REPORT FOR THE HEARING
in Case E-8/07

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 Oslo tingrett (Oslo District Court), Norway, in a case pending before it between

Celina Nguyen

and

The Norwegian State, represented by Justis- og politidepartementet (the Ministry of Justice and the Police)

concerning interpretation of the Directives on motor vehicle insurance, referred to at points 8, 9 and 10 of Annex IX to the Agreement on the European Economic Area (the EEA Agreement).

I Introduction

1. By a letter dated 14 September 2007, registered at the Court on 17 September 2007, Oslo tingrett made a request for an Advisory Opinion in a case pending before it between Celina Nguyen (hereinafter the "Plaintiff") and the Norwegian State, represented by the Ministry of Justice and the Police (hereinafter the "Defendant").

II Facts and procedure

2. The case concerns a dispute on whether national legislation that excepts redress for non-economic loss from compulsory insurance coverage is contrary to the Directives on motor vehicle insurance referred to at points 8, 9 and 10 of Chapter I of Annex IX to the EEA Agreement. The Directives are as follows: Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1] (hereinafter the "First Directive"); the Second Council Directive

[1] OJ 1972 L 103, p. 1, referred to at point 8 of Annex IX to the EEA Agreement.

84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles on motor vehicle insurance[2] (hereinafter the "Second Directive"); and the Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles[3] (hereinafter "the Third Directive"). Reference is hereinafter made to these Directives together as "the Motor Vehicle Insurance Directives" or "the Directives".

3. On 8 December 2002, the Plaintiff lost her husband and two children in a road traffic accident. The Plaintiff herself was only slightly injured physically, but has suffered from psychological afflictions since the accident. The driver of the car which caused the accident was intoxicated.

4. By judgment of 7 June 2005 of Halden tingrett (Halden District Court), the driver was sentenced to one year and six months in prison for *inter alia* manslaughter, driving while intoxicated, and for having inflicted a considerable psychological injury upon the Plaintiff.

5. At the same time, the driver was ordered to pay the Plaintiff a redress of NOK 400 000 (about 48 000 euros) for non-economic loss. According to the request, redress is not punishment, but a civil form of liability in tort law which is to compensate for non-economic loss ("pain and suffering"). Redress can be awarded in both criminal and civil cases. The precondition is that the person who caused the injury acted with qualified fault.

6. The redress awarded to the Plaintiff cannot be claimed from the insurance company covering the person who caused the injury. This is so because Section 6, second paragraph of the Norwegian Automobile Liability Act of 3 February 1961 (*lov av 3. februar 1961 om ansvar for skade som motorvogn gjer (bilansvarslova)*, hereinafter the "Automobile Liability Act") explicitly excepts redress from the compulsory insurance coverage. The person who caused the injury has not paid the redress.

7. In an application of 11 September 2006, the Plaintiff filed a lawsuit before Oslo tingrett against the Defendant with a claim for compensation for incorrect implementation of the Motor Vehicle Insurance Directives. She pleads that it is contrary to the Directives to except redress from the insurance coverage, and that the breach is sufficiently serious to entail State liability under the conditions set

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2 OJ 1984 L 8, p. 17, referred to at point 9 of Annex IX to the EEA Agreement.

3 OJ 1990 L 129, p. 33, referred to at point 10 of Annex IX to the EEA Agreement.

out in the judgment of the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir*.[4] On this basis, she claims compensation, corresponding to the redress that has not been paid out to her. The Defendant contests that the Directives require that redress be covered by the road traffic insurance. It is pleaded that there is no conflict between national law and EEA law, and that the Directives are therefore not breached. In the opinion of the Defendant, the possible breach of the Directives would in any case not be sufficiently serious to entail State liability under EEA law.

8. Oslo tingrett decided to request an Advisory Opinion from the Court on interpretation of the Motor Vehicle Insurance Directives. Oslo tingrett refers in particular to Article 3(1) of the First Directive, Articles 1 and 3 of the Second Directive and Article 1 of the Third Directive. Oslo tingrett also refers to judgment of the Court of Justice of the European Communities (hereinafter the "ECJ") in Case C-348/98 *Ferreira*[5] and Case C-166/02 *Viegas*[6] and of the Court in Case E-7/00 *Helgadóttir.*[7] Finally, Oslo tingrett refers to two judgments of Norges Høyesterett (the Supreme Court of Norway) regarding the Motor Vehicle Insurance Directives.[8]

9. In relation to the dispute on whether the possible breach of the Directives constitutes a sufficiently serious breach of EEA law to entail State liability, Oslo tingrett states that as a point of departure the conditions for liability are the same in EEA law as in Community law and refers in that respect to the judgment of the ECJ in Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur*[9] and to Case E-4/01 *Karlsson.*[10]

III Questions

10. The following questions have been referred to the Court:

> **1. Is it compatible with the Motor Vehicle Insurance Directives to except redress for non-economic loss ("pain and suffering") from the compulsory insurance system under national law?**

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4 Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

5 Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraphs 27–29.

