EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 90(1) of the Rules of procedure of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Sandrine DELAUDE and Freya VAN SCHAIK, Members of its Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles*,

in Case E-3/24

concerning a request for advisory opinion submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the national case No E-5586/2022

Margrét Rósa Kristjánsdóttir

- Applicant -

and

The Icelandic State for Health Insurance (*Sjúkratryggingar Íslands* - "SÍ"))

- Defendant -

regarding the interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, which was incorporated into point 22 of Annex XVIII to the EEA Agreement by Decision No 41/1999 of 26 March 1999 of the EEA Joint Committee.

I. INTRODUCTION

1. The request for advisory opinion (hereafter, "the Request") seeks clarification on the notion of "worker" used in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereafter, "Council Directive 98/59/EC"), and in particular seeks to know whether that notion can include "*board members of a legal entity that operates in the public interest*" (Request, p. 1). The Request also seeks clarification on the interpretation of Article 6 of Council Directive 98/59/EC.

2. Council Directive 98/59/EC is a directive providing that Member States must establish a procedure in case of collective redundancies, whose main features are that the workers must receive relevant information through their representatives, and that there must be consultation between the workers through their representatives and the employer, at the time when it contemplates collective redundancies, *"over ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant"* (Council Directive 98/59/EC, art. 2(2)). Competent public authorities of the Member State concerned are also involved in the procedure as they must be notified in writing by the employer of any projected collective redundancies. This notification triggers a time-period after which the collective redundancies can take effect (Council Directive 98/59/EC, art. 3(1) and 4(1)).

II. LAW

II.1. EEA law

3. The first paragraph of Article 1 of the Agreement on the European Economic Area, to which the EU and Iceland are contracting party (hereafter, the "EEA Agreement"), provides that "[t]*he aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the*

same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA".

4. Article 7, point b, of the EEA Agreement provides:

"*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:* (…)

b. an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation".

5. Council Directive 98/59/EC is applicable to Iceland as from 1.7.2010 by virtue of Decision No 41/1999 of 26 March 1999 of the EEA Joint Committee amending point 22 of Annex XVIII (health and safety at work, labour law, and equal treatment for men and women) to the EEA Agreement (Official Journal of the European Communities, L 266 of 19.10.2000, p. 47; also published in the EEA Supplement 2000 No 46, p. 257, in an Icelandic version).

6. Article 1(1), point a, (i), of Council Directive 98/59/EC reads as follows:

"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 % of the number of workers in establishments normally employing at least 100 but less than 300 workers (...)".

7. Article 1(2), point b, of Council Directive 98/59/EC reads as follows:

"2. This Directive shall not apply to:

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)".

8. Article 5 of Council Directive 98/59/EC reads as follows:

"*This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers*".

9. Article 6 of Council Directive 98/59/EC reads as follows:

"*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*".

II.2. National law

10. The Act on collective redundancies No 63/2000 of 19.5.2000 (*Lög um hópuppsagnir* - hereafter, the "Act on collective redundancies"), which entered into force on 26.5.2000, implements in Icelandic law Council Directive 98/59/EC (see art. 14 of that Act).

11. Article 1, point b, of that Act reads as follows (free translation):

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

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

12. Article 11 of that Act reads as follows (free translation):

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

13. Article 12 of that Act reads as follows (free translation):

"*Violations of Articles 5-7 of this Act may be subject to fines that shall go to the treasury*".

III. FACTS AND QUESTIONS ASKED

14. The Applicant in the national case is a pharmacist who worked as head of department at the Icelandic State for Health Insurance (Sjúkratryggingar Íslands – hereafter, "SÍ") when she was dismissed on 29.9.2020 together with 13 other managers. The employer did not apply the procedure provided for in Council Directive 98/59/EC and implemented in the Act on collective redundancies. The Applicant then concluded a new contract of employment with SÍ, which entered into force on 1.2.2021, with a reduction of salary. On 1.8.2022, she commenced leave without pay and has now stopped working in SÍ (Request, p. 2).

