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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by

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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-9/22

Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga* and *Lyfjafræðingafélag Íslands

v

the Icelandic State

in which the Court of Appeal requests the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation and application of Articles 1, 2 and 3 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

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1 INTRODUCTION

1. The Agreement on the European Economic Area (the "**Agreement**" or the "**EEA Agreement**") sets out numerous objectives and aspirations for the European Economic Area (the "**EEA**"). One such objective is "*to provide for the fullest possible realization of the free movement of goods, persons, services and capital […]*".[1] At the same time, the EEA Agreement recognizes the "*importance of the development of the social dimension, including equal treatment of men and women, […]*".[2] The Contracting Parties also expressed that they wished to "*ensure economic and social progress and to promote conditions for full employment, an improved standard of living and improved working conditions […]*"[3] within the EEA.
2. Article 3(3) of the Treaty on the European Union ("**TEU**") states that the European Union shall "*establish an internal market […]*", and *inter alia* work for a "*highly competitive social market economy, aiming at full employment and social progress […]*".[4] The EEA Agreement provides that the objective is "*to arrive at, and maintain, a uniform interpretation and application […]"*[5] of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in it "*and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition".*[6]
3. As a result, ESA considers that equal treatment to that in the EU of individuals and economic operators with respect to the four freedoms and the conditions of competition of the EEA internal market must, like in the EU, equally be understood in light of the aspiration of a highly competitive social market economy.
4. In that respect, Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies (the **"Directive**" or

1 Recital 5 of the Preamble to the EEA Agreement.
2 Recital 11 of the Preamble to the EEA Agreement. See e.g. EFTA Court Judgment of 22 March 2002 in Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others*, paragraph 41.
3 Recital 11 of the Preamble to the EEA Agreement.
4 Article 3(3) of the TEU.
5 Recital 15 of the Preamble to the EEA Agreement.
6 Recital 15 of the Preamble to the EEA Agreement.

"**Directive 98/59**")[7] plays a key role. This is so not only because it affords protection to workers facing a potential collective redundancy, which is a part of the social dimension of EEA and EU law. It also includes those workers in very specific and important processes of the undertaking, empowering workers in a manner concerned with the strategic and commercial decisions of the undertaking. In *Enes Deveci*, the Court held that "[t]he *freedom to conduct a business lies … at the heart of the EEA Agreement*".[8] ESA considers that the Directive gives a concrete expression of this freedom in the European social market economy. Thus, the Directive balances the freedom to conduct a business and, in particular, the freedom of contract which undertakings and individuals in principle have, in respect of the workers whom they employ and for which they are employed, with the rights of those workers to be involved.[9]

5. This combination of affording protection as well as providing agency to workers is set out in recital 2 of the Directive. As the Court of Justice of the European Union ("**CJEU**") put it in case C-201/15 *AGET*,[10] the European Union has not only an economic but also a social purpose. Therefore, the rights concerning "*the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy*".[11] This includes "*the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion*."[12]
6. On that background, the present case seeks to answer the questions whether an employer who unilaterally decides to terminate independent contracts with a group of workers covering fixed overtime, is obliged to follow the procedural

[7] Council Directive 98/59/EC of 20 July 1998 *on the approximation of the laws of the Member States relating to collective redundancies* (OJ L 225, 12.8.1998, p. 16), incorporated into the EEA Agreement at point 22 of Annex XVIII by Joint Committee Decision No 41/1999 of 26 March 1999 (OJ L 266, 19.10.2000, p. 47), which entered into force 1 July 2000 and was made part of the Icelandic legal order on that same date.
[8] Judgment of 18 December 2014, Case E-10/14, *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden*, paragraph 64.
[9] See Judgment of the CJEU of 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ("AGET"), EU:C:2016:972, paragraphs 69-70.
[10] See Case C-201/15, *AGET,* cited above, paragraph 77
[11] *Ibid*.
[12] *Ibid.*

rules laid down in the Directive, and whether the fact that such termination does not result in full termination of the employment relationship removes that obligation.