6 Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraph 21.

7 Case E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246, at paragraph 29.

8 Rt. 2000 page 1811 *Finanger I*, in particular page 1825, and Rt. 2005 page 1365 *Finanger II*.

9 Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029.

10 Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraphs 32, 36 and 38. Oslo tingrett also refers to the judgment of the ECJ in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, at paragraph 38.

2. If the question is answered in the negative: is an exception from the insurance coverage as mentioned in question 1, a sufficiently serious breach of the Motor Vehicle Insurance Directives to be able to entail State liability?

IV Legal background

National law

11. In Norway, the duty to carry insurance for injury caused by motor vehicles is regulated by the Automobile Liability Act. The Act establishes that injured parties have a claim for compensation from the insurance company for property damage and personal injury which is caused by a motor vehicle. Liability is not conditioned upon fault of the driver or others. The injured party can claim compensation directly from the insurance company as a matter of strict liability. Section 4 of the Automobile Liability Act reads:

> *When a motor vehicle causes injury, the injured party may claim compensation from the insurance company with which the vehicle, pursuant to chapter IV, is insured, even if no one is to blame for the injury.*

12. The insurance covers economic loss. In addition, it shall cover permanent injury compensation for non-economic loss, but not redress ("pain and suffering"). This follows from Section 6 *(Assessment of the compensation)* of the Act, which regulates how the insurance payment is to be determined. The Section reads:

> *The compensation is assessed according to general rules on torts except as otherwise provided.*
>
> *The Act applies also to compensation for permanent injury under Section 3–2 of the Torts Act of 13 June 1969 No 26, but not to compensation (redress) for non-economic injury.*
>
> *In addition to compensation, there shall be paid interest pursuant to Section 3 of the Act relating, inter alia, to Interest on Overdue Payments. Notification of the injury to the insurance company is considered a demand for payment.*

13. According to the request from the national court, Section 6, first paragraph establishes that the amount of compensation is determined according to ordinary rules of compensation found in the Torts Act of 13 June 1969 No 26 (*skadeserstatningsloven 13. juni 1969 nr. 26,* hereinafter "the Torts Act"). In Section 3–1, first paragraph of the Torts Act it is stated:

> *Compensation for personal injury shall cover the injury sustained, loss of future earnings and expenses which the personal injury is presumed to cause the injured party in the future.*

14. In addition to covering the economic loss, the insurance company shall cover permanent injury compensation if under the Torts Act the general conditions for this are fulfilled. This follows from Section 6, second paragraph of the Automobile Liability Act. Permanent injury compensation is not compensation for economic loss, but an amount which is to compensate for reduced quality of life. The basic condition is that lasting and significant medical injuries have been inflicted upon the injured party.

15. The Automobile Liability Act Section 6, second paragraph, prescribes that the compulsory road traffic insurance does not cover redress for non-economic injury ("pain and suffering"). It is this exception which the case pending before Oslo tingrett relates to.

16. Redress comes into question if the person who caused the injury did so intentionally or with gross negligence. Redress is awarded and the redress amount determined on the basis of an overall assessment of what is reasonable under the circumstances. Thus, injured parties or their survivors do not have any absolute claim to redress, but in practice redress is normally awarded if the conditions for it are fulfilled. Redress is regulated in Section 3–5 *(Compensation (redress) for non-economic injury)* of the Torts Act, which reads:

> *Anybody who intentionally or by gross negligence has*
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> *(a) caused personal injury or*
>
> *(b) inflicted such offence or displayed such misconduct as mentioned in Section 3–3*
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> *may, regardless of whether permanent injury compensation is paid under Section 3–2 or standardised compensation is paid under Section 3–2a, be ordered to pay the victim such non-recurrent amount as the court finds reasonable in compensation (redress) for inflicted pain and suffering and for other offence or injury of a non-economic kind. In the case of offence or misconduct as mentioned in Sections 195, 196 and 200, third paragraph, of the Penal Code, when determining the redress amount, particular importance is to be attached to the nature of the act, how long the conduct has endured, whether the act is a misuse of a blood relationship, care relationship, a relationship of dependence or trust, and whether the act was committed in an particularly painful or offensive way.*
>
> *Anybody who intentionally or by gross negligence has caused another person's death may be ordered to pay to the spouse, common-law spouse [samboer*], children or parents of the deceased such redress as mentioned in the preceding paragraph.*

17. The national court explains in its request that Section 3–5, first paragraph, litra b is not relevant in the case at hand whereas litra a of the same paragraph,

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* The Norwegian concept of *samboer* is distinct from and generally broader than the concept of a common-law spouse.

regarding intentional or grossly negligent infliction of injury on a person, such as in the present case, may be relevant.

