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EFTA SURVEILLANCE AUTHORITY

Ministry for Foreign Affairs
Rauðarárstíg 25
105 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning State liability for breach of EEA law by a court adjudicating at last instance

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.

2 Correspondence

3. By the same letter of 24 February 2014, the Authority invited the Icelandic Government to submit information regarding the complaint by 4 April 2014.

4. The Icelandic Government was invited to comment, in particular, first, on whether it considered that liability for judicial breaches fell within the scope of the general principle of State liability under the EEA Agreement.

5. Second, the Icelandic Government was also invited to explain how a claim for damages based on breaches of EEA law by the judiciary would be lodged according to Icelandic procedural law. In particular, whether Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*) and/or Article 24 of Act no. 15/1998 on the Judiciary (*lög um dómstóla*) precluded such a claim being pursued in the Icelandic courts.

6. The Icelandic Government did not reply to the request for information of 24 February 2014. Therefore, on 28 August 2014 (Doc. No 720032), the Authority's Internal Market Affairs Directorate ("the Directorate") sent a Pre-31 letter to the Icelandic Government concerning non-cooperation of Iceland with the Authority in carrying out the duties assigned to it under the EEA Agreement and the Agreement between the EFTA States

on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The letter invited the Icelandic Government to submit the reply to the request for information of 24 February 2014 as soon as possible and no later than by 30 September 2014.

7. On 10 December 2014 (Doc. No 731050), a letter of formal notice was issued to Iceland for non-cooperation.

8. On 11 December 2014, the Authority received a letter from Iceland, dated 2 December 2014 (ref. IRR14090024/2.13.0, Doc. No 732385), replying to the request for information of 24 February 2014.

3 Relevant national law

9. Article 24(1) of Act no. 15/1998 on the Judiciary (*lög um dómstóla*) provides[1]:

"*Judges shall discharge their judicial functions independently and on their own responsibility. They shall, in resolving a case, proceed solely according to law, and shall never be subject to the authority of any other person. A judicial resolution cannot be revised, except by appeal to a higher court.*"[2]

10. Article 116 of Act no. 91/1991 on Civil Procedure (*lög um meðferð einkamála*) states[3]:

"*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.*

2. A claim that has already been decided on its merits shall not be submitted to the same court or a court of the same instance except to the extent prescribed by this Act. A new case concerning such a claim shall be dismissed.

3. A judgment is binding for a judge when it has been delivered. A judge is however permitted to correct typos, miscalculations, errors with regard to names and any other obvious error in a judgment, provided that the judge give anyone who has obtained a certified copy of a judgment a new certified copy without delay.

4. A judgment has full evidentiary value as to the facts of that case until the opposite is proven."[4]

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[1] English translation used by the Authority found at http://eng.innanrikisraduneyti.is/laws-and-regulations/nr/109, checked on 4 May 2015.

[2] In Icelandic: *„Dómarar eru sjálfstæðir í dómstörfum og leysa þau af hendi á eigin ábyrgð. Við úrlausn máls fara þeir eingöngu eftir lögum og lúta þar aldrei boðvaldi annarra. Dómsathöfn verður ekki endurskoðuð af öðrum nema með málskoti til æðra dóms."*

[3] Translated by the Authority.

[4] In Icelandic: *"1. Dómur er bindandi um úrslit sakarefnis milli aðila og þeirra, sem koma að lögum í þeirra stað, um þær kröfur sem eru dæmdar þar að efni til.*
2. Krafa sem hefur verið dæmd að efni til verður ekki borin aftur undir sama eða hliðsettan dómstól framar en segir í lögum þessum. Nýju máli um slíka kröfu skal vísað frá dómi.
3. Dómur er bindandi fyrir dómara þegar hann hefur verið kveðinn upp. Dómara er þó heimilt að leiðrétta ritvillur, reikningsskekkjur, nafnskekkjur og aðrar bersýnilegar villur í dómi, enda láti hann aðilum sem hafa fengið endurrit af dómi þá í té nýtt endurrit án tafar.
4. Dómur hefur fullt sönnunargildi um þau málsatvik sem í honum greinir þar til það gagnstæða er sannað."

4 The Authority's assessment

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

11. As for the EU, 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 ("the Court of Justice") in its judgment in *Francovich*[5]. In its judgment in *Köbler*[6] the Court of Justice confirmed that this principle applies also for the infringements of EU law stemming from a decision of a court adjudicating at last instance.

12. According to the Court of Justice, in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of EU law attributable to a decision of a court of a Member State adjudicating at last instance[7].