2 THE FACTS OF THE CASE

7. On 14 February 2020 workers of the technical support units of Landspítali Háskólasjúkrahús ("**LSH**"), received a letter stating that their contracts covering regular overtime were terminated with three months' notice. At the same time, they were offered new temporary contracts covering regular overtime.
8. The Association of Chartered Engineers in Iceland (Verkfræðingafélag Íslands), the Computer Scientists' Union (Stéttarfélag tölvunarfræðinga) and the Pharmaceutical Society of Iceland (Lyfjafræðingafélag Íslands) (the "**Plaintiffs**") are the unions of chartered engineers, computer scientists and pharmacists in Iceland.
9. On 20 February 2020, the workers were informed of measures that were being planned by **LSH which would mean that all fixed-wage contracts covering regular overtime would be terminated and workers would, from then on, be offered alternative contracts on regular overtime which would be temporary, valid for one year**. This change would result in a reduction of the wages of workers in the technical support departments **of as much as 3.5%**; nevertheless, this change would be executed in such a manner that **workers who received under ISK 700,000 in monthly wages would not incur wage reductions**, while the reduction applied to other workers would take into account the amount of wages they received.
10. These measures planned by LSH, applied to 319 workers, and the number of overtime hours was reduced in the case of 113 workers. Of the 319 workers, the measures affected 26 members of he Association of Chartered Engineers in Iceland. Overtime hours were reduced for 14 of these 26 workers. The measures affected 4 members of the Computer Scientists' Union. Overtime hours were reduced for 3 of these 4 workers. The measures affected 2 members of the Pharmaceutical Society of Iceland. Both had their overtime hours reduced.

11. On 25 February 2020, the Plaintiffs sent an enquiry to LSH requesting information concerning the terminations, and whether the defendant regarded them as falling under the provisions of the Collective Redundancies Act No 63/2000 (the "**Collective Redundancies Act"** or the **"Act**"). In its reply of 26 February 2020, LSH stated that, in its view, no termination of the workers' employment contracts was involved. Consequently, the Collective Redundancies Act did not apply. What was proposed was a moderate reduction of regular overtime hours in the case of specific workers who had enjoyed terms of employment which were over and above the terms stipulated in their collective agreements. The reply furthermore stated that in practice, State institutions were allowed to terminate contracts covering payments going beyond the terms stipulated in the relevant collective agreements without this constituting a termination of the employment contract. Finally, the LSH stated that other institutions had previously been obliged to take similar measures without complaints having been voiced that the provisions of the Collective Redundancy Act had been violated.
12. On 11 March 2020, the Plaintiffs sent LSH and the Ministry of Health a letter outlining their view that the measures involved collective redundancies in the sense of the Collective Redundancy Act. Consequently, LSH would be obliged to follow the procedural rules laid down in the Act. LSH replied on 31 March 2020, reiterating its views. Here it also stated that so few workers' contracts covering regular overtime had been terminated that the Collective Redundancies Act did not apply. With reference to these arguments, the LSH view was that the Act did not apply to the measures.
13. The Plaintiffs decided to take the matter to the District Court of Reykjavik requesting, that the termination by the Defendant of the fixed overtime contracts was to be recognised as redundancy under the Collective Redundancy Act. In its judgment of 14 December 2020,[13] the **District Court held that the Collective Redundancies Act only applied when the employment relationship between employer and worker had been fully terminated**. Consequently, the plaintiffs' claims were dismissed on all grounds.

[13] See link to judgment of the district Court of Reykjavík dated 14 December https://www.heradsdomstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=d76125ba-6f24-4e08-8e66-414cec61d46a .

14. The judgment was appealed to the Court of Appeal (the "**Referring Court**") on 28 December 2020, which, submitted a request for an advisory opinion (the "**Request**") to the EFTA Court asking for an interpretation of Articles 1, 2 and 3 of the Directive.
15. As set out below, ESA considers that an independent contract covering fixed overtime is a part of the employment relationship. An employer who intends to terminate such contracts with a sufficient number of workers is obliged to follow the procedural rules laid down in the Directive as long as the changes are made unilaterally by the employer to the detriment of the employee and for reasons not related to the individual employee, and as long as the changes to the employment relationship are significant and concern essential elements of the employment relationship. The fact that such termination does not result in full termination of the employment relationship does not remove that obligation.

3 EEA LAW

16. Recital 2 of the Directive reads:

> "*Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the* [EEA];"

Recital 3 states:

> *"Whereas, despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers;"*

Recital 4 states:

> *"Whereas these differences can have a direct effect on the functioning of the internal market."*

Recital 7 reads:

> "*The completion of the internal market must lead to an improvement in the living and working conditions of workers in the* [EEA] (. . .).

The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies."

Article 1 of Section I of the Directive reads:

"*1. For the purposes of this Directive:*

a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

i) either, over a period of 30 days:

— at least 10 in establishments normally employing more than 20 and less than 100 workers,

— at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,

— at least 30 in establishments normally employing 300 workers or more,

ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

b) 'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

2. This Directive shall not apply to:

a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;

b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies); […]"

4 NATIONAL LAW

17. Iceland implemented the Directive into its national legal system with the Collective Redundancies Act.[14] The Directive sets out an exception in relation to its scope in Article 1(2)(b) where it is stated: *"This Directive shall not apply to: workers employed by public administrative bodies or by establishments governed by public law […]".*[15] When the Directive was implemented in Iceland, the Icelandic legislator implemented two exceptions from the scope of the Directive.[16] The exception in Article 1(2)(b) was not included, however.[17]

18. The Collective Redundancies Act provides in relevant parts:

Article 1 states:

"*This Act applies to collective dismissals of workers by an employer for reasons not related to each individual worker where the number of workers dismissed in a 30-day period is:*

a. at least 10 workers in enterprises normally employing more than 20 but fewer than 100 workers,

b. at least 10% of workers in enterprises normally employing at least 100 but fewer than 300 workers,

c. at least 30 workers in enterprises normally employing 300 workers or more.

