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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-3/24

Margrét Rósa Kristjánsdóttir

v

The Icelandic State

in which Reykjavik District Court 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 of Articles 1 and 6 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 present case concerns a request for an Advisory Opinion ('the request') from Reykjavik District Court ('the referring court') concerning the interpretation of Articles 1 and 6 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ('the Directive').[1]
2. The aim of the Directive is to align the procedures and the costs with regard to redundancies within the EU and the EEA. This can be seen from the recitals to the Directive and the case-law of the CJEU.[2] Notably, 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.
3. The Directive was amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015.[3]
4. For information about the facts of the case, reference is made to the request.

2 EEA LAW

5. 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 Community;"*

6. Recital 3 of the Directive reads:

[1] OJ 1998 L 225, p. 16 and Icelandic EEA Supplement 2000 No 46, p. 258. Incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision No 41/1999 of the EEA Joint Committee of 26 March 1999 (OJ 2000 L 266, p. 47, and Icelandic EEA Supplement 2000 No 46, p. 257) and is referred to at point 22 of Annex XVIII (Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women) to the EEA Agreement and entered into force on 1 July 2000.

[2] See Case 422/14 *Chrisian Pujante Rivera v Gestora Clubs Dir SL and Fondo de Garantía Salarial,* EU:C:2015:743, paragraph 53 and Case C-55/02 *Commission v Portugal*, EU:C:2004:605, paragraph 18 and Case C-383/92 *Commission v United Kingdom*, EU:C:1994:234, paragraph 16.

[3] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, OJ 2015 L 263, p. 1, and Icelandic EEA Supplement 2018 No 85, p. 133. Incorporated into the EEA Agreement by Decision No 258/2018 of the EEA Joint Committee of 5 December 2018 (OJ 2021 L 337, p. 57, and Icelandic EEA Supplement 2021 No 62, p. 54), referred to at point 32m of Annex XVIII to the EEA Agreement and entered into force on 1 August 2019.

"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;"

7. Recital 4 of the Directive reads:

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

8. Recital 12 of the Directive reads:

   "Whereas Member States should ensure that workers' representatives and/or workers have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this Directive are fulfilled;"

9. 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).”

10. Article 6 of Section IV of the Directive reads:

“Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.”

3 NATIONAL LAW

11. The Directive has been implemented into Icelandic law through Act No 63/2000 on collective redundancies (“the Collective Redundancies Act”).[4]

12. Article 1 of the Collective Redundancies Act reads:

“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.”

[4] In Icelandic: *Lög um hópuppsagnir*. See link https://www.althingi.is/lagas/nuna/2000063.html .

13. Article 2 of The Collective Redundancies Act reads:

"This Act does not apply to:

a. 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,

b. …"

14. Article 11 of The Collective Redundancies Act reads:

"An employer who intentionally or negligently violates this Act is liable for damages according to general rules."

15. Article 12 of The Collective Redundancies Act reads:

"Violations of Articles 5 to 7. of this Act may be subject to by fines that shall go to the Treasury."

4 THE QUESTIONS REFERRED

16. The referring court asks the following questions:

"1. Can board members of a legal entity that operates in the public interest fall within the concept of 'worker' within the meaning of Council Directive 98/59/EC, for deciding the number of workers deemed to be employed by such a legal entity, for the purpose of calculating the minimum for collective redundancy (10% or 30 workers), as stated in point (i)(a) of paragraph 1 of Article 1 of the Directive?

2. Does Article 6 of Directive 98/59/EC, regarding that EEA States shall ensure that representatives of workers and/or workers themselves can have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this Directive are fulfilled, entail other or further requirements than those that EEA States prescribe in general for liability for damages resulting from infringements of the rules inherent in the Directive?"

5 LEGAL ANALYSIS

5.1 Admissibility of the request

17. The Directive sets out an exception in relation to its scope in Article 1(2)(b) where it is stated that: *"This Directive shall not apply to: workers employed by public administrative bodies or by establishments governed by public law […]".*

18. When the Directive was implemented in Iceland, the Icelandic legislator implemented two exceptions from the scope of the Directive.[5] The exception in Article 1(2)(b) of the Directive however, concerning public administrative bodies, was not one of these and is not included in Icelandic legislation.[6]

19. The implementation of the Directive in Iceland has already been the subject of an advisory opinion procedure before the EFTA Court.[7] In Case E-9/22 *Verkfræðingafélag Íslands and others*, the Icelandic Government submitted that the request was inadmissible because the case concerned workers who would qualify as workers employed by public administrative bodies or by establishments governed by public law within the meaning of Article 1(2)(b) of the Directive, and who would therefore fall outside the scope of the Directive. Accordingly, the Icelandic Government submitted, there was no EEA law matter at issue in the main proceedings and in the request.