13. As regards the EEA Agreement, the principle of State liability for breaches of EEA law is established by the EFTA Court in judgments in Cases E-9/97 *Sveinbjörnsdóttir*[8], E-4/01 *Karlsson*[9], E-8/07 *Nguyen*[10], E-2/12 *HOB-vín ehf*[11].

14. In Case E-9/97 *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 depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law[12]. Under the EEA Agreement 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. The principle of State liability must be seen as an integral part of the EEA Agreement as such[13].

15. To reach the conclusion that the principle of State liability is inherent to the EEA legal order, the EFTA Court based itself, *inter alia*, on 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[14].

16. In Case E-4/01 *Karlsson*, the EFTA Court concluded that an EEA State can be held responsible for breaches of its obligations under EEA law where the conditions for State liability are fulfilled. The three conditions for State liability must be satisfied both where the loss or damage for which compensation is sought is the result of a failure to act on the part of the EEA State, and where it is the result of the adoption of a legislative or

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[5] Judgment in *Francovich*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428.
[6] Judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraphs 39 and 40.
[7] Judgment in *Köbler*, paragraph 33.
[8] Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.
[9] Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240.
[10] Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224.
[11] Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092.
[12] Case E-9/97 *Sveinbjörnsdóttir*, paragraph 59.
[13] Case E-9/97 *Sveinbjörnsdóttir*, paragraphs 62 and 63.
[14] See Case E-9/97 *Sveinbjörnsdóttir*, paragraphs 46-63.

administrative act in breach of EEA law. Under the EEA Agreement, an EEA State may, in principle, be held liable for breaches of its obligations under both secondary acts of EEA legislation and the main part of the EEA Agreement[15].

17. The absence of recognition of direct effect for EEA rules does not preclude the existence of an obligation on the State to provide compensation for loss and damage caused to individuals and economic operators as a result of breaches of obligations under the EEA Agreement for which that State can be held responsible[16].

18. Cases E-8/07 *Nguyen* and E-2/12 *HOB-vín ehf.* further confirmed that it is a general principle of EEA law that an EFTA State is obliged to provide for compensation for loss and damage caused to individuals and economic operators as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible. State liability must be seen as an integral part of the EEA Agreement as such[17].

19. As stated in its written observations in Case E-2/10 *Kolbeinsson*[18], the Authority considers that the general principle of state liability under the EEA Agreement extends to liability for judicial breaches.

20. This was confirmed at paragraph 77 of the judgment in Case E-2/10 *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.*"

21. This means that an EEA State is liable for a breach of EEA law by its courts provided that three conditions are fulfilled: 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[19].

22. With regard more particularly to 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, 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 be incurred only in the exceptional case where the court has manifestly infringed the applicable law[20].

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[15] Case E-4/01 *Karlsson*, paragraph 32.
[16] Case E-4/01 *Karlsson*, paragraph 29.
[17] Case E-8/07 *Nguyen*, paragraph 31 and Case E-2/12 *HOB-vín ehf.*, paragraph 119.
[18] Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234.
[19] Case E-9/97 *Sveinbjörnsdóttir*, paragraph 66; Case E-4/01 *Karlsson*, paragraph 32.
[20] Judgment in *Köbler*, paragraph 53; Case E-2/10 *Kolbeinsson*, paragraph 77; judgment in *Commission* v *Italy*, C-379/10, EU:C:2011:775, paragraph 41.

23. Therefore, 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 EEA law.

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, whether the error of law was excusable or inexcusable[21].

25. In any event, an infringement of EEA law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court of Justice or the EFTA Court in the matter[22].

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

26. In its letter of 2 December 2014 the Icelandic Government expressly stated that it did not share the view that liability for judicial breaches was part of the general principle of State liability under the EEA Agreement. It pointed out that judgments of the Supreme Court of Iceland were final. If a party to a case maintains that the Supreme Court has misinterpreted legal rules it can only request that the case be reopened according to Article 169 of Act no. 91/1991 on Civil Procedure.

27. Moreover, the Authority notes that, in the complainant's case, after receiving the advisory opinion from the EFTA Court in Case E-2/10 *Kolbeinsson, Héraðsdómur Reykjavíkur* ("the District Court") found, first, that the differences between the Icelandic legislation and the Directives concerned were not such that the breach could be considered as sufficiently serious. Thus the District Court held that the State was not liable for the insufficient implementation of the Directives into the Icelandic legal order. Second, concerning the complainant's claim that the Supreme Court had wrongly interpreted EEA law in its judgment of 20 December 2005, the District Court considered that the subject matter of that case had been finally decided and the formal validity of that judgment remained unchanged, in accordance with Article 116(1) of the Act on Civil Procedure. According to Article 116(2) of the Act on Civil Procedure, a claim that had been decided on its merits could not be submitted to the same court or a court of the same instance, except to the extent prescribed by the Act on Civil Procedure. The possibility of revising a case decided by the Supreme Court was limited to the possible re-opening of that case according to Article 169 of the Act on Civil Procedure. As Icelandic law did not provide for the possibility of revising the Supreme Court's judgment of 20 December 2005 on the basis of the complainant's argument that the Supreme Court had wrongly interpreted EEA law, the District Court dismissed this claim of the complainant. On appeal, the Supreme Court upheld this reasoning of the District Court[23].