When calculating the number of persons dismissed under the first paragraph, attention shall be given to terminations of the employment contracts of individual workers that are equivalent to collective dismissals provided that there are at least five such terminations."

Article 2 reads:

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[14] See link https://www.althingi.is/lagas/nuna/2000063.html .
[15] See Article 1(2)(b) of the Directive.
[16] Articles 1(2)(a) and (c) of the Directive. The exception in Article 1(2)(c) of the Directive was deleted by Directive (EU) 2015/1794 and removed from the Collective Redundancies Act.
[17] Currently, the only exception in the Act is in Article 2, implementing Article 1(2)(a) of the Directive, providing that the Collective Redundancies Act does not apply to temporary employment contracts and employment contracts for specific mandates unless they are terminated before the period has expired or before the mandate has been finished. Our translation.

"*This Act does not apply to collective redundancies effected in accordance with employment contracts made for specific periods or to cover specific projects unless such redundancies occur before these contracts expire or before the projects are completed.*"

Article 3 reads:

"The provisions of Article 7 and of the first paragraph of Article 8 shall not apply when the operations of an enterprise are stopped by the ruling of a court of law. Nevertheless, the employer shall send the Directorate of Labour a notification in accordance with Article 7 if the Directorate of Labour so requests."

Article 4 reads:

"The provisions of this Act shall apply irrespective of whether the decision on collective redundancies is taken by the employer or by an enterprise that is in a position of control with regard to the employer.

In the event of an allegation of a violation of requirements regarding information, consultation and notification under this Act, the employer may not maintain that he did not receive sufficient information from the enterprise where the decision on the collective redundancies was taken."

5 THE QUESTIONS REFERRED

19. The Referring Court asks the following questions:

"Does it follow from Article 1(1) and Article 2 of Council Directive 98/59/EC, and also from the principle of effectiveness, that an employer who intends to terminate contracts with a group of workers covering fixed overtime is required to observe the procedural rules laid down in the Directive, including as regards consultation with workers' representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive?

If the answer to the first question is in the affirmative, does the employer's obligation cease to apply if termination of contracts covering fixed overtime does not subsequently result in the full termination of the workers' employment contracts?

Is it of significance for the answer to the first two questions whether the contracts covering fixed overtime which the employer terminates were specifically made in independent contracts that were additional to the workers' employment contracts?"

6 LEGAL ANALYSIS

6.1 Introduction about the Directive

20. Directive 98/59 repealed Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, which was the first Directive regulating redundancies on an EU level. The aim of Directive 98/59 was to align the procedures and the cost with regard to redundancies within the EU/EEA. This can be seen from the recitals to the Directive and the case law of the CJEU.[18]
21. Recital 2 of the Directive reiterates the importance of a greater protection to be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the [EEA].[19]
22. Recital 3 provides that differences between provisions in force in the Member States concerning practical arrangements and procedures for redundancies and the measures designed to alleviate the consequences of redundancy for workers still remain. Recital 4 further states that these differences can have a direct effect on the functioning of the internal market.
23. By harmonising the rules applicable to collective redundancies, the legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for the undertakings.[20]
24. The term collective redundancy is defined in Article 1(1) of the Directive. The CJEU has through its case law stated that the concept of 'redundancy' within

[18] See judgments of the CJEU of 11 November 2015, Case 422/14 *Chrisian Pujante Rivera v Gestora Clubs Dir SL and Fondo de Garantía Salarial ("Pujante Rivera"), (*EU:C:2015:743), paragraph 53 and of 12 October 2004, Case C-55/02 *Commission v Portugal*, (EU:C:2004:605), paragraph 18 and of 8 June 1994 in Case C-383/92 *Commission v United Kingdom*, (EU:C:1994:234), paragraph 16.
[19] See Recital 2 of the Directive.
[20] See C-422/14, *Pujante Rivera*, cited above, paragraph 53, C-55/02, cited above, paragraph 18 and C-383/92 *Commission v United Kingdom*, cited above, paragraph 16.

the meaning of the Directive must be construed in the context of EU law. The term includes any termination of contract of employment not sought by the worker, and therefore without his consent.[21]

25. The Directive provides for an obligation of the employer to engage in consultation provided for in Article 2. Procedures for notification by the employer are laid out in Article 3 and 4 of the Directive.