18. In the preparatory works, the exception for redress in the Automobile Liability Act was motivated with reference to the legal institution of redress being based on considerations relating to individual deterrence, with certain penal characteristics. In the report of the expert committee, which prepared the Act, it is stated:[11]

> *Also some persons in Norway have voiced the opinion that the road traffic insurance shall cover redress for pain and suffering, partly to secure the car owner against the risk of this liability, partly to guarantee the injured party coverage. However, the majority in the Norwegian committee – all except the Chairman – cannot find reason to propose a novel system to this effect, at least not as long as claims for redress are based on gross fault. The liability then has, in essence, a deterring purpose, and should therefore be kept out of the insurance.*

19. In its request, Oslo tingrett states that it is nevertheless clear that redress, in addition to having a function of individual deterrence, also has the purpose of providing compensation to the injured party for burdens inflicted.

20. On certain conditions, the Automobile Liability Act provides for later settlements between the insurance company and the person who caused the injury. According to the Automobile Liability Act Section 12, first paragraph, litra a, the liable insurance company has a right to recourse against the driver or user of the insured motor vehicle in cases of intent or gross negligence.

EEA law

21. Article 1(2) of the First Directive reads:

> *"[I]njured party" means any person entitled to compensation in respect of any loss or injury caused by vehicles;*

22. Article 3(1) of the First Directive reads:

> *Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.*

23. Article 1(1) and 1(2) of the Second Directive reads:

> *1. The insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.*

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[11] Report of the Motor Vehicle Committee of 1951, page 61.

2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:
- in the case of personal injury, 350 000 ECU where there is only one victim; where more than one victim is involved in a single claim, this amount shall be multiplied by the number of victims,
…

24. Article 2(1) of the Second Directive reads:

1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:
- persons who do not have express or implied authorization thereto, or
- persons who do not hold a licence permitting them to drive the vehicle concerned, or
- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,
shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.
…

25. Article 3 of the Second Directive reads:

The members of the family of the insured person, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 1 (1) shall not be excluded from insurance in respect of their personal injuries by virtue of that relationship.

26. Article 1 of the Third Directive reads:

Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.
…

V Written Observations

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

- the Plaintiff, represented by Christian Lundin, advocate;
- the Defendant, represented by Karin Fløistad, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

- the Kingdom of Belgium, represented by Liesbet Van den Broeck, Attaché with the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent;
- the EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Senior Officer and Florence Simonetti, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Nicola Yerrell, a member of its Legal Service, acting as Agent.

The Plaintiff

28. In relation to the first question, the Plaintiff submits that the Norwegian rule on exception of liability for redress from insurance coverage is contrary to the Motor Vehicle Insurance Directives.

29. The Plaintiff maintains that it follows from the clear wording of the Directives that liability for redress towards the Plaintiff should have been covered by liability insurance. Article 3(1) of the First Directive must be understood to mean that any personal liability which the driver of a motor vehicle may incur shall be covered by insurance. Liability for redress is a personal liability in this sense. The Second and the Third Directives clarified that the right to make exceptions from insurance coverage cannot be applied to third party victims such as the Plaintiff. The wording of the Directives thus leaves the legislator no room for discretion in implementing the Directives and makes it clear that all liability which may be incurred by a driver shall be covered by insurance. In this respect, the Plaintiff contests that the wording "damage to property and personal injury" in Article 1(1) and (2) of the Second Directive, does not cover non-economic loss. Such an understanding has in her view neither basis in the Preambles nor in the wording of the Directives.

30. The Plaintiff refers to the general aim of safeguarding consumer interests in EEA law, cf. the twelfth recital of the Preamble to the EEA Agreement. This aim is followed up in the Directives. Therefore, the purpose of the Directives is to secure insurance coverage for the victim's claim for compensation. In the Plaintiff's view, this purpose is undermined if non-economic loss is excepted from insurance coverage under the Directives. Moreover, as redress is a central part of tort law in most European countries, excepting it from the scope of the Directives leads to unequal treatment of victims in the various EEA States.[12]

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[12] The Plaintiff refers inter alia to Case C-168/00 *Leitner* [2002] ECR I-2631, at paragraphs 18, 21 and 22.

31. The Plaintiff maintains that her understanding of the Directives is also supported by case law of the ECJ and refers in that respect to Case C-166/02 *Viegas*[13] and Case C-348/98 *Ferreira.*[14] In the view of the Plaintiff, Høyesterett interpreted the Directives in the same way in the cases *Finanger I* and *Finanger II.*[15]

32. The Plaintiff contests the arguments that liability for redress is a personal liability and that it is not reasonable that the community of the insured has to finance coverage of this type of liability. Firstly, the penal element of liability for redress is ensured through the insurance companies' right of recourse.[16] Secondly, the compulsory liability insurance also covers the tort-feasor's liability towards a third party for economic loss (loss of income and additional expenses) and non-economic loss (permanent injury compensation), in cases of negligence, gross negligence or intent. In this respect, the Plaintiff explains that it must be assumed that most motor vehicle accidents occur as a result of some form of negligence. The fact that motor vehicle liability insurance exists does not exclude liability for the tort-feasor, cf. Section 11, first paragraph of the Automobile Liability Act. The Plaintiff also points out that the purpose of redress is twofold – i.e. penal purpose and compensating the victim. Today, the former is a significantly less weighty consideration.[17] The main purpose, namely the objective of compensation, is not sufficiently safeguarded if the tort-feasor's liability is not covered by the insurance.