15. Together with three workers also dismissed from SÍ, she lodged a complaint before the Althingi Ombudsman (case No 11320/2021 (1)). In his opinion delivered on 24.6.2022 (2), the Ombudsman found that the Act on collective redundancies (i) also applied to public institutions, and not only to private employers, and that it (ii) applied in the present case as 14 workers were dismissed, out of a total which did not include 5 board members of SÍ, reaching thus the threshold of 10 % set out in Article 1, point b, of the Act on collective redundancies. In particular, the Ombudsman found that the inclusion by the Icelandic State for Health Insurance of the 5 board members of SÍ within the number of workers because they would work under the authority of the Minister, and the allegation that the 10 % threshold was thus not reached, were not grounded.

16. On 1.12.2022, the Applicant claimed before the Reykjavík District Court (Héraðsdómur Reykjavíkur) damages amounting to ISK 2 546 500 (plus interest) corresponding to the difference in salaries at SÍ before her dismissal and after concluding her new employment contract, and in addition compensation for non-pecuniary damage amounting to ISK 2 000 000 (plus interest). The Applicant

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(1) The role of the Ombudsman is to "*monitor the administration of the State and local authorities and safeguard the rights of the citizens vis-à-vis the authorities*". The Ombudsman delivers non-binding opinions. Information in english - Umboðsmaður Alþingis (umbodsmadur.is).

(2) Available on Álit og bréf - Umboðsmaður Alþingis (umbodsmadur.is).

"*therefore appears (...) to consider that a level of compensation lower than this, such as at the discretion of the Reykjavík District Court, does not constitute the redress that must be provided as a minimum"* (Request, p. 3). The Applicant bases her claims on the Act on collective redundancies, that, according to her, (i) *"applies regardless of the fact that Directive 98/59/EC appears however to exempt public employees"* and (ii) which procedure should have been followed as "[t]*he defendant deviated from the law by counting 5 salaried board members in SÍ, appointed by a Minister, as 'workers' within the meaning of Directive 98/59/EC, which means that the total number of workers was 143 instead of 139, as stated, and those who were dismissed were a total of 14*" (Request, p. 2).

17. Before the Reykjavík District Court, the defendant claims the following. First, that the Act on collective redundancies implements Council Directive 98/59/EC and that "*it does not apply to workers employed by the State*" (Request, p. 2), or at least that it is not clear (while, "[i]*n the light of legal uncertainties, the Ministry of Finance has directed State institutions to observe these special procedural rules where applicable*" - Request, p. 3). Second, that it is "*tenable to include SÍ board members as they receive salaries from SÍ*" (Request, p. 3). Finally, that "*a potential right to compensation* [is] *contingent on adherence to general rules which have normally led to significantly lower damages than the criteria relied on by the* [Applicant] *in this instance*" (Request, p. 3). The defendant also considers that the Applicant "*has not demonstrated any loss for which the defendant would be liable*" (Request, p. 2).

18. Being of the view that the case before it raises questions of interpretation of Council Directive 98/59/EC "*which does not seem to have been interpreted in the context here in question*" (Request, p. 4), the Reykjavík District Court has referred the following questions to the EFTA Court for an advisory opinion (Request, p. 1):

"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 ?".

IV. ANALYSIS

IV.1. Preliminary observations

19. By way of preliminary remark, some of the facts and legal rules underlying the present request for an advisory opinion are not entirely clear to the Commission.

20. First, given that the number of salaried board members seems to be 5 (Request, p. 2), it is unclear why the number of workers would be 143 if those 5 board members are included in the total number of workers, instead of 139 if they are not included. The Commission is therefore not in a position at this stage to comment on the calculation of the 10 % threshold as such.

21. Second, it is not clear either if, under the new employment contract, the Applicant was tasked with the same work and the same responsibilities as before her dismissal, i.e. if only her salary was reduced.

22. Finally, while it is clear that Article 1(2), point b, of Council Directive 98/59/EC excludes "*workers employed by public administrative bodies or by establishments governed by public law*", and while it seems clear that SÍ, being the Icelandic State for Icelandic Health Insurance (Request, p. 1), falls within this category, it is unclear if the Act on collective redundancies applies to both public-sector and private-sector workers, and if its scope is thus wider than that of Council Directive 98/59/EC ([3]).

