REPORT OF THE EFTA COURT 2020

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- Case number, date of the judgment, names of the parties (option 2).

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EFTA COURT

REPORT OF THE **EFTA** COURT **2020**

The year 2020 will be remembered for the COVID-19 pandemic, which has had a major impact all over the planet. The operations of the EFTA Court were no exception, as we had to close the premises when Luxembourg entered into lockdown in March 2020. Fortunately, the Court was able to continue to function close to normal and we have continued to deliver judgments throughout the pandemic. A few days before the lockdown was announced, we were able to hold two oral hearings at the Court. Subsequently, the pandemic required us to organise hearings via video conference, which, thanks to the effort and dedication of our staff, were successful. In 2020 we organised nine oral hearings in such a manner and more are scheduled for early 2021. To ensure the accessibility and transparency of the hearings, they have been streamed live on the Court's website. I would like to take this opportunity to express my gratitude to everyone who participated in the hearings, and to those who helped make them possible.

Last year saw several noteworthy judgments from the EFTA Court. I would, in particular, like to highlight that in *Campbell*, following questions from the Supreme Court of Norway, the Court concluded that the EEA legal context had not changed since our 2016 judgment in *Jabbi*. Therefore, the Court confirmed our conclusion that Article 7 of the

Directive 2004/38/EC should be interpreted as also imposing obligations on the home State. In *Scanteam* the Court declined the invitation from the Norwegian Government to conclude that the Norwegian Complaints Board for Public Procurement did not fulfil the requirements to be considered a "court" for the purposes of Article 34 of the Surveillance and Court Agreement. In reaching that conclusion, we took note of the constitutional traditions of the EFTA States and the important role bodies such as the Complaints Board play in the application of EEA law.

Upon a request from the Liechtenstein Board of Appeal for Administrative Matters, the Court handed down its first judgment on the interpretation of the General Data Protection Regulation (GDPR). The questions referred, concerned anonymisation in an adversarial general procedure to hear a complaint under the GDPR, and further national appellate proceedings, as well as the extent of the requirement under the GDPR that complaints should be free of charge.

In the first criminal case referred to the EFTA Court from Norway, Borgarting Court of Appeal sought advice on the interpretation of what constitutes market manipulation. We held that the assessment of the concept must be based on objective factors and consideration of the results of transactions and their effects, and accordingly that real transactions could come therewithin.

In other developments, the Grand Chamber of the Court of Justice of the European Union dealt with the interpretation of the EEA Agreement in its judgment in *IN* (C-897/19). The Court of Justice held that a national of an EEA EFTA State, which also implements and applies the Schengen *acquis*, is in a situation objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.

Last year, the Court registered 17 new cases of which 2 were direct actions and 15 were requests for an advisory opinion. One of the direct actions is a case brought by Telenor against ESA's decision to fine the company 112 million EUR for a breach of the competition rules of the EEA Agreement. This case is undoubtedly one of the largest and most complex cases ever brought before the Court, as evidenced by the fact that the challenged decision runs to well over 300 pages. Three of the requests for an advisory opinion concern the legal implications of the so-called NAV case, which has generated considerable media attention

in Norway. In the first of these cases, the Supreme Court of Norway posed an unprecedented number of questions (16) to the EFTA Court. The other two are on the exportability of unemployment benefits.

As regards our cooperation with national courts, I would like to note that in the last two years the Supreme Court of Norway has referred 4 cases to the EFTA Court, which is a most welcome development. As always, the Liechtenstein courts have been very active in asking for advisory opinions. Last year, I observed that the requests received from the Icelandic Public Procurement Complaints Committee were the first requests received from Iceland in two and a half years, which I noted was a cause for concern. In the second half of 2020, we received two new requests from the Reykjavík District Court, which I sincerely hope is the beginning of a positive trend in that respect.