26. The CJEU has held that the obligations of consultation and notification of an employer arise prior to any decision by the employer to terminate contracts of employment.[22] In addition, it has held that achievement of the objective of avoiding terminations of contracts of employment or reducing the number of such terminations would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision.[23]

27. In Case C-44/08 the CJEU held that the consultation procedure provided for in Article 2 of the Directive must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for a collective redundancy has been taken.[24]

6.2 Admissibility of the Request

28. As a starting point, under the Advisory Opinion procedure laid down in Article 34 of the Agreement between the EFTA States on the establishment of a surveillance authority and a court of Justice ("**SCA**"), the EFTA Court has "*jurisdiction to give advisory opinions on the interpretation of the EEA Agreement*".[25] Similarly, the CJEU has jurisdiction under Article 267 TEU "*to give preliminary rulings concerning: a) the interpretation of the Treaties*" and "b) *the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*."

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[21] See Case C-55/02, cited above, paragraphs 49 and 50 and judgment of the CJEU of 7 September 2006 in joined cases C-187/05, *Georgios Agorastoudis and Others*, C-188/05, *Ionnis Panou and Others*, C-189/05, *Kostantinos Kotsampougioukis and Others*, C-190/05 *Georgios Akritopoulos and Others v Goodyear Hellas AVEE* ("*Agroastoudis and others"*), (EU:C:2006:535), paragraph 28.

[22] See judgments of the CJEU of 27 January 2005, C-188/03 *Irmtraud Junk v Wolfgang Kühnel ("Junk")*, (EU:C:2005:59), paragraph 37, and of 10 September 2009, C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and others v Fujitsu Siemens Computers Oy*, (EU:C:2009:533), paragraph 38.

[23] See Cases C-188/03 *Junk,* cited above, paragraph 38, and C-44/08, cited above, paragraph 46.

[24] See Case C-44/08, cited above, paragraph 48.

[25] This provision must be understood in light of Article 1(a) SCA, according to which the term "EEA Agreement" includes "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein". See judgment of 14 December 2011 in Case E-3/11 *Pálmi Sigmarsson v Seðlabanki Íslands*, paragraph 26.

29. As Advocate General Bobek has explained with respect to the CJEU, "[o]*ne of the conditions for the Court's jurisdiction under that provision is that the EU act, the interpretation of which is sought, is applicable in the main proceedings, with that applicability normally set out in the relevant EU law act itself*."[26] However, it is settled case law of the CJEU (which it refers to as the "the Dzodzi line of cases"[27]) that it has jurisdiction to give preliminary rulings on questions concerning EU provisions also "in *situations where the facts of the cases being considered by the national courts were outside the scope of EU law but where those provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions*".[28]
30. While the Court has recognised the concept of procedural homogeneity,[29] it is clear that it "*is for the Court to determine the relevance of the case law of the ECJ as regards the interpretation of Article 34 SCA*."[30] ESA nonetheless submits that the Dzodi line of case law of the CJEU is relevant also for the Court's jurisdiction under Article 34 SCA. In that respect, ESA also recalls that the Court has held that the Article 34 SCA procedure "*is determined on the basis of EEA law. Indeed, the Court has no competence to interpret national rules. The Court must nevertheless include national rules in its assessment of the situation. In case of doubt in that context, it would run counter to the purpose of Article 34 SCA to declare the reference inadmissible*."[31]
31. ESA notes that the Directive, pursuant to its Article 1(2)(b) does not apply to workers employed by establishments governed by public law. In principle, an entity such as the LSH may therefore constitute an establishment governed by public law pursuant to Article 1(2)(b) and thus fall outside the scope of the Directive. In case C-149/16, the CJEU similarly examined the applicability of the Directive to a public hospital. There, the CJEU noted that the employees of the hospital in question "*have the same legal status as employees of private*

[26] Opinion of Advocate General Bobek, delivered on 3 September 2020 in Case C-620/19 *Land Nordrhein-Westfalen* v *D.-H. T*, EU:C:2020:649, paragraph 1.
[27] See judgment of the CJEU of 17 July 1997 in Case C-28/95 *A. Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* ("*Leur-Bloem*"), EU:C:1997:369.
[28] See e.g. Case C-28/95, *Leur-Bloem*, paragraph 25, with further references.
[29] See judgment of 17 July 2013 in Case E-14/11 *DB Schenker v ESA*, paragraphs 77 and 78.
[30] See judgment of 16 July 2020 in Case E-8/19 *Scanteam AS v The Norwegian Government*, paragraph 45.
[31] See judgment of 9 May 2014 in Case E-23/13 *Hellenic Capital Markets Commission*, paragraphs 33 and 34.