33. Finally, with respect to the first question, the Plaintiff maintains that in Denmark and Sweden, equivalent rules on redress are covered by compulsory liability insurance. Therefore, if redress falls outside the scope of the compulsory liability insurance in Norway, it will lead to a disparity amongst the legal systems of the Nordic EEA countries and thereby different conditions of competition for traffic insurance companies and disparity in the level of protection for road users.

34. In relation to the second question, the Plaintiff maintains that the State is liable on the basis of the EEA Agreement and the EEA Act which implements the

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13 Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraph 21.

14 Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraph 29.

15 Rt. 2000 page 1811 *Finanger I*, at page 1825 and Rt. 2005 page 1365 *Finanger II* at paragraphs 98 and 101.

16 The Plaintiff refers to Case C-129/94 *Bernáldez* [1996] ECR I-1829, at paragraph 22, in relation to the right of insurance companies' right of recourse.

17 The Plaintiff refers to developments in the relevant national law and quotes *inter alia* proposals for amendments to the Automobile Liability Act to the effect that redress would be covered by compulsory insurance. These proposals were according to the Plaintiff put on hold due to the Plaintiffs filing of a lawsuit against the State, cf. Ot.prp. No 30 (2006–2007).

EEA Agreement in Norwegian law. The Plaintiff argues that the conditions for liability as laid down in case law are fulfilled in the case at hand.[18] The Plaintiff argues that the norm for liability is the same in the EEA as in the EU, and refers in that respect to the need for homogeneity.

35. When assessing whether the breach is "sufficiently serious," all factors that characterise the situation must be taken into account.[19] Central to the assessment is whether the provision to be implemented in national legislation has left room for discretion. If the State is left with discretion, it has greater latitude and more is required in order to establish State liability. In such cases, the breach must be "manifest and grave". The Plaintiff refers in this respect to Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur.*[20] The judgment must be interpreted to the effect that where the national authorities are not granted discretion the reason for restrictive application of the conditions for liability will not weigh as heavily, and less is required in order to establish liability.

36. As concerns the State's error in this case, the Plaintiff submits that the State did not have discretion in implementing the Directives with respect to the requirement for insurance coverage of the driver's personal liability. The wording of the Directives is, in her view, unambiguous and precise, leaving no room for alternative interpretation. Therefore, the exception of redress from compulsory insurance coverage constitutes a manifest breach of the wording and purpose of the Directive. It is principally submitted that already for that reason the breach of the Directives is sufficiently serious to establish liability of the State towards the Plaintiff. In the view of the Plaintiff, the legal situation is relatively parallel to the situation in *Finanger II*. Therefore, reference is made to Høyesterett's grounds for imposing liability on the State.[21]

37. The Plaintiff suggests the following answers to the questions:

> *1. It is incompatible with the Motor Vehicle Insurance Directives to except redress for non-economic loss ("pain and suffering") from the compulsory insurance scheme under national law.*

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18 The Plaintiff refers to Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, at paragraph 66 and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 32.

19 E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 38.

20 Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, at paragraphs 41–47. The Plaintiff also refers to Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, at paragraph 28, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845, Case C-140/97 *Rechberger* [1999] ECR I-3499, Case C-424/97 *Haim* [2000] ECR I-5123 and Case C- 150/99 *Stockholm Lindöpark* [2001] ECR I-493.

21 Rt. 2005 page 1365 *Finanger II*, at paragraphs 94 to 104.

2. The exception from insurance coverage as mentioned in point [1] constitutes a sufficiently serious breach of the Motor Vehicle Insurance Directives for the State to be held liable towards Celina Nguyen.

The Defendant

38. The principal view of the Defendant is that redress for non-economic loss falls outside the scope of the Directives, as they merely regulate economic loss resulting from personal injury or damage to property. Thus, it is compatible with the Directives to except redress for non-economic loss ("pain and suffering") from the compulsory insurance. If the Directives are to be interpreted as requiring redress for non-economic loss to be covered by the compulsory insurance, this breach cannot be considered sufficiently serious so as to establish State liability.

39. At the outset, the Defendant notes that whereas the content of the relevant Norwegian law as such is undisputed among the parties, there might be different views in relation to the legislative reasoning concerning redress for non-economic loss. In that regard, the Defendant states in essence that the characteristics of redress for non-economic loss differ from ordinary liability, as its motivation is not only to compensate the victim, but more importantly, to deter and penalise the tort-feasor. In the Defendant's view, the character of redress as individual sanction will be impaired if a third party, such as an insurance company, is obliged to cover the redress.