Páll Hreinsson
President

Contents

2020

Case Summaries

EFTA COURT

Criminal Proceedings

against

F and G

Case E-5/19

(Directive 2003/6/EC – Market manipulation – Harmonisation – Real transactions – False and misleading signals – Securing the price at an abnormal or artificial level – Legitimate reasons – Dissemination of information)

Judgment of the Court of 4 February 2020

The case concerned a request from the Borgarting Court of Appeal *(Borgarting lagmannsrett)* for an advisory opinion concerning the interpretation of the definition of market manipulation according to Directive 2003/6/EC on insider dealing and market manipulation (market abuse) ("the Directive").

ØKOKRIM appealed against the Oslo District Court's judgment on criminal charges against F and G for allegedly manipulating the bond market on the Oslo Stock Exchange *(Oslo børs)*. F was an advisor and manager of a bond fund and G was a bond broker in a brokerage firm. It remained undisputed that the transactions in question were real in the sense that they transferred expense and risk with full effect between independent parties. Oslo District Court acquitted both F and G.

The Borgarting Court of Appeal referred five questions to the Court which sought to clarify the interpretation of the concept of market manipulation, as defined in Article 1(2) of the Directive.

The Court held that as real transactions may be capable of giving false or

misleading signals to the supply of, demand for, or price of financial instruments, they are not excluded from the scope of the first indent of Article 1(2)(a) of the Directive. The assessment of false or misleading signals must be based on objective factors and consideration of the results of transactions and their effects. In examining whether a transaction conveys false or misleading signals, the real interest in buying and selling the security in question, while not by itself a necessary or sufficient element in finding market manipulation, may support a finding of such objective factors.

The Court held that the determination of an "abnormal" or "artificial" price within the meaning of the second indent of Article 1(2)(a) of the Directive may be established on the basis of an individual transaction and that it is for the national courts to assess and determine which signals and factors are relevant for the assessment.

A price can thus be secured within the meaning of the second indent of Article 1(2)(a) of the Directive in a transaction involving a security that is not traded in an auction mechanism, but that has come into being through direct negotiations between two of several brokerage houses. It was for the referring court to determine whether the price has been secured. Factors for the court to take into account included the nature and type of the market in question, the type and pricing of the financial instrument traded on the market, whether the market and the relevant financial instrument is characterised by low liquidity in trading, and the information available to market participants, including the means by which information on trades is made available. It was for the national court to assess, in light of the investor's behaviour as a whole, the legitimate reasons within the meaning of the second subparagraph of Article 1(2)(a) of the Directive. Legitimate reasons include the supply of, demand for and price of a financial instrument, or taking advantage of other investor's uncertainty in this regards, provided that they are not contrary to the objectives of the Directive. It was furthermore for the national court to assess whether an accepted market practice, applicable to the market and financial instrument in question, does indeed exist. An investor may benefit from the defence in the second subparagraph of Article 1(2)(a) of the Directive provided that the condition of a legitimate reason and the transaction's conformity with an accepted market practice is fulfilled.

The Court further held that it is not compatible with Article 1(2)(c) of the Directive to consider information to be disseminated, in the case that an investor has given information regarding a potential transaction to a broker in order for it to be passed on to one or more other investors in the market, or the broker actually has passed on such information. «

eftacourt.int/cases/e-05-19/

Gable Insurance AG in Konkurs

Case E-3/19

(Directive 2009/138/EC – Insolvency – Winding-up proceedings – Insurance claim – Judicial composition – Differential treatment of insurance claims)

Judgment of the Court of 10 March 2020

The Princely Court of Liechtenstein *(Fürstliches Landgericht)* referred questions to the Court which sought to clarify the interpretation of Articles 268, 274, 275 and 282 of Directive 2009/138/EC ("Solvency II"). The Court was asked to give its interpretation of the term 'insurance claim' and how such claims are determined and treated during the course of winding-up proceedings.

