REPORT FOR THE HEARING
in Case E-9/97

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 (Reykjavik City Court) for an Advisory Opinion in the case pending before it between

Erla María Sveinbjörnsdóttir

and

The Government of Iceland

on the interpretation of Article 6 of the EEA Agreement and Council Directive 80/987/EEC, as amended by Council Directive 87/164/EEC, referred to in Point 24 of Annex XVIII to the EEA Agreement.

I. Introduction

1. By orders dated 5 and 12 November 1997, registered at the Court on 18 November 1997, Héraðsdómur Reykjavíkur (Reykjavik City Court) of Iceland made a request for an Advisory Opinion in a case pending before it between Erla María Sveinbjörnsdóttir, plaintiff, and the Government of Iceland, defendant.

II. Legal background

2. The questions submitted by the national court concern the interpretation of Articles 1(2) and 10 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (hereinafter referred to as the "Directive") as amended by Council Directive 87/164/EEC.

3. Article 1 of the Directive reads:

> *"1. This directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).*

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this directive, by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this directive.

The categories of employee referred to in the first subparagraph are listed in the annex.

3. This directive shall not apply to Greenland. This exception shall be re-examined in the event of any development in the job structures in that region."

4. Article 10 of the Directive reads:

"This directive shall not affect the option of Member States :

(a) to take the measures necessary to avoid abuses;

(b) to refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them."

5. The Directive is referred to in Point 24 of Annex XVIII to the EEA Agreement, which, for the purposes of the EEA Agreement, provides for, *inter alia*, the following adaptation:

"(a) The following shall be added to section I of the Annex:
...

H. ICELAND

1. Those members of the Board of Directors of a bankrupt company after the company's financial situation became considerably adverse.

2. Those having held 5% or thereover of the capital of a bankrupt limited company.

3. The general manager of a liquidated company or those others who, on account of their work with the company, had had a survey of the company's finances in such a manner that it could not be concealed from them that a company's liquidation had been impending at the time the wages were being earned.

4. The spouse of a person in a situation specified in clauses 1 to 3 as well as his/her direct relative and direct relative's spouse."

6. The questions submitted by the national court also concern the interpretation of Article 6 EEA, which reads:

"Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."

III. Facts and procedure

7. According to the Icelandic Insolvency Act No. 21/1991 (*Lög um gjaldþrotaskipti* – hereinafter the "Insolvency Act"), claims for unpaid wages are, as a rule, privileged claims against the estate of an insolvent employer. However, under Article 112, paragraph 3 of the Act, claims put forward by certain relatives of an insolvent person will not be recognized as privileged claims. Relatives to whom this Article applies are listed in Article 3 of the Act. Among those listed are siblings of an insolvent person.

8. Pursuant to Article 5, first paragraph of the Wage Guarantee Fund Act No. 53/1993 (*Lög um ábyrgðarsjóð launa vegna gjaldþrota* – hereinafter the "Wage Guarantee Fund Act"), it is a condition for the Fund's guarantee of wage claims that a claim be recognized as a privileged claim in the insolvency estate. There are, however, exceptions to this, which are listed in Article 6 of the Act. Thus, pursuant to Article 6(d) of the Act, it is for example possible, if certain conditions are fulfilled, to pay a wage claim to the spouse of an insolvent person, as well as to his relatives in direct line and the spouses of such relatives, even if their wage claims have not been recognized as privileged claims in the insolvency estate. The exception does not, according to the wording, apply to siblings of an insolvent person.

9. Ms Sveinbjörnsdóttir, the plaintiff in the case before the national court, had been employed for a number of years at a machine workshop when she was dismissed from her position by a letter of 29 December 1994 with effect from 1 January 1995. The plaintiff was dismissed with six months' notice and was not required to work during the notice period. The plaintiff received her wages until 12 March 1995. On 22 March 1995, the machine workshop was declared insolvent. On 23 May 1995, the plaintiff filed a claim against the insolvency estate, claiming payment of wages for the notice period, unpaid wage increases, vacancy pay from 1 May 1994 to the end of the notice period, i.e. until 30 June 1995, vacancy pay supplement and a December wage supplement, in total 743 844 Icelandic crowns.

10. On 24 May 1995, the plaintiff's counsel filed a copy of the claim with the Wage Guarantee Fund, claiming payment from the Fund pursuant to the Wage Guarantee Fund Act. By a letter of 13 October 1995, the liquidator of the insolvency estate rejected the plaintiff's claim against the estate on the grounds that the plaintiff was the sister of the holder of 40% of the shares in the machine

workshop. The claim was rejected pursuant to Article 112 *in fine* of the Insolvency Act, cf. Article 3 of the Act. On 4 March, an explanation was requested from the Wage Guarantee Fund regarding the grounds on which the Fund based its decision not to pay the plaintiff's claim. The answer was given in a letter of 18 March 1996, which set out the grounds for rejection of the claim, namely that the liquidator of the insolvency estate had not recognized the claim as a privileged claim in the insolvency estate. Reference was also made to Article 5, first paragraph, and Article 6 of the Wage Guarantee Fund Act. By a letter of 20 March 1996, the plaintiff's counsel asked the Fund's management board to reconsider the Fund's decision. By a letter of 1 April 1996, the management board confirmed the decision rejecting the claim.

11. The plaintiff then brought an action for compensation against the Government of Iceland with a writ of summons served on the defendant on 12 March 1997. In the writ of summons the plaintiff submitted that the Government is liable for damages for not having adjusted its national legislation correctly to the EEA Agreement, i.e. for not having adapted national legislation (Article 5, first paragraph, and Article 6 of the Wage Guarantee Fund Act and Article 112, paragraph 3, of the Insolvency Act, cf. Article 3 of that Act) correctly to the act referred to in point 24 of Annex XVIII to the EEA Agreement.