establishments and are not covered by civil service law. Moreover, hospitals are autonomous bodies which are not subject to State supervision and are funded by income from their own activity. There is, therefore, no basis in national law on which to exclude the hospital staff concerned by the case in the main proceedings from the scope of the [national law implementing the Directive]."[32] In other words, the CJEU looked into the legal status of the employees, whether the hospital was subject to state supervision and how it was funded. In the case of LSH, there does not seem to be much relevant information in the referral. Hence, on the basis of the referral, it appears unclear whether the LSH may qualify as an establishment governed by public law under Article 1(2)(b). However, based on an assessment of relevant Icelandic legislation,[33] it could be argued that this is the case. At any rate, ESA recalls that first, Article1(2)(b) is an exception which should therefore be interpreted narrowly and, second, the case law of the Court to the effect that when in doubt about admissibility, it would run counter to the purpose of Article 34 SCA to declare the reference inadmissible.[34] The Court may however want to seek clarification from the national court with respect to whether the LSH is an establishment governed by public law within the meaning of Article 1(2)(b).

32. Moreover, the Icelandic State has not implemented the exception in Article 1(2)(b) of the Directive into the Collective Redundancy Act. Hence, it is in any case clear that the provisions of the Directive have been rendered applicable in those situations by domestic law.[35] It follows from the *Dzodi* line of case law of the CJEU, referred to above, that in such circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from EU law should be interpreted uniformly.[36] Any other understanding might risk undermining the harmonised protection of workers which the Directive offers. Furthermore, the CJEU has held that an interpretation by the European Courts of provisions of EU law in situations not falling within the scope of EU law is warranted "*where such provisions have*

[32] See judgment of the CJEU of 21 September 2017 in Case C-149/16 *Halina Socha and Others v Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu* ("*Halina Socha*"), (EU:C:2017:708), paragraph 21.
[33] See especially Act No 40/2007 on Public Health Service.
[34] See footnote 31.
[35] See judgment of the CJEU of 7 November 2018 in Case C-257/17, *C, A ,v Staatssecretaris van Veiligheid en Justitie*, (EU:C:2018:876), paragraph 31.
[36] See e.g. *ibid,* paragraphs 31 to 33 and the case law cited therein.

been made directly and unconditionally applicable to such situations by national law, in order to ensure that those situations and situations falling within the scope of EU law are treated in the same way". [37] This appears to be the situation in Iceland, as set out in paragraph 23 of the Request, where the Referring court states that "*while public employees do not come within the scope of Directive 98/59/EC, Act No 63/2000 applies to both public-sector and private-sector employees."*

33. For the sake of good order, ESA observes that in Case C-583/10 *Nolan*, the CJEU held that it did not have jurisdiction to reply to a question about the Directive in a case concerning a termination of the employment relationship between an EU national worker and a non-EU Member State following the closure of an American military base located in an EU Member State. Here, the CJEU found first that because "*armed forces fall within the public administration or equivalent body, it is clear from the wording of Article 1(2)(b) of Directive 98/59 that the civilian staff of a military base is covered by the exclusion laid down by that provision"*.[38] Second, it noted that its assessment was "*corroborated by the objective and the general system*" of the Directive, which was, *inter alia*, "*improving the protection of workers and the functioning of the internal market*."[39] On that very specific background it held that where an EU measure expressly provides a case of exclusion from its scope and the "*EU legislature states unequivocally that the measure which it has adopted does not apply to a precise area*", the EU legislator renounces "*the objective seeking uniform interpretation and application of the rules of law in that excluded area*."[40] Since the *Nolan* case explicitly concerned Article 1(2)(b), one could legitimately ask whether, after this judgment, there is any room at all for applying the *Dzodzi* line of case law to Article 1(2)(b) as well as, more generally, what the scope of *Dzodzi* is after *Nolan*. This more general question came before the CJEU in case C-257/17.[41] Here, the referring court asked the CJEU about the scope of the exception in Nolan in light of the fact that, just as in *Nolan*, Article 3(3) of Directive 2003/86 expressly excluded situations such

[37] *Ibid*, paragraph 33.
[38] See judgment of the CJEU of 18 October 2012 in Case C-583/10 *United States of America v Christine Nolan ("Nolan")*, (EU:C:2012:638), paragraph 34.
[39] *Ibid*, paragraphs 35 to 39.
[40] *Ibid, paragraphs* 54-55.
[41] See C-257/17, *C, A ,v Staatssecretaris van Veiligheid en Justitie*, cited above.

as those at issue in the main proceedings from its scope. The CJEU used the occasion to reaffirm *Dzodzi*.[42] It also explained that *Nolan* "*was characterised by particularities which do not apply to the cases in the main proceedings*".[43] It first explained that if it had held that it had jurisdiction in *Nolan*, it "*would have meant a departure from the logic underpinning the EU legislation at issue, which furthered the establishment or functioning of the internal market*".[44] It also noted that it could not be ascertained in *Nolan* "*whether the national law referred directly and unconditionally to EU law*".[45]

34. ESA therefore submits that *Nolan* was decided on the very specific facts at issue and is only relevant where it is clear that interpreting provisions of an EU act that has been rendered applicable by domestic law, despite of an exception in that act, would, **first**, be contrary to the objective and system of that act and, **second**, where it is not clear whether national law refers directly and unconditionally to EU law.