20. The Court, however, ruled that it is settled case-law that where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law.[8]

21. Based on this, the Court noted in *Verkfræðingafélag Íslands* that the referring court considered the interpretation of the Directive to be relevant for the application of national law in that case. As it is for the referring court to interpret national law and

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[5] 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 subsequently removed from the Collective Redundancies Act.
[6] Currently, the only exception in the Collective Redundancies 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. ESA's translation.
[7] Case E-9/22 *Verkfræðingafélag Íslands and Others*, judgment of 19 April 2023.
[8] *Ibid*, paragraph 25. See also Case E-2/23 *A Ltd,* judgment of 25 January 2024*,* paragraph 36.

to define and assess the accuracy of the factual and legislative context in the case before it, it was irrelevant that the Icelandic Government disputed the referring court's assessment as regards the applicability of the Collective Redundancy Act. Any other conclusion would, according to the Court, undermine the purpose of the judicial dialogue envisaged by Article 34 SCA and the presumption of relevance of the questions referred.[9]

22. ESA submits that the same applies in the present case.

5.2 First question

23. The first question of the request concerns in essence the interpretation of the concept of 'workers' within the meaning of the Directive. More specifically, the referring court asks whether board members of a legal entity that operates in the public interest are to be included for the purpose of calculating the thresholds set out in Article 1(1)(a) of the Directive.

24. In *Balkaya*, the CJEU set out that Article 1(1)(a) of the Directive must be interpreted in light of its objective, which is *inter alia*, to afford greater protection to workers in the event of collective redundancies. In accordance with that objective, a narrow definition cannot be given to the concepts that define the scope, including the including the concept of 'worker' in Article 1(1)(a).[10]

25. It is settled case-law that the concept of 'workers' in EEA law must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. In that regard, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and *under the direction of another person*, in return for which he receives *remuneration*.[11]

26. The CJEU has furthermore underlined that the nature of the employment relationship under national law is of no consequence as regards whether a person is a worker for the purposes of EU law.[12]

27. Based on this, in order to decide if a person is a 'worker' within the meaning of the Directive, the national court must in each particular case assess whether that

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[9] Case E-9/22 *Verkfræðingafélag Íslands and Others*, judgment of 19 April 2023, paragraph 26.
[10] Case C-229/14 *Balkaya*, EU:C:2015:455, paragraph 44 and case-law cited.
[11] *Ibid* paragraph 34 and case-law cited and Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 49.
[12] Case C-229/14 *Balkaya*, EU:C:2015:455, paragraph 35 and Case C-232/09 *Danosa*, EU:C:2010:674, paragraph 40.

person is *under the direction of another person*. Or in other words, if a relationship of *subordination* exists. The answer must be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties.[13]

28. As regards the specific issue of whether *board members* can be considered workers, the CJEU found in *Danosa* that the fact that a person was a member of the board of directors of a capital company was not in itself enough to rule out the possibility that he or she was in a relationship of subordination to that company: it is necessary to consider the circumstances in which the board member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.[14]

29. In *Danosa* the CJEU found that members of a directorial body of a company, such as a Board of Directors, satisfied *prima facie* the criteria for being treated as workers within the meaning of the case-law of the Court:

> *"[…] in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed, the fact remains that Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction,[…]"*[15]

30. This was repeated in *Balkaya*, where the CJEU also found that even if a board member of a capital company enjoys a degree of latitude in the performance of his duties that exceeds that of other workers, who may be directed by the employer as to the specific tasks that he must complete and the manner in which they must be carried out, the board member could still be in a relationship of subordination vis-à-vis that company within the meaning of the case-law.[16]

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[13] Case C-232/09 *Danosa*, EU:C:2010:674, paragraph 46.
[14] *Ibid* paragraph 47.
[15] *Ibid* paragraph 51.
[16] Case C-229/14 Balkaya, EU:C:2015:455, paragraph 41.