The case before the national court concerned the insolvency proceedings of Gable Insurance AG ("Gable"), a Liechtenstein insurance undertaking. New insurance claims had been notified despite the cancellation of all of Gable's insurance contracts four weeks after the opening of the insolvency proceedings. These included claims where the insured events took place before the opening of the insolvency proceedings, but where the loss or damage was not yet known.

The Court held that an insured event must have occurred before the cancellation of an insurance contract for it to be an insurance claim within the meaning of Article 268(1)(g) of Solvency II. However, the scope of an insurance claim cannot be limited to claims that have arisen, been lodged or admitted before the opening of the winding-up procedure if the claim cannot yet be fully determined. In accordance with Article 274(2)(g) of Solvency II, the Court held that it is for national law to set the specific rules and conditions concerning lodging, verification and admission of claims, including temporal limits for lodging and final determination of the amount of an insurance claim in cases where elements of the debt are not yet known. A claim for owed premium resulting from the cancellation of a contract after the opening of winding-up proceedings does not constitute an insurance claim according to Article 268(1)(g) of Solvency II.

The Court interpreted the term "winding-up proceedings" provided for in Article 268(1)(d) of Solvency II. The Court held that that provision neither obliges EEA States to provide nor pre-

cludes them from providing for composition in the termination of winding-up proceedings.

The Court held that Article 275(1)(a) of Solvency II does not preclude national rules on the lodging, verification and admissibility of insurance claims that result in different categorisation and ranking of insurance claims. This applies provided that those rules ensure that insurance claims take precedence over other claims and that insurance creditors are treated equally. «

eftacourt.int/cases/e-03-19/

Criminal proceedings

against

H and I

Case E-6/19

(Regulation (EC) No 561/2006 – Article 13(1)(m) – Specialised vehicles transporting money and/or valuables – Empty journeys – Escort vehicles)

Judgment of the Court of 4 May 2020

The Princely Court of Appeal of Liechtenstein *(Fürstliches Obergericht)* referred several questions to the Court seeking clarification on Regulation (EC) No 561/2006 concerning certain social legislation relating to road transport ("the Regulation"). The case before the national court concerned charges against two employees of a Liechtenstein company providing security services, transporting money and/or valuables. Charges had been brought against the two employees for infringements of the Liechtenstein provisions on rest periods and control.

The national court asked for the interpretation of the exception provided for specialised vehicles transporting money and/or valuables in Article 13(1)(m) of the Regulation, and whether the exception applies to empty journeys and escort vehicles. The Court held that this exception applies to both empty journeys and to escort vehicles, provided that the escort vehicle falls

within the scope of the Regulation and forms an integral and necessary part of the specialised vehicle's transport of money and/or valuables.

The national court also questioned whether penalties under Article 19 of the Regulation are necessary or proportionate if the journeys were undertaken on the territory of an EEA State that has granted such an exception. The Court held that if the journeys were undertaken on the territory other EEA States where those EEA States have granted an exception under Article 13(1)(m) and any individual conditions to such an exception are complied with, penalties under Article 19 may neither be imposed, nor are necessary or proportionate, as no infringement has taken place.

The last question from the national court was whether a driver is required to record any time spent as detailed in Article 4(e) and time spent driving such specialised vehicles as 'other work' under Article 6(5), if an exception is granted. The Court found that where the EEA State has granted an exception under Article 13(1)(m) this is not required under the Regulation. «

eftacourt.int/cases/e-06-19/

Campbell

-- V --

The Norwegian Government, represented by the Immigration Appeals Board (Utlendingsnemnda – UNE)

Case E-4/19

(Freedom of movement of workers – Directive 2004/38/EC – Right of residence – Derived rights for third-country nationals)

Judgment of the Court of 13 May 2020

The Supreme Court of Norway (Norges Høyesterett) referred questions to the Court regarding the interpretation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive").

The Court held that when an EEA national makes use of their right as a worker under Article 28 EEA and establishes in another EEA State a genuine residence which creates or strengthens family life, the effectiveness of that right requires that the EEA national's family life may continue on their return to the EEA State of origin. Therefore, a worker may not be deterred from exercising that right by an obstacle to the entry and residence of the worker's family members in the EEA State of origin.

