JUDGMENT OF THE COURT

10 December 2010*

(Safety and health of workers – Directives 89/391/EEC and 92/57/EEC – Article 3 EEA – Employers' and employees' liability for work accidents – State liability)

In Case E-2/10,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland, in a case pending before it between

Þór Kolbeinsson

and

The Icelandic State

concerning the interpretation of 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 and of 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),

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Henrik Bull (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- the Plaintiff, Þór Kolbeinsson, represented by Einar Gautur Steingrímsson, Supreme Court Attorney, Reykjavík;

* Language of the request: Icelandic.

- the Defendant, the Icelandic State, represented by Einar Karl Hallvarðsson, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), Reykjavík;
- the Kingdom of Belgium, represented by Liesbet Van den Broeck and Marie Jacobs, the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;
- the Norwegian Government, represented by Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), and Kaja Moe Winter, Adviser, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority (hereinafter "ESA"), represented by Ólafur Jóhannes Einarsson, Senior Officer, and Lorna Armati, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;
- The European Commission, represented by Gérard Rozet and Johan Enegren, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Stefán Geir Þórisson, the Defendant, represented by Einar Karl Hallvarðsson, the Norwegian Government, represented by Ketil Bøe Moen and Kaja Moe Winter, ESA, represented by Ólafur Jóhannes Einarsson, and the Commission, represented by Gérard Rozet and Johan Enegren, at the hearing on 6 October 2010,

gives the following

Judgment

I Facts and Procedure

1 By a letter dated 26 March 2010, registered at the Court on 6 April 2010, Héraðsdómur Reykjavíkur made a request for an Advisory Opinion in a case pending before it between Þór Kolbeinsson (hereinafter the "Plaintiff") and the Icelandic State (hereinafter the "Defendant").

2 On 28 July 2001, the Plaintiff, an Icelandic carpenter, was working with two colleagues at the construction site of the Smáralind shopping mall when he suffered an accident. The Plaintiff fell from joists on a temporary construction loft, through gypsum boards, to the ground five metres below, and suffered both temporary and permanent physical injuries.

3 By judgment of 20 December 2005, the Supreme Court of Iceland dismissed the Plaintiff's claim for compensation from his employer.

4 The Occupational Safety and Health Administration in Iceland had previously stated in a report:

The circumstances at the site of the accident were that no measures of any type had been taken there, either above or below the joists, to prevent the workers from falling, as is obligatory under Article 31.2 and 33.6 in Part B of Annex IV to the Regulation No. 547/1996. Nor were safety-belts, attached to a life-line, used as prescribed in Article 33.9 of the same rules. It appears that the cause of the accident can be solely attributed to the fact that neither were measures taken to prevent the workers from falling nor were safety belts in use on the site.

5 In the judgment, the Supreme Court of Iceland noted the conclusion of the Occupational Safety and Health Administration that the accident could be attributed to the fact that there were no measures to prevent the workers from falling or safety belts on the site. However, the Supreme Court also found that the Plaintiff was familiar with the working conditions, that he was a qualified carpenter and had considerable experience of work in the field. Consequently, the Plaintiff should have known what measures needed to be taken in those particular circumstances and he should have been aware of the inherent dangers of moving around the area by simply walking on the crossbeams. According to the Supreme Court, it was obvious that it would have been possible to increase safety by laying out timber on which the workers could move across the crossbeams. It was not considered necessary for his employer to provide him with any special instructions or guidance concerning these hazards. In light of the factual situation and with reference to Article 26, first paragraph of the Icelandic Act No 46/1980 on Working Conditions, Health, Hygiene and Safety in Work places, the obligation to take safety measures should instead have been considered to be within the Plaintiff's own sphere of responsibility. On this basis, the Supreme Court found that liability for the accident could not be attributed to the Plaintiff's employer.

6 On 1 October 2009, the Plaintiff brought an action before Héraðsdómur Reykjavíkur, demanding compensation from the Defendant, the Icelandic State, for losses sustained as a result of the dismissal of his claim in the Supreme Court judgment of 20 December 2005. According to the Plaintiff, the judgment is a consequence of the Defendant's failure to fulfil its obligations under the EEA Agreement to implement the above-mentioned Directives into Icelandic law.