31. And lastly in *Balkaya*, the CJEU found that there was nothing to suggest that an employee who was a board member of a capital company, in particular, a small or medium sized company such as that at issue in the main proceedings, was necessarily in a different situation from that of other persons employed by that company as regards the need to mitigate the consequences of his dismissal, and, inter alia, to alert, for that purpose, the competent public authority so that it is able to seek solutions to the problems raised by all the projected collective redundancies.[17]
32. It should be noted that as the Directive does not apply to workers employed by public administrative bodies or by establishments governed by public law, the case-law of the CJEU referred to above concerns board members of private companies.
33. However, as provisions or concepts taken from EEA law should be interpreted uniformly, irrespective of the circumstances they are to apply,[18] ESA submits that the same criteria as set out in the case-law referred to above should be applied when assessing if a board member of a public administrative body is a worker pursuant to the Collective Redundancies Act. If the concept of worker would be interpreted differently in the case of public sector employees covered by the Collective Redundancies Act, this could in ESA's view advance rather than forestall future differences of interpretation.
34. That said, when applying the criteria set out in the case-law, especially as regards subordination, there could be factors and circumstances characterising the relationship between a board member and the employer in a public sector body, that, in the individual case, could be of relevance when assessing whether that board member is to be considered a 'worker' under Article 1(1)(a) of the Directive.
35. To sum up, it follows from the case-law that a board member is to be considered a worker under EEA law if he or she receives remuneration and is in a relationship of subordination. This must be assessed based on the circumstances of the recruitment; the nature of the duties entrusted; the context in which those duties were performed; the scope of the person's powers and the extent of supervision; and the circumstances under which the person could be removed. A board member could be in a relationship of subordination even if he or she enjoys a degree of latitude in the performance of duties that exceeds that of other workers, and even

[17] Case C-229/14 *Balkaya*, EU:C:2015:455, paragraph 46.
[18] Case E-2/23 *A Ltd,* judgment of 25 January 2024*,* paragraph 36 and case-law cited.

if he or she may be directed by the employer as to the specific tasks that must be completed and the manner in which they must be carried out.

36. Based on the above, ESA submits that a board members of a legal entity that operates in the public interest is to be included for the purpose of calculating the thresholds set out in Article 1(1)(a) of the Directive, if that board member is to be considered a worker as set out in the case-law of the EFTA Court and the CJEU.

5.3 Second question

37. The second question concerns the interpretation of Article 6 of the Directive, and to what extent that Article entails other or further requirements than those that EEA States prescribe in general for liability for damages.

38. ESA limits its observations to the interpretation of Article 6 in general, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only. Based on the advisory opinion of the EFTA Court in the present case, it is for the referring court to assess possible implications on national law, including the implementation of the Directive in Iceland.

39. Pursuant to Article 6 of the Directive, EEA States are to ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to the workers' representatives and/or workers.

40. ESA notes that Article 6 refers to "obligations under this Directive". Consequently, it could be questioned whether Article 6 entails any requirements on Iceland in the present circumstances, where domestic legislation, in regulating purely internal situations not governed by EEA law, has adopted the same or similar solutions as those adopted in EEA law. ESA, however, submits that the general principle referred to above, pursuant to which provisions or concepts taken from EEA law should be interpreted uniformly, irrespective of the circumstances in which they are to apply, is applicable also as regards Article 6 of the Directive.[19]

41. As noted by the CJEU in *Mono Car Styling*, it is clear from the terms of Article 6 that the States are required to introduce procedures to ensure compliance with the obligations laid down in the Directive. On the other hand, and in so far as the

[19] Case E-2/23 *A Ltd,* judgment of 25 January 2024*,* paragraph 36 and case-law cited.

Directive does not develop that obligation further, it is for the States to lay down detailed arrangements or specific measures for those procedures.[20]

42. Furthermore, the CJEU found that, although it is true that the Directive merely carries out a partial harmonisation of the rules for the protection of workers in the event of collective redundancies, it is also true that the limited character of such harmonisation cannot deprive the provisions of the Directive of useful effect. Consequently, although it is for the EEA States to introduce procedures to ensure compliance with the obligations laid down in the Directive, such procedures must not deprive the provisions of the directive of useful effect.[21]
43. As pointed out by Advocate General Sharpston, the principles of equivalence and effectiveness, and the requirement under EU law that there be effective judicial protection of those rights, are embodied in Article 6 of the Directive. Hence, workers and their representatives must be in a position to enforce their rights under the Directive in the same way as they would be able to enforce equivalent rights under national law and the relevant procedural rules must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law.[22] The same, ESA submits, applies under the EEA Agreement.[23]
44. Lastly, in *Consulmarketing*, the CJEU added that Article 6 requires the States to ensure real and effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union and have a real deterrent effect.[24] As observed by the EFTA Court, Article 47 of the Charter of Fundamental Rights is an expression to the principle of effective judicial protection, which is a general principle of EEA law.[25]
45. It should also be noted that Article 6 applies only to procedures for the enforcement of obligations laid down in the Directive. Hence, for example, if a dispute concerns the criteria for choosing the workers to be dismissed, which is the responsibility of