The Court found that a derived right of residence in an EEA national's State of origin for that national's family member, who is a third-country national, will arise where the residence in the other EEA State has been sufficiently genuine so as to enable that worker to create or strengthen family life there.

The Court held that with regard to an EEA national who has not pursued an economic activity, Article 7(1)(b) and (2) of the Directive is applicable to the situation where that EEA national returns to the EEA State of origin together with a family member, such as a spouse who is a national of a third country.

The Court further held that any period of residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of the Directive by an EEA national in an EEA State other than the EEA State of origin, during which the EEA national has created or strengthened family life with a third-country national, creates a derived right of residence for the third-country national upon the EEA national's return to the EEA State of origin. The Court ruled that the notion of residence must be interpreted as allowing reasonable periods of absence which may or may not be work-related. This is without prejudice to Article 35 of the Directive. An EEA national consciously placing himself or herself in a situation conferring a right of residence in another EEA State does not, however, in itself constitute a sufficient basis for assuming abuse. «

eftacourt.int/cases/e-04-19/

Tak-Malbik ehf.

-- V --

The Icelandic Road and Coastal Administration and Þróttur ehf.

Case E-7/19

(Public procurement – Directive 2014/24/EU – Public works contract – Public service contract)

Judgment of the Court of 16 July 2020

The Icelandic Public Procurement Complaints Committee *(Kærunefnd útboðsmála)* ("the Complaints Committee") referred a question to the Court regarding the interpretation of Directive 2014/24/EU on public procurement ("the Directive").

Tak – Malbik ehf. lodged a complaint with the Complaints Committee contesting a decision awarding a contract following a procurement procedure conducted by the Icelandic Road and Coastal Administration *(Vegagerðin)* on the processing and stockpiling of base materials of specific sizes.

The Complaints Committee asked the Court whether a public contract to process and stockpile certain raw materials provided by the contracting

authority and in accordance with its requirements constitutes a public works contract under point (6) of Article 2(1) of the Directive, or a public service contract under point (9) of Article 2(1) of the Directive.

Point (9) of Article 2(1) of the Directive defines a public service contract as a public contract having as its object the provision of services other than those covered by the definition of a public works contracts under point (6) of Article 2(1).

Recital 8 of the Directive states that a public contract is a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II.

The definition in point (b) and point (c) of point (6) of Article 2(1) is contingent on the existence of "a work" within the meaning of point (7) of Article 2(1). Further, the execution of the planned work must correspond to the requirements specified by a contracting authority. As mentioned in recital 9 of the Directive, this is the case where the contracting authority has taken measures to define the characteristics of the work or the type of work or, at the very least, has had a decisive influence on its design.

The Court held that the public contract in question did not constitute a public works contract within the meaning of point (6) of Article 2(1) of the Directive. The Court further held that where a public contract has as its object the provision of services other than those referred to in point (6) of Article 2(1), the public contract constitutes a public service contract within the meaning of point (9) of Article 2(1). It was thus for the Complaints Committee to decide whether the public works contract at issue constitutes a public works contract under points (a), (b) or (c) of point (6) of Article 2(1), or, under point (9) of Article 2(1). A public contract which has as its object the provision of services other than those referred to in point (6) of Article 2(1) constitutes a public service contract within the meaning of point (9) of Article 2(1). «

eftacourt.int/cases/e-07-19/

Scanteam AS

-- V --

The Norwegian Government, represented by the Ministry of Foreign Affairs

Case E-8/19

(Public procurement – Directive 2014/24/EU – Definition of "contracting authority" – Foreign mission of an EFTA State – Applicability of EEA law – Article 126 EEA – Geographic scope of the EEA Agreement)

Judgment of the Court of 16 July 2020

The case concerned a request from the Complaints Board for Public Procurement *(Klagenemnda for offentlige anskaffelser)* ("the Complaints Board") for an advisory opinion concerning the interpretation of Directive 2014/24/EU on public procurement.