7 On 17 February 2010, Héraðsdómur Reykjavíkur decided to refer certain questions to the Court for an Advisory Opinion. On appeal, the Supreme Court of Iceland, in a judgment of 23 March 2010, upheld the decision to request an Advisory Opinion, but also specified what questions the District Court was to refer to the Court and how the questions were to be formulated.

8 The following questions were referred to the Court:

1. *Is it compatible with the provisions of Council Directive No 89/391/ECC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and 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) that a worker, due to his own contributory negligence, is held liable for losses suffered as a result of an accident at work, when it has been established that the employer has not on his own initiative complied with rules regarding safety and conditions in the work place?

2. *If the answer to the above question is in the negative, is the Icelandic State then liable to award damages to a worker who suffered an accident at work and, contrary to the aforementioned directives, had to partly or wholly bear the losses suffered, due to his own contributory negligence, on the grounds that the State had not correctly implemented these directives into Icelandic law?*

II Legal background

EEA law

9 Article 3 of the EEA Agreement reads:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *[...]*

10 Council Directive 89/391/EEC of 12 June on the introduction of measures to encourage improvements in the safety and health of workers at work (hereinafter "Directive 89/391") is referred to at point 8 of Annex XVIII to the EEA Agreement. The Directive is adapted to the EEA Agreement by way of Protocol 1 thereto.

11 Article 1 of Directive 89/391, under Section I *General Provisions*, reads:

> *Object*
>
> *1. The object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.*
>
> *2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.*

[...]

12 Article 4 of Directive 89/391, under Section I *General Provisions*, reads:

> *1. Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.*
>
> *2. In particular, Member States shall ensure adequate controls and supervision.*

13 Article 5 of Directive 89/391, under Section II *Employers' Obligations*, reads:

> *General provision*
>
> *1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.*
>
> *2. Where, pursuant to Article 7 (3), an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.*
>
> *3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.*
>
> *4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.*
>
> *[...]*

14 Article 13 of Directive 89/391, the sole article under Section III *Workers' Obligations*, reads:

> *1. It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or Commissions at work in accordance with his training and the instructions given by his employer.*
>
> *2. To this end, workers must in particular, in accordance with their training and the instructions given by their employer:*
>
> *(a) make correct use of machinery, apparatus, tools, dangerous substances, transport equipment and other means of production;*

(b) make correct use of the personal protective equipment supplied to them and, after use, return it to its proper place;

[...]

(d) immediately inform the employer and/or the workers with specific responsibility for the safety and health of workers of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements;

[...]

15 Article 16 of Directive 89/391 reads:

1. The Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual Directives, inter alia, in the areas listed in the Annex.

[…]

3. The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/or specific provisions contained in these individual Directives.

16 Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eights individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) − hereinafter "Directive 92/57" − is referred to at point 16b of Annex XVIII to the EEA Agreement. The Directive is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptation contained in Annex XVIII.

17 Article 9 of Directive 92/57 reads:

Obligations of employers

In order to preserve safety and health on the construction site, under the conditions set out in Article 6 and 7, employers shall:

(a) in particular when implementing Article 8, take measures that are in line with the minimum requirements set out in Annex IV;

[...]

18 Point 1.2 in Part A *General Minimum Requirements for On-Site Work places* of Annex IV *Minimum Safety and Health Requirements for Construction Sites* to Directive 92/57 reads:

1.2. Access to any surface involving insufficiently resistant materials is not authorized unless appropriate equipment or means are provided to enable the work to be carried out safely.

19 Point 10.4 in Part A *General Minimum Requirements for On-Site Work places* of Annex IV *Minimum Safety and Health Requirements for Construction Sites* to Directive 92/57 reads:

10.4. [...]

Appropriate measures must be taken to protect workers who are authorized to enter the danger areas.

[...]

20 Point 1 under Section I *On-site indoor workstations* in Part B *Specific Minimum Requirement for On-Site Workstations* of Annex IV *Minimum Safety and Health Requirements for Construction Sites* to Directive 92/57 reads:

1. Stability and solidity

Premises must have a structure and stability appropriate to the nature of their use.

National law

21 In Icelandic law, two sets of rules apply with regard to the liability of employers vis-à-vis their employees for damages due to work-related accidents. The first set is based on general principles of tort law. The second set originates within the context of labour law and provides for an employee to receive insurance payments irrespective of liability in tort.