40. The Defendant submits that the first question must be answered in the affirmative. In its view, this conclusion follows from both the wording and the purpose of the Directives. The Defendant refers in particular to the wording of Article 1(1) and (2) of the Second Directive which requires civil liability for damage to *property* and *personal injuries* to be compulsorily covered up to specified amounts. In the Defendant's view, personal injury as well as damage to property entail economic loss by their nature. Given that the Directives only mention economic loss and only have minimum requirements for economic loss, the wording clearly indicates that the Directives are limited to such loss.

41. The Defendant also refers to the Directives' aim of removing barriers to free movement of motor vehicles and persons within the European Economic Area resulting from disparities between national provisions on liability insurance for motor vehicles, cf. the seventh and eighth recitals of the First Directive, and to ensure adequate compensation and protection of victims, cf. the fifth recital of the

Preamble to the Second Directive and the tenth recital of the Preamble to the Fifth Directive.[22]

42. In relation to the purpose of the Directives, the Defendant states that the requirement of compulsory insurance for motor vehicles is justified by the considerable risk involved in motor traffic. These considerations are not relevant when it comes to redress for non-economic loss, as it is conditional upon the tort-feasor having acted with intent or gross negligence, cf. Section 3–5 of the Torts Act. The risk of such wrongful conduct cannot be considered to be greater when it comes to motor traffic than to other areas of life. Also, the Defendant points out that it would be very difficult to determine which incidents would be covered as the Tort Act is based on general tort law, and is applicable to tort-feasors in general. Moreover, requiring redress for non-economic loss to be covered by the compulsory insurance seems to go far beyond the purpose of the Directives, as there is no actual economic loss to be compensated.

43. The Defendant also maintains that the nature of redress for non-economic loss makes it unsuitable for insurance coverage. Firstly, redress is conditional upon the tort-feasor having caused the injury intentionally or with gross negligence. Secondly, the evaluation of whether the conditions are fulfilled must be based on a broad assessment involving a considerable amount of discretion both with respect to the conditions for the redress and its calculation. The calculation of the redress is based on elements of both tort law and criminal law. This fact makes it difficult for insurance companies and the victims to negotiate the amounts, with the result that each case will be litigated and the costs of insurance will increase tremendously. The cost will eventually be born by all drivers, which is not reasonable in light of the penal characteristics of redress described above.

44. The Defendant maintains that its understanding of the Directives is further supported by the case law of both the EFTA Court and the ECJ which seems to deal only with the question of compensation for economic loss. The Defendant also refers to case E-7/00 *Helgadóttir*[23] and stresses the wording "all actual loss incurred" used by the Court in paragraph 29 in relation to Article 3(1) of the First Directive and the insurance coverage of the Directives. With respect to Article 1 of the Second Directive, the Defendant refers to the opinion of the Advocate General

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22 Directive 2005/14/EC of the European Parliament and the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability to the use of motor vehicles (OJ 2005 L 149, p. 14), added to Annex IX EEA by Decision No 86/2006 and entered into force 1 March 2008.

23 Case E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246.

in Case C-348/98 *Feirrera*[24], which in its view is supported by the opinion of the Advocate General and the judgment of the ECJ in Case C-63/01 *Evans*[25]. In the view of the Defendant, these cases show that the Directives limit the scope of the obligation to insure, and that for claims not specifically mentioned in the Directives a further analysis of the nature of the claim has to be made before one can conclude on the extent of the obligation to insure. In this regard, the Defendant reiterates the specific personal character of claims for redress, i.e. that it is based on personal wrongdoing and calls for an assessment of guilt on the part of the tort-feasor in each individual case. Such an assessment is impossible in cases where the identity of the tort-feasor is unknown. If the Directives were interpreted to cover such claims it would interfere with national liability law.

45. For further support of its views, the Defendant refers to opinions of legal experts and to legislation in other states, namely Denmark, Finland and Sweden, maintaining that redress for non-economic loss is not covered by compulsory insurance in these states. It also refers to the legislative history of the Fifth Directive which in its view shows that the starting point of the Directives is not that all loss must be covered by the insurance, but rather to establish insurance coverage up to the minimum requirements set by the Directives.[26]

46. As concerns the second question, the Defendant submits that it should be answered in the negative. For an assessment of whether a breach of EEA law by a State is sufficiently serious to entail State liability, the Defendant refers to Case E-4/01 *Karlsson.*[27] The Defendant also refers to case law of the ECJ, as in its view, the conditions for liability under EEA law are, at least in principle, the same as under EC law.[28] In the opinion of the Defendant, it follows from this case law that an absolute prerequisite for entailing liability is that the breach of the State is sufficiently serious, meaning that the state has manifestly and gravely disregarded the limits of its powers. A breach may be considered sufficiently serious if the Directive in question does not give leeway for any interpretation, and the Member State has not taken sufficient and correct measures to implement the directive.

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24 Opinion of the Advocate General in Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraph 43.

