REPORT FOR THE HEARING
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 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.

I Introduction

1. By a letter dated 26 March 2010, registered at the EFTA Court on 6 April 2010, Héraðsdómur Reykjavíkur, Iceland, 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").

II Facts and procedure

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

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

4. Previously the Occupational Safety and Health Administration had 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. The Supreme Court noted in the above-mentioned judgment that the Occupational Safety and Health Administration had concluded 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 Court also pointed out, inter alia, that the Plaintiff was familiar with the working conditions, that he was a qualified carpenter and had considerable experience of work in this field. 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 walking on 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 Workplaces, 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, that judgment is a consequence of the Defendant's failure to fulfil its obligations under the EEA Agreement to implement the above-mentioned Directives in Icelandic law.

7. On 17 February 2010, Héraðsdómur Reykjavíkur 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, upheld the decision to request an Advisory Opinion, but also specified what questions the District Court was to refer to the EFTA Court and how the questions were to be formulated.

III Questions

8. The following questions were thus 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 had to, contrary to the aforementioned directives, 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?

IV Legal background

National law

9. The following description of national law is based primarily on the written observations of the EFTA Surveillance Authority. In a statement to the Court of 22 July 2010, the judge making the request for an advisory opinion has accepted it as adequate for the purposes of this Report.

10. 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.

11. If an employee suffers an accident at work, the employer is liable, according to general principles of tort law, for damages caused by his 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 workplace 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 Workplaces. The extensive rules adopted in the field of health and safety aim to regulate the right behaviour for various fields under specific circumstances.

12. 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.

13. 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. The amount of the damages is governed by the provisions of the Tort Damages Act No 50/1993. 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 this situation. According to Article 23a of the 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.

14. 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.

15. 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 (Article 5(3) of the Tort Damages Act).

16. In summing up, it may be concluded that Icelandic law provides for all workers employed under Icelandic law who are injured at work to receive compensation irrespective of any fault of the employer although the amount will be higher if the employer is liable based on the general principles of tort law.

EEA law

17. 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 in point 8 of Annex XVIII to the EEA Agreement. The Directive is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex XVIII.

18. 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.

[...]

19. 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.

20. 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.

[...]

21. Article 6 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

General obligations on employers

1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means.

The employer shall be alert to the need to adjust these measures to take account of changing circumstances and aim to improve existing situations.

2. The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention:

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided:

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health.

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;

(h) giving collective protective measures priority over individual protective measures;

(i) giving appropriate instructions to the workers.

[...]

22. Article 7 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

Protective and preventive services

1. Without prejudice to the obligations referred to in Articles 5 and 6, the employer shall designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment.

[...]

23. Article 9 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

Various obligations on employers

1. The employer shall:

(a) be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks;

(b) decide on the protective measures to be taken and, if necessary, the protective equipment to be used;

[...]

2. Member States shall define, in the light of the nature of the activities and size of the undertakings, the obligations to be met by the different categories of undertakings in respect of the drawing-up of the documents provided for in paragraph 1 (a) and (b) [...]

24. Article 10 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

Worker information

1. The employer shall take appropriate measures so that workers and/or their representatives in the undertaking and/or establishment receive, in accordance with national laws and/or practices which may take account, inter alia, of the size of the undertaking and/or establishment, all the necessary information concerning:

(a) the safety and health risks and protective and preventive measures and activities in respect of both the undertaking and/or establishment in general and each type of workstation and/or job;

[...]

2. The employer shall take appropriate measures so that employers of workers from any outside undertakings and/or establishments engaged in work in his undertaking and/or establishment receive, in accordance with national laws and/or practices, adequate information concerning the points referred to in paragraph 1 (a) and (b) which is to be provided to the workers in question.

3. The employer shall take appropriate measures so that workers with specific functions in protecting the safety and health of workers, or workers' representatives with specific responsibility for the safety and health of workers shall have access, to carry out their functions and in accordance with national laws and/or practices, to:

(a) the risk assessment and protective measures referred to in Article 9 (1) (a) and (b);

[...]

(c) the information yielded by protective and preventive measures, inspection agencies and bodies responsible for safety and health.

25. Article 11 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

Consultation and participation of workers

1. Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work.

[...]

26. Article 12 of Directive 89/391, under Section II – *Employers' Obligations*, reads:

Training of workers

1. The employer shall ensure that each worker receives adequate safety and health training, in particular in the form of information and instructions specific to his workstation or job:

[...]

27. 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;

[...]

28. Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (hereinafter "Directive 92/57") is referred to in 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 adaptations contained in Annex XVIII.

29. 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;

[...]

30. Article 12 of Directive 92/57 reads:

Consultation and participation of workers

Consultation and participation of workers shall take place in accordance with Article 11 of Directive 89/391/EEC on matters covered by Articles 6, 8 and 9 of this Directive, ensuring whenever necessary proper coordination between workers and/or workers' representatives in undertakings carrying

out their activities at the workplace, having regard to the degree of risk and the size of the work site.

31. Point 1.2 in Part A *General Minimum Requirements for On-Site Workplaces* 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.

32. Point 10.4 in Part A *General Minimum Requirements for On-Site Workplaces* 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.

[...]

33. 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.

V Written observations

34. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Plaintiff, represented by Einar Gautur Steingrímsson, Supreme Court Attorney, Reykjavík;
- the Defendant, 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 of Civil Affairs, and Kaja Moe Winter, Adviser, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority, 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.

The Plaintiff

The first question

35. The Plaintiff notes that Directive 89/391 and Directive 92/57 are intended to establish minimum requirements to encourage improvements, especially in the working environment, as regards the health and safety of workers. Moreover, the Plaintiff, with reference to the preamble to Directive 89/391, notes that this objective should not be subordinated to purely economic considerations.

36. In the view of the Plaintiff, the Supreme Court judgment of 20 December 2005 permitted purely economic considerations to prevail over the objective of protection of workers, contrary to what the Directives prescribe.

