

# RÍKISLÖGMAÐUR

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## TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

### WRITTEN OBSERVATIONS

Submitted, pursuant to Article 20 of the Statue and Article 97 of the Rules of Procedure of

The EFTA Court, by

#### **The ICELANDIC STATE**

Represented by Fanney Rós Þorsteinsdóttir

State Attorney General and

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Acting as Agents in

#### **CASE E-3/2024**

*Margrét Rósa Kristjánsdóttir*

v

*The Icelandic State*

in which the Reykjavik District Court (*Héraðsdómur Reykjavíkur*) 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 on the interpretation of Council Directive 95/58/EC of 20 July 1995 on the approximation of the laws of the Member States relating to collective redundancies. The Icelandic State, on its own behalf, has the honor to submit the following written observations.

## I. INTRODUCTION

1. With application dated 20 February 2024, the Reykjavik District Court (*Héraðsdómur Reykjavíkur*) requested 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 (“SCA”), on the following questions:

*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?*

*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?*

## II. LEGAL BACKGROUND

### ***EEA LAW***

2. The Agreement on the European Economic Area (“EEA” or “the EEA Agreement”).

*Article 3 of the EEA Agreement, reads as follows:*

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.

*Article 28 (1) and (2) of the EEA Agreement, reads as follows:*

Freedom of movement for workers shall be secured among EC Member States and EFTA States.

Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies is referred to in Annex XVIII to the EEA Agreement. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 41/1999 of 26 March 1999.

*Recital 2 and 11 of the Directive, reads as follows:*

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

Whereas it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer;

*Article 1 of Section I of the Directive 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 State, 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 '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); [...]

*Article 6 of the Directive, 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.

## **NATIONAL LAW**

### 11. Act No 63/2000 on Collective Redundancies (“the Collective Redundancies Act”).

*Article 1 of the Collective Redundancies Act, reads as follows:*

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 4 of the Collective Redundancies Act, reads as follows:*

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 collective redundancies was taken.

*Article 11 of the Collective Redundancies Act, reads:*

An employer, who intentionally or negligently breaches the rules of that Act, is liable for payment of damages in accordance with general rules.

*Article 12 of the Collective Redundancies Act, reads as follows:*

Breaches of Articles 5 and 7 of the Act may be punishable by fines paid to the treasury.

12. The preparatory works to Articles 11 and 12 state that those provisions are intended to ensure correct application of the Act.
13. Act No 112/2008 on Iceland Health Insurance (*Sjúkratryggingar Íslands*).

*Article 4 of the Act on Iceland Health Insurance, reads as follows:*

The Minister is responsible for the central administration of health insurance and contracting for health services and other assistance under this Act, and the administration of the Health Insurance Administration.

*Article 6 of the Act on Iceland Health Insurance, reads as follows:*

The Minister appoints five members to the board of Iceland Health Insurance, one of whom shall be appointed chairman of the board and another vice chairman. An equal number of alternates shall be appointed. The chair of the board calls board meetings and chairs them, and the director attends board meetings with the right to speak and make proposals. The minister shall issue a letter of appointment to the Board of Directors and determine remuneration to Directors, which shall be paid from the operating budget of the Institute.

The board of governors of the Health Insurance Administration shall approve the organisation chart of the Administration, its annual program of operation and budget, and shall establish its long-term 3 strategy. The board shall supervise the work of the Administration and the maintenance of its operations within the framework of the State Budget at any time.

The chairman of the board of the Health Insurance Administration shall report regularly to the Minister on the work of the Administration and notify the Minister if its activities and services are not compliance with the provisions of law and if its operation is not in compliance with the State Budget.

### **III. FACTS**

14. Icelandic Health Insurance is a public administrative organisation, the main role of which is to ensure the rights of health insured persons in Iceland. As the main buyer of health services in Iceland, its role is also to analyse the cost, efficiency, and quality of the health services.
15. The plaintiff is a pharmacist who had worked as head of department at Icelandic Health Insurance. On 29 September 2020, the plaintiff along with 13 other managers at Icelandic Health Insurance were dismissed. The dismissals were a part of organisational changes at the institution.
16. The main objective of the changes was to simplify the organisational chart and to modify the organisation more in line with its role and purpose. The changes were the result of a wide consultation between the administration and staff of Icelandic Health Insurance. The purpose was not to reduce the number of employees. Some departments were merged, and new departments were established. As a result, several department heads lost their positions. All the employees that were dismissed were offered new

positions at Icelandic Health Insurance and were encouraged to apply for new vacancies that would open up after the new organisational chart took effect.