25 Case C-63/01 *Evans* [2003] ECR I-14447, at paragraphs 27, 30 and 31.

26 Reference is made to a proposal of the European Parliament, which was not adopted, to amend Article 1(1) of the Second Directive to include in the compulsory insurance cover all necessary and appropriate legal costs borne by victims during the settlement of the claim. The Defendant also refers to a report of the Commission to the European Parliament and the Council on certain issues relating to motor insurance, summarising that national legislation differs on whether legal costs are covered by compulsory insurance.

27 Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 38.

28 The Defendant refers to the opinion of the Advocate General in Case C-63/01 *Evans* [2003] ECR I-14447, at paragraph 152 and to the opinion of the Advocate General in Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, at paragraph 84.

Where this is not the case, a more nuanced approach is necessary.[29] In such a situation, the margin of discretion of the State is important but not decisive. The degree of clarity and precision of the rule is also important, as well as all the factors which characterise the situation.[30] Therefore, even though the State was not left with any discretion, a mistake in implementing EEA law may be excusable.[31] In that regard, the clarity and precision of the rule in question is of vital importance.[32]

47. In the view of the Defendant, the wording of the Directives is not clear and precise with respect to the scope of compulsory insurance coverage. The wording indicates that it only concerns economic loss. Moreover, excepting redress for non-economic loss from compulsory insurance is not contrary to the purpose of the Directives. Finally, other countries have shared the Defendant's understanding of the Directives and the Community legislator has shared the interpretation that the Directives do not require all types of compensation to be covered. All this supports the conclusion that the Defendant's possible breach of the Directives is not sufficiently serious to entail State liability.

48. The Defendant requests the Court to answer the first question as follows:

> *1. It is compatible with the Motor Vehicle Insurance Directives to except redress for non-economic loss ("pain and suffering") from the compulsory insurance system under national law.*
> *Consequently, it is of no actual interest to the pending case for the Court to answer question 2.*

49. Alternatively, the Defendant suggests that the Court answers the second question as follows:

> *2. An exception from the insurance coverage as mentioned in question 1 is not a sufficiently serious breach of the Motor Vehicle Insurance Directives to be able to entail State liability.*

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29 The Defendant refers to Case C-278/05 *Robins* [2007] ECR I-1053, at paragraphs 70–73.

30 The Defendant refers to the opinion of the Advocate General in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, at paragraph 160 and to the opinion of the Advocate General in Case C-224/01 *Köbler* [2003] ECR I-10239, at paragraphs 130–139.

31 The Defendant refers to Case C-392/93 *British Telecommunications* [1996] ECR I-1631, at paragraphs 42–44.

32 The Defendant refers to Case C-63/01 *Evans* [2003] ECR I-14447, at paragraph 86.

The Kingdom of Belgium

50. The Kingdom of Belgium limits its observations to the first question. It is submitted that excluding redress from the compulsory insurance coverage is contrary to the Directives. The Kingdom of Belgium refers to the overall purpose of the Directives to facilitate the free movement of goods and persons and to safeguard the interests of persons who may be victims of accidents caused by motor vehicles, cf. the first, second and third recitals of the Preamble to the First Directive. The Kingdom of Belgium also refers to Article 3(1) of the First Directive and to the Second Directive, which establishes minimum amounts which the compulsory insurance shall cover, intended to guarantee victims adequate compensation irrespective of the Member State in which the accident occurs, cf. the fifth recital of the Preamble to that Directive.

51. The Kingdom of Belgium adds that according to case law, Member States are free to determine the type of civil liability applicable to road traffic accidents. However, they must ensure that the civil liability arising under their domestic law is covered by insurance that complies with the provisions of the Directives, irrespective of whether it was based on fault or risk. As compensation for pain and suffering is a part of civil liability, it has to be covered by the compulsory insurance. This conclusion is also supported by the judgment of the Court in Case E-7/00 *Helgadóttir*[33] where the Court referred to "all actual loss" in paragraph 29.

52. The Kingdom of Belgium suggests the first question to be answered as follows:

> *It is not compatible with the Motor Vehicle Insurance Directives to except redress for non-economic loss from the compulsory insurance system under national law.*

The EFTA Surveillance Authority

53. The EFTA Surveillance Authority (hereinafter "ESA") submits that the first question must be answered to the effect that it is incompatible with the Directives to except redress for non-economic loss (pain and suffering) from the compulsory insurance system under national law if such redress constitutes a civil liability.

54. According to ESA, EEA States have full discretion with regard to the type of civil liability applicable to road traffic accidents, as the Directives do not harmonise the rules of the EEA States governing civil liabilities. However, the States must, according to the wording of Article 3(1) of the First Directive, ensure that all civil liability arising under domestic law is covered by insurance. In that

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[33] Case E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246.

regard, the EEA States do not have any discretion.[34] ESA states that there is no express derogation in the Directives for specific types of liabilities. Any derogation from the general rules contained in Article 3(1) must be interpreted strictly[35] and therefore a cautious approach must be taken with regard to non-explicit derogations.

55. Therefore, the wording of Article 3(1) of the First Directive, and the case law concerning that provision, do not support the finding that non-economic loss is excluded or could be excluded from the scope of the Directive. Nor do other parts of the Directive support such a conclusion.