22 According to the general principles of tort law, if an employee suffers an accident at work, the employer is liable for damages caused by him or his employees' intentional or negligent conduct. This applies, e.g., in the case of injuries resulting from the employer not complying with rules concerning safety at work. The employer is obliged to ensure that work place conditions are such that the personal safety of the employees is not endangered, see Article 13 of Act No 46/1980 on Working Conditions, Health, Hygiene and Safety in Work places. The extensive rules adopted in the field of health and safety aim to lay down correct procedures and practices for various fields under specific circumstances.

23 Article 26, first paragraph of the same Act stipulates the following with regard to the obligations of the employees:

Employees shall endeavour to make the working conditions within their field satisfactory with regard to working conditions, health, hygiene and safety, and, furthermore, ensure that the measures taken towards

increasing safety and improving working conditions, health and hygiene according to this Act are enforced.

24 The amount of the damages is governed by the provisions of the Tort Damages Act No 50/1993. When evaluating whether the employer is liable for damages, contributory negligence on the part of the employee may be taken into account. This may lead to the employer being partially or entirely absolved of responsibility for the accident. If liability is divided, the amount of damages awarded will be reduced accordingly. This was the legal situation at the time of events in the main proceedings. However, an amendment to the Tort Damages Act by Act No 124/2009 changed the situation. According to Article 23a of the Tort Damages Act as amended, an employee who suffers physical harm in a work-related accident must have acted with gross negligence or intent in order for the damages to be reduced.

25 Turning to the second set of rules, employers on the Icelandic labour market are required by collective agreements made generally applicable, see Article 1 of Act No 55/1980 on Working Terms and Pension Rights Insurance, to take out accident insurance for the benefit of their employees in the event of temporary or permanent disability, or death. Insurance benefits under these schemes are in principle paid irrespective of whether the accident can be attributed to any fault of the employer. Should the employer fail to take out insurance, he must pay the equivalent amount himself to the injured worker.

26 The amount of these insurance benefits is lower than that provided for under the Tort Damages Act. If the employee is also entitled to damages under that Act, the amount of the insurance benefits is deducted from the damages awarded, see Article 5(3) of the Tort Damages Act.

27 Responding to questions put to them by the Court in advance, the Plaintiff and the Defendant stated at the oral hearing that an employer who has not complied with the relevant safety requirements for work places may also face sanctions under criminal law and administrative law. These sanctions are in principle not linked to the employer's civil liability and may therefore be imposed even if the employee has been denied compensation from the employer under civil law due to contributory negligence. Criminal and administrative sanctions for non-compliance may also be imposed even if there has been no accident as a result of the non-compliance. However, such sanctions are imposed by way of different processes than is the case with a claim under civil law and those processes can not, or only exceptionally, be initiated by the employee himself. Furthermore, it is far from certain that in reality such processes would be initiated or would lead to sanctions in a situation where compensation under tort law has been completely denied due to contributory negligence.

28 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The first question

29 With its first question, the national court essentially asks whether Directives 89/391 and 92/57 allow national rules on civil liability which may lead to the employee being held liable for losses suffered due to his own contributory negligence as a result of a work accident in a situation where the employer has not, on his own initiative, complied with the relevant rules regarding safety requirements at the work place.

Observations submitted to the Court

30 The Plaintiff argues that it is incompatible with Article 5 of Directive 89/391 to hold him responsible for the accident due to contributory negligence. It is the duty of the employer to ensure the safety and health of workers in every aspect related to the work, as laid down in Article 5(1). According to Article 5(3), the workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.

31 The argument cited by the Supreme Court of Iceland, that it would have been difficult to meet the safety requirements, is untenable, the Plaintiff submits, since economic considerations may not take precedence over considerations of safety. The employer had a duty to undertake any expense necessary to meet the safety requirements. Thus, the Plaintiff argues, it follows from the 20 December 2005 Supreme Court judgment that Icelandic law does not meet the minimum requirements laid down in Directive 89/391.

32 The Plaintiff contends that Article 13 on workers' obligations must be interpreted in light of the principle of the employer's responsibility. It is argued that the judgment of the Supreme Court effectively takes the opposite approach under Icelandic law, in finding the employee's responsibility for his own safety to take precedence over the employer's obligations.