12. The national court, considering that it was necessary for it to deliver judgment, decided to stay the proceedings and request the EFTA Court for an advisory opinion on the interpretation of relevant parts of the EEA Agreement.

IV. Questions

13. The following questions were referred to the EFTA Court:

> **"1. Is the act referred to in point 24 of Annex XVIII to the EEA Agreement (Council Directive 80/987/EEC of 20 October 1980, as amended by Council Directive 87/164/EEC of 2 March 1987), in particular Article 1, paragraph 2, and Article 10 of the Directive, to be interpreted to mean that national legislation may provide that an employee may be precluded from receiving payment of a wage claim against an insolvency estate from the State's Wage Guarantee Fund on grounds of family relation to an owner of 40% of the shares in the insolvent company. The relevant relation in the case at hand is collateral, i.e. siblings?**
>
> **2. If the answer to question 1 is to the effect that such an employee may not be precluded from receiving payment of a wage claim, is the State liable vis-à-vis the employee for not having adapted national legislation when it became party to the EEA Agreement, so that the employee has a legal right to the payment of the wage claim?"**

V. Written observations

14. 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, Erla María Sveinbjörnsdóttir, represented by Counsel Stefán Geir Þórisson, Lögmenn Klapparstíg;

– the defendant, the Government of Iceland, represented by Counsel Árni Vilhjálmsson, Adelsteinsson & Partners, assisted by Martin Eyjólfsson, Legal Officer, Ministry for Foreign Affairs;

– the Government of Norway, represented by Jan Bugge-Mahrt, Assistant Director General, Royal Ministry of Foreign Affairs, acting as Agent;

– the Government of Sweden, represented by Erik Brattgård, Director, Ministry for Foreign Affairs, acting as Agent;

– the Government of the United Kingdom, represented by Dawn Cooper, Treasury Solicitor's Department, acting as Agent;

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director, Legal & Executive Affairs Department, acting as Agent and assisted by Bjarnveig Eiriksdóttir and Anne-Lise H. Rolland, Officers of that Department;

– the Commission of the European Communities, represented by Peter Jan Kuijper and Dimitrios Gouloussis, both Legal Advisers in its Legal Service, acting as Agents.

The first question

Ms Sveinbjörnsdóttir – the plaintiff

15. In the opinion of the plaintiff, Ms Sveinbjörnsdóttir, the Icelandic legislation excluding siblings of main shareholders from the scope of the Directive is not in accordance with the EEA Agreement.

16. It is submitted that Iceland has not exercised its right under Article 1(2) of the Directive to exclude claims from such persons. Iceland has, by virtue of that provision, excluded certain other categories of claims as specified in Annex XVIII EEA, but the exceptions actually provided for do not cover siblings of main shareholders in an insolvent company. Point 4 of the Icelandic exemptions covers spouses of persons mentioned in Points 1 to 3, as well as direct relatives and spouses of direct relatives. Siblings are not related in a direct line and are therefore not covered by this exemption.

17. Furthermore, Iceland may not rely on Article 10(a) of the Directive as advocated by the Icelandic Government. According to the plaintiff, both the EFTA Court and the Court of Justice of the European Communities (hereinafter "ECJ") have, in situations comparable to the present on all relevant points, rejected the possibility of a Member State relying on Article 10(a) of the Directive when the national legislation has not granted the minimum protection stipulated by the Directive and the Annex does not list a ground to reject a wage claim of the employee, see the advisory opinion of the EFTA Court in *Samuelsson*,[1] and the preliminary rulings of the ECJ in *Wagner Miret*[2] and *Commission* v *Greece*.[3] It follows from this case law that Article 10(a), due to the social aim of the Directive and the provision being an exception, must be interpreted narrowly, and that it does not permit every measure which may serve to avoid abuses. In any event, the plaintiff is in no way trying to take undue advantage of the Wage Guarantee Fund system. It is far-fetched of the Icelandic Government to argue that every close relative within the meaning of the Icelandic Insolvency Act abuses the Wage Guarantee Fund system under the Directive. Each case must be considered separately, and a Member State relying on Article 10(a) carries the burden of proof that it is justified to reject an employee's claim on the basis of that provision.

18. The plaintiff proposes the following answer to the first question:

> *"An employee, a sister of the owner of 40% of the shares in a company, may, upon the insolvency of the company, not be precluded from the scope of the act referred to in point 24 of Annex XVIII to the EEA Agreement (Council Directive 80/987/EEC of 20 October 1980, as amended by Council Directive 87/164/EEC of 2 March 1987), as this category of employees is not listed in Annex 1 to the act."*

The Government of Iceland – the defendant

19. In the opinion of the Government of Iceland, the defendant, the Icelandic legislation excluding siblings of main shareholders from coverage by the Wage Guarantee Fund is in conformity with the EEA Agreement. Three alternative legal foundations are referred to as the basis for the exception.

20. Principally, it is submitted that the exception is provided for by point 4, cf. point 2 of the adaptations in Annex XVIII EEA concerning Iceland. According to those provisions, persons having held 5% or more of the capital of an insolvent company and their "direct relatives" are exempted from the scope of the Directive. In the opinion of the defendant, it follows both from the wording and the object of the provision that the expression "direct relatives" must be interpreted as covering siblings.

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1 Case E-1/95 *Samuelsson* [1994-95] EFTA Court Report 145.