Scanteam lodged a complaint with the Complaints Board, claiming that the procurement procedure conducted by the Royal Norwegian Embassy in Luanda, Republic of Angola, was an unlawful direct procurement.

In its question, the Complaints Board asked the Court whether the Directive is applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country.

The Norwegian Government argued that the Complaints Board did not satisfy the criteria in order to qualify as a court or tribunal within the meaning of Article 34 SCA. This argument was based on recent ECJ case law on the interpretation of the notion of 'court or tribunal' under Article 267 of the Treaty on the Functioning of the European Union.

The Court held that the interpretation of the notion of 'court or tribunal' under Article 34 SCA must pay due regard to the constitutional and legal traditions of the EFTA States. The interpretation must thus take account of the important role played by administrative appeal boards in the EFTA States, also in the application of EEA law. The objective of Article 34 SCA is to establish a system of cooperation ensuring a homogenous interpretation of EEA law and any interpretation rendering administrative appeal boards ineligible to request an advisory opinion would undermine that objective. The Court therefore held that the ECJ's case law referred to by the Norwegian Government was not capable of altering the Court's own case law under Article 34 SCA. Having found that the Complaints Board satisfied the criteria in order to qualify as a court or tribunal under Article 34 SCA and that the

request for an advisory opinion was therefore admissible.

As to the question referred, the Court held that procurement, within the meaning of the Directive, falls within the scope of the EEA Agreement if it is sufficiently closely linked to the EEA. Acquisition by an EFTA State's foreign mission located in a third country by means of a public contract of supplies or services from an economic operator established in the EEA is liable to have a direct impact on the functioning of the internal market within the EEA. The Court thus found that the Directive is applicable to a procurement procedure undertaken by a foreign mission of an EFTA State in a third country if the procurement is sufficiently closely linked to the EEA. «

eftacourt.int/cases/e-08-19/

Pintail AG

-- V --

Finanzmarktaufsicht

Case E-6/20

(Withdrawal of a request for an Advisory Opinion)

Order of the President of 16 July 2020

The Board of Appeal of the Financial Market Authority *(Beschwerdekommission der Finanzmarktaufsicht)* ("the Board of Appeal") requested an advisory opinion from the Court concerning the interpretation of Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions and Directive 2007/64/EC on payment services in the internal market.

Pintail AG appealed against a decision of the Liechtenstein Financial Market Authority *(Finanzmarktaufsicht)*, where it found that Pintail AG's licence as an electronic money institution had lapsed in full on 1 January 2020 as it had not engaged in business activities for a period of at least 6 months.

The Board of Appeal referred four questions to the Court which sought to clarify the terms “activity”, “business activity” and “ceasing to engage in business” within the meaning of Directive 2009/110/EC and Directive 2007/64/EC.

The Board of Appeal withdrew the request for an advisory opinion by letter of 3 July 2020, registered at the Court on 13 July 2020. «

eftacourt.int/cases/e-06-20/

Abelia and WTW AS

-- V --

EFTA Surveillance Authority

Case E-9/19

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – eHealth – Admissibility – Status as interested party – Doubts or serious difficulties – Notion of an undertaking)

Judgment of the Court of 17 November 2020

Abelia and WTW AS (“WTW”) brought a direct action before the Court against the EFTA Surveillance Authority (“ESA”) for the annulment of ESA’s Decision No 57/19/COL of 10 July 2019.

Abelia is a Norwegian trade and employers association representing IT and IT-technology companies. WTW is a software developer and a member of Abelia.

ESA requested the Court to dismiss WTW’s application as inadmissible or unfounded on the grounds that the public financing of digital health infrastructure in the Norwegian healthcare system did not constitute state aid.

The Court held that for Abelia, as an association, to have legal standing, it is

sufficient if WTW has standing. Further, the Court found that WTW was an interested party and was seeking to safeguard its procedural rights. Therefore, the application was admissible.