33 The Plaintiff further draws attention to point 1.2 in Part A of Annex IV to Directive 92/57 which states that access to any surface involving insufficiently resistant materials is not authorised unless appropriate equipment or means are provided to enable the work to be carried out safely. The Plaintiff also refers to point 10.4 which entails that appropriate measures must be taken to protect workers who are authorised to enter dangerous areas. Lastly, reference is made to point 1 of Section I of Part B of Annex IV, which states that premises must have a structure and stability appropriate to the nature of their use. According to the Plaintiff, in the circumstances giving rise to his accident, nothing had been done to ensure that work could be carried out safely.

34 The Plaintiff acknowledges that in the absence of harmonisation of national rules on civil liability, it is, at the outset, a matter for the EEA States to determine the content of civil liability. However, this must be done within the boundaries set by EEA law. In this case, EEA law limits the possibility of letting an employee bear

the economic loss caused by a work accident through the application of national principles on contributory negligence.

35 In the opinion of the Defendant, the general principles of the law of torts are in essence outside the sphere of application of the EEA Agreement. This includes the assessment of liability and contributory negligence. The Defendant submits that Directives 89/391 and 92/57 contain no provisions on compensation from an employer. It argues that the judgment of the Court of Justice of the European Union (hereinafter "the ECJ") in Case C-127/05 *Commission* v *United Kingdom* [2007] ECR I-4619 must be interpreted to mean that an employer's compensation liability cannot be derived from Article 5(1) of Directive 89/391. In the Defendant's opinion, it follows from this judgment that the Directive does not prevent a party suffering loss as a result of an accident at work from being made to bear that loss himself. Accordingly, the Defendant regards a rule of national law providing for a party to bear his own loss due to contributory negligence as outside the scope of EEA law.

36 Even if this view is not sustained, the Defendant considers that the Icelandic rules of tort law concerning contributory negligence are, in any event, fully compatible with Directives 89/391 and 92/57. In this context, reference is made to Article 13 of Directive 89/391, which according to the Defendant stipulates that each worker shall be responsible to ensure, as far as possible, his own safety and health and that of other persons affected by his acts or omissions at work in accordance with his training and the instructions given by the employer. The Defendant also finds this provision in accordance with Article 5(4). It is submitted that Directives 89/391 and 92/57 do not exempt workers from the duty of averting harm and injury and of immediately drawing attention to safety deficiencies, even if rules on protection of workers have been breached or compliance control arrangements are lacking. In the case at hand, the Plaintiff's conduct can only be characterised as grossly negligent.

37 The Kingdom of Belgium takes the view that although Directive 89/391 does not contain explicit provisions on compensation for damages suffered by a worker as the result of a work-related accident, the principle of final responsibility of the employer for the safety and health of his workers, laid down by the Directive, results in liability for the employer even if the damage is partially caused by negligent behaviour of the worker.

38 The Norwegian Government argues that EEA law does not harmonise the principles of civil liability in the EEA States. Accordingly, it is for each EEA State to determine the conditions for civil liability, including the significance of the injured party's own conduct, provided that the general principles of equivalence and effectiveness are met.

39 The Norwegian Government acknowledges that a concrete interpretation of a directive may lead to the conclusion that some form of compensation is necessary in order for a private party to have an effective remedy. Accordingly, adjustments of national principles of civil liability may be required. However,

when interpreting Directives 89/391 and 92/57, it is important to distinguish two aspects: on one hand, the duties incumbent on employers and employees and on the other, principles of liability. The former is regulated; the latter is not. As the Norwegian Government sees it, this understanding of the Directives was confirmed by the ECJ in *Commission* v *United Kingdom*, cited above.

40 In conclusion, the Norwegian Government finds that neither Directives 89/391 and 92/57 nor the principle of effectiveness provide for any form of civil liability or place limitations on national rules on the effect of contributory negligence.

41 ESA is of the opinion that it is compatible with Article 5 of Directive 89/391 to take into account the behaviour of the employee when determining liability for work-related accidents. This is corroborated by Article 13 of the Directive which lays down workers' obligations in relation to health and safety at work. ESA argues that since a provision on the workers' obligations was included, it would be illogical to consider that the Directive prevents a breach of those obligations from being taken into account when determining liability for damages under national law. However, the obligations placed on the employee by national law must not be so onerous as to nullify the obligations of the employer under the Directive. Based on the description of Icelandic law set out above, ESA considers that the duty of care of the employee is commensurate with his experience and relates to refraining from putting himself in danger rather than to a substitution of the obligation of the employer with a positive obligation of the employee to ensure safety in the work place.

