breaches was not based on Article 53(2) of the Act on the Judiciary, but merely on general rules of State liability, by reference to the

[41] Council Directive 89/391/EEC of 12 June 1989 *on the introduction of measures to encourage improvements in the safety and health of workers at work* (OJ L 183, 29.6.1989, p. 1).
[42] Council Directive 92/57/EEC of 24 June 1992 *on the implementation of minimum safety and health requirements at temporary or mobile construction sites* (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ L 245, 26.8.1992, p. 6).

judgment of the Icelandic Supreme Court in Case No 236/1999 (*the Icelandic State v Erla María Sveinbjörnsdóttir)* and the judgment of the CJEU in *Köbler*.[43]

On 17 February 2010, the District Court decided to refer certain questions to the EFTA Court for an advisory opinion. On appeal, the Supreme Court of Iceland, in a judgment of 23 March 2010 in Case No 132/2010, *the Icelandic State* v *Þór Kolbeinsson*, upheld the decision to request an advisory opinion, but also specified which questions the District Court was to refer to the EFTA Court and how the questions were to be formulated.

In its judgment of 10 December 2010 in *Kolbeinsson*,[44] dealing with the District Court's request for an advisory opinion, the EFTA Court concluded:

> "Save in exceptional circumstances it is not compatible with […] Directive 89/391/EEC […] and […] Directive 92/57/EEC […] interpreted in light of Article 3 EEA to hold a worker liable under national tort law for all, or the greater share, of the losses suffered as a result of an accident at work due to his own contributory negligence when it has been established that the employer had not on his own initiative complied with rules regarding safety and conditions in the work place.
> […]
> An EEA State may be held liable for breach of the rule on contributory negligence inherent in Directives 89/391/EEC and 92/57/EEC interpreted in light of Article 3 EEA provided that the breach is sufficiently serious. It is for the national court to decide in accordance with the settled case law on State liability for breaches of EEA law whether this condition is fulfilled in the case before it."

After receiving the advisory opinion from the EFTA Court, Reykjavík's District Court held that the implementation of the Directives into the Icelandic legal system with the entering into force of the EEA Agreement had called for an amendment of Icelandic legislation. The reason was the general principle of tort law that a worker could be submitted to a reduction or a full loss of damages due to his own contributory negligence. However, the court found that the differences between the Icelandic law and the Directives were not such that the breach of the legislator could be considered sufficiently serious.

Concerning the claim that the Supreme Court had in its judgment of 20 December 2005 wrongly interpreted EEA law, the District Court found, with reference to Article 116 of the Act on Civil Procedure, that it could not pronounce on this question. The District Court referred to the judgment of the Supreme Court of 20 December 2005, which resolved the dispute on the complainant's claims by a final judgment and found that the effect of the judgment remained unaltered in accordance with Article 116(1) of the Act on Civil Procedure.

The District Court further held that it could be inferred from Article 116(2) of the same Act, that parties to a civil case had limited possibilities under Icelandic law to have a case reviewed following a judgment by the Supreme Court, apart from the re-opening of cases according to Article 169 (currently Article 191) of the Act on Civil Procedure. Therefore, there was no authorisation in the Icelandic legislation to review the judgment concerning the complainant's claim for damages from his former employer on its merits on the grounds pleaded in the case at hand. In this regard, the District Court referred to a judgment of the Supreme Court of 18 June 2009 in Case No 604/2008, *Pétur Þór Sigurðsson* v *the Icelandic State,* where the same reasoning was applied in terms of a claim of damages sought from the Icelandic State following a judgment of the European Court of Human Rights. In that judgment the European Court of Human Rights concluded that the appellant of that case had not received a fair trial in a case concerning a monetary claim.

[43] Case C-224/01 *Köbler*, cited above.
[44] Case E-2/10 *Kolbeinsson*, cited above.

Following an appeal by the complainant, the Supreme Court upheld the District Court's conclusion on acquittal in the complainant's case.[45] The Supreme Court stated that, irrespective of whether the Directives limited the possibilities, under these circumstances, to subject workers to a reduction or a complete loss of damages due to their own contributory negligence, it was clear, with a reference to the District Court's judgment, that the complainant was not able to claim damages on this basis. The Supreme Court thus did not expressly pronounce on the application of the principle of State liability for judicial breaches of EEA law but did uphold the District Court's conclusion.