35. In our case, it appears that the facts in relation to the second condition are different from the ones in Nolan. In not implementing the exception in Article 1(2)(b) concerning workers employed by public administrative bodies or by establishments governed by public law, the Icelandic Collective Redundancies Act refers directly and unconditionally to the Directive as far as workers employed in those institutions are concerned. It should however, still be examined whether it would be contrary to the objective and system of the Directive if it the Court were to have jurisdiction to interpret it by virtue of that direct and unconditional reference in national law. In practice, this means whether it would be contrary to the objectives of improving the protection of workers and the functioning of the internal market to interpret the Directive with respect to an entity such as LHS. In contrast with the armed forces (of a third state) at issue in *Nolan*, in the present case we are concerned with a hospital. It is settled case-law that health care activities, including those provided at hospitals, fall within the scope of the internal market, such as the freedom to provide services.[46]

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[42] *Ibid,* paragraph 38.
[43] *Ibid*, paragraph 41.
[44] *Ibid*, paragraph 42.
[45] *Ibid*, paragraph 43.
[46] See Joined Cases E-11/07 and E-1/08 *Rindal and Slinning v Norway*, paragraph 42. See also Case C-157/99 *Smits and Peerbooms*, EU:C:2001:404, paragraph 53.

36. In sum ESA therefore considers that an interpretation by the Court of provisions of the Directive in situations outside its scope appears to be justified as those provisions seem to have been made applicable to such situations by Icelandic law in a direct and unconditional way in order to ensure that internal situations and situations governed by EU law are treated in the same way.
37. ESA consequently submits that the EFTA Court has jurisdiction to interpret the Directive as requested by the Referring Court. The Request is therefore admissible.

6.3 The questions from the national court

38. Article 1 of the Directive provides two scenarios related to redundancies. The first is for the collective redundancies pursuant to Article 1(1)(a), which are qualitatively defined as "*dismissals effected by an employer for one more reasons not related to the individual workers concerned*", where quantitative requirements are also fulfilled. The second is for terminations which are merely assimilable to a redundancy, see the last subparagraph of Article 1(1). The Directive provides protection to workers for collective redundancies only in the first scenario.[47] The second scenario is merely used for calculating the threshold for the application of the Directive, "*without the employees affected themselves receiving the benefit of the protection conferred by the directive*."[48]
39. It follows further from Article 1(1)(a) that the Directive applies to "collective redundancies", which are present when certain qualitative and quantitative criteria are fulfilled. The quantitative criteria are set out by the two alternative provisions Article 1(1)(a)(i) or Article 1(1)(a)(ii). Iceland has chosen the alternative in Article 1(1)(a)(i). It is not clear exactly how many employees were employed by the hospital, but it is clear that the number of affected workers, in any event fulfils the quantitative criteria of Article 1(1)(a)(i): a total of 319 workers were affected by spending cuts and "*the number of overtime hours was reduced in the case of 113 workers*".[49]
40. The questions in this case are about the qualitative definition of collective redundancies. In essence, the first and the second questions ask whether

[47] Opinion of Advocate General Kokott in C-422/14 *Pujante Rivera,* paragraph 49.
[48] *Ibid*.
[49] See Request on page 3.

termination of contracts with a group of workers covering fixed overtime is to be considered a "collective redundancy" within the meaning of the Directive regardless of whether the unilateral change made by the employer to the employment contract results in a full termination of the employment relationship or not. The third question concerns whether it has a bearing on the answer to the first two questions if such contracts are independent from the main employment contract. Since they are strongly interrelated, these questions will be dealt with together in the following.

41. ESA submits that termination of independent contracts covering fixed overtime shall be considered collective redundancies within the meaning of the Directive, regardless of the fact that such termination does not result in full termination of the employment relationship (or "dismissals" in the wording of the Directive), provided that the changes are made unilaterally by the employer to the detriment of the employee and for reasons not related to the individual employee, and as long as the changes are significant and concern essential elements of the employment relationship. This is supported by case law of the CJEU, in particular case C-422/14 and subsequent case law,[50] as set out more fully below.