42 ESA observes that in Iceland employees are in any event entitled to compensation for accidents at work on the basis of mandatory insurance schemes subscribed to by employers. Therefore, even if Article 5 of Directive 89/391 required a stricter liability of employers than one based on negligence, or the Court found that the Directive precluded taking into account the negligence of the employee, ESA submits that Icelandic law is still compatible with the Directive. It is pointed out that the mandatory accident insurance applies irrespective of any fault of the employer and/or contributory negligence of the employee. The fact that the amount of compensation paid out under the accident insurance is lower than the one provided for under the Tort Damages Act is not relevant in this context. ESA considers *a fortiori* that the Directive cannot be regarded as regulating the level of compensation as it does not mandate a particular form of liability for employers.

43 According to the European Commission, the objective of Directive 89/391 is to introduce measures to encourage improvements in the safety and health of workers at work. It follows from the Directive, in particular from the rules in Section II on the obligations of employers, that the employer bears the principal responsibility for ensuring the safety and health of workers. Therefore, the Commission argues, it is decisive for the effective attainment of the objective of the Directive to ensure that employers comply with their obligations. The objective of providing for a safe work place could not be achieved effectively by a rule which states that the responsibility for achieving the objective falls on the

employer but does not provide for any form of liability in case of a breach of his duty. In this context, the Commission submits that *Commission* v *United Kingdom*, cited above, cannot be interpreted to mean that the Directive may not have implications for national rules on the liability of the employer even though the ECJ rejected the view that Article 5(1) of the Directive implies no-fault liability for the employer.

44 This leads the Commission to conclude that in a situation, such as the one in the national proceedings, where it has been established that an employer has not on his own initiative complied with rules regarding safety in the work place, the employer should bear a responsibility for the failure to fulfil the obligations, both general and specific, laid down in Directives 89/391 and 92/57 in order to achieve the objective of improving the health and safety of workers at work.

Findings of the Court

45 It follows from its Article 1 that Directive 89/391 applies to the protection of the safety and health of workers in general. Directive 92/57 lays down minimum safety and health requirements, *inter alia,* for temporary construction sites. The requirements laid down by Directive 92/57 apply in addition to the more general requirements found in Directive 89/391, see Article 16 of the latter Directive. That means that both Directives are applicable to construction work such as that which was being carried out when the accident at issue happened.

46 Neither Directive contains provisions addressing specific forms of sanctions for employers in case they do not provide a safe working environment as required by the Directives. However, Article 3 EEA requires the Member States to take all measures necessary to guarantee the application and effectiveness of European law. This is so even where a directive does not specifically provide any penalty for an infringement or refer for that purpose to national laws, regulations and administrative provisions.

47 The ECJ has repeatedly held that while the choice of penalties remains within the discretion of the Member States, they must ensure that infringements of European law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive, see Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and Others* [1996] ECR I-4345, paragraph 14, and the case law cited therein. These considerations are equally valid in the context of the EEA Agreement. Provisions establishing a duty would be reduced to mere declarations of intent if they were imposed without any form of liability in the event of the duty being breached, see to this effect the Opinion of Advocate General Mengozzi in *Commission* v *United Kingdom*, cited above, paragraph 76.

48 As pointed out by Advocate General Mengozzi at paragraph 76 of that Opinion, the prescriptive nature of the duties laid down in Directive 89/391 emerges

clearly from Article 4(1), which requires EEA States to "take the necessary steps to ensure that employers … are subject to the legal provisions necessary for the implementation of this Directive".

49 It thus follows that EEA States are under an obligation to sanction infringements of rules implementing Directives 89/391 and 92/57. It is not sufficient that these sanctions are analogous to sanctions for infringements of national law of a similar nature. They also need to be effective, proportionate and dissuasive.

50 In the case at hand, it appears that it is the application of general principles of national tort law which has led the Supreme Court of Iceland to conclude that an employee, due to his own contributory negligence, should be completely denied compensation from his employer for injuries he would probably not have sustained had the employer on his own initiative complied with rules regarding safety in the work place.