2 Case C-334/92 *Wagner Miret* [1993] ECR I-6911.

3 Case C-53/88 *Commission* v *Greece* [1990] ECR I-3917.

21. According to the defendant, the expression used in the English language version as well as the expressions used in other language versions such as the Norwegian, Danish, Greek, German, Swedish, Portuguese, Dutch and Italian, must be understood as covering siblings. Admittedly, the Icelandic text reads differently, as the corollary to "direct relative" is "ættmenni í beinan legg" which has the same meaning as "a line of ascendants and descendants" and therefore does not cover siblings. However, all language versions are equally authentic and since the EEA Agreement was negotiated in English, an error in the translation into Icelandic cannot change the meaning of the Directive.

22. The purpose of the request for the Icelandic exemptions from the scope of the Directive was to take account of exemptions already contained in the Icelandic Insolvency Act and Wage Guarantee Fund Act, which predate the EEA Agreement. According to Article 112, paragraph 3 of the Insolvency Act, "direct relatives" are excluded from coverage, and a definition of that expression in Article 3 of the Act also covers siblings. Thus, claims from siblings to a main shareholder were quite clearly excluded from coverage at the time of the EEA negotiations.

23. Subsidiarily, if the interpretation suggested above is rejected by the EFTA Court, it is submitted that a situation such as the plaintiff's could fall within point 3 of the adaptations for Iceland contained in Annex XVIII EEA. In that connection, it is pointed out that the plaintiff had worked for many years as a cashier in a business run by her family and with one of her family members as main shareholder and managing director. In the view of the defendant, a person in such a position might fall under the scope of the exemption in point 3 as she might have had sufficient overview over the company's affairs. Therefore, the Icelandic exemption in point 3 of the Annex to the Directive must be interpreted to the effect that a person in such a situation "may be precluded" from the protection provided for by the Directive.

24. Subsidiarily, if neither of the interpretations suggested above are accepted by the Court, it is submitted that Article 10(a) of the Directive – allowing Member States to take measures necessary to avoid abuses – must be interpreted so that a person in a position such as the plaintiff's may be precluded from receiving payments from the Wage Guarantee Fund. Reference is made to the ruling of the EFTA Court in *Samuelsson*,[4] which, according to the defendant, must be understood to the effect that a Contracting Party may not have in its national legal order a general rule that excludes a person in a situation such as the plaintiff's from the protection of the Directive, but also as rejecting a general interpretation of Article 10(a) that completely excludes the application of that provision to the situation in question.

25. The defendant proposes the following answer to the first question:

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[4] See footnote 1.

> *"The Annex to Directive 80/987/EEC, cf. Annex XVIII point 24(a)(H)(4) EEA, is to be interpreted so as to cover an employee who is the sister of an owner of 40% of the shares in an insolvent company and, thus, she "may be precluded" from receiving payment of a wage claim against an insolvency estate."*

The Government of Norway

26. In the opinion of the Government of Norway, an employment relationship or contract of employment will, as a general rule, be of a special nature within the meaning of Article 1(2) of the Directive if a close relative of a person who owns a substantial part of the company is employed by the company. Special treatment of such employees will be justified, *inter alia*, because of their opportunities to influence the operations and financial situation of the company by virtue of their close relationship with the owner.

27. The Government of Norway submits that EEA States other than those listed in the Annex also exclude close relatives from wage guarantee arrangements. Several States have arrangements similar to those of Iceland, in that claims must be approved as privileged pursuant to their bankruptcy legislation in order to be covered by the wage guarantee arrangement. In the opinion of Norway, such exceptions must be accepted provided that they are within the scope of the type of exception provided for in the Directive.

28. Whether or not exceptions can be made for employees in situations covered by Article 1(2) of the Directive cannot be entirely dependent on whether individual States have listed the exceptions in the annex to the Directive or in Annex XVIII EEA. This requirement was made to ensure predictability in legal terms, but in this respect national legislation is the most important. Given that the Directive allows for exceptions to be made from its area of application pursuant to Article 10 as well, it will in any case be necessary to examine national legislation to obtain full information about one's rights.

29. Consequently, in Norway's view, the derogating provision of the Directive means that an EEA State may exclude a specified category of persons regardless of whether there is a corresponding listing in the annex to the Directive, provided that the exception is based on considerations such as those mentioned above.

30. The Government of Norway proposes the following answer to the first question:

> *"Council Directive 80/987/EEC can be interpreted to mean that exceptions may be made for close relatives of persons who own more than 40% of an insolvent company. Such an exception may include siblings."*

The Government of Sweden

31. The Government of Sweden has confined its written observations to the second question only.

The Government of the United Kingdom

32. The Government of the United Kingdom addresses the relationship between Articles 1(2) and 10 of the Directive.

33. In the opinion of the United Kingdom, Article 10 of the Directive provides a free-standing ground for derogations which is separate from Article 1(2). It follows both from the wording and the purpose of the provisions that they have a different scope of application. Whereas Article 1(2) looks at the nature of the employment relationship or employment contract, and permits the exclusion of categories of employee where there is something unusual about that contract or relationship, Article 10(b) looks at the identity of the employee and employer and the existence of unusual connections and common interests between them. In the view of the United Kingdom, this must mean some connection and common interest outside the employer-employee relationship as such.

34. However, the United Kingdom submits that there is a possibility of overlap between Article 1(2) and Article 10(b) of the Directive, so that Article 10(b) may apply to cases which could have given rise to an exception under Article 1(2), but where no such exception has in fact been made by the Member State in question. Thus, the fact that an exception in national legislation implementing the Directive is of a type which could have been the subject of an entry in the Annex to the Directive under Article 1(2) (because there is something special about the nature of the employment relationship itself), does not prevent the Member State in question from including such an exception in implementing legislation, even though there is no such entry in the Annex, if the exception in question *also* falls within the parameters of Article 10, in particular Article 10(b) (because there are special links between employees in that category and their employers and common interests resulting, or liable to result, in collusion between them).