56. ESA contests the view of the Defendant that Article 1(1) of the Second Directive is limited to economic loss. The wording "both damage to property and personal injury" does not in itself exclude non-economic loss. This wording merely aims at distinguishing damage to properties from personal damage, whether economic or not, as each category of damage is subject to a specific minimum amount. Moreover, in ESA's view, the wording "all actual loss" in paragraph 29 of the judgment of the Court in Case E-7/00 *Helgadóttir*[36] would appear to encompass both economic and non-economic loss. In any case, Article 1(1) of the Second Directive merely supplements Article 3(1) of the First Directive and does not amend or replace it. ESA also maintains that according to current case law no distinction is made between economic and non-economic loss.[37]

57. Finally, with respect to the first question, ESA submits that the Defendant's argument that the motivation and character of redress is personal, is irrelevant for the assessment of whether non-economic loss is covered by the Directives. In that regard, ESA refers to the purpose of the Directives to ensure free movement and to guarantee equal treatment of victims of car accidents, irrespective of where within the EEA they occur. ESA recalls that in several cases of the Court and the ECJ the courts have refused to restrict the coverage of the Directives on the basis of the victim's contribution to the damage. In any event, if it is the wish of the legislator in Norway to make the one causing the damage pay in the end, a right of recourse of the insurance companies, as well as criminal sanctions, could ensure that.

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34 ESA refers to Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraph 29, Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraph 21, Case C-537/03 *Candolin* [2005] ECR I-5745, at paragraph 24 and Case C-356/05 *Farrell* [2007] ECR I-3067, at paragraph 33.

35 See Case C-537/03 *Candolin* [2005] ECR I-5745, at paragraphs 18 and 21 and Case E 1/99 *Finanger* [1999] EFTA Ct. Rep. 119, at paragraph 33 and Case E-5/96 *Nille* [1997] EFTA Ct. Rep. 30, at paragraph 33.

36 Case E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246.

37 ESA refers to Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraph 13, that concerned both economic and non-economic loss.

58. As concerns the second question, ESA states that the EFTA Court has applied the same methods as the ECJ when assessing whether a breach of the EEA Agreement is sufficiently serious to entail State liability. The test applied is whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers.[38]

59. ESA notes that it is for the national court to determine whether the conditions for State liability are met, but finds it appropriate to give certain guidance based on the available information.

60. According to ESA, the first test to apply when assessing whether a breach is sufficiently serious is the discretion enjoyed by the EEA State concerned when implementing the relevant act. If the State has either considerably reduced or even no discretion, a mere infringement of the law at issue may be sufficient to establish the existence of a sufficiently serious breach.[39]

61. ESA argues that the Directives at issue did not leave any discretion to the State legislators concerning whether liability that applies in a State should be covered by insurance. This could in itself indicate that the breach at issue is sufficiently serious. However, account must be taken of all the factors which characterise the situation at hand. These include, in particular: the clarity and precision of the rules infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or not, the guidance provided by case law and whether the position taken by a Community or EEA institution may have contributed towards the adoption or maintenance of the national measure.[40]

62. As concerns the clarity and precision of the Directives at issue, ESA maintains that it is not obvious that textual analysis of the Directives leads to the conclusion that Norway's interpretation constitutes a sufficiently serious breach of the relevant provisions.[41] However, since the ECJ had clarified at the time of the accident, in the judgment in Case C-348/98 *Feirrera*[42], that all civil liabilities

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38 Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 38.

39 C-424/97 *Haim* [2000] ECR I-5123, at paragraph 38 and C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, at paragraphs 39–40.

40 ESA refers to Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 43, Case C-392/93 *British Telecommunications* [1996] ECR I-1631, at paragraphs 44, Case C-278/05 *Robins* [2007] ECR I-1053, at paragraphs 70–80.

41 ESA refers to Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECR I-5255, at paragraphs 30 and 31.

42 Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraph 29. ESA points out that later the ECJ answered a similar question as the one in *Ferreira* by order pursuant to Article 104(3) of the Rules of Procedure of the ECJ, see Case C-166/02 *Viegas* [2003] ECR I-7871.

should be covered by an insurance, the breach in the case at hand may be regarded sufficiently serious to entail State liability.[43]

63. ESA states that it is not aware of any practice by itself or the Commission that could alter the above assessment. If the Defendant's understanding of the relevant provisions is shared by other EEA States it could affect the assessment of whether the breach is sufficiently serious. However, it is not enough, to avoid liability that this is the situation in only one or limited number of EEA States.