[20] Case C-12/08 *Mono Car Styling*, EU:C:2009:466, paragraph 34, Case C-32/20 *Balga*, EU:C:2020:441, paragraph 33 and Case C-496/22 *Brink's Cash Solutions*, EU:C:2023:741, paragraph 45.
[21] Case C-12/08 *Mono Car Styling*, EU:C:2009:466 paragraphs 35 and 36.
[22] Opinion of Advocate General Sharpston in Joined Cases C-61/17, C-62/17 and C-72/17, EU:C:2018:482, paragraph 70.
[23] See to this effect EFTA Court Judgment of 4 July 2023 in Case E-11/22 *RS*, paragraph 55.
[24] Case C-652/19 *Consulmarketing*, EU:C:2021:208, paragraph 43 and C-496/22 *Brink's Cash Solutions*, EU:C:2023:741, paragraph 45.
[25] Case E-15/10 *Posten Norge*, [2012] EFTA Ct. Rep. 246, paragraph 86 and case-law referred to.

the EEA States, not a violation of an obligation laid down by the Directive, Article 6 cannot be applied.[26]

46. Based on this, ESA submits that Article 6, in line with the general principle of procedural autonomy,[27] leaves the EEA States with discretion to choose between different solutions suitable for achieving the Directive's objectives and to lay down detailed arrangements for those procedures, including laying down procedural rules governing actions for safeguarding those rights.[28]
47. The referring court makes reference to ESA's Closure Decision of 15 December 2021 in Case No 84844.[29] This case was based on a complaint alleging that Iceland is in breach of Article 6 of the Directive by not ensuring that "useful or practicable remedies or resorts" are available to workers or their unions when the rules of the Directive are breached.
48. In that case, ESA assessed whether Articles 11 and 12 of the Collective Redundancies Act constitute sufficient implementation of Article 6 of the Directive.
49. Article 11 of the Collective Redundancies Act sets out that an employer who intentionally or negligently violates this Act is liable for damages. Article 12 provides a legal basis for issuing fines for violations of Articles 5 to 7 of the Collective Redundancies Act.[30]
50. Based on the information available, ESA was unable to conclude that Articles 11 and 12 of the Collective Redundancies Act jointly do not provide sufficient remedies for the effective enforcement of the Directive's obligations, and on 15 December 2021 ESA decided to close the case.[31]
51. ESA considers that the assessment of Articles 11 and 12 of the Collective Redundancies Act as set out in the closure decision is relevant for the present case, as it provides information about the implementation of the Directive in Iceland. However, for the purposes of this advisory opinion procedure, given the formulation of the question by the referring court, ESA limits its observations to the interpretation of Article 6 in general and does not elaborate further on the actual implementation in Iceland.

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[26] See Case C-652/19 *Consulmarketing*, EU:C:2021:208, paragraph 44 and Case C-32/20 *Balga*, EU:C:2020:441, paragraph 33.
[27] See *e.g.* Case C-132/21 *BE*, EU:C:2023:2, paragraph 45.
[28] See Case C-12/08 *Mono Car Styling*, EU:C:2009:466, paragraph 34 and Case E-11/12 *Koch and Others*, [2013] EFTA Ct. Rep. 272, para. 121.
[29] Annex A.1, Closure Decision No 282/21/COL (Document No: 1231409).
[30] Articles 5 to 7 of the Collective Redundancies Act implement Articles 2 and 3 of the Directive.
[31] Annex A.1, Closure Decision No 282/21/COL (Document No: 1231409).

52. Based on the above, ESA submits that Article 6 requires the EEA States to introduce procedures to ensure compliance with the obligations laid down in the Directive. It is for the EEA States to lay down detailed arrangements or specific measures for those procedure, which must ensure real and effective judicial protection.

6 CONCLUSION

Accordingly, ESA respectfully proposes that the Court should answer the questions referred as follows:

1. A board member of a legal entity that operates in the public interest is to be considered a worker and included for the purpose of calculating the thresholds set out in Article 1(1)(a) of the Directive, if he or she receives remuneration and is in a relationship of subordination. This must be assessed based on the circumstances of the recruitment; the nature of the duties entrusted; the context in which those duties were performed; the scope of the person's powers and the extent of supervision; and the circumstances under which the person could be removed. A board member could be in a relationship of subordination even if he or she enjoys a degree of latitude in the performance of duties that exceeds that of other workers, and even if he or she may be directed by the employer as to the specific tasks that must be completed and the manner in which they must be carried out.
2. Article 6 requires the EEA States to introduce procedures to ensure compliance with the obligations laid down in the Directive. It is for the EEA States to lay down detailed arrangements or specific measures for those procedure, which must ensure real and effective judicial protection.

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Agents of the EFTA Surveillance Authority

7 SCHEDULE OF ANNEXES

No	Description	Referred to in these written observations at paragraph(s)	Number of pages
1	ESA Closure Decision No 282/21/COL	47, 50	5