35. The United Kingdom proposes that the Court should answer the first question submitted to it by stating that nothing in the act referred to in point 24 of Annex XVIII EEA precludes national legislation from providing for an exception which is within the scope of Article 10 of the Directive where that exception could have been provided for by a specific reservation under the EEA Agreement in reliance on Article 1(2) of the Directive.

The EFTA Surveillance Authority

36. The EFTA Surveillance Authority submits, with regard to Article 1(2) of the Directive, that it is clear from the wording of the provision that an exclusion

by virtue of Article 1(2) is dependent upon the category of employee concerned actually being listed in the Annex to the Directive.

37. The EFTA Surveillance Authority submits that point 4 of the Icelandic adaptation is obviously intended to correspond to the exception provided for under Article 6(d) of the Wage Guarantee Fund Act. In view of the clear language of the national provision (referring *inter alia* to "relatives in direct line of descent") and since there is no reason to assume that the adaptation was intended to be broader in scope than the exception under national law, it would seem clear that point 4 of the adaptation is limited to relatives in direct line of descent. Consequently, Article 1(2) of the Directive does not allow Iceland to exclude siblings of shareholders of an insolvent employer company from the guarantee provided for by the Directive.

38. With regard to Article 10(b) of the Directive, the EFTA Surveillance Authority submits that the derogation should be given a narrow interpretation in line with the ruling of the EFTA Court in *Samuelsson*[5] concerning Article 10(a) of the Directive. The provision calls for a case-by-case assessment of whether the criteria contained therein are satisfied, and it cannot be argued that a sibling relationship in general fulfils those criteria. The only possibility for generally excluding certain types of employment relationships is to list them in Section I of the Annex to the Directive.

39. The EFTA Surveillance Authority proposes the following answer to the first question:

> *"The Act referred to in Point 24 of Annex XVIII to the Agreement on the European Economic Area (Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer) must be interpreted as precluding Iceland from maintaining a provision of national law, according to which, in the case of a sibling relationship between an employee and an owner of 40 per cent of the shares of the employer company, the employee is excluded from the guarantee provided for in Article 3 of the Act already on the basis of that family relationship."*

The Commission of the European Communities

40. With regard to the scope of the entry by Iceland in Annex XVIII EEA, the Commission of the European Communities points out that there are great divergences between the various language versions thereof. There are six language versions (Danish, English, Italian, Dutch, Portuguese and Swedish) which use terms comparable to "direct or close relatives", which are non-technical terms which can be taken to include brothers and sisters of the person concerned. The French and Spanish versions use more precise terms, corresponding to "relatives in direct line", whereas the German and Finnish

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[5] See footnote 1.

versions are the most precise when referring to “relatives of the first degree”. The text of all the latter four language versions would seem to exclude siblings.

41. Although all texts of the EEA Agreement are equally authentic, it is the Commission’s view that particular attention should be paid to the original Icelandic text. Despite a certain ambiguity attached to the expression “in direct line” contained in the Icelandic text, the most plausible interpretation of that text is that relatives are covered by the exception although they are not “in direct line”.

42. The most plausible interpretation of the Icelandic text would be in conformity with the majority of the other language version, but would go *against* the explicit wording of four equally authentic language versions, i.e. the German, Finnish, French and Spanish versions. In the opinion of the Commission, this is a situation which is difficult to accept in the case of equally authentic language versions. Since the interpretation of the Icelandic text *can* be brought into conformity with the aforementioned texts, and the other language versions can also be interpreted in this way if absolutely necessary, it is this interpretation that should nevertheless prevail.

43. With regard to Article 10 of the Directive, the Commission points out that it is a free-standing provision which is not linked to exceptions granted to the Member States under Article 1(2). There is no indication in the text or the Preamble to the Directive how the option in Article 10(b) should be exercised by the Member States. However, the Commission has always followed the line that, since this is a directive which should be implemented by the Member States, the Member States need to create a specific rule or must be able to point to a relevant existing legal provision which makes it possible for the national wage guarantee authority or the courts to refuse or reduce insolvency protection in the event of abuse, clashing interests and collusion.

44. The wording of Article 10(b) does not exclude that the Member State may use that option by enacting legislation which deems that in specific situations involving close family ties there is *ipso facto* collusion which makes the fulfilment of the obligation of Article 3 of the Directive unjustifiable. Although it cannot be entirely excluded that Iceland has exercised the option in Article 10(b) of the Directive by setting general rules such as those of the Insolvency Act, the information presently available would seem to indicate that Iceland has *not* exercised this option. Therefore, the barring of siblings of the employer, director, or major shareholder of the employer from exercising a claim of outstanding wages against the insolvency estate is not in conformity with Directive 80/987, as incorporated into the EEA.

45. The Commission proposes that the first question should be answered in the negative, but has not formulated a specific proposal to that effect.

The second question

Ms Sveinbjörnsdóttir – the plaintiff

46. In the opinion of Ms Sveinbjörnsdóttir, the plaintiff, the problem addressed by the second question is, first, a question of whether the obligations undertaken by the EFTA States under the EEA Agreement include the fundamental issue of liability for damages vis-à-vis individuals and legal persons who have incurred loss because of discrepancies between national law and the EEA Agreement, in the same way as is the case for the Member States of the European Union, as established by the case law of the ECJ in the first *Francovich*[6] case and subsequent case law regarding the same issue. Secondly, if the answer to that question is in the affirmative, it is necessary to decide whether the conditions for liability are present in the case at hand.