64. ESA suggests answering the questions as follows:

> *1. It is incompatible with the Motor Vehicle Insurance Directives to exempt redress for non-economic loss ("pain and suffering") from the compulsory insurance system under national law if such redress is a civil liability.*
>
> *2. It is for the national court to determine whether the conditions for State liability for breach of EEA law are met. In order to determine whether such an infringement of EEA law constitutes a sufficiently serious breach, account must be taken of all the factors which characterise the situation at hand. Those factors include, in particular, the amount of discretion granted to the national authorities, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, whether guidance was provided by the case law as to the interpretation of the infringed provision, and whether the position taken by a Community or an EEA institution may have contributed towards the adoption or maintenance of the national measure.*

The Commission of the European Communities

65. As concerns the first question, the Commission of the European Communities (hereinafter "the Commission") submits that Article 3 of the First Directive should be interpreted as precluding national legislation which excludes redress for non-economic loss ("pain and suffering") from the scope of the compulsory insurance obligation.

66. The Commission maintains that whilst it is for each State to decide its own system of liability, any liability which then arises must be covered by insurance

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[43] As concerns the effect of preliminary rulings on the assessment of whether there is sufficiently serious breach, ESA refers inter alia to Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029 and Joined Cases C-231/06, C-232/06 and C-233/06 *Jonkman* [2007] ECR I-5149, at paragraphs 38–41. Furthermore, in its view the logic of the Case C-118/00 *Larsy* [2001] ECR I-5063, applies in EEA law even though the EC principle of direct effect is not a part of EEA law. If the national bodies are precluded under national law from setting aside national rules, the breach lies with the legislator.

which complies with the requirements of the Directive.[44] In the view of the Commission, this means that both no-fault liability under the Automobile Liability Act, as well as civil liability arising under Section 3–5, first paragraph, litra a of the Torts Act, must be covered by the compulsory insurance obligation laid down by Article 3(1) of the First Directive. Both are types of civil liability which may be incurred in relation to road traffic accidents and form a part of the overall Norwegian system of liability in this context.

67. The Commission submits that this conclusion is not altered by the fact that redress covers non-economic loss. In its view, there is nothing in the text of the First Directive that suggests that a distinction should be made on this basis, nor that non-economic loss be excluded. On the contrary, the broad definition of the term "injured party" in Article 1(2) of the First Directive, based on entitlement to compensation "in respect of any loss," reinforces the conclusion. Further, the Commission states that Article 1 of the Second Directive, referring to personal injuries and damage to property, merely serves to clarify that the latter should *also* be included, cf. the terms of the fourth recital of the Preamble to the Directive, and cannot be taken as a restriction on the type of loss covered under the heading "personal injuries".

68. Finally, the Commission contests the Defendant's understanding of Case E-7/00 *Helgadóttir*.[45] In this case the Court was simply stating that all loss should be covered up to the amounts fixed in Article 1(2) of the Second Directive.[46]

69. As concerns the second question, the Commission states that the conditions for State liability under EEA law are essentially the same as those under EC law. Under EEA law a breach of an obligation will be sufficiently serious if the Contracting Party concerned has manifestly and gravely disregarded the limits on its discretion.[47] In performing this assessment, the national court may take into account such factors as the clarity and precision of the rule breached, the measure of discretion left by that rule to national authorities, whether the infringement and

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44 Case C-348/98 *Ferreira* [2000] ECR I-6711, at paragraphs 27–29, Case C-365/05 *Farrell* [2007] ECR I-3067, at paragraph 33 and Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraph 21.

45 E-7/00 *Helgadóttir* [2000–2001] EFTA Ct. Rep. 246.

46 In its view, similar comments arise in relation to the judgment in Case E-1/99 *Finanger* [1999] EFTA Ct. Rep. 119.

47 See Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, at paragraph 68 and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, at paragraph 55.

the damage caused was intentional or involuntary and whether any error was excusable or inexcusable.[48]

70. In the view of the Commission, it seems arguable that one cannot establish a sufficiently serious breach of EEA law based on the degree of clarity and precision of the Directives alone. However, it was sufficiently clarified by the ECJ in the judgment in Case C-348/98 *Ferreira*[49] that all forms of civil liability arising under national law in relation to road traffic accidents must be covered by insurance complying with the Directives. It follows from the judgment of the ECJ in Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur*[50] that from that point in time exclusion of redress from the Norwegian compulsory insurance obligation appears to constitute a sufficiently serious breach of EEA law for the purposes of establishing State liability under EEA law.

71. The Commission suggests answering the questions as follows:

1. The motor vehicle insurance Directives, and in particular Article 3(1) of Directive 72/166/EEC, should be interpreted as precluding national legislation which excludes redress for non-economic loss ("pain and suffering") from the scope of the compulsory insurance obligation.

2. Such an exclusion of a form of civil liability from the compulsory insurance obligation is in principle a sufficiently serious breach of the obligations arising under the EEA Agreement as to entail State liability.

Thorgeir Örlygsson
Judge-Rapporteur

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48 The Commission refers to Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 38 and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, at paragraph 57.

49 Case C-348/98 *Ferreira* [2000] ECR I-6711. The Commission also refers to the order of the ECJ in Case C-166/02 *Viegas* [2003] ECR I-7871.

50 Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, at paragraph 57. The Commission also refers to Case C-118/00 *Larsy* [2001] ECR I-5063, at paragraph 44.