23. Article 5 of Council Directive 98/59/EC expressly allows Member States (and EEA States) "*to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers*".

([3]) On this, see judgment of the EFTA Court of 19 April 2023, *The Association of Chartered Engineers in Iceland ea*, E-9/22, para. 24 where it is explained that the Icelandic referring Court stated in its request for an advisory opinion to the EFTA Court in that case that Council Directive 98/59/EC "*applies to both public and private-sector employees*".

24. In any event, 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 ([4]).

25. The Commission therefore submits that the Request is admissible.

IV.2. On the first question

26. By harmonising the rules applicable to collective redundancies, Council Directive 98/59/EC intended both to ensure comparable protection for workers' rights in the different EEA States and to harmonise the costs, which such protective rules entail for all employers established in the EEA ([5]).

27. Council Directive 98/59/EC does not define the term "worker" but the Court of Justice of the EU has held that in view of that objective of the Directive, the concept of worker cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order. Otherwise, the methods for calculating the thresholds laid down in Article 1(1), point a, of the Directive, and therefore the thresholds themselves, would be within the discretion of the Member States (and EEA States), which would allow them "*to alter the scope of that Directive and thus deprive it of its full effect*" ([6]).

([4]) Judgment of the EFTA Court of 27 October 2017, *Pascal Nobile*, E-21/16, para. 25 and case law cited, judgment of the EFTA Court of 19 April 2023, *The Association of Chartered Engineers in Iceland ea*, E-9/22, para. 25.

([5]) Judgment of the Court of Justice of the EU of 11 November 2015, *Pujante Rivera*, C-422/14, EU:C:2015:743, paras 51 and 53; of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, para. 32; of 18 January 2007, *CGT e.a.*, C-385/05, EU:C:2007:37, para. 43. See also Recital 2 of Council Directive 98/59/EC.

([6]) Judgment of the Court of Justice of the EU of 18 January 2007, *CGT e.a.*, C-385/05, EU:C:2007:37, para. 47 and judgment of 9 July 2015 of the Court of Justice of the EU, *Balkaya*, C-229/14, EU:C:2015:455, para. 33.

28. In that context, the Court of Justice of the EU held that the "*concept of worker must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned*" ([7]). On that regard, the Court referred by analogy to the definition of worker in the context of freedom of movement of workers ([8]), according to which "*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*" ([9]). Hence, "*the nature of the employment relationship under national law* [for instance a service contract] *is of no consequence as regards whether or not a person is a worker for the purposes of EU law*" ([10]).

29. The Court of Justice of the EU provided clarifications more specifically on the question whether board members can be included in the concept of worker used in Article 1(1), point a, of Council Directive 98/59/EC, in its "*Balkaya"* judgment. Those clarifications were provided in relation to a member of a board of directors of a private company, but can be applied mutatis mutandis to a board member of a public entity.

30. The requirement of remuneration being straightforward, the Court gave more clarifications on the requirement that services be performed by the Board member "*for and under the direction of"* the private company. The assessment of this requirement requires a case-by-case analysis: "*whether such a relationship of subordination exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties*" ([11]). In particular, "[i]*t is necessary to consider the circumstances in which*

([7]) Judgment of 9 July 2015 of the Court of Justice of the EU, *Balkaya*, C-229/14, EU:C:2015:455, para. 34.

([8]) Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284, paras 16-17.

([9]) Judgment of 9 July 2015 of the Court of Justice of the EU, *Balkaya*, C-229/14, EU:C:2015:455, para. 34 and of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, para. 39 (emphasis added by the Commission).

([10]) *Balkaya*, para. 35.

([11]) *Balkaya*, para. 37 and *Danosa*, para. 46.

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" (12).

31. The Court made this case-by-case analysis in its "*Balkaya"* judgment and concluded that the remunerated director in question was a worker:

"*In the present case, it must be held that it is apparent from the order for reference that a director of a capital company, such as the director in question in the main proceedings, is appointed by the general meeting of shareholders of that company, which may revoke his mandate at any time against the will of the director. Furthermore, that director is, in the exercise of his functions, subject to the direction and supervision of that body, and, in particular, to the requirements and restrictions that are imposed on him in that regard. Moreover, although it is not by itself a decisive factor in that context, it must be observed that a director, such as the one in the main proceedings, does not hold any shares in the company for which he carries out his functions*" (13).