47. With regard to the first issue, the plaintiff submits that the aim of the EEA Agreement is to achieve homogeneous, common rules within the European Economic Area. The reciprocity, homogeneity and coherence, which are the basis of and the premise for the EEA Agreement, will be distorted in an unacceptable way if EFTA States are not liable in the same circumstances as Member States of the European Union.

48. In the *Francovich*[7] case, the ECJ found that liability was inherent in the system of the EC Treaty. The main considerations were to ensure the full effect of EC law and to protect the rights of individuals under those provisions. The relevant arguments of the ECJ for State liability all apply in the same way in EEA law as in EC law; there are no relevant differences between those two legal systems entailing such a different nature as to justify different rules regarding State liability. The object of Protocol 35 EEA is to ensure full effect of EEA rules, and in the eight recital of the Preamble to the EEA Agreement it clearly emerges that the intention is to protect the rights which the Agreement grants to individuals. The full effect of rights granted to citizens by the Agreement will not be achieved in practice if the State's breach of the citizens' rights is not followed by State liability. The provisions of the EC Treaty on which the ECJ based the principle of State liability in the *Francovich* case, i.e. Article 5 and Article 189, correspond to Article 3 and Article 7 EEA. Further developing the conditions for liability in *Brasserie du Pêcheur*,[8] the ECJ referred to Article 215 EC, which corresponds to Article 46 of the Surveillance and Court Agreement.

49. The plaintiff further submits that if such a fundamental issue as State liability, which was established prior to the date of signature of the EEA Agreement, were not to be included in the EEA Agreement, the EFTA States would have had to make this clear during the negotiations.

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6 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

7 See footnote 6.

8 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 27-31.

50. With regard to the assessment of the conditions of State liability in the present case, the plaintiff submits, with reference to *Brasserie du Pêcheur*, that the decisive test is whether the Member State's breach is manifest and whether it gravely disregards the limits on the Member State's discretion. It follows from that judgment that if a Member State has persistently breached its obligations despite settled case law on the relevant matter, the conduct constitutes an infringement which entails liability. As the rulings by the EFTA Court in *Samuelsson* and by the ECJ in *Wagner Miret* and *Commission* v *Greece*[9] provide clear precedents with regard to the case at hand, that condition is fulfilled.

51. The plaintiff proposes the following answer to the second question:

> *"Iceland is liable vis-à-vis an employee, for not having, being a party to the Agreement on the European Economic Area, granted the employee the protection stipulated in the act referred to in point 24 of Annex XVIII to the EEA Agreement (Council Directive 87/987/EEC of 2 October 1980, as amended by Council Directive 87/164/EEC of 2 March 1987), since Article 10(a) is not applicable and such employee's claims have not been excluded in an Annex to that act, in accordance with Article 1, paragraph 2 of that act."*

The Government of Iceland – the defendant

52. In the opinion of the Government of Iceland, the defendant, a principle of State liability in the case at hand could theoretically be based on three different foundations: on non-contractual liability principles of Icelandic law, on the *Francovich*[10] judgment having been made part of the EEA Agreement by virtue of Article 6 EEA, and on the EEA Agreement itself entailing a rule which serves as a ground for State liability.

53. In the opinion of the defendant, the EFTA Court should not express its view on the first alternative, as this is a matter of national law. With regard to the latter two foundations, an assessment necessitates a closer analysis of the nature of the EEA Agreement as compared to the EC Treaty.

54. The defendant submits that a comparison between the nature, aim and contents of the EEA Agreement and of the EC Treaty reveals a fundamental difference between the EEA Agreement and Community law. The co-operation at the Community level is wider in scope and aims at a close integration in many fields, whilst the EEA Agreement provides for the co-operation of the Contracting Parties within a considerably narrower field. This is clearly reflected in *Opinion 1/91*[11] by the ECJ and partly confirmed by the EFTA Court in *Maglite*.[12] This difference between the EEA Agreement and Community law

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9 See footnotes 1-3.

10 See footnote 6.

11 Opinion 1/91 [1991] ECR I-6079, paragraphs 14-29.

12 Case E-2/97 *Mag Instrument* v *California Trading Company Norway* [1997] EFTA Court Reports 127, paragraphs 25 and 27.

stems from the fact that the EFTA States were not prepared to participate in a closer co-operation at the price of having to transfer part of their sovereign rights to supranational institutions. As a result, EEA law makes use of other methods to attain the objectives of the Agreement, such as those provided for by Protocol 35 EEA, Articles 6, 7 and 105 to 111 EEA and Article 3 of the Surveillance and Court Agreement.

55. In the opinion of the defendant, the difference between the nature of the EEA on the one hand and Community law on the other has the following consequences:

a) Compared to Community law, there are more limited possibilities for deducing unwritten principles from the EEA Agreement, without a prior introduction of those principles into the national legislation of the EFTA States or submission of them for the approval of those States in each separate case.

b) The competence of the institutions set up by the EEA Agreement, insofar as it is seen as affecting the sovereign rights of the Contracting Parties, is more restricted than the competence of the EC institutions. In other words, the EEA institutions are not endowed with the same rights and thus have more limited possibilities for creating general principles not explicitly laid down in the EEA Agreement than do the corresponding EC institutions in relation to Community law. This is particularly true with regard to the ECJ on the one hand and the EFTA Court on the other.

56. With regard to the question whether the principle of State liability, as established by the ECJ in its *Francovich*[13] judgment, has been incorporated into the EEA by virtue of Article 6 EEA, the defendant submits that neither the EEA Agreement nor Community law contain a specific written provision on State liability in cases of breaches thereof. Instead, *Francovich* is a consequence of the special nature of Community law as an autonomous legal system, characterized *inter alia* by the transfer of sovereign rights, which is the basis for the principle of direct effect. State liability is a continuation of this principle and an extension thereof, as a further step in the direction of granting individuals rights under Community law. Article 6 EEA refers to judgments of the ECJ which are based on primary and secondary EC legislation, but not to those which are based on unwritten rules and general principles derived from the special nature of the Community legal order.