51 The question is then whether, in a situation such as this, the requirement of effective, proportionate and dissuasive sanctions means that an employee may not be denied compensation under tort law, fully or in part, due to his own contributory negligence.

52 The assessment of what constitutes effective, proportionate and dissuasive sanctions must take into account the provisions with which the sanctions are meant to secure compliance. Thus, the conclusion in this regard may depend on the directive concerned.

53 Article 5(1) of Directive 89/391 provides that the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. With regard to construction sites, Article 9 of Directive 92/57 read in conjunction with Annex IV of the same Directive makes it incumbent upon employers to implement safety measures on such sites. These measures comprise denying access to any surface involving insufficiently resistant materials unless appropriate equipment or means are provided to enable the work to be carried out safely. They also include taking appropriate measures to protect workers who are authorised to enter the danger areas.

54 Article 13 of Directive 89/391 requires workers to take care as far as possible of their own safety and health. To this end, they must, *inter alia*, immediately inform the employer of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements.

55 However, Article 5(3) of Directive 89/391 provides that the workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer. Thus, the Directive establishes the principle that the employer bears the main responsibility for safety and health in work places. Pursuant to Article 16 of Directive 89/391, this principle also applies to work covered by Directive 92/57.

56 The Defendant has pointed to Article 5(4) of Directive 89/391 which gives the EEA States the right to limit the responsibility of the employer for accidents caused by unusual and unforeseeable circumstances beyond his control or by exceptional events having consequences which could not have been avoided despite the exercise of all due care. However, this does not detract from the duty of the employer to prevent accidents which do not fall under Article 5(4). Clearly, the possibility that employees might perform their work even when the necessary safety measures have not been put in place by the employer cannot qualify as an occurrence falling under Article 5(4).

57 In order to be effective, proportionate and dissuasive, sanctions for breach of the duties established by Directives 89/391 and 92/57 must reflect the principle that the employer bears the main responsibility for the safety and health of workers. This does not exclude the possibility of attributing responsibility for an accident to an employee who has contributed to the accident through his own negligence.

58 However, save in exceptional circumstances it would be contrary to the principle that the main responsibility lies with the employer to attribute all, or the greater share, of the losses suffered as a result of an accident at work to the employee due to his own contributory negligence when it has been established that the employer, in disregard of his duties according to the Directives, had not on his own initiative complied with rules regarding safety and conditions in the work place. Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer.

59 This conclusion is not altered even if, as a result of the accident, sanctions under criminal law or administrative law are imposed upon the employer for not having complied with the relevant safety requirements. In a civil lawsuit between employer and employee following such an accident, the apportionment of responsibility between the parties would be a central issue. The attribution of all or the greater share of the responsibility for the accident to the employee would constitute a strong statement, not only to the parties directly involved but also to others. An apportionment of responsibility contrary to the Directives would therefore undermine the effective attainment of compliance with the Directives even if, in other proceedings, the employer is sanctioned for non-compliance with the safety regulations in a way which is in accordance with the Directives.

60 Nor can it matter that the employee may obtain compensation from a mandatory accident insurance scheme. If, due to his own contributory negligence, he is still denied compensation under national tort law in a situation where this would be contrary to the Directives, the result would be the same negative effect on compliance as pointed out at paragraph 59 above. Moreover, if the accident insurance does not lead to the employer having to bear some of the financial burden caused by the accident, either by having to reimburse the insurer for parts

of the pay-out or by being charged higher premiums for the coming years, the insurance scheme could hardly be characterised as a sanction at all.

61 In accordance with the above, the answer to the first question must be that save in exceptional circumstances it is not compatible with Directives 89/391 and 92/57 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.

62 Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer.

63 It is for the national court to assess, in light of the interpretation set out above, whether it was contrary to Directives 89/391 and 92/57 to completely deny the Plaintiff compensation under tort law.

IV The second question

64 The second question from the national court concerns whether an EEA State may be held liable under EEA law for loss suffered by a worker who has been injured in a work accident and who, due to incorrect implementation of Directives 89/391 and 92/57 into national law, has had, partly or wholly, to bear the losses suffered due to his own contributory negligence.