ESA is required to initiate the formal investigation procedure unless it overcomes all doubts or difficulties on a measure's compatibility with the EEA Agreement. The legality of the contested decision thus depended on whether ESA should have had doubts as to whether Norsk Helsenett SF ("NHN") and the Norwegian Directorate of eHealth ("NDE") carried out economic activities when providing digital health infrastructure.

The Court concluded that ESA did not have to entertain any doubts whether NHN and NDE might carry out economic activity and thus constitute an 'undertaking' within the meaning of Article 61(1) of the EEA Agreement. The Court therefore dismissed the application as unfounded. «

eftacourt.int/cases/e-09-19/

Adpublisher AG

-- V --

J

and

Adpublisher AG

-- V --

K

Joined cases E-11/19 and E-12/19

(Regulation (EU) 2016/679 – Data protection – Right to lodge a complaint with a supervisory authority – Right to an effective judicial remedy against a supervisory authority – Anonymity – Costs incurred in appeal proceedings)

Judgment of the Court of 10 December 2020

The case concerned a request from the Liechtenstein Board of Appeal for Administrative Matters *(Beschwerdekommission für Verwaltungsangelegenheiten)* ("the Board of Appeal") for an advisory opinion concerning the interpretation of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) ("the GDPR").

The case concerned appeals brought by Adpublisher against decisions of the Liechtenstein Data Protection

Authority in response to complaints brought by the data subject J for alleged infringement of Articles 5, 6, and 15 of the GDPR and the data subject K for alleged infringement of Article 15 of the GDPR. Both complaints questioned the sourcing and subsequent processing of personal data by Adpublisher as a data controller pursuant to Article 4(7) of the GDPR, in the context of online marketing.

The Board of Appeal referred questions to the Court that concerned an adversarial general procedure to hear a complaint under the GDPR and further national appellate proceedings. The supervisory authority had already granted "anonymisation" of the complainants during proceedings under Article 77 of the GDPR, and "anonymisation" was also sought in proceedings under Article 78 of the GDPR.

The Court was asked whether it follows from the provisions of the GDPR, or any other provision of EEA law, that proceedings under Articles 77 and 78(1) of the GDPR may be carried out without disclosing the identity of a complainant, and whether any grounds should be provided for not disclosing the identity of the complainant. The Court held that disclosure of a complainant's personal data during proceedings based on a complaint lodged under Article 77 of the GDPR, or proceedings based on Article 78(1) of the GDPR, is not precluded by the GDPR or any other provision of EEA law. The question of non-disclosure of a complainant's personal data must be examined in the light of the principles for processing personal data under Articles 5 and 6 of the GDPR. Non-disclosure should not be granted if it would inhibit the performance of the obligations provided in the GDPR, or the exercise of the right to effective judicial remedy and due process as set out in Article 58(4) of the GDPR and under the fundamental right to an effective judicial remedy.

The Court was further asked whether the free of charge nature of the complaint procedure under Article 77 of the GDPR extends to subsequent proceedings before appellate bodies or has an impact on the liability of the data subject to be ordered to pay costs. The Court held that it follows from Articles 77(1) and 57(3) of the GDPR that where a data subject becomes a party to proceedings under Article 78(1) of the GDPR as a result of a data controller appealing against a supervisory authority's decision, and where national law imposes this status on a data subject automatically, the data subject may not be made responsible for any costs incurred in relation to those proceedings. «

eftacourt.int/cases/joined-cases-e-11-19-and-e-12-19/

Hraðbraut ehf.

–– V ––

mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf.

Case E-13/19

(Public procurement – Directive 2014/24/EU – Public service contract – Article 37 EEA – Notion of "services"– Upper secondary education)

Judgment of the Court of 10 December 2020

The Icelandic Complaints Board for Public Procurement *(Kærunefnd útboðsmála)* referred questions which sought to clarify whether Directive 2014/24/EU on public procurement ("the Directive") is applicable to contracts for providing upper secondary education in Iceland concluded between the Icelandic Ministry of Education, Science and Culture and three private colleges.