37. The Plaintiff finds that Directive 89/391 provides that workplaces are to be organised so as to take account of the risks involved in the operations and to ensure an improved degree of protection of workers' safety and health. In the view of the Plaintiff, his employer ignored these obligations. With further reference to Article 1(2) of the Directive, the Plaintiff also complains that his employer failed to take preventive measures. According to the Plaintiff, the arrangements used by the employer were such that, in the opinion of the Supreme Court, it was not practicable to put the legally required protective equipment in place.

38. Article 4(2) of Directive 89/391, the Plaintiff notes, states that Member States are to ensure, in particular, adequate controls and supervision. The Plaintiff then submits that in the first case, the Supreme Court was of the opinion that it had not been demonstrated that he had been given any safety instructions, yet he was held responsible for the accident.

39. The Plaintiff then turns to Article 5 of Directive 89/391, arguing that it was incompatible with this Article that the Supreme Court should hold the Plaintiff responsible for the accident. The Plaintiff underlines 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). The provision in Article 5(3) according to which the workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer is also highlighted.

40. Article 6(1), the Plaintiff further notes, states that the employer is to take the measures necessary for the safety and health protection of workers, including prevention of occupational risks. The argument cited by the Supreme Court, that it would have been difficult to meet the safety requirements, is untenable, the Plaintiff argues, since economic considerations may not take precedence over considerations of safety. According to the Plaintiff, the employer had a duty to undertake any expense necessary to meet the safety requirements. Thus, the Plaintiff argues, it also follows from the 20 December 2005 Supreme Court judgment that Icelandic law does not meet the minimum requirements laid down in Directive 89/391.

41. The Plaintiff also points to Article 6(2), stating the obligation of the employer to implement such measures as referred to in Article 6(1), following general principles of prevention, including avoiding risks, evaluating risks which cannot be avoided, exercising caution in the organisation of workplaces and giving appropriate instructions to the workers. The Plaintiff further notes that he and his two colleagues at the construction site had poor knowledge of each other's languages, that they were unaccustomed to each other's working methods and that none of them was in charge of the others. Against this background, the Plaintiff argues that appropriate instructions were particularly important in the circumstances in which the accident occurred. The Plaintiff also asserts that no risk evaluation was carried out and notes that he himself did not have the authority to give instructions or orders to his workmates.

42. Article 7(1) of Directive 89/391 provides, according to the Plaintiff, for obligations relating to the protection and prevention of occupational risks to be placed on parties other than the employer without absolving the employer of the obligations set forth in Articles 5 and 6.

43. The Plaintiff also asserts that his employer carried out no risk assessment within the meaning of Article 9 of Directive 89/391 and took no decisions on preventive measures. Furthermore, the Plaintiff asserts, the employer failed to provide information to the workers, in accordance with Article 10, and the employer failed to consult with workers and provide training, in accordance with Articles 11 and 12.

44. Finally, as regards Directive 89/391, the Plaintiff contends that Article 13, on workers' obligations, must be interpreted in light of Article 5(3) which states the principle of the employer's responsibility. It is then argued that the judgment of 20 December 2005 by the Supreme Court effectively takes the opposite approach under Icelandic law, in that the Supreme Court considered the employee's responsibility for his own safety to take precedence over the employer's obligations.

45. Concerning Directive 92/57, the Plaintiff adds, with reference to the preamble, that this Directive is intended to address, amongst other things, poor planning of works at the project preparation stage. The Plaintiff alleges that his

employer did not meet the obligations of employers set out in Article 9 of the Directive and failed to ensure consultation and participation of workers, as provided for in Article 12, regarding the implementation of preventive and safety measures.

46. In the context of Article 9 of the Directive, the Plaintiff further draws attention to point 1.2 in Part A of Annex IV, stating 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. Moreover, the Plaintiff draws attention 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 also 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.

47. In conclusion, it follows from the pleas made by the Plaintiff that he suggests that the first question be answered in the negative.

The second question

48. On the second question, the Plaintiff's principal argument is that the 20 December 2005 judgment by the Supreme Court of Iceland has demonstrated that under Article 26, first paragraph of Act No 46/1980 on Working Conditions, Health, Hygiene and Safety in Workplaces, Icelandic law places such great responsibility on employees for their safety, as to exonerate the employer of negligence in such a way as to violate Directive 89/391 and Directive 92/57.

49. The Plaintiff also pleads that the Supreme Court decided the said case in violation of Article 3 of the Icelandic Act No 2/1993 on the European Economic Area, according to which Icelandic laws and regulations shall be interpreted in accordance with the EEA Agreement and the rules based on the Agreement.

50. To the Plaintiff, it appears that the Supreme Court of Iceland later, in its judgment of 23 March 2010, concluded that as no specific mention was made of Article 3 of Act No 2/1993 in the Plaintiff's action against his employer, there was no need to seek an Advisory Opinion on this point. That judgment can be understood to imply that a judgment against the Icelandic State could not be based on an alleged error by the Supreme Court because of how the grounds for action were presented in the Plaintiff's action against his employer. To the Plaintiff, this is untenable. He argues that the Supreme Court was obliged, in any case, to interpret Icelandic law in conformity with Directive 89/391 and Directive 92/57.

51. It is further argued that if these Directives had been properly incorporated into Icelandic law or if the judgment rendered was in conformity with them, then

the conclusion in the Supreme Court judgment of 20 December 2005 would have been different and the Plaintiff would have been awarded compensation. In either case, there is a breach of the EEA Agreement for which Iceland is responsible and which, the Plaintiff argues, should be redressed by means of State liability, placing him in the position he would have been in, had the Supreme Court afforded him compensation in the judgment of 20 December 2005.

52. In conclusion, it follows from the pleas made by the Plaintiff that he suggests that the second question be answered in the affirmative.