42. The letters of LHS dated 25 February 2020 and 31 March 2020 (referred to in the Request) seem to indicate that LSH is of the view that the Collective Redundancy Act does not apply to situations where full termination of the employment relationship does not take place. ESA disagrees with this interpretation. The Directive applies, in principle, also to partial terminations of the employment relationship and an independent working contract covering fixed overtime must be considered part of the employment relationship. An employer should not be able to circumvent the Directive by regulating remuneration, various benefits and other essential elements in separate contracts with the employee apart from the main contract governing the existence of an employment relationship as such. If the employer were allowed to circumvent the Directive in this way, it would create a situation, whether

[50] Case C-422/14 *Pujante Rivera*, cited above, paragraph 55, Case C-149/16 *Halina Socha*, cited above, paragraph 25 and Case C-429/16 *Małgorzata Ciupa and Others v II Szpital Miejski im. L. Rydygiera w Łodzi obecnie Szpital Ginekologiczno-Położniczy im dr L. Rydygiera Sp. z o.o. w Łodzi* ("***Małgorzata Ciupa***"), EU:C:2017:711, paragraph 27.

artificial or for other reasons, which would render the protection afforded to workers ineffective.

43. The key issue to be determined in this case is whether the phrase "*dismissal effected by an employer*", and therefore also the phrase "*collective redundancies*" which it defines, in the first subparagraph of Article 1(1)(a) of the Directive must be interpreted in such a manner that it encompasses a situation such as that at issue in the main proceedings. In other words, the question is, where there is no full termination of the employment relationship, whether a change by the employer whereby contracts covering regular overtime would be made temporary, where they were previously permanent, and which would result in a reduction of the wages of workers in the technical support departments of as much as 3.5% is to be considered a "*dismissal effected by an employer*" and therefore, qualifies as a "*collective redundancy*". ESA recalls in that context that the term "redundancy" must be given an independent and uniform interpretation throughout the EEA, see paragraph 24 above, and submits that the same is the case for the term "dismissal".

44. That interpretation must also take into account the context of the provision and the purpose of the Directive. An important objective of the Directive is to afford greater protection to workers in the event of collective redundancies.[51] Thus, it is settled case law that a "*narrow definition cannot be given to the concepts that define the scope*" of the Directive, "*including the concept of 'redundancy' in the first subparagraph of Article 1(1)(a).*"[52]

45. In that respect, it is of particular importance that the CJEU has held that the concept of 'redundancy' in the first subparagraph of Article 1(1)(a) of the Directive *"directly determines the scope of the protection and the rights conferred on workers under that directive*."[53] On that basis it concluded in *Pujante Rivera* that the Directive

> "*must be interpreted as meaning that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of*

[51] See Case C-422/14 *Pujante Rivera,* cited above, paragraph 51, referring to recital 2 of the Directive.
[52] *Ibid.*
[53] *Ibid*, paragraph 54.

'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the directive."[54]

This has been followed in subsequent case law.[55]

46. Thus, it appears clear to ESA that the scope of the Directive is broader than only encompassing dismissals in the sense of full termination of employment relationships. The concept of collective redundancy in the first subparagraph of Article 1(1)(a) of the Directive consequently covers not just formal "dismissals", but any scenario where the employer unilaterally and to the detriment of the employee makes significant changes to essential elements of the employment contract for reasons not related to that individual employee and without his consent.

47. As a result, it appears that when the District Court interpreted the Collective Redundancies Act No 63/2000 as only applying when the employment relationship between employer and employee had been fully terminated, is an interpretation at odds with the Directive and the case law relating to it.

48. ESA submits that the facts at issue in the main proceedings relate to a unilateral change to employment contracts for reasons not related to the individual employees. It is immaterial in this respect that the unilateral changes in question were specifically made in independent contracts that were additional to the workers' main employment contracts. The protection afforded to workers by the Directive must clearly cover the whole of an employment relationship, including any and all separate contractual arrangements and formal or informal agreements between the employer and the employee. Any other understanding would risk rendering that protection ineffective and thus deprive the Directive of its full effect.[56]

49. The only question is therefore whether the changes in question were "significant" and whether they concerned "essential elements" of the employment relationship.

50. ESA submits that in order to determine whether the changes in question where "significant" and concerned "essential elements", it is necessary to analyse

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[54] *Ibid*, paragraph 55. Our emphasis.

[55] See the references in footnote 50 above.