Under the contracts, the colleges provide pupils and teachers with the necessary services and facilities customary for instruction for the upper secondary school level. The colleges are responsible for ensuring that the education complies with quality requirements and the law. The colleges receive contributions from the Icelandic State based on an allocation of funds determined by the Icelandic Parliament in each year's budget legislation.

The Court found that for the Directive to apply, contracts such as those in question must constitute a "public services contract" for the provision of "services" within the meaning of the Directive and of Article 37 of the EEA Agreement, that

is services normally provided for remuneration. This characteristic is absent in the case of education provided under a national education system in situations where two conditions are satisfied. The State must firstly seek to fulfil its duties towards its own population in the social, cultural, and educational fields. Secondly, the system in question must, as a general rule, be funded from the public purse.

Accordingly, the Court held that in such circumstances, the provision of upper secondary education provided under a national education system cannot be regarded as a "service" for the purposes of Article 37 of the EEA Agreement. Therefore, such contracts cannot be regarded as having as their object the provision of "services" within the meaning of the Directive, and accordingly do not constitute "public service contracts" within the meaning of the Directive. «

eftacourt.int/cases/e-13-19/

Bergbahn Aktiengesellschaft Kitzbühel

-- V --

Meleda Anstalt

Case E-10/19

(Directive (EU) 2015/849 – Anti-money laundering – Information on beneficial ownership – Prevention of the use of the financial system for the purpose of money laundering and terrorist financing – Adequate, accurate and current information – Data minimisation)

Judgment of the Court of 22 December 2020

The Princely Court of Appeal *(Fürstliches Obergericht)* referred questions which sought to clarify the interpretation of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("the Directive").

Bergbahn Aktiengesellschaft Kitzbühel ("Bergbahn") brought an action against its owning legal entity Meleda Anstalt ("Meleda"), requesting that Meleda be ordered to provide information and proof on its beneficial owner(s). Meleda alleged that no natural person exercises direct or indirect control over

Meleda and instead asked Bergbahn to enter Meleda's board member in the Beneficial Owners Register.

Several questions on the interpretation of Article 30(1) of the Directive were referred to the Court. The referring court asked whether legal entities must confirm information on beneficial ownership by requesting underlying documentation, and whether it is relevant that the beneficial owner is a legal person with a registered office in an EEA State and that its board members are subject to professional requirements. The referring court further asked whether and to what extent the principle of data minimisation in the GDPR affects the documents to be produced, how the non-existence of ownership or control by a natural person must be proven, and whether a legal entity is required to bring a legal action to obtain information on its beneficial owner.

The Court held that Article 30(1) of the Directive must be interpreted as requiring a legal entity to take reasonable measures to seek to confirm the identity of its beneficial owner, such as requiring underlying documentation when the circumstances of a situation present it with doubts as to the accuracy of the information. The obligation is not altered by the fact that the owner is a legal person with a registered office in an EEA State nor by the profession of its board members.

The Court further held that it is for the referring court to ascertain to what extent the information on beneficial ownership processed is in line with the principle of data minimisation in point (c) of Article 5(1) of the GDPR.

The Court also held that point (v) of Article 3(6)(b) and point (c) of Article 3(6) of the Directive cannot be interpreted as obliging anyone to prove the non-existence of indirect ownership or ultimate control by a natural person.

Finally, the Court held that the Directive does not require a legal entity to bring legal proceedings against its owning entity to obtain information on a beneficial owner. «

eftacourt.int/cases/e-10-19/

2020

News and Events

EFTA COURT

Complete Revision of the Court's Rules of Procedure

On 1 December 2020, the ESA/Court Committee, on behalf of the EFTA States, approved the new Rules of Procedure of the EFTA Court, which the Court had adopted and submitted for approval and constitute a complete revision of the current Rules. Those Rules of Procedure were adopted when the Court started its operations in 1994 and had subsequently been amended several times. For comparison, the Rules of Procedure of the Court of Justice and the General Court were recast in 2012 and 2015.