The Defendant

General

53. In the Defendant's opinion, a brief explanation should be provided of how the Plaintiff's arguments in the present legal action can be understood. He has asserted that his employer failed to comply with the rules on working conditions and safety matters. In the Defendant's opinion, this assertion does not relate to any failure to bring the provisions of Icelandic law into agreement with Directive 89/391 and Directive 92/57. The Defendant notes that it cannot be seen from the writ filed with Héraðsdómur Reykjavíkur that the Plaintiff bases his case on there being a conflict between Icelandic laws or administrative provisions and the Directives. Rather, the Plaintiff bases his case on the allegation that it is the judgment of the Supreme Court in his action against his employer which reflects an incorrect implementation of said Directives, in so far as the Plaintiff's own negligence was found to prevent liability for damages from arising.

54. The Defendant notes that the questions posed in the request from Héraðsdómur Reykjavíkur are of a general nature and do not mention those facts which were crucial for the Supreme Court's resolution of the Plaintiff's litigation against his employer. Nor is any mention made of the particular provisions of the relevant Directives. The questions originate, nevertheless, in the charges brought against the Plaintiff's employer and the resolution of the case by the Supreme Court. A discussion of these matters by the Defendant must therefore relate in a general manner to the question of whether it is compatible with the Directives that an employee, in particular an employee possessing specialist education and training, is made to bear a loss ensuing from an accident at work himself, in spite of inadequate working conditions or safety measures. In this context, it is noted that the Supreme Court seems to have regarded the Plaintiff's own negligence as gross, in view of his knowledge of the working conditions, his training and his experience.

The first question

55. The Defendant draws attention to the fact that the provisions of Directive 89/391 and Directive 92/57 impose various duties upon employers. The Defendant holds that Icelandic law requires employers to heed those rules,

provides for sanctions in the event of a failure to do so, and establishes control of compliance to be exercised by public authorities.

56. The principles of the law of torts apply autonomously and may affect the legal status of a worker suffering an accident at work, the Defendant also argues. This may be the case for an employee who continues with his work in spite of being deemed to possess knowledge of circumstances and an ability to comprehend at once that necessary safety precautions have not been taken.

57. 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. According to the Defendant, it is first and foremost a task of the individual Member States and their courts to determine whether and to what extent liability for damages has arisen. The Defendant contends that a distinction must be drawn between the question of whether a Member State becomes liable by reason of a breach of EEA rules, if the relevant conditions for such liability are fulfilled, and the question of how liability for damages arises and is determined under national law. The Defendant notes that whenever the EFTA Court has deemed the conditions for compensation liability to be fulfilled, the Court has as a general rule held that compensation should be determined on the basis of national law. It is further noted, however, that the national rules on compensation for breach of EEA law may not result in a legal status inferior to that resulting from rules applying to similar domestic claims, and that they must not be formulated in a manner making award of compensation impossible or unduly difficult in practice. In addition, the Defendant argues that the EFTA Court has held that an assessment of the causal relationship between non-compliance with EEA law and the loss suffered is within the purview of national law.[1] In the view of the Defendant, the Court has thus generally regarded the substantial rules of the law of torts as being outside the scope of the EEA Agreement, and that the national courts have exclusive jurisdiction as regards assessing the particular conditions for compensation liability. Assessment of liability and contributory negligence, the Defendant argues, falls within this sphere.

58. The Defendant points out that Directive 89/391 and Directive 92/57 do not contain any provisions on the right to compensation from an employer. The Defendant also argues that the Court of Justice of the European Union (hereinafter "the ECJ") has concluded that an employer's compensation liability cannot be derived from Article 5(1) of Directive 89/391.[2] In the Defendant's opinion, it also follows from this judgment and its holdings in other respects that the provisions of the Directive also do not prevent a party suffering loss as a result of an accident at work from being made to bear that loss himself. Such a determination is to be made on the basis of national law by the courts competent to resolve the question of whether the conditions for compensation liability are

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1 The Defendant refers to Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240.

2 The Defendant refers to Case C-127/05 *Commission* v *United Kingdom* [2007] ECR I-4619, at paragraphs 42, 47 and 49–51.

fulfilled. The Defendant therefore regards a rule of national law providing for a party to bear his own loss due to contributory negligence as outside the scope of the EEA Agreement and said Directives; and such rules cannot be deemed to constitute breaches thereof.[3]

59. 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 Directive 89/391 and Directive 92/57. In this context, reference is made to Article 13 of Directive 89/391, which contains provisions on the duties of workers and stipulates, according to the Defendant, 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. Further, Article 13(2) enumerates various particularities in this respect. Account is taken of a worker's level of training and the instructions given by the employer, and it is stipulated that the worker shall make correct use of any equipment referred to in subparagraph (a) and of personal protective equipment, in accordance with subparagraph (b). Moreover, subparagraph (d) states that a worker shall immediately inform the employer and/or the workers with specific responsibility for the safety and health of workers of any work situation which he has reasonable grounds for considering a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements. The Defendant also finds this provision to accord with Article 5(4), which is said to express a general principle.

60. The Defendant goes on to submit that an employee is never under a duty to perform any work of dangerous nature if there are deficiencies in safety measures or safety equipment. It is further submitted that Directive 89/391 and Directive 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. The Defendant therefore considers that the Icelandic rules of tort law concerning contributory negligence are in full conformity with the Directives.

61. Directive 92/57 does not, in the Defendant's opinion, change the fact that there are no provisions on workers' rights to compensation or on forfeiture of such rights by reason of contributory negligence, in Directive 89/391. The Defendant also notes that the former Directive does not in any way replace or alter the duties of workers as provided for in the latter.

62. Lastly, the Defendant asserts that a worker who possesses particular knowledge by reason of his education and experience may be deemed at fault irrespective of whether his employer provided him with particular training and guidance.

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[3] The Defendant refers to Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, at paragraphs 58–69.

63. In conclusion, the Defendant suggests answering the first question in the affirmative, as follows:

> *[I]t is compatible with the provisions of the said Directives that the rules on contributory negligence are applied when determining whether a right to compensation from an employer on account of an accident at work has been created, and [...] it does not conflict with the Directives if a person suffering loss in an accident at work is made to bear his loss himself on account of his own contributory negligence in a situation such as the one applying in this case.*

The second question

64. The Defendant argues that three conditions for State liability are set out in the case law of the EFTA Court. First, the rule which is breached must provide individual persons with certain clear, substantial rights. Second, the State's negligence must have been grave in nature. Third, there must be a causal relationship between the State's negligence and the loss suffered.[4] The Defendant further argues that inter alia as a consequence of the different foundations for EEA law and EU law, State liability under EEA law is an exception and not a general rule.