[56] See judgments of the CJEU of 11 November 2020 in Case C-300/19, *UQ v Marclean Technologies*, EU:C:2020:898, paragraph 27; and of 28 January 2007 in Case C-385/05 *SLU Confédération générale du travail* **(CGT)** *and Others v Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement,* EU:C:2007:37, paragraph 47, and Case C-422/14, *Pujante Riviera*, cited above, paragraph 31, by analogy.

them in light of the whole employment relationship as well as in light of all other relevant circumstances. This analysis must be conducted by the national court in the main proceedings, which has the sole jurisdiction to assess the facts.[57]

51. In principle, ESA considers that any unilateral change or changes made by the employer to the detriment of an employee affecting essential elements of the employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy'. This is the case as long as the change or changes in question, taken as a whole, are sufficiently serious to be considered "significant". Conversely, '*if an employer — unilaterally and to the detriment of the employee — makes a change that is not significant to an essential element of the employment contract for reasons not related to the individual employee concerned*", that cannot be classified as a redundancy within the meaning of the Directive.[58]

52. Moreover, such "significant" change or changes will fall under the concept of "redundancy" if they concern any element or several elements of an employment contract, as long as the significantly affected element or elements, taken as a whole, are "essential". Conversely, if an employer — unilaterally and to the detriment of the employee — makes "*a significant change to a non-essential element of that contract for reasons not related to the individual employee concerned*", that cannot be classified as a 'redundancy' within the meaning of that directive.[59] Thus, change falling under the concept of "redundancy" can for instance concern one specific substantial change, such as a transfer of workplace to a distance obliging the worker to change residence,[60] or a combination of smaller changes, such as to the content of the job in question, the hours worked, or the remuneration provided. ESA also considers that unilateral changes to the employment relationship, for reasons not relating to the employee and to the detriment of the employee, which take place over a limited period of time must be considered as a whole for the purposes of determining whether they are "significant", as long as they are sufficiently linked.

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[57] See Case C-429/16 *Małgorzata Ciupa*, cited above, paragraph 30.
[58] See Case C-149/16 *Halina Socha*, cited above, paragraph 26.
[59] *Ibid.*
[60] See judgment of the CJEU of 28 June 2018 in Case C-57/17 *Eva Soraya Checa Honrado v Fondo de Garantía Salarial,* EU:C:2018:512, by analogy.

53. With respect to the changes at issue here, it cannot be disputed that remuneration is an essential element of an employment contract.[61] ESA also recalls that the CJEU has held that "*a 15% reduction of remuneration could in principle be regarded as a 'significant change'*".[62]
54. Here, the employer is also changing the permanent contracts for fixed overtime into temporary contracts. This would appear to increase the risk for the employees that overtime will not part of the employment relationship at a later stage. More generally, it should also be noted that pursuant to Article 1(2)(a) the Directive does not apply to temporary employment contracts, and such contracts are not protected by the Collective Redundancies Act. ESA submits that making permanent contracts temporary therefore, in principle, may also effect essential elements of the employment contract and be considered a significant change. Any other understanding would allow an employer to circumvent the protection afforded by the Directive and consequently deprive the workers of a right that they had before this unilateral decision was made by the employer without fulfilling the procedural requirements of the Directive.
55. In so far as the effects of the unilateral change at issue in the present case are a reduction of the remuneration, or overall income, of up to 3,5%, in addition to the change of the permanent contract of fixed overtime to a temporary one, the question is thus whether such changes are a "significant change" to the employment relationship. It should be noted in that respect that LSH did not apply the change to employees under the threshold of ISK 700,000. While the determination of whether the changes are "significant" in light of all the circumstances of the case is for the national court to assess, ESA considers that, a 3,5% decrease in remuneration **by itself** would not normally be enough to be considered a "significant change". The fact that the contracts on overtime have been made temporary could have an impact on that conclusion.
56. If the Referring court does not consider that the termination of the overtime contracts with the resulting consequences overall is to be considered a "significant change" and therefore covered by the concept of "dismissal" within the first subparagraph of Article 1(1)(a) of the Directive, a termination of the

[61] See Case C-429/16 *Małgorzata Ciupa*, cited above, paragraph 29.
[62] *Ibid*.

employment relationship following a potential refusal by employees to accept a change such as that made by the employer must be regarded as constituting a termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the last subparagraph of Article 1(1) of the Directive. The consequence would be that it must be taken into account for calculating the total number of redundancies.[63]

7 CONCLUSION

57. Accordingly, the Authority respectfully requests the Court to answer the questions referred as follows:

1. **Article 1(1) and Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, read in light of the principle of effectiveness, should be interpreted as requiring an employer who, for reasons not related to the individual employee, intends to terminate unilaterally contracts with a group of workers covering fixed overtime with the effect of reducing remuneration and changing the status of the contracts from permanent to temporary, to observe the procedural rules laid down in the Directive, including as regards consultation with workers' representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive, provided that the changes in question are significant changes to essential elements of the employment contract, which is for the national court to determine in light of all circumstances.**
2. **The fact that the employment relationship is not fully terminated subsequently is immaterial with regard to the determination of the employer's procedural obligation.**

[63] C-429/16 *Malgorzata Ciupa,* cited above, paragraph 31. See also Case C-149/16 Halina Socha, cited above, paragraph 28.

3. **It is not of significance for the answer to the first two questions whether the contracts covering fixed overtime which the employer terminates were specifically made in independent contracts that were additional to the worker's employment contracts.**

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