It can be inferred from the District Court's reasoning in the complainant's case, and also from the Supreme Court judgment of 18 June 2009 in Case No 604/2008, *Pétur Þór Sigurðsson* v *the Icelandic State,* that State liability for judicial breaches appears not to be completely excluded under the Icelandic legal system. However, in order to bring a claim for damages for judicial breaches of EEA law in this context before the Icelandic courts, the relevant case must have been re-opened. Only if the re-opened case leads to a different conclusion as regards the disputed EEA legislation, liability can be claimed. However, as the conditions for re-opening of civil cases in Iceland have been very strict, the possibilities for the application of the principle of State liability for judicial breaches of EEA law have been limited.

3.5 The re-opening of court cases in Iceland

Until 1 December 2020, Article 191(1) of the Act on Civil Procedure provided that re-opening of court cases could be granted at District Court level if all the following conditions were met:

> "a. it is demonstrated that there is a strong likelihood that the circumstances of the case were not revealed with sufficient clarity when the case was examined […] and none of the parties can be blamed for this,
> b. it is demonstrated that there is a strong likelihood that new evidence will lead to a different conclusion on significant matters,
> c. other circumstances favour the granting of granting the licence, including the consideration that very great interests of a party may be at stake."

Until the same time, Article 191(2) of the Act on Civil Procedure prescribed that the parties could only apply once to have a case re-opened.

Furthermore, Article 193(1) of the same Act provided that re-opening of cases adjudicated by the Court of Appeal or the Supreme Court could be granted if the conditions of Article 191 of the Act were fulfilled.

On 19 May 2020, the Icelandic Parliament adopted Act No 47/2020 on the establishment of a Re-opening Court ("Act No 47/2020" or "the Act on the establishment of a Re-opening Court"). The Act, which entered into force on 1 December 2020, amended the Act on the Judiciary, the Act on Civil Procedure and the Act on Criminal Procedure.[46]

According to Article 191 of the Act on Civil Procedure, as amended by Article 8 of Act No 47/2020, *one general* and *one of two specific* conditions set out by the provision need to be fulfilled for a case to be re-opened. First, the party requesting re-opening must have significant interests (*stórfellda hagsmuni*) at stake. Second, one of the two following conditions needs to be met:

> Article 191(1)(a): "strong probabilities, based on new documents or information, exist that the facts of the case were not clear while the case was being processed and the party is not at

[45] Judgment of 21 February 2013 in Case No 532/2012, *Þór Kolbeinsson* v *the Icelandic State.*
[46] https://www.althingi.is/altext/150/s/1464.html

> fault and that the new documents or information will lead to a different conclusion in important aspects of the case."[47]
>
> Article 191(1)(b): "strong probabilities exist that new documents or information, which does not pertain to the facts of the case, will lead to a different conclusion in important aspects of the case."[48]

The changes broaden the conditions for parties requesting re-opening of cases, compared to previous legislation, as only one of two conditions set out in point (a) and (b) of Article 191(1) now need to be satisfied, instead of both. Furthermore, point (b) not only comprises *"new documents"*, as before, but also *"new information"*, which is a wider concept. It is also clarified that point (b) applies to other aspects than the facts of a case.

It should also be noted that similar changes have been made to the Act on Criminal Procedure No 88/2008. Article 12 of the Act on the establishment of a Re-opening Court amends Article 228(1) of the Act on Criminal Procedure, so that point (a) of that provision now comprises not only *"new documents"* but also *"new information"*.

Furthermore, as noted above, parties could only apply once for re-opening of a case under the previous regime. However, according to Article 191(2) of the Act on Civil Procedure, as amended by Article 8 of Act No 47/2020, parties will *generally* only be able to apply once, *unless* new documents or information surfaces after their last application has been processed and there is a high probability that these new documents or information might lead to a different conclusion in important aspects of the case. The same applies under Article 193(2) of the Act, as amended by Article 10 of Act No 47/2020.

The preparatory works to the Act on the establishment of a Re-opening Court, more precisely the comments to the bill in relation to Article 8 of the Act, which amends point (b) of Article 191(1) of the Act on Civil Procedure, state:

> "The conditions of point (b) will on the other hand comprise other circumstances than those pertaining to the facts of a case. According to that point, it is sufficient that new documents or information emerge, which do not pertain to the facts of the case, and that strong probabilities exist that those will lead to a different conclusion in important aspects of the case. New documents or information within the meaning of the provision should be understood as any documents or information that could lead to a different conclusion in important aspects of the case, including rulings of international courts, such as the European Court of Human Rights and the EFTA Court. The EFTA Surveillance Authority (ESA) has emphasised that Icelandic legislation contains the possibility for the re-opening of cases concerning EEA law if conclusions of the EFTA Court indicate changed findings of Icelandic courts in a case concerning EEA law. ESA has sent a reasoned opinion to the Icelandic Government on that issue."[49]