65. Moreover, the Defendant distinguishes the present case from earlier cases decided by the EFTA Court concerning State liability.[5] In the present case, the Defendant argues, the Icelandic State has not in any way prevented the Plaintiff from enjoying the rights provided for in the Directives; and it is submitted that these are correctly implemented in Icelandic law. It is submitted that Icelandic law seeks to achieve the same objective as the Directives, by means of specific provisions, sanctions in case of breach and inspections by public authorities.

66. The Defendant also notes that the legal relationship between the Plaintiff and his employer was a private law relationship in nature; and that the employer was to fulfil its duties under Icelandic law concerning safety at work.

67. The Defendant finds that the first and second conditions for State liability are not fulfilled in the present case. In support of this position, the Defendant also reiterates arguments set out concerning the first question, on the interpretation of Directive 89/391 and Directive 92/57. Summing up, the Defendant takes the view that no right to compensation follows from the Directives.

68. The Defendant then argues that the third condition for State liability is not fulfilled either. In this respect also reference is made to arguments set out concerning the first question. In addition, the Defendant emphasises that a

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4 The Defendant refers to *Karlsson*, cited above, at paragraph 32.

5 The Defendant refers to *Karlsson*, cited above; and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

worker's own negligence may contribute to his loss. In the present case, the Defendant submits, the Supreme Court of Iceland has already found this to be the case. Indeed, the Defendant asserts, the Plaintiff's loss was first and foremost due to his own carelessness, as he knew the working conditions and was in possession of particular knowledge and experience. The Defendant thus asserts that the Plaintiff's loss had nothing to do with the implementation of the Directives in Icelandic law. Even if it is held that Icelandic provisions have not been fully adapted to the Directives, the Defendant argues that, in any event, there is no causal relationship between that fact and the accident.

69. In conclusion, the Defendant maintains that there are no grounds for holding Iceland liable for compensation. Even if the first question were answered in the negative, the conclusion would be the same, as the conditions for State liability, as they can be derived from the case law of the EFTA Court, are not met. The second question would thus have to be answered in the negative.

The Belgian Government

The first question

70. The Government of the Kingdom of Belgium finds the first question to be an issue of the compatibility with Directive 89/391 and Directive 92/57 of a national rule which provides 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.

71. According to the Belgian Government, such a rule is not compatible with Directive 89/391. The Government takes the view that, even though Directive 89/391 makes no explicit mention of compensation for damages caused to a worker as a result of work-related accidents, the final responsibility of the employer for the safety and health of his workers results in the employer's liability to pay compensation for such damages, even if (partially) caused by fault or negligence on the part of the worker himself.

72. To substantiate this view, reference is made to Article 5(1) of Directive 89/391; and Belgian law relevant to employers' responsibility for the protection of workers is described in some detail.

73. It is suggested that the first question be answered as follows:

> *It is not compatible with the provisions of the Council Directive No 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 (eight individual Directive within the meaning of Article 16(1) of Directive*

89/391/EEC) that the 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.

The second question

74. The Belgian Government has restricted its written observations to the first question. Thus, no remarks are made on the second question.

The Norwegian Government

General

75. The Norwegian Government finds that the questions referred to the EFTA Court by Héraðsdómur Reykjavíkur are in part framed as if the EFTA Court should assess concretely whether the relevant Icelandic legislation is compatible with EEA law. The Norwegian Government argues that such a concrete application of EEA law falls outside the authority of the Court under the Advisory Opinion procedure.[6] It is for the national court to assess the facts of the case and to determine whether the conditions for State liability are met. The Court must confine itself to indicating the relevant circumstances and considerations that the national court may take into account.[7]

76. Moreover, the Norwegian Government finds that there are features characterising the present case calling for caution on the part of the Court as regards the level of detail in its advice to Héraðsdómur Reykjavíkur. Both questions from the referring court seem to rest on premises which are, as far as the Norwegian Government understands, disputed among the parties. The reference also lacks sufficient information on the facts of the case and on the relevant Icelandic legislation in order to indicate with any degree of certainty whose understanding is correct. In the view of the Norwegian Government, this epitomises the importance of respecting the division of responsibilities between the EFTA Court and the national courts.

77. Concerning the facts of the case, the Norwegian Government notes that it does seem determined in the final judgment that the Plaintiff contributed to the accident by his own negligence. However, in that judgment the Supreme Court did not seem to rule explicitly on whether the employer had failed to comply with his duties according to Icelandic legislation or the relevant directives. In this context, the Norwegian Government notes that a prerequisite for the first question to be relevant seems to be the proviso at the end of it, namely that it

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6 The Norwegian Government refers to Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, at paragraph 34; Case C-421/01 *Traunfellner* [2003] ECR I-11941, at paragraphs 21–24; and Joined Cases C-428 to 434/06 *Unión General de Trabajadores de la Rioja* [2008] ECR I-6747, at paragraph 77.

7 The Norwegian Government refers to *Karlsson*, cited above, at paragraph 36.

"has been established that the employer has not on his own initiative complied with rules regarding safety and conditions in the work place". The Government finds that it must be for the national court to determine whether the employer complied with the safety requirements.

78. Similarly, the Norwegian Government notes that a prerequisite for the second question to be relevant must be that Iceland "has not correctly implemented" the relevant directives in Icelandic law, as it is put in the question. This premise is, however, contested by the Icelandic State, the Defendant in the case. The Norwegian Government submits that it must be for the national court to determine whether said directives are correctly implemented.

The first question

79. As the Norwegian Government sees it, the first question essentially concerns whether an employee's own negligence may lead to the result that he must himself bear the loss caused by an accident at work.