57. The reference in the *Francovich* judgment to Article 5 EC, a parallel of which is found in Article 3 EEA, does not alter this assessment as the reference is only an *additional ground* for justifying State liability.

58. Consequently, in the opinion of the defendant, the *Francovich* judgment does not fall within the scope of Article 6 EEA. Therefore, the EFTA States do

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13 See footnote 6.

not have the obligation to base their implementation and application of EEA provisions on the principles laid down in that judgment.

59. Even if Article 6 EEA does not apply to *Francovich*, the defendant points out that it could be argued that a similar rule to that found in *Francovich* can be deduced from the EEA Agreement itself. However, the defendant is of the opinion that no such rule can be deduced from the EEA Agreement, and submits four main arguments in support of that view.

60. First, since the *Francovich* judgment of the ECJ was delivered, and the question on State liability was heavily debated within the EC before the closing of the EEA negotiations, the absence of a provision in the EEA Agreement on State liability strongly indicates that the Contracting Parties made a deliberate decision not to include such a provision.

61. Secondly, there is an important difference between the nature of the EEA Agreement on the one hand and the nature of Community law on the other, with the consequences mentioned above.

62. Thirdly, where the contents of a ruling of the ECJ which is not covered by Article 6 EEA can nevertheless affect the homogeneous interpretation of the EEA Agreement, the matter is to be dealt with politically and through diplomatic channels, as set out particularly in Articles 105 to 111 EEA, and not by the EFTA Court.

63. Fourthly, the question concerning State liability in the present situation concerns in fact the effect of an international obligation as a source of law in the national legal order of Iceland. In other words, it concerns the interpretation of Icelandic legal rules regarding the connection between national law and international law and therefore falls outside the competence of the EFTA Court.

64. As a consequence of its view on the principal question of State liability, the defendant does not make any comments on the possible conditions of State liability under EEA law.

65. In light of the answer to the first question the defendant submits that it is not necessary for the Court to give its opinion of the second question. If, however, the Court does take the second question into consideration, the defendant is of the opinion that the EEA Agreement does not entail State liability vis-à-vis individuals and legal persons in case of breach of the Agreement.

The Government of Norway

66. The Norwegian Government submits that, under Community law, the principles laid down by the ECJ in, *inter alia*, the *Francovich*[14] judgment, would

[14] See footnote 6.

be relevant to the problem raised by the second question. However, under EEA law the legal situation is different for the Nordic EFTA/EEA States.

67. The EEA Agreement is an international agreement which creates rights and obligations between the Contracting Parties, but which lacks the supranational features that characterize Community law, see *Opinion 1/91*[15] of the ECJ, paragraphs 19-21.

68. The Nordic EFTA States apply the so-called "dualistic" principle, which implies that obligations under international law only become part of national law following a separate implementation act. This enactment is additional to consent to ratification. This means that EEA rules cannot be given direct effect. The EEA Agreement does not entail the transfer of legislative powers nor the relinquishment of the "dualistic" principle.

69. The EEA Agreement contains requirements for national compliance, particularly in Articles 3, 7 and 104 EEA, and in Protocol 35 EEA. Those provisions are based on the premise that the EEA Agreement does not entail a transfer of legislative power, and that specific implementation is necessary for EEA rules to become applicable at the national level.

70. The EEA Agreement does not contain any provision on State liability, and the absence of any such provisions is in itself a strong indication that the Contracting Parties have not undertaken any obligations in this respect.

71. In the view of the Norwegian Government, the authors of the EEA Agreement have made a deliberate choice as to what force the Agreement is to have in the legal orders of the respective States; it is the national implementation that is presumed to make the Agreement applicable to citizens. It would thus be a circumvention of those presumptions if the EFTA Court were to introduce liability for non-compliance, as this would indeed be giving the Agreement direct effect vis-à-vis the individual citizen – without any national implementation. In the opinion of Norway, the *Francovich* judgment reflects the supranational character of Community law in that it can produce legal effects in the internal legal order that normally require a decision by the legislator.

72. Nor can the EEA Agreement be interpreted to mean that the EFTA States have undertaken to amend their national legislation on liability for damages in order to "imitate" at the national level the principles set out in *Francovich* and subsequent case law of the ECJ.

73. The above conclusion is, in the view of the Norwegian Government, not affected by Article 6 EEA, which only deals with *relevant* rulings of the ECJ. Given the differences between Community law and EEA law, judgments that concern the special status of Community law in relation to national law in EU Member States are not relevant in relation to the EEA Agreement.

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[15] See footnote 11.

74. It is finally noted that experience shows that the balance of benefits, rights and obligations sought in the Preamble to the EEA Agreement has been achieved despite the differences pointed out above.

75. The Government of Norway proposes the following answer to the second question:

> *"Article 6 of the EEA Agreement does not comprise the elements of jurisprudence of the Court of Justice of the European Communities that solely concern the effect of Community law in national law. The legal principles laid down by the Court of Justice of the European Communities on the basis of Community law, inter alia in cases C-6/90 and 9/90, concerning the State's liability in damages vis-à-vis individuals when Community law is set aside do not therefore come under the scope of Article 6 of the EEA Agreement, in the way this provision must be interpreted in relation to a State that is only party to the EEA Agreement and not a Member State of the European Union."*

The Government of Sweden

76. The Government of Sweden points out that, according to Article 6 EEA, the provisions of the EEA Agreement can only be interpreted and applied in conformity with the relevant rulings of the ECJ where they are identical in substance to corresponding rules under Community law.