32. In the present case, given that the Request does not describe "*the factors and circumstances characterising the relationship between the parties*", it is for the referring Court, to determine, in the light of all those factors and circumstances (14), whether the five board members meet the conditions for being regarded as workers according to the conditions defined in the case-law of the Court of Justice of the EU for the purpose of Article 1(1), point a, of Council Directive 98/59/EC.

33. In light of the above, the Commission is of the opinion that Article 1(1), point a, of Council Directive 98/59/EC must be interpreted as meaning that board members must be taken into account in the number of workers if they perform duties under

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(12) *Balkaya*, para. 38 and *Danosa*, para. 47.

(13) *Balkaya*, para. 40.

(14) Judgment of the EFTA Court of 19 April 2023, *The Association of Chartered Engineers in Iceland ea*, E-9/22, para. 33.

the direction of another body of the entity and receive remuneration in return for the performance of duties, which is for the national court to determine. In doing so, the national court must determine the existence of a relationship of subordination on the basis of all the factors and circumstances characterizing the relationship between the parties, such as the circumstances in which the board members were recruited; the nature of the duties entrusted to them; the context in which those duties are performed; the scope of their powers and the extent to which they were supervised within the entity; and the circumstances under which they could be removed as well as the fact of receiving remuneration in return for services provided.

IV.3. On the second question

34. With its second question, the national court asks in essence whether Article 6 of Council Directive 98/59/EC precludes a national provision like Article 11 of the Act on collective redundancies which provides that "*An employer who intentionally or negligently violates this Act is liable for damages according to general rules*" because "*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"* would be required.

35. The Request does not detail the national general rules applicable in order to compensate damages resulting from the breaching of the procedural obligations of informing and consulting in case of collective redundancies. In addition, the Request does not explain which "*other or further requirements*" would be required, and why. In particular, the Request does not specify whether and why those general rules would not allow to compensate, when the procedure of information and consultation provided in case of collective redundancies has not been complied with, for the pecuniary damage of a dismissed worker up to the difference of salaries before his/her dismissal and after conclusion of a new employment contract if applicable, and in addition for his/her non-pecuniary damage.

36. The Commission can therefore only provide the Court with some general guidance as to the interpretation of Council Directive 98/59/EC resulting from the case-law of the Court of Justice of the EU.

37. The Court of Justice consistently explains that "*the right to information and consultation provided for in Directive 98/59, in particular by Article 2 thereof, is intended to benefit workers as a collective group and is therefore collective in nature*": it is intended for workers' representatives. The level of protection of that collective right required by Article 6 of Council Directive 98/59/EC is reached when the national rules give workers' representatives a right to act ([15]).

38. This does not exclude remedies in domestic law intended to ensure protection of the individual rights of workers in the case of improper dismissal ([16]) and the Commission understands that Article 11 of the Act on collective redundancies provides for remedies also in favour of dismissed workers when the procedure of information and consultation provided in case of collective redundancies has not been complied with.

39. Other clarifications on the implementation of Article 6 of Council Directive 98/59/EC provided by the Court of Justice of the EU point at the principles of procedural autonomy and useful effect:

> "(…) *Member States are required to introduce procedures to ensure compliance with the obligations laid down in Directive 98/59. On the other hand, and in so far as the directive does not develop that obligation further, it is for the Member States to lay down detailed arrangements for those procedures.*
>
> *However, it should be pointed out that, although it is true that Directive 98/59 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 (see, in regard to Directive 75/129, Case C-383/92 Commission v United Kingdom [1994] ECR I-2479, paragraph 25).*
>
> *Consequently, although it is for the Member States to introduce procedures to ensure compliance with the obligations laid down in Directive 98/59, such procedures must not deprive the provisions of the directive of useful effect*" ([17]).