80. The Norwegian Government takes the view that neither the relevant directives nor general principles of EEA law preclude such a result. Moreover, it is submitted that it seems to be a general principle common to the legal systems of the EEA States that the conduct of the injured party may lead to the conclusion that he must bear his own loss, in whole or in part.

81. At the outset, 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.[8] This may, the Norwegian Government submits, imply that there will be no basis for civil liability at all. Alternatively, negligent behaviour on the part of the injured party may lead to a reduction of the compensation awarded.

82. However, the Norwegian Government argues, this discretion for the EEA States is subject to the principles of equivalence and effectiveness, meaning that the conditions for compensation must not be less favourable than those relating to similar domestic claims and must not be framed so as to make it impossible or excessively difficult to obtain compensation.[9]

83. The Norwegian Government cannot see that there are indications to the effect that Icelandic principles of compensation raise doubts concerning the

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[8] The Norwegian Government refers to *Danske Slagterier*, cited above, at paragraph 61; Joined Cases C-397&410/98 *Metallgesellchaft and Others* [2001] ECR I-1727, at paragraph 101; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, at paragraph 124.

[9] The Norwegian Government refers to *Karlsson*, cited above, at paragraph 33.

principles of equivalence and effectiveness. Nevertheless, the Norwegian Government finds the principle of effectiveness to warrant some further remarks.

84. A concrete interpretation of a directive may, the Norwegian Government notes, lead to the conclusion that some form of compensation is necessary in order for the private party to have an effective remedy. Accordingly, adjustments of national principles of civil liability may be required. It is recalled that both the EFTA Court and the ECJ have held that the rules of the EEA States on civil liability for road accidents are not subject to harmonisation, neither by general principles of EEA law nor by the Motor Vehicle Insurance Directives.[10] Moreover, the Government submits that the EFTA Court emphasised the wide margin of appreciation for the EEA States, but found that the directives, read in the light of the principle of effectiveness, could have possible effects upon the liability regimes, effects that would, however, be exceptional and limited.[11]

85. According to the Norwegian Government, Directive 89/391 and Directive 92/57 are occupied solely with laying down the obligations – often worded in a quite general manner – which the employer and employee must comply with in order to ensure the objective of safety and health in the workplace. When interpreting the Directives and their implications, the Norwegian Government asserts, it is important to distinguish two aspects: the duties incumbent on the employers and the employees on the one hand, and the principles of liability on the other. The former is regulated; the latter is not.

86. The Norwegian Government finds that this understanding of Directive 89/391 is confirmed by the ECJ in Case C-127/05 *Commission* v *United Kingdom*, cited above, in which the European Commission argued that the Directive implicitly required the employer to be subject to a strict, no-fault liability (at paragraph 38). This interpretation was rejected by the ECJ. The Court held that the general principle of safety and health of workers set out in Article 5(1) simply embodies the general duty of safety to which the employer is subject, without specifying any form of liability (at paragraph 42).

87. In conclusion, the Norwegian Government finds that Directive 89/391 and the principle of effectiveness do not provide for any form of civil liability.

88. Moreover, the Government finds that the same conclusion must be drawn with regard to Directive 92/57, on the basis that no relevant provision in that Directive regulates civil liability.

89. Based on the above, the Norwegian Government suggests answering the first question in the affirmative, as follows:

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10 The Norwegian Government refers, in particular, to Case E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246, at paragraph 30; Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraph 23; and Case C-356/05 *Farrell* [2007] ECR I-3067, at paragraphs 32–33.

11 The Norwegian Government refers *Helgadóttir*, cited above, at paragraph 31.

It is compatible with the provisions of Council Directive 89/391/EEC and Council Directive 92/57/EEC that a worker, due to his own contributory negligence, is held liable for losses suffered as a result of an accident at work, even if it is established that the employer has not complied with his duties under the said directives.

The second question

90. Noting that the second question is only relevant if the first question were to be answered in the negative, and having suggested to answer the first question in the affirmative, the Norwegian Government suggests that the second question be answered as follows:

Based on the answer to question no. 1, there is no need for the EFTA Court to address question no. 2.

91. In the alternative, in case the EFTA Court were to address the second question, the Norwegian Government finds it necessary to put forward, first, a number of general remarks and then, second, specific remarks to each of the three conditions for State liability.

92. To start with, the Government refers to Article 7(b) EEA and notes that it is for the EEA State to choose the form and method of implementation of the Directives. In the view of the Norwegian Government, the decisive factor is that the national legislation does not undermine the objective of the relevant provisions.[12]

93. The Norwegian Government goes on to state that it is settled case law that the EEA Agreement does not entail a transfer of legislative powers and that this implies, inter alia, that directives under EEA law do not have direct effect.[13] The Government also notes, however, that the EFTA Court has indeed found that the EEA States may have an obligation to provide compensation for loss and damages due to incorrect implementation of a directive, if three conditions are met: first, the directive must be intended to confer rights on individuals, the content of which can be identified on the basis of the directive; second, the breach on the part of the State concerned must be sufficiently serious; and, third, there must be a direct causal link between this breach and the damage sustained by the injured party.[14]

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12 The Norwegian Government refers to Case C-428/04 *Commission* v *Austria* [2006] ECR I-3325, at paragraphs 99 and 101.

13 The Norwegian Government refers to *Karlsson*, cited above, at paragraph 28; and *Criminal proceedings against A*, cited above, at paragraph 40.

14 The Norwegian Government refers to *Sveinbjörnsdóttir*, cited above, at paragraph 66; and *Karlsson*, cited above, at paragraph 32.

94. The Norwegian Government also finds reason to state that even though these criteria are formulated in the same way as the criteria for State liability under EU law, it should be recalled that the basis for State liability differs under EEA law and EU law, respectively. Therefore the application of the criteria may not necessarily be identical in all respects.[15] For instance, due to future developments by the ECJ, there may be situations, the Government argues, where EU State liability could come so close to direct effect that such a form of liability would hardly be compatible with the characteristics of the EEA Agreement.