77. In the view of the Swedish Government, the principles of Community law, in particular the principles of direct effect and direct application, on which the case law of the ECJ regarding Member State liability is based, have no equivalent in the EEA Agreement. Consequently, the Contracting Parties are under no obligation to interpret and apply the Agreement in accordance with the principles laid down in *Francovich*[16] and subsequent case law of the ECJ.

78. Article 6 EEA must be interpreted in the light of the objectives of the EEA Agreement, which are narrower than those of the Community treaties.

79. With reference to *Opinion 1/91*[17] of the ECJ, paragraphs 20 and 21, it is furthermore submitted that, due to differences in the nature of the instruments, obligations established by the EEA Agreement, which is merely an agreement in international law between the Contacting Parties, cannot be interpreted and applied in the same way as obligations imposed by Community law. The rulings of the ECJ relating to the matter at issue are not relevant to decisions on obligations created by the EEA Agreement.

80. The difference between the EEA Agreement and the Community treaties is also shown by the fact that several basic elements of Community law are absent from the EEA Agreement; the EEA Agreement contains no provision

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16 See footnote 6.

17 See footnote 11.

corresponding to Article 189 EC laying down that Regulations shall be binding and directly applicable in all Member States (Article 7 EEA provides for a different solution), and the EEA Agreement contains no equivalent to Article 215 EC concerning non-contractual liability of the Community. Moreover, it follows from Protocol 35 EEA that the EEA Agreement entails no transfer of legislative powers to institutions of the EEA and that the homogeneity object of the Agreement will consequently have to be achieved through national procedures.

81. The Government of Sweden proposes the following answer to the second question:

> *"The EEA Agreement cannot be interpreted as meaning that the legal principles relating to the liability of the EC Member States laid down by the Court of Justice in Cases C-6/90 and C-9/90 and subsequent case law have been incorporated into EEA law. Consequently, the Government of Iceland cannot be deemed liable in relation to a private individual due to the fact that it has not implemented a Directive correctly."*

The Government of the United Kingdom

82. The Government of the United Kingdom has confined its written observations to the first question only.

The EFTA Surveillance Authority

83. The EFTA Surveillance Authority submits that it is not clear from Article 6 EEA whether it is concerned only with the material content of the EEA rules or whether it also refers to more general principles of Community law established in the relevant rulings of the ECJ, *inter alia* the *Francovich*[18] judgment, with regard to State liability. It is, therefore, necessary to consider *inter alia* the aim and purpose of the EEA Agreement.

84. With reference to *inter alia* Article 1 EEA and to the fourth, eight and fifteenth recitals of the Preamble to the EEA Agreement, the EFTA Surveillance Authority points out that the ultimate aim of the EEA Agreement is to create a homogeneous EEA. It is obvious that the objectives envisaged would not be achieved merely by identical provisions being interpreted in the same way as to their substantive content. For instance, there would clearly not be "an equal treatment of individuals and economic operators", as set out in the fifteenth recital of the Preamble to the EEA Agreement, if different rules were to apply with regard to the possibilities of being compensated for losses resulting from a failure to correctly implement a directive.

85. However, it is equally clear, in the view of the EFTA Surveillance Authority, that there were limits with regard to the extent to which the EFTA

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18 See footnote 6.

States were prepared to accept general principles developed in Community law. This is illustrated by Protocol 35 EEA, from which two conclusions may be drawn. First, although the EFTA States were not ready to accept the principle of primacy, as applied under Community law, the Contracting Parties nevertheless confirmed the aim of achieving a homogeneous EEA. Secondly, it was a particular feature of the EEA Agreement that prompted the Contracting Parties to opt for a special solution in this respect, i.e. the fact that the aim of the homogenous EEA was to be achieved without any transfer of legislative powers to the EEA institutions.

86. In view of this, the EFTA Surveillance Authority submits that the second question is not in the first place to be settled on the basis of the extent to which the principle of State liability can be seen as an outflow of the special nature of the Community and Community law. Rather, the decisive test should be whether or not the principle of State liability is reconcilable with the basic philosophy underlying the EEA Agreement, i.e. a homogeneous EEA without the transfer of legislative powers and without EEA rules being directly applicable at the national level.

87. An obligation on the part of the Contracting Parties to make good loss and damage does not, in the opinion of the EFTA Surveillance Authority, presuppose any transfer of legislative powers or the national courts basing themselves directly and exclusively on EEA rules. In fact, the relevant case law of the ECJ on the matter is clearly based on the assumption that any compensation to be paid to individuals is to be paid not directly on the basis of Community law, but on the basis of national law, see the judgments of the ECJ in *Francovich*,[19] at paragraph 42, and *Brasserie du Pêcheur*,[20] point 2 of the operative part. Consequently, the issue raised in the present case in essence boils down to a question of the content of the obligations assumed by the Contracting Parties with regard to the implementation of directives integrated into the EEA Agreement. In the view of the EFTA Surveillance Authority, there are several features in the EEA Agreement – including the clearly stated homogeneity objective, the explicit recognition of the important role that individuals will play in defending their rights in judicial proceedings and the stated intention of ensuring equal treatment of individuals and economic operators – that bear clear evidence that the Contracting Parties must have envisaged that the obligations assumed by them with regard to the implementation of directives integrated into the EEA Agreement were meant to include the obligation incumbent upon EC Member States under Community law to make good loss or damage resulting from a failure to implement the directives.

88. The EFTA Surveillance Authority finds further support for this view in the formulation of Article 7 EEA, which is modelled upon Article 189 EC, and in

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19 See footnote 6.