Observations submitted to the Court

65 The Plaintiff submits that the national rules on contributory negligence are sufficiently flexible for national courts to have reached a different result had they realised that it was necessary in order to comply with the Directives in question. The result in the first case may therefore be understood as a direct consequence of an incorrect interpretation of the Directives by national courts rather than as the result of incorrect implementation of the Directives into national law by way of legislation. The Plaintiff argues that the reference to incorrect "implementation" in the second question cannot prevent the Court from addressing the consequences, with regard to State liability under EEA law, of incorrect interpretation of the Directives by national courts.

66 On the premise that the question concerns incorrect implementation of the Directives by the national legislature, the Plaintiff argues that if the Directives had been properly implemented into Icelandic law the conclusion of the Supreme Court in its judgment of 20 December 2005 would have been different and the Plaintiff would have been awarded compensation. Consequently, there is a breach of the EEA Agreement for which Iceland is responsible and which should be redressed by means of State liability, placing the Plaintiff in the position he

would have been in had the Supreme Court afforded him compensation in the judgment of 20 December 2005. The Plaintiff further argues that in the case at hand it should not be left to the national court to determine whether the State should incur liability. In the opinion of the Plaintiff, the Court has all the information needed to assess whether all conditions for State liability are fulfilled, and the Court should indeed carry out this assessment, leaving only the amount to be awarded and the precise reduction, if any, due to contributory negligence to be decided by the national courts.

67 The Defendant submits that none of the three conditions for State liability set out in the case law of the Court are fulfilled. Firstly, the case does not concern rules that provide individuals with clear and substantial rights. Secondly, the breach is in any case not sufficiently serious. Thirdly, there is no causal link between the State's negligence and the loss suffered.

68 With regard to the second condition, the Defendant asserts that it is far from obvious how the Directives and the case law of the ECJ should be understood with regard to the civil liability of employers and the consequences of contributory negligence on the part of an injured employee.

69 The Norwegian Government submits that the second question is built on the premise that the Directives have been incorrectly implemented into national law by the State, and that the Court, as a consequence, cannot base itself on a different premise. In this respect, the Norwegian Government specifically points to the judgment of the Icelandic Supreme Court of 23 March 2010, in which the Supreme Court ordered the deletion of a question to the Court based on the premise that the Supreme Court had interpreted the Directives incorrectly.

70 In the alternative, the Norwegian Government argues that unlike EU law, where decisions by national courts can lead to liability for the State for incorrect application of EU law, see Case C-224/01 *Köbler* [2003] ECR I-10239, EEA law provides no basis for State liability for incorrect application of EEA law by national courts. The Norwegian Government argues that 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.

71 Basing itself on the same three criteria for State liability as the Defendant, the Norwegian Government argues that rights for individuals must be provided in express provisions of the directive in question in order to fulfil the condition that the relevant provisions must be intended to confer rights on individuals. The Government questions whether this is the case here.

72 As regards the condition that the breach by the State must be sufficiently serious, the Norwegian Government submits that in Case C-392/93 *The Queen / H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631, the ECJ found that the provision at issue was imprecisely worded and reasonably capable

of bearing the interpretation given to it by the Member State in question in good faith and on the basis of arguments not entirely devoid of substance. The main provisions of the Directives at issue in this case are generally formulated and do not set out the content of the rights in a precise manner. Contrary to the situation in Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, and Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224, there does not seem to be case law making it clear that Iceland has failed to implement the Directives correctly. Furthermore, it is submitted that the ECJ has held that the discretion enjoyed by Member States constitutes an important criterion in determining whether there has been a sufficiently serious breach. That discretion, in turn, is broadly dependent on the degree of clarity and precision of the rule infringed. The two Directives at issue seem to leave discretion to the national authorities with regard to their implementation.

73 With regard to the condition that there must be a direct causal link between the breach of the obligation of the State and the damage sustained by the injured party, the Norwegian Government submits that this must be determined by the national court.

74 ESA submits that the principles established by the ECJ in *Köbler*, cited above, with regard to EU law also apply under EEA law. This means that an EEA State is liable for breach of EEA law by its courts provided that EEA law has been "manifestly infringed", see *Köbler*, paragraph 53. This is a higher threshold than the criterion of a "sufficiently serious breach" which applies in other cases.