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[47] Authority translation. The original text reads as follows: *"Sterkar líkur eru leiddar að því með nýjum gögnum eða upplýsingum að málsatvik hafi ekki verið leidd réttilega í ljós þegar málið var til meðferðar og aðilanum verður ekki um það kennt og að gögnin eða upplýsingarnar muni verða til breyttrar niðurstöðu í mikilvægum atriðum."*

[48] Authority translation. The original text reads as follows: *"Sterkar líkur eru leiddar að því að ný gögn eða upplýsingar um annað en málsatvik muni verða til breyttrar niðurstöðu í mikilvægum atriðum."*

[49] Authority translation. The original text reads as follows: "*Skilyrði b-liðar muni aftur á móti taka til annarra tilvika en þeirra sem varða málsatvik. Samkvæmt því nægir að fram hafi komið ný gögn eða upplýsingar, um annað en málsatvik, og sterkar líkur hafi verið leiddar að því að þau muni breyta fyrri niðurstöðu dómsmálsins í mikilvægum atriðum. Með nýjum gögnum eða upplýsingum í þessum skilningi er átt við öll þau gögn eða upplýsingar sem leitt gætu til breyttrar niðurstöðu málsins í mikilvægum atriðum, þar á meðal úrlausnir alþjóðlegra dómstóla á borð við Mannréttindadómstól Evrópu og EFTA-dómstólinn. Hefur Eftirlitsstofnun EFTA (ESA) lagt áherslu á að til staðar sé heimild í réttarfarslöggjöf til endurupptöku dómsmála er varða EES-löggjöf ef*

The comments to the bill concerning Article 12 of the Act on the establishment of a Re-opening Court, which amends Article 228(1)(a) of the Act on Criminal Procedure, also emphasise that *"new documents or information"* should be interpreted broadly enough to not only encompass evidence but also rulings of international courts. Reference is then made to the comments in relation to Article 8 of the Act.

It should also be noted that in a comment from the Parliament's Judicial Affairs and Education Committee (*Allsherjar- og menntamálanefnd*) on the legislative bill on the Re-opening Court, it is stated that *"rulings of international courts"* is only mentioned as an example and the list thus not exhaustive. The concept should be interpreted broadly and could apply to findings of breaches of the EEA Agreement. It is further noted in the comment that a judgment in a similar case could be a basis for the re-opening of a case and that *"new documents or information"* should be interpreted broadly enough to not only encompass evidence.[50]

3.6 Summary of the Authority's assessment

3.6.1 General assessment

As noted above, the Authority takes the view that the principle of State liability for breaches of EEA law by a court adjudicating at last instance forms part of EEA law. However, it is clear from the case law of the CJEU that the conditions of the principle are strict and the threshold for its application is high.

With regard to Iceland's application of the principle of State liability for judicial breaches of EEA law, it seems that the principle will not be applied by the Icelandic courts unless the relevant case has first been re-opened. In the complainant's case, the District Court reached the conclusion, with reference to Article 116 of the Act on Civil Procedure and the principle of *res judicata*, that it could not pronounce on the question whether the Supreme Court had wrongly interpreted EEA law. Although the Supreme Court in the complainant's case did not expressly pronounce on the application of the principle of State liability for judicial breaches, the Supreme Court did uphold the District Court's conclusion on the matter, which also referred to the Supreme Court's reasoning in Case No 604/2008, *Pétur Þór Sigurðsson* v *the Icelandic State.*

Consequently, the current legal situation in Iceland appears to be that damages cannot be claimed from the State for breaches of EEA law by Icelandic courts adjudicating at last instance, without the re-opening of the relevant case. It should, however, be noted that it is somewhat unclear whether a claim for damages based on Article 53(2) of the Act on the Judiciary, which provides that the State shall be held liable for damages if the actions or inactions of a judge in the exercise of his judicial functions lead to loss, could lead to a different conclusion, as the provision has not been applied in practice, to the Authority's knowledge.

3.6.2 Re-opening of court cases as an alternative to state liability

The Authority has acknowledged in its previous correspondence with the Icelandic Government in this case that the limited application of State liability for judicial breaches in Iceland might be remedied by extending the possibility of the re-opening of cases. As noted above, it could also be argued that pure State liability claims might be unnecessary when alternative and equally effective remedies, such as the re-opening of cases, are

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niðurstöður frá EFTA-dómstólnum benda til breyttrar niðurstöðu íslenskra dómstóla í máli er varða EES-löggjöf. Hefur ESA sent íslenskum stjórnvöldum rökstutt álit í máli er þetta varðar."