The purpose of the new Rules of Procedure of the EFTA Court is essentially to align the rules with recent amendments to the Rules of Procedure of the Court of Justice and of the General Court, in so far as those provisions are relevant for the structure and jurisdiction of the EFTA Court. This includes taking account of technological changes, in particular the recent introduction of the e-EFTACourt application, which allows for electronic lodging and service of documents.

The new Rules of Procedure of the EFTA Court are structured according to the Rules of Procedure of the Court of Justice. After setting out some introductory provisions, the Rules are divided into five titles, each consisting of chapters with individual provisions. Title I concerns the organisation of the Court. Title II sets out common procedural provisions, which are to apply to both types of cases before the EFTA Court (the advisory opinion procedure and direct actions). Title III contains provisions specific to the advisory opinion procedure, whereas Title IV deals exclusively with direct actions. Title V governs special forms of procedure. There are also some final provisions, and two annexes.

At the time of writing the new Rules of Procedure are being translated into all EU languages and awaiting publication in the EEA Supplement of the Official Journal. The new Rules will enter into force on the first day of the third month following publication.

Remote Oral Hearings

Like other institutions, the Court had to adapt its work in 2020 to the challenges of the COVID-19 pandemic. A major impact was the fact that oral hearings could no longer be held on site.

With considerable effort, the Court was able to make the necessary arrangements to hold all its oral hearings via video conference. To ensure the accessibility and transparency of the hearings, they have been streamed live on the Court's website.

The Court held nine oral hearings in such a manner in 2020, and further hearings have already been scheduled for the first half of 2021.

2020

Judges and Staff

EFTA COURT

Judges and Staff

The members of the Court in 2020 were as follows:

Mr Per CHRISTIANSEN (nominated by Norway)
Mr Bernd HAMMERMANN (nominated by Liechtenstein)
Mr Páll HREINSSON, President (nominated by Iceland)

The judges are appointed by common accord of the Governments of the EFTA States.

Mr Ólafur Jóhannes Einarsson is the Registrar of the Court.

Ad hoc Judges of the Court are:

Nominated by Iceland:
Mr Benedikt Bogason, forseti Hæstaréttar (President of the Supreme Court)
Ms Ása Ólafsdóttir, hæstaréttardómari (Supreme Court Judge)

Nominated by Liechtenstein:
Ms Nicole Kaiser, Rechtsanwältin (lawyer)
Mr Martin Ospelt, Rechtsanwalt (lawyer)

Nominated by Norway:
Mr Ola Mestad, University of Oslo (Professor)
Ms Siri Teigum, Advokat (lawyer)

In addition to the Judges, the following persons were employed by the Court in 2020:

Ms Candy BISCHOFF, Administrative Assistant
Mr Birgir Hrafn BÚASON, Senior Lawyer Administrator
Mr Thierry CARUSO, Caretaker/Driver
Mr Michael-James CLIFTON, Legal Secretary
Mr Ólafur Jóhannes EINARSSON, Registrar
Ms Hrafnhildur EYJÓLFSDÓTTIR, Personal Assistant
Mr Gjermund FREDRIKSEN, Financial Officer
Ms Ingeborg Maria GUNDEM, Legal Secretary
Mr Ólafur Ísberg HANNESSON, Legal Secretary
Mr Kristján JÓNSSON, Legal Secretary
Ms Annette LEMMER, Receptionist/Administrative Assistant
Mr Tomasz MAZUR, Administrative and Financial Officer
Ms Katie NSANZE, Administrative Assistant
Ms Silje NÆSHEIM, Personal Assistant
Mr Håvard ORMBERG, Legal Secretary
Ms Kerstin SCHWIESOW, Personal Assistant
Ms Lisa ZERMANN, Legal Secretary