([15]) Judgment of 16 July 2009, *Mono Car Styling SA*, C-12/08, EU:C:2009:466, paras 38-43. See also judgment of 13 July 2023, *MO*, C-134/22, EU:C:2023:567, para. 41.

([16]) *Mono Car Styling SA*, para. 44.

([17]) *Mono Car Styling SA*, paras 34-36 (emphasis added by the Commission).

40. In a similar way, the Court of Justice has recently held that "*Article 6 does not require Member States to adopt a specific measure in the event of a failure to comply with the obligations laid down in Directive 98/59, but leaves them free to choose between the different solutions suitable for achieving the objective pursued by that directive, depending on the different situations which may arise. As the referring court pointed out, in essence, those measures must, however, ensure real and effective judicial protection under Article 47 of the Charter and have a real deterrent effect (order of 4 June 2020, Balga, C-32/20, not published, EU:C:2020:441, paragraph 33 and the case-law cited)*" ([18]).

41. Indeed, the Member States' procedural autonomy is limited by the principles of equivalence and effectiveness. Under these two principles, national procedural rules governing actions for safeguarding rights derived from EU law by individuals must not "*be less favourable than those governing similar domestic actions*" (principle of equivalence) and must not "*render practically impossible or excessively difficult the exercise of rights conferred by the EU law order*" (principle of effectiveness) ([19]).

42. The principle of equivalence seems to be complied with by the Act on collective redundancies as its Article 11 refers to the application of the "*general rules*" in case of violation of its provisions. As to the principle of effectiveness, as already noted (supra, 35), the Request does not specify why it would be infringed, and which "*other or further requirements*" to the ones of Article 11 of the Act on collective redundancies would be needed to ensure the useful effect of Council Directive 98/59/EC. In particular, the Request does not specify if Article 12 of the Act on collective redundancies, which provides for fines in favour of the Treasury, has some bearing on that regard.

43. In addition to those principles, the general principle of proportionality applies.

([18]) Judgment of 17 March 2021, *Consultmarketing*, C-652/19, EU:C:2021:208, para. 43 (emphasis added by the Commission).

([19]) Judgment of 9 July 2020, joined cases C-698/18 and C-699/18, *SC Raiffeisen Bank SA and BRD Groupe Societé Générale SA*, EU:C:2020:537, para. 57.

44. It is for the national court to ensure that the principles referred to above are satisfied. When making that assessment, the national court must "*do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 98/59 is fully effective so as to avoid the obligations binding an employer who intends to proceed with collective redundancies being reduced below those laid down in Article 2 of that directive*" ([20]).

45. In light of the above, the Commission is of the opinion that Article 6 of Council Directive 98/59/EC does not preclude a national provision such as Article 11 of the Act on collective redundancies that applies general national rules on liability for damages when an employer does not comply with the consultation and information obligations applicable in case of collective redundancies, provided that those are effective, dissuasive and proportionate, which is for the national court to determine.

V. CONCLUSION

46. In the light of the foregoing, the Commission considers that the two questions referred to the EFTA Court for an advisory opinion by the Reykjavík District Court (*Héraðsdómur Reykjavíkur*) should be answered as follows:

1) Article 1(1), point a, of Council Directive 98/59/EC must be interpreted as meaning that board members must be taken into account in the number of workers if they perform duties under the direction of another body of the entity and receive remuneration in return for the performance of duties, which is for the national court to determine. In doing so, the national court must determine the existence of a relationship of subordination on the basis of all the factors and circumstances characterizing the relationship between the parties, such as the circumstances in which the board members were recruited; the nature of the duties entrusted to them; the context in which those duties are performed; the scope of their powers and the extent to which they were supervised within the

([20]) Judgment of 16 July 2009, *Mono Car Styling SA*, C-12/08, EU:C:2009:466, para. 64 (emphasis added by the Commission).

entity; and the circumstances under which they could be removed as well as the fact of receiving remuneration in return for services provided.

2) Article 6 of Council Directive 98/59/EC does not preclude a national provision such as Article 11 of the Act on collective redundancies that applies general national rules on liability for damages when an employer does not comply with the consultation and information obligations applicable in case of collective redundancies, provided that those are effective, dissuasive and proportionate, which is for the national court to determine.

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