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[21] See for comparison judgment in *Köbler*, paragraphs 54 and 55.

[22] See for comparison judgment in *Köbler*, paragraph 56.

[23] See Supreme Court Case No 532/2012 of 21 February 2013. See also Supreme Court Case No 604/2008 of 18 June 2009. The Supreme Court rejected a claim for damages for a breach of the European Convention on Human Rights on the basis of essentially the same reasoning. In that case, the Supreme Court held that Article 116 of the Act on Civil Procedure precluded a claim for damages based on the liability of the State for an erroneous judgment of the Supreme Court, as the subject matter in the judgment in question had been finally decided and could thus not be subject to further revision.

28. It appears therefore that Iceland excludes any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance.

29. To justify such an exclusion the Icelandic Government claimed in its letter that national courts of EFTA States were under no obligation to request advisory opinions from the EFTA Court nor were advisory opinions legally binding upon national courts. EFTA States therefore should be able to expect that judgments of national courts be applied even if they concern interpretation of EU law.

30. According to the Icelandic Government, in the EU, State liability for decisions by 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. As there is no such duty under EEA law, there can be no State liability for incorrect application of EEA law by national courts.

31. Furthermore, the Icelandic Government pointed to the EEA Agreement where it was stated that in full deference to independence of the courts, the objective of the Contracting Parties was to arrive at and maintain, a uniform interpretation and application of the Agreement[24]. In the view of the Icelandic Government, 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.

32. However, the Authority notes that the arguments put forward by the Icelandic Government concerning the independence of the national courts and the principle of *res judicata* are already answered in the judgment in *Köbler*.

33. In particular, recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage. Therefore, the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance[25].

34. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to EU law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question[26].

35. In the Authority's view, the same arguments should apply as regards the EEA Agreement.

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[24] See Articles 105 and 106 of the EEA Agreement.
[25] Judgment in *Köbler*, paragraphs 39 and 40.
[26] Judgment in *Köbler*, paragraph 42.

36. This conclusion is not altered by the fact, pointed out by the Icelandic Government, that there is no obligation under the EEA Agreement to request advisory opinions from the EFTA Court and that the advisory opinions are not legally binding upon national courts.

37. First, admittedly, in its judgment in *Köbler* the Court of Justice mentions the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU as one of the factors which must be taken into account in order to determine whether the condition "*manifestly infringed*" is satisfied[27].

38. However, that does not mean that the condition at issue might be satisfied only in cases of the non-compliance by the court in question with the obligation to make a reference for a preliminary ruling. On the contrary, in paragraph 56 of the judgment in *Köbler* the Court of Justice stated:

"*In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter*".

39. Moreover, in its judgment in *Traghetti del Mediterraneo* the Court of Justice added[28]:

"*<...> 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.*"

40. Therefore, it is not correct to claim that State liability for decisions by national courts must be seen only as a kind of sanction against national courts of last instance breaching their duty to request preliminary rulings on the interpretation of EU law.

41. Both in the EU and the EEA, State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance could therefore arise from the substantive ruling of the court at issue. However, in the EEA, such liability would not arise as a result of non-referral to the EFTA Court, because Article 34 SCA does not contain an obligation to refer to the EFTA Court.

42. Furthermore, in Case E-4/01 *Karlsson* the EFTA Court held that the finding that the principle of State liability was an integral part of the EEA Agreement differed, as it must, from the development in the case law of the Court of Justice of the principle of State liability under EU law. Therefore, the application of the principles may not necessarily be in all respects coextensive[29].

43. Therefore, even if State liability for decisions by national courts were, in the EU, connected with the duty of the national courts of last instance to request preliminary rulings, which, as outlined above, is not the case, that would not be an impediment for recognising State liability for decisions by national courts under the EEA Agreement.

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[27] Judgment in *Köbler*, paragraph 55.
[28] Judgment in *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 35.
[29] Case E-4/01 *Karlsson*, paragraph 30.

44. 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*) 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 Agreement.

5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude 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 Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank Büchel
College Member