17. During the consultation period and before the dismissal took effect the director of Icelandic Health Insurance received guidance from the Directorate of Labour in Iceland regarding the dismissals. The Directorate was of the view that the Act on Collective Redundancies did not apply to public administrative bodies. In addition, the Directorate concluded that the number of employees dismissed did not reach the minimum for the Act to apply. According to the guidance, everyone that received remuneration from the institution should be counted as a worker within the meaning of the Act and Directive 98/59/EC. The number of employees was in total 143 at the time of the dismissals and that included 5 members of the Board of Directors of Icelandic Health Insurance appointed by the Minister. Although there are no dismissals of Board members in question in the case, it is clear that dismissals of board members may come under scrutiny based on the Directive and the Collective Redundancies Act. In such cases, the calculation of the number of those dismissed would also take into account the dismissals of committee and board members of an organisation. In the same way, those jobs should count towards the total jobs of an organisation.
18. The members of the Board of Iceland Health Insurance are appointed by the Minister of Health. The Minister can revoke their mandate at any time. The role of the Board is to supervise the work of the administration and the maintenance of its operations within the framework of the State budget at any time. The chairman of the Board of Icelandic Health Insurance shall report regularly to the Minister on the work of the administration and notify the Minister if its activities and services are not in compliance with the provisions of law and if its operation is not in compliance with the State budget.
19. The plaintiff entered into a new employment contract with Icelandic Health Insurance which entered into force on 1 February 2021, after the completion of a notice of dismissal. However, this new position involved a reduction in salary from her prior terms of employment. She commenced leave without pay on 1 August 2022 and is now no longer working for Icelandic Health Insurance.
20. The plaintiff sought damages from the Icelandic State on behalf of Icelandic Health Insurance in the amount of the difference in salary between that which she had received in her prior post at Icelandic Health Insurance and that which she received from the institution subsequent to the dismissal, with the addition of compensation for non-pecuniary damages. The plaintiff bases her claim on the dismissal being unlawful and maintains that Icelandic Health Insurance did not comply with the procedural rules laid down in the Collective Redundancies Act with respect to inter alia the worker's rights to information, the obligation relating to consultation and the obligation relating to notification.
21. The defendant rejected the claims on the grounds that the Collective Redundancies Act does not apply to employees in the public sector. In addition, the defendant referred to the fact that the number of employees dismissed did not reach the 10% limit of workers at a workplace with 100-300 workers for the act to apply, as prescribed in point b of paragraph 1 of Article 1 of the Collective Redundancy Act.
22. On 1 December 2022, the plaintiff brought the present action before the District Court of Reykjavík (*Héraðsdómur Reykjavíkur*). The plaintiff claims damages for an unlawful dismissal in the amount of ISK 2,546,500 plus penalty interests and compensation for non-pecuniary damages in the amount of ISK 2,000,000 plus penalty interests. On 11 December 2023, the day of the hearing of the case, it was decided to

request that questions, set out in detail below, would be submitted to the EFTA Court with a request for an advisory opinion.