[50] https://www.althingi.is/altext/150/s/1365.html

available. Indications can be found in the case law of the CJEU that other remedies than liability actions might be sufficient to ensure effective judicial protection of rights under EEA law, (see, for example, *Unibet,*[51] *Târșia*[52] and *Tomášová*[53]). Furthermore, the Authority understands that many EEA States do provide for some form of re-opening of court cases due to breaches of EEA law.

Whether Iceland's recently adopted legislative amendments, extending the possibilities for the re-opening of court cases, are sufficient to compensate for the limited application of State liability for judicial breaches in Iceland, must be assessed in the context of the relevant criteria namely the principle of national procedural autonomy and the principles of effectiveness and equivalence. The conditions for re-opening must not make it, in practice, *impossible* or *excessively difficult* to obtain reparation arising from judicial breaches of EEA law (effectiveness) and the conditions must not be *less favourable* than those relating to similar domestic actions (equivalence).[54] The judgments in *Köbler* and *Traghetti del Mediterraneo* suggest that the CJEU accepts that the Member States impose restrictions on the possibility of State liability for judicial breaches, as long as that possibility is not *absolutely excluded* or *virtually impossible* to achieve.[55]

As discussed in Section 3.5 above, the changes made by the Act on the establishment of a Re-opening Court broaden the conditions for the re-opening of court cases, both in civil and criminal proceedings. The main changes are that only one of the conditions set out in point (a) and (b) of Article 119(1) of the Act on Civil Procedure need to be fulfilled, that re-opening can be based on *"new information"* in addition to "*new documents*" and that the possibilities to request re-opening more than once are widened.

When assessing the effectiveness of the remedy of the re-opening of court cases in Iceland under the current regime, as amended by the Act on the establishment of a Re-opening Court, it is important to note that following the amendment Article 191(1)(b) of the Act on Civil Procedure is phrased in open and general terms. In addition, the preparatory works to the Act on the establishment of a Re-opening Court open up for a broad interpretation. "*New documents or information"* within the meaning of the provision should be understood as *any* documents or information that could lead to a different conclusion in important aspects of the case. Rulings of the EFTA Court and the European Court of Human Rights are mentioned in the preparatory works as examples of such new documents or information, which means that judgments of the CJEU are not excluded. There is no requirement that a subsequent judgment of the EFTA Court is between the same parties or concerns the same EEA EFTA State as the previous case. Accordingly, the previous case presumably only needs to concern interpretation of the same provision or principle of EEA law. Further, there is nothing in the wording of the provision that would exclude either judgments in infringement proceedings or advisory opinions (EFTA Court) or preliminary rulings (CJEU) from being covered. Lastly, the re-opening of court cases is not conditioned on a *manifest* breach of law, as is the case for the principle of State liability for judicial breaches.

It will be for the Re-opening Court to interpret and apply the provisions on the re-opening of court cases, according to the Act on Civil Procedure, as amended by the Act on the establishment of a Re-opening Court. It remains to be seen how those provisions will be applied in practice. The wording of the provisions and the preparatory works to the bill, however, indicate that the will of the legislature was to allow for a broad interpretation.

[51] Case C-432/05 *Unibet*, cited above, paragraphs 40-41.
[52] Case C-69/14 *Târșia,* cited above, paragraph 40.
[53] Case C-168/15 *Tomášová*, cited above, paragraph 40.
[54] See e.g. Case C-168/15 *Tomášová*, cited above, paragraphs 38-39.
[55] Case C-224/01 *Köbler,* cited above, paragraph 48; Case C-173/03 *Traghetti del Mediterraneo*, cited above, paragraph 46.

When it comes to the practical application of these legislative amendments in relation to the re-opening of court cases in the event of new documents or information pertaining to other than the facts of the case, the Authority assumes that re-opening would be possible in the circumstances where an Icelandic court has erred in a final judgment concerning interpretation or application of EEA law and then subsequently the EFTA Court (or the CJEU) has given a ruling on the same matter of law which clarifies the situation and entails that the Icelandic court was wrong.

If the Icelandic court, however, has given a final ruling which is in breach of already established case law, without a subsequent judgment of the EFTA Court (or the CJEU), there is more uncertainty as to the possibilities of re-opening, which *inter alia* depends on the application of the new Act on the establishment of a Re-opening Court.