95. Turning, then, to the first condition for State liability – that the relevant provisions must be intended to confer rights on individuals – the Norwegian Government notes that this condition has been clarified on several occasions, by the EFTA Court and the ECJ. The Government argues that the rights for concrete individuals must be provided in express provisions of the directive. The mere fact that a group of individuals are among those included in the objective of a directive is not sufficient.[16] The Norwegian Government notes that the EFTA Court and the ECJ have held that it must be possible to identify the content of the right for the individuals on the basis of the provisions of the directive.[17] It has also been emphasised that the rights of the individuals must be identified in an unconditional and sufficiently precise manner.[18] The Government submits that the first condition for State liability typically has been fulfilled where the incorrectly implemented directive itself provides a concrete right of compensation from another private party, or from the authorities.[19]

96. The Norwegian Government points out, firstly, that none of the provisions of the two Directives at issue in the present case provides for rights to compensation for the employee. The provisions are not of the kind typically capable of fulfilling the first condition for State liability. Moreover, several of the provisions are worded in a general manner and may be characterised as important standards or ideals to aim at rather than provisions encapsulating concrete rights with a set content for specific private parties.[20]

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15 The Norwegian Government refers to *Karlsson*, at paragraph 30.

16 The Norwegian Government refers to Case C-222/02 *Paul and Others* [2004] ECR I-9425, at paragraphs 40–41.

17 The Norwegian Government refers to *Sveinbjörnsdóttir*, cited above, at paragraph 66; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, at paragraph 27.

18 The Norwegian Government refers to *Karlsson*, cited above, at paragraph 37; and Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, at paragraph 108.

19 The Norwegian Government refers to Joined Cases C-6&9/90 *Francovich and Others* [1991] ECR I-5357; *Sveinbjörnsdóttir*, cited above; *Dillenkofer and Others*, cited above; and Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224.

20 In this context, the Norwegian Government refers to Article 1 of Directive 89/391, stipulating that the Directive contains general principles and general guidelines for the implementation of those principles.

97. Moreover, the Government notes, Article 5(1), emphasised by the Plaintiff, stipulates in a general manner that the employer "shall have a duty to ensure the safety and health of workers in every aspect related to the work". It is submitted that this does not imply a duty to ensure a zero-risk environment; a contested UK provision limiting the duty of the employer to what was "reasonably practicable" was not set aside by the ECJ.[21] The Norwegian Government argues that despite the ideal set out in the preamble that the improvement of conditions for workers "should not be subordinated to purely economic considerations" it cannot be excluded to include economic considerations in an overall assessment necessary in finding a reasonable balance between, inter alia, security and practicability.

98. Directive 89/391 itself balances the duties of the employer and employee, respectively, the Norwegian Governments submits. In particular, pursuant to Article 13(1), it is "the responsibility of each worker to take care as far as possible of his own safety and health". It is also noted that to this end, and pursuant to Article 13(2)(d), workers must "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".

99. It is further submitted that Article 5(1) in itself only to a limited extent clarifies the extent of the employer's duty to ensure a safe working environment.[22] The Norwegian Government notes that these duties are specified more clearly in other provisions and other directives. However, it is argued, even other provisions than Article 5 – such as for example Article 6 – seem to lack the clarity necessary to establish the substance of the employer's duties.

100. With reference to the preamble of Directive 89/391, the Norwegian Government also finds it notable that the relevant rules of the Member States within the scope of the Directive have differed widely. And, referring to a Communication from the Commission, the Government further submits that Member States are still struggling to understand and correctly implement Directive 92/57.[23]

101. Against this background, the Norwegian Government finds it questionable that private parties could rely on these main provisions of the Directives as a basis for State liability, even if the Directives were to be considered, by the national court, as incorrectly implemented in Iceland.

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21 The Norwegian Government refers to Case C-127/05 *Commission* v *United Kingdom*, cited above, at paragraphs 53 and 55.

22 The Norwegian Government refers to Case C-127/05 *Commission* v *United Kingdom*, cited above, at paragraph 41.

23 COM(2008) 698 final, at pages 4 and 15.

102. As regards the second condition for State liability – that the breach by the state must be sufficiently serious – the Norwegian Government notes that the EFTA Court has repeatedly held that the decisive test is whether the EEA State has "manifestly and gravely" disregarded the limits of its powers under the EEA Agreement.[24] The Government points out that other, less serious mistakes or misunderstandings on the part of the state concerned thus do not lead to EEA State liability.

103. The Government further notes that the EFTA Court has also held that in determining whether there is a manifest and grave error by the State, the national court must take into account all the factors that characterise the situation before it. Those factors include the clarity and precision of the rule infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable.[25]

104. Whereas the information in the request for an Advisory Opinion is scarce, the Norwegian Government does find several factors to indicate that a possible incorrect implementation should not lead the national court to establish State liability in the present case.

105. First, the Government notes that, contrary to what was the case in *Karlsson* and *Nguyen*, cited above, there does not seem to be case law making it clear that Iceland has failed to implement the Directives correctly.

106. Secondly, the Norwegian Government holds that the Directives seem to leave discretion to the national authorities in their implementation. The term "discretion" is, according to the Norwegian Government, used in case law with two separate meanings in assessing the seriousness of the breach of EU and EEA law. The first meaning of the term refers to situations where the state can choose between several solutions in its implementation, all compatible with EU/EEA law. In the case at hand, the Government finds this to be the case, as it seems that several of the provisions can be correctly implemented in more than one way.

107. Moreover, the Norwegian Government continues, the second meaning of the term "discretion" relates to the "clarity and precision" of the provisions of the Directives. In this context, it is submitted that the ECJ has held that the discretion enjoyed by the states constitutes an important criterion in determining whether there has been a sufficiently serious breach; and that that discretion is broadly dependent on the degree of clarity and precision of the rule infringed.[26]

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24 The Norwegian Government refers to *Sveinbjörnsdóttir*, cited above, at paragraph 68; *Karlsson*, cited above, at paragraph 38; and *Nguyen*, cited above, at paragraph 33.