20 See footnote 8.

Article 3 EEA, which, within the meaning of Article 6 EEA, is identical in substance to Article 5 EC, referred to by the ECJ in *Francovich*.[21]

89. The EFTA Surveillance Authority finally notes that the absence in the EEA Agreement of an explicit provision on State liability does not justify any conclusion as to the intention of the Contracting Parties on the issue. The inclusion of a provision of this kind would have marked a distinct deviation from one of the main principles underlying the structure and drafting of the Agreement.

90. While establishing State liability as a matter of principle, the ECJ has in its case law recognized that the obligation to make good loss and damage is subject to certain conditions. The EFTA Surveillance Authority submits that these conditions must apply also in the context of the EEA.

91. With regard to loss and damage resulting from an incorrect implementation into national law of a directive, three conditions have been identified, see the judgments of the ECJ in *Francovich*,[22] at paragraph 40, and *Brasserie du Pêcheur*,[23] at paragraph 51. First, the directive concerned should be intended to confer rights on individuals, the content of which can be identified on the basis of the provisions of the directive. Secondly, the breach of the obligation on part of the State concerned must be sufficiently serious. Thirdly, there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party.

92. The EFTA Surveillance Authority submits that the first condition is fulfilled in the present case, while it is for the national court to determine whether the second and third conditions are satisfied.

93. The EFTA Surveillance Authority proposes the following answer to the second question:

> *"The Contracting Parties to the EEA Agreement are obliged to make good loss and damage caused to an individual as a result of a failure to correctly implement a directive incorporated into the Agreement, provided that the directive is intended to confer rights on individuals, the content of which can be identified on the basis of the provisions of the directive, that the failure is sufficiently serious and that there is a direct causal link between the failure and the damage sustained by the injured person."*

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21 See footnote 6.

22 See footnote 6.

23 See footnote 8.

The Commission of the European Communities

94. Following a presentation of the *Francovich*[24] case law of the ECJ, the Commission of the European Communities submits that, according to the ECJ, the principle of State liability in the EC rests on three pillars:

- The notion of the "own legal order" of the Community which permeates the legal orders of the Member States, prevails over them and imposes rights and obligations on Member States, institutions and individuals alike.
- Because the Community legal order permeates those of the Member States and individuals can derive rights directly from the Community legal order, the national courts must help enforce Community law and protect the rights of individuals.
- Article 5 EC.

95. In the view of the Commission, Article 6 EEA does not resolve the issue as *Francovich* is a ruling about the enforcement of Community law by individuals, underpinned by fundamental quasi-constitutional principles of judge-made Community law, and not a judgment about the mere application and implementation of EEA rules which are identical in substance to corresponding rules of EC law. Such principles cannot be transplanted without further ado from the Community to the EEA. They remain different organizations, based on different treaties, which implies that even identical provisions of the constituent treaties may have to be interpreted differently, depending on the context of the provision and the object and purpose of the treaties.[25]

96. In the opinion of the Commission, especially the fourth, eight and fifteenth recital of the Preamble to the EEA Agreement go a long way in the direction of an EC-like organisation. However, the body of the Agreement, in particular Article 7 EEA and Protocol 35 EEA, makes it quite clear that the EFTA States did not want to create a second EC when they co-operated in the creation of the EEA, see *Opinion 1/91*[26] of the ECJ. They did not want to create a superior legal order that would permeate their national legal orders and, by bypassing their national parliaments, would impose obligations and grant rights to their citizens. Consequently, the Commission is inclined to think that the two first fundamental underpinnings that are considered as the basis for the liability of States for damages due to incorrect implementation of directives are not present in the EEA and that it was even one of the basic aims of the EFTA States to avoid such fundamental changes in their constitutional order.

97. However, the question may then arise whether it is possible to base a principle of State liability on the EEA Agreement, even if these quasi-constitutional traits of the EC Treaty are absent. The third element mentioned by

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24 See footnote 6.

25 See Case 270/80 *Polydor* [1982] ECR 329.

26 See footnote 11.

the ECJ in *Francovich*, the good faith obligation in Article 5 EC, does have a parallel in Article 3 EEA. The question is thus whether this element in combination with the binding character of the instruments in the Annexes, as laid down by Article 7 EEA, would be sufficient to create a treaty-based obligation for Member States to enable such liability proceedings, even if not normally permitted in their legal system.

98. Since there is obviously no rule of general international law, or treaty law, which requires States to provide for the possibility of damage claims simply on the basis that the treaty is binding and should be performed in good faith, a positive answer to this question would, in the opinion of the Commission, presuppose that Articles 3 and 7 EEA are qualitatively different from, or go beyond, what is normal in international treaties. While apparently doubting that is the case, the Commission submits that the EFTA Court should base its decision principally on the arguments advanced by the EFTA States and the EFTA Surveillance Authority.

99. Finally, the Commission submits that regardless of the EFTA Court's decision on the question of principle, the conditions for liability, as set out in the case law of the ECJ, are in any case not satisfied in the present case. As dealt with in relation to the first question, there is a legitimate difference of opinion on the interpretation of the Icelandic entry in the Annex to the Directive and on the interpretation of Article 10 of the Directive. Consequently, the EFTA Court should come to the conclusion that in the present case the conditions for a sufficiently qualified breach of Community law by Iceland, as set out in *Brasserie du Pêcheur*,[27] at paragraphs 37 *et seq.*, in particular paragraph 56, are not present.

100. The Commission proposes that the second question should be answered in the negative, but has not formulated a specific proposal to that effect.

Bjørn Haug
Judge-Rapporteur

[27] See footnote 8.