#### IV. LEGAL ARGUMENTS

##### *Question 1*

23. Directive 98/59/EC was implemented into Icelandic law through the Collective Redundancies Act. It is disputed in the main proceedings before the Reykjavík District Court whether the Act on Collective Redundancies also applies to employees of establishments governed by public law. The Icelandic State argues that the Act does not apply to such employees. Icelandic national courts have not, to this date, reached a conclusion on the scope of the Act. The issue is now before the Supreme Court in case nr. 3/2024.
24. Although the Icelandic State is of the view the Act on Collective Redundancies does not apply to employees of public entities it must propose an answer to the question as the referring Court considers the interpretation of the Directive to be relevant for the application of national law.
25. It is settled case law<sup>1</sup> when domestic legislation, in regulating 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 Agreement 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 EFTA 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.<sup>2</sup>
26. Directive 98/59/EC does not apply to public administrative bodies. It is therefore not for the EFTA Court to conclude whether members of a board of directors of a public administrative body should be considered workers within the meaning of the Directive. Furthermore, the Icelandic State recalls that it is settled case law<sup>3</sup> that questions on the interpretation of the EEA law referred by a national court enjoy a presumption of relevance, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the EFTA Court to determine. The Icelandic State argues that it is irrelevant in this case whether the legal entity is a public administrative body or a capital company. Therefore, the Icelandic State suggests that the question should be reworded as follows:

*Must Article 1(1)(a) of Directive 98/59/EC be interpreted as meaning that it precludes a national law or practice that does not take into account, in the calculation provided for by that provision of the number of workers employed, members of the board of directors of a legal entity, such as in the main proceedings?*

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<sup>1</sup> Judgment of the EFTA Court of 19 April 2023, *Verkfræðingafélag Íslands*, E-9/22, paragraph 21-27.

<sup>2</sup> Judgment of the EFTA Court of 27 October 2017, *Pascal Nobile*, E-21/16, paragraph 25 and case law cited.

<sup>3</sup> Judgment of the EFTA Court of 13 May 2020, *Campbell*, E-4-19, paragraph 44.

27. In light of the aforementioned, the Icelandic State argues that board members should fall within the definition of a worker in the meaning of Directive 98/59/EC as the concept has been described by the EFTA Court and the Court of Justice of the European Union (hereinafter “CJEU”). The minimum number of workers for the Directive to apply in the referred case is therefore not reached and no collective redundancies took place. The protection under Directive 98/59/EC was therefore not invoked, if the Act on Collective Redundancies would be found to be applicable in this case.
28. The “four freedoms” (the free movement of goods, services, capital and persons) are the foundation of the Internal Market. Article 28 EEA concerns the free movement of workers. Directive 98/59 is intended to strengthen the protection of workers in the case of collective redundancies as prescribed in recital 2 of the Directive.
29. The concept of ‘worker’ as mentioned in Article 1(1)(a) of Directive 98/59/EC, may not be defined by any reference to the laws of the Member States, but has instead meaning in EEA law.
30. With a reference to the CJEU, *Collins*<sup>4</sup>, *Trojani*<sup>5</sup> and *Styrelsen*<sup>6</sup> the concept of ‘worker’ within the meaning of Article 45 TFEU has autonomous meaning specific to EU law and must not be interpreted narrowly. The essential feature of an employment relationship has been prescribed in case law. That is, 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. In order to qualify as a worker, the person concerned must pursue effective and genuine activities, which are not on such a small scale as to be regarded as purely marginal and ancillary. In the view of the Icelandic State, those requirements have been met in the present case.<sup>7</sup>
31. Moreover, in *Trojani*<sup>8</sup>, the Court held that neither the *sui generis* nature of the employment relationship under national law nor the level of productivity of the person concerned, the origin of the fund from which the remuneration is paid, or the limited amount of the remuneration can have any consequence with regard to whether or not the person is a worker for the purpose of EEA law.
32. For members of the board of directors, the CJEU developed a certain criterion. The most relevant case is *Danosa*<sup>9</sup> where the Court observed that even though Ms Danosa enjoyed a margin of discretion as a sole member of a capital company’s board of directors in the performance of their duties, she had to report on her management to the supervisory board and to cooperate with that board.<sup>10</sup> Furthermore, under national law, she could be removed from her duties by a decision of the shareholders, in some circumstances following suspension from those duties by the supervisory board.<sup>11</sup> Moreover, the Court observed that she was dismissed “by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes.”<sup>12</sup>

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<sup>4</sup> Case C-138/02 *Collins*, [2004] ECR I-2703, paragraph 26.

<sup>5</sup> Case C-456/02 *Trojani* [2004] ECR I-07573, paragraph 15.