25 The Norwegian Government refers to *Sveinbjörnsdóttir*, cited above, at paragraph 69; *Karlsson*, cited above, at paragraph 38; and *Nguyen*, cited above, at paragraph 33.

26 The Norwegian Government refers to Case C-278/05 *Robins and Others* [2007] ECR I-1053, at paragraphs 72–73; and Case C-452/06 *Synthon* [2008] ECR I-7681, at paragraph 39.

108. Thirdly, the Norwegian Government recalls *British Telecommunications*,[27] where the ECJ underlined 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; and that that interpretation, which was also shared by other Member States, was not contrary to the wording of the directive at issue or the objective pursued by it (at paragraph 43).

109. Fourthly, the Norwegian Government underlines that the main provisions of the Directives are generally formulated and do not set out the content of the rights in a precise manner; and the Government argues that this is also an indication that any possible implementation mistake by Iceland is "excusable".

110. As to the third condition for State liability – 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 notes only that this must be determined by the national court.[28]

111. Hence, it is suggested that the second question, in the alternative, could be answered as follows:

> *It is for the national court to decide whether the relevant provisions of Directive 89/391/EEC and Directive 92/57/EEC are incorrectly implemented and – if that is the case – whether the conditions for State liability are fulfilled. These conditions are; first, that the directive provisions are intended to confer rights on individuals that are unconditional and sufficiently precise; second, that the breach is sufficiently serious; and third, that there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.*

The EFTA Surveillance Authority

The first question

112. The EFTA Surveillance Authority (hereinafter "ESA") finds that the first question, in essence, asks whether Directive 89/391 requires a specific form of liability of employers; and whether and to what extent the contributory negligence of the employee may be taken into account when determining liability for damages due to accidents at work.

113. As regards employers' liability, ESA notes that according to Article 5(1) of Directive 89/391, the employer shall have a duty to ensure the safety and health

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27 Case C-392/93 *The Queen / H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631.

28 The Norwegian Government refers to *Karlsson*, cited above, at paragraph 47.

of workers in every aspect related to the work. In Case C-127/05 *Commission* v *United Kingdom*, cited above, the Commission claimed that by failing to impose a no-fault liability on employers, the UK had breached its obligations arising from that provision. Employers were only liable under the common law for damage resulting from a failure on their part to discharge the duty of care owed in relation to their workers. The ECJ rejected the Commission's claim and found, inter alia, that Article 5(1) does not specify any form of liability (at paragraphs 41–42).

114. ESA further notes that the ECJ also examined whether an obligation to impose no-fault liability on employers could be derived from the scheme of Article 5 of the Directive, and rejected that proposition as well.[29]

115. In light of this judgment, ESA finds it clear that the implementation of Directive 89/391 does not require the imposition of no-fault liability on employers. ESA then submits that the duty of care liability under English law is essentially similar to the liability imposed on employers under Icelandic tort law. Therefore, ESA sees no reason to depart from the conclusion of the ECJ on this point and considers that obligations such as those provided for under Icelandic law are in principle compatible with Article 5 of Directive 89/391.

116. Turning to employees' liability, ESA examines whether the conclusion above may be called into question by the duties imposed on the employees as a matter of Icelandic law, which in the case of the Plaintiff resulted in him receiving no damages in tort.

117. Given the conclusion of the ECJ outlined above, and the absence of any provision to that effect, ESA is of the opinion that taking into account the behaviour of the employee when determining liability for work-related accidents is also compatible with Article 5 of Directive 89/391. In ESA's view, this is corroborated by Article 13 of the Directive which lays down workers' obligations in relation to health and safety at work. In particular, ESA finds Article 13(2)(d) to be of interest for the case at hand; employees must, in accordance with their training and instructions given by the employer, 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. ESA argues that since the legislator included a provision on the workers' obligations it would be illogical to consider that the Directive prevented that a breach of those obligations could, under national law, be taken into account when determining liability for damages.

118. In ESA's understanding, the first question seeks to ascertain whether this is the case "when it has been established that the employer has not on his own initiative complied with rules regarding safety and conditions in the workplace". As ESA understands the request for an Advisory Opinion and the 20 December

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[29] ESA refers to Case C-127/05 *Commission* v *United Kingdom*, cited above, at paragraphs 48–50.

2005 Supreme Court judgment, the employer was not considered to have failed to comply with safety rules. To the extent that this understanding is correct, this aspect of the question thus appears to ESA to be without relevance for the judge in the main proceedings. However, ESA does make the observation that in any situation of assessing whether liability should be shared, the relative fault of both parties should be taken into account.

119. According to ESA, what is relevant for the case at hand is to check that the obligations placed on the employee by Icelandic law are not 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 this is not the case. ESA notes that the duty of care of the employee is commensurate with his experience and relates to refraining from putting himself in danger rather than substituting the obligation of the employer with a positive obligation of the employee to ensure safety in the workplace.

120. Turning then to the legal context in Icelandic law, ESA observes that, in any event, employees are 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.

121. ESA further submits that 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. Even if the imposition of stricter liability is required, ESA considers that there is nothing in Directive 89/391 which would prevent EEA States from having in place a system under which higher compensation is granted if the employer has been found to have been at fault for the accident. As the Directive does not mandate a particular form of liability for employers, ESA considers *a fortiori* that it cannot be regarded as regulating the level of compensation. In that respect, ESA refers by analogy to *Helgadóttir*, cited above, which concerned whether standardised damages under the Tort Damages Act were compatible with the Motor Vehicle Insurance Directives. There the Court stated, inter alia, that "the possible effect of the Directives upon the liability regimes will be exceptional and limited, and the Contracting Parties have a wide margin of appreciation" (at paragraph 31). Finding that Directive 89/391 contains no rules on compensation, ESA takes the view that these considerations are even more pertinent in the case at hand.

122. Lastly, as to Directive 92/57, ESA notes that this Directive lays down detailed rules on minimum health and safety requirements at construction sites; and that it does not contain any provisions on the liability of employers. It is also noted that the request for an Advisory Opinion does not specify which provisions

of the Directive are of relevance in the main proceedings. Hence, ESA has not considered it necessary to examine this Directive further.