75 ESA argues that if the Court were to disagree with ESA's view on the interpretation of Directives 89/391 and 92/57 with regard to the first question, with the consequence that the second question would have to be answered, the breach of EEA law in the case at hand would not be sufficient to trigger liability on behalf of the State.

76 The European Commission submits that it is for the national court, having regard to the facts and circumstances of the national proceeding and in accordance with the settled case law on State liability for breaches of EEA and EU law, to determine whether the State should incur liability due to incorrect implementation of Directives 89/391 and 92/57.

Findings of the Court

77 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.

78 As stated *inter alia* in *Karlsson*, cited above, paragraph 32, an EEA State can be held responsible for breaches of its obligations under EEA law where three conditions are met: first, the rule of law infringed 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 resting on the State and the damage sustained by the injured party.

79 It is clear that an EEA rule which, for the reasons set out at paragraphs 46−58 above, limits the possibilities of EEA States to introduce or maintain rules of tort law concerning the legal consequences of contributory negligence on the part of the injured party, is intended to confer rights on that individual.

80 It is for the national court to decide whether it was contrary to Directives 89/391 and 92/57, as interpreted above, to deny the Plaintiff any compensation under tort law because of contributory negligence on his part. If the national court finds this to be the case, it follows that there is a direct causal link between the economic loss thus incurred and the breach of EEA law by the State in question.

81 If the national court comes to the conclusion that it was contrary to Directives 89/391 and 92/57 to deny the Plaintiff any compensation, the question is whether such a denial of compensation, based on a rule of contributory negligence that is contrary to EEA rules on safety and health of workers, can be considered a sufficiently serious breach of EEA law. As stated in *Karlsson*, cited above, paragraph 36, and *Nguyen*, cited above, paragraph 32, it is in principle for the national court to assess the facts of the case and to determine whether the conditions for State liability for breach of EEA law are met. The Court may nevertheless indicate certain circumstances and considerations which are for the national court to take into account in its evaluation.

82 As the Court has repeatedly held, whether a State has committed a sufficiently serious breach of EEA law through the exercise of its legislative powers depends on whether the State has manifestly and gravely disregarded the limits on the exercise of its powers, see *Nguyen*, paragraph 33, with reference to further case law. Important circumstances in this respect are the clarity and precision of the rule infringed, the measure of discretion left to the national authorities by that rule, whether the infringement and the damage caused was intentional or involuntary, and whether any error of law was excusable or inexcusable, see *Karlsson*, cited above, paragraph 38. Moreover, the presence or absence of settled case law with regard to the interpretation of the rule in question is relevant, see, *inter alia*, *Nguyen*, paragraph 34.

83 With regard to the present case, the Court notes that there is well-established case law of the ECJ to the effect that States must ensure that infringements of obligations set out in directives are sanctioned. The case law also sets out the conditions to be fulfilled in that respect but leaves the States free to choose sanctions within those parameters. As pointed out at paragraph 47 above, this case law is clearly relevant also with regard to EEA law.

84 The ECJ dealt with civil liability for breach of duties under Directive 89/391 in *Commission* v *United Kingdom*, cited above. This judgment was rendered after the national judgment asserted to be in breach of EEA law. In any case, *Commission* v *United Kingdom* would not have given much guidance, as it merely rejected the view that the Directive entailed an obligation for Member States to introduce no-fault liability for employers for work accidents and did not address the effect of the principle contained in Article 5(3) of the Directive on such other forms of liability as may exist in national law. The present case, furthermore, raises the question of how to assess a situation where several sanctions may be imposed on the employer and where some of those sanctions place too much emphasis on the contributory negligence of an employee whereas other sanctions are based on a correct understanding of the Directives.

85 In accordance with the above, the answer to the second question must be that an EEA State may be held liable for breach of the rule on contributory negligence inherent in Directives 89/391 and 92/57 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.

V Costs

86 The costs incurred by the Kingdom of Belgium, the Norwegian Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Héraðsdómur Reykjavíkur, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by *Héraðsdómur Reykjavíkur* hereby gives the following Advisory Opinion:

1. **Save in exceptional circumstances it is not compatible with 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 and 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) 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.

Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer.

2. **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.**

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 10 December 2010.

Skúli Magnússon
Registrar

Carl Baudenbacher
President