If the relevant case law of the European Courts was not discussed during the court proceedings, it might be considered as "*new information*", as long as it is not to be considered a new cause of action (*málsástæða*), which the party should have submitted earlier. In the Icelandic judicial system, references to legal provisions and case law are usually considered as reasons of law (*lagarök*), rather than causes of action.

If the relevant case law of the European Courts was referred to by the parties during the proceedings, but still not taken into account by the Icelandic court, there is the possibility the conditions for re-opening might not be fulfilled and the re-opening of the case might not be possible. As noted above it remains to be seen how the provisions on the re-opening of court cases will be applied in practice and what will be the emphasis of the Re-opening Court in its assessment of the conditions for re-opening.

When assessing the effectiveness of Iceland's legal regime on the re-opening of court cases as compared to liability actions for judicial breaches, the limitations of re-opening discussed above must be balanced against the limitations of pure liability actions for judicial breaches. In that context, it must be taken into account that the conditions for State liability for judicial breaches are strict and the scope of application of the principle is narrow.

When looking at the advantages of the remedy of re-opening court cases in Iceland, it must also be noted that, while a liability action provides for economic compensation, re-opening of a court case can provide for substantive protection. In addition to that, if a case would be re-opened and an Icelandic court would reach a materially different final conclusion in line with EEA law, the person concerned could subsequently file a claim for damages against the Icelandic State, if he/she had suffered a loss due to the court's breach of EEA law.[56] In that case, a double remedy would be available to the aggrieved individual, substantive and economic.

In light of the above, the Authority takes the view that Iceland's legal regime for the re-opening of court cases, as amended by Act No 47/2020, provides for a remedy, which is not less effective than a pure liability action based on the principle of State liability for judicial breaches. As noted above, the principle of national procedural autonomy entails that it is for the legal system of the EEA States to lay down the rules as regards reparations for judicial breaches of EEA law. With the amendments made to the Act on Civil Procedure, loosening up the conditions for re-opening of cases, such reparations cannot be said to be *impossible* or *excessively difficult* to achieve.

In addition to the above, the legislative amendments also directly affect the principle of State liability for judicial breaches of EEA law as they widen the possibilities for a liability action. As explained above, damages can be claimed from the State for judicial breaches if a case has been re-opened and a materially different final conclusion reached. Taking

[56] In that context, reference is made to the conclusion of the District Court in the complainant's case and to the Supreme Court's judgment in Case No 604/2008.

into consideration the loosening up of the conditions for re-opening of court cases by the Act on the establishment of a Re-opening Court and the statements made in its preparatory works for the broad interpretation of the provisions, the precondition set by the Icelandic legislation that a case has been re-opened and a materially different conclusion reached does not, at the outset, render it impossible or excessively difficult to obtain damages based on the principle of State liability for judicial breaches. In that regard, note is also taken of the conclusion made above that Iceland's legal regime for the re-opening of court cases, as amended by Act No 47/2020, provides for a remedy, which is not less effective than a pure liability action.[57]

With regard to the principle of equivalence, the conditions for the re-opening of court cases in the event of breaches of EEA law under the amended regime are not less favourable than those relating to domestic claims. Furthermore, it appears that there are even more possibilities for the re-opening of court cases in the event of breaches of EEA law than when national law is breached, as judgments of international courts, such as the EFTA Court, are specifically mentioned, but there is no similar reference concerning breaches of national law.

4 Conclusion

In light of the above, and giving a particular concern to the comments to the bill that was adopted as Act No 47/2020 as well as the comment to the bill from the Parliament's Judicial Affairs and Education Committee, the Authority concludes that, by extending the possibilities for the re-opening of court cases in Act No 47/2020, the Icelandic legislation is in compliance with EEA law in so far as an effective judicial protection under EEA law is ensured.

This conclusion takes into account that the newly adopted legislative amendments have not yet been applied in practice in cases that are of relevance for the case at hand, and it is without prejudice to any future decision by the Authority to open a new case on this or a related issue in light of further developments.

By letter of 14 September 2020, the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 14 October 2020.

The complainant did not reply to that letter.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Iceland to comply with the principle of State liability for judicial breaches of EEA law, is hereby closed.

For the EFTA Surveillance Authority,

[57] See in that context Case C-160/14 *Ferreira da Silva e Brito and Others,* cited above, paragraph 60.

ESA | EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni S. Kristjánsson College Member

For Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Catherine Howdle.