123. Thus, ESA proposes that the first question be answered as follows:

> *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 does not preclude national legislation which provides that the conduct of a worker be taken into account when assessing liability for damages and may thereby result in that worker being held liable, due to his own contributory negligence, for losses suffered as a result of an accident at work.*

The second question

124. Noting that the second question need only be answered if the first question is answered in the negative, and being of the opinion that the first question should be answered in the affirmative, ESA proposes no answer to the second question.

125. ESA does, however, restate the basic conditions for the imposition of state liability, as expressed in EFTA Court case law.[30] Furthermore, ESA adds that the questions as originally formulated by the referring court were centred on whether the law, as interpreted by the Supreme Court of Iceland in its judgment of 20 December 2005, was compatible with EEA law. ESA then contends that if it were the conclusion that, in general, the Icelandic rules on liability for work accidents were compatible with EEA law but that the result in that particular case was not – as a consequence of a wrongful interpretation of the rules by the Supreme Court – there are stricter conditions to be fulfilled for liability to incur.[31]

The European Commission

The first question

126. The European Commission finds that in order to answer the first question it is necessary to determine whether the Directives at issue oblige Member States to impose a liability requirement on employers for accidents at work and their consequences.

127. 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, and in particular from the rules in Section II on the obligations of employers, that the latter bears the principal responsibility for ensuring the safety and health of workers. Therefore, the

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30 ESA refers to *Karlsson*, cited above, at paragraphs 32–33.

31 ESA refers to Case C-224/01 *Köbler* [2003] ECR I-10239, at paragraph 53.

European Commission argues, it is of decisive importance for the effective attainment of the objective of the Directive to ensure that employers comply with their obligations.

128. The European Commission notes that, pursuant to Article 5(2) of Directive 89/391, the employer is not discharged from his obligations by enlisting the help of external services and persons to deal with matters of safety and health at work. Moreover, pursuant to Article 5(3), the principle of the responsibility of the employer is not affected by the obligations incumbent on the workers. However, the European Commission notes, the Member States may, pursuant to Article 5(4), limit or exclude the employer's responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employer's control.

129. The European Commission also notes that neither Directive 89/391 nor Directive 92/57 explicitly provides for sanctions or a particular form of liability in case an employer fails to discharge the duties laid down in Articles 5–12 of Directive 89/391 and the relevant provisions of Directive 92/57. Nonetheless, the European Commission asserts, the objective of a safe workplace 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. The European Commission refers, in this context, to Advocate General Mengozzi at the ECJ having emphasised the link between duty and liability in case of a breach of that duty with regard to Directive 89/391.[32]

130. The European Commission further submits that the ECJ has laid down that the freedom of Member States to choose the ways and means of implementing a directive does not affect the obligation of Member States to adopt all the measures necessary to ensure that the directive is fully effective in accordance with the objective it pursues.[33] In a situation such as the one at issue in the national proceedings, where EU law does not prescribe a particular sanction or determine the form of liability in case of an infringement of EU law, the European Commission argues that the ECJ has laid down that such infringements must be sanctioned under procedural and substantive conditions which are analogous to those applicable with respect to infringements of national law of a similar nature and importance and which, in any event, make the sanctions effective, proportionate and dissuasive.[34]

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32 Opinion of the Advocate General in Case C-127/05 *Commission* v *United Kingdom*, cited above, at point 76 of the Opinion.

33 The European Commission refers to Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, at paragraph 15; and Case C-208/90 *Emmott* [1991] ECR I-4269, at paragraph 18.

34 The European Commission refers to 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, at paragraph 14; and to Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, at paragraph 94.

131. Recent directives in the area of labour law, the European Commission notes, contain a clause which specifies that Member States shall determine the applicable penalties when national provisions transposing the directive are infringed and ensure that these penalties are effective, proportionate and dissuasive.[35]

132. The European Commission also asserts that the ECJ has found that the absence of no-fault liability for an employer's breach of duty under Article 5(1) of Directive 89/391 does not limit the responsibility of the employer.[36]

133. In conclusion – 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 workplace – the European Commission is of the view that the employer should bear a responsibility for the failure to fulfil the obligations, both general and specific, laid down in Directive 89/391 and Directive 92/57 in order to achieve the objective of improving the health and safety of workers at work.

134. The European Commission finds that the attribution to the employer of a liability for damages resulting from an accident at work which occurred due to the employer's failure to comply with his obligations under safety and health legislation can be considered an effective, proportionate and dissuasive measure, appropriate to make the provisions concerning the employer's duties, as laid down in the Directives, fully effective.

135. Based on the above, the European Commission suggests that the first question be answered as follows:

> *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 must be interpreted as precluding national legislation according to which a worker, due to his own negligence, is held solely 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.*

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35 The European Commission refers to Article 2 of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC; and Article 2 of Council Directive 2010/32/EU of 10 May 2010 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU.

36 The European Commission refers to Case C-127/05 *Commission* v *United Kingdom*, cited above, at paragraphs 42, 50 and 51.

The second question

136. The European Commission recalls that an individual has the right to invoke the liability of a Member State for a breach of EEA and EU law where the rule infringed is intended to confer rights on individuals, where the breach is sufficiently serious and where there is a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the individual concerned.[37]

137. Furthermore, the European Commission argues, it follows from ECJ case law that the protection of rights of individuals relying on EEA and EU law requires that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance.[38]

138. Finally, 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 an incorrect implementation of Directive 89/391 and Directive 92/57.

139. Accordingly, the European Commission suggests that the second question be answered as follows:

> *It is for the national court, having regard to the facts and circumstances of the main proceedings 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 an incorrect implementation of the directives in question.*

Henrik Bull
Judge-Rapporteur

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37 The European Commission refers to Joined Cases C-46&48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1026, at paragraph 51.

38 The European Commission refers to *Köbler*, cited above, at paragraph 36.