<sup>6</sup> Case C-46/12 *Styrelsen* [2004] paragraph 39. EU:C:2013:97

<sup>7</sup> Joined cases C-22/08 and 23/08 *Vatsouras and Koupatanze* EU:C:2009:344, paragraph 26.

<sup>8</sup> *Trojani*, paragraph 16.

<sup>9</sup> Case C-232/09 *Dita Danosa v LKB lizings* SLA ECLI:EU:C:2010:674.

<sup>10</sup> *Ibid*, paragraph 49.

<sup>11</sup> *Ibid*, paragraph 50.

<sup>12</sup> *Ibid*, paragraph 50.



33. In *Balkaya*<sup>13</sup> and *Commission v. Italy*<sup>14</sup> the Court concluded, when interpreting the concept of 'worker' in the meaning of Directive 95/59/EC, that it "must be given an autonomous and independent meaning in the EU legal order"<sup>15</sup> and that "the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law".<sup>16</sup>
34. In the *Balkaya* case, Mr. Balkaya was not considered an employee by German case-law. However, the CJEU concluded otherwise, in light of the same factors it took into account in *Danosa*. The Court observed the facts that Mr. Balkaya was appointed by the general meeting of the company shareholders, which "may revoke his mandate at any time, even against his will", he was subject to the direction and supervision of the same body, and he did not own any shares in the company.<sup>17</sup> The Court stated that its objective of granting a "greater protection to workers in the event of collective redundancies" would be undermined by a narrow definition of "worker".<sup>18</sup>
35. The Court put into effect the jurisprudence it had developed for Article 45 TFEU, under which it is irrelevant that a person does not carry out full duties and works only a small number of hours per week and thus receives limited remuneration. These conclusions were based on an interpretation of Directive 98/95/EC aimed at ensuring the principle of effectiveness. In this regard, the Court stated that its objective of affording a greater protection to workers in the event of collective redundancies would be undermined by a narrow definition of the concept of a worker.
36. On examining those criteria in the case at hand it should be noted that the members of the Board of Icelandic Health Insurance are appointed by the Minister of Health, who may revoke their mandate at any time, even against their will. The Board members are an integral part of the organisation and under the supervision of the Minister. The members of the Board perform their duties in accordance with a letter of appointment, which stipulates their duties, and the Act on Icelandic Health Insurance. This is entirely consistent with the exercise of an activity which has a specific economic value and is effective and genuine within the meaning of the case-law. Even though they enjoy a margin of discretion in the performance of their duties they are subject to the direction and supervision of the Minister.
37. The supervision of the Minister of Health can be compared to a general meeting of shareholders or a supervisory board. The Board members can furthermore be removed from their post by the Minister at any time. According to the letter of appointment the Board is responsible for the organisation's structure, annual objectives and setting a long-term strategy for the organisation. The Board shall also supervise the work of the administration and the maintenance of its operations within the framework of the State budget at any time. The chairman of the Board shall report regularly to the Minister on the work of the administration and notify the Minister if its activities and services are not in compliance with the provisions of law and the State budget. The Minister can assign the Board other tasks that concern the institution.
38. Furthermore, it is clear from the organisational chart and the role of the Board as described in the Act on Icelandic Health Insurance that the members of the Board are

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<sup>13</sup> Case C-229/14 *Ender Balkaya contro Kiesel Abbruch- und Recycling Technik TmbH* ECLI:EU:C:2015:455.

<sup>14</sup> Case C-596/12 *European Commission v Italian Republic* ECLI:EU:C:2014:77.

<sup>15</sup> *Balkaya*, paragraph 33.

<sup>16</sup> *Ibid*, paragraph 35.

<sup>17</sup> *Ibid*, paragraph 40.

<sup>18</sup> *Balkaya*, paragraph 44; *Commission v Italy*, paragraph 47.

an integral part of Icelandic Health Insurance. In this regard, it is clear that the status of the Board members is clearly distinct from that of an agent, such as legal counsel or an accountant, who receives a mandate from a company to perform a specific task, but remains a third party in relation to that company.

39. As regards the degree of supervision that the members of the Board of Directors are subject to, it should be noted that they have to account for their management to the Minister of Health. They are accountable for their actions to a body which they do not themselves control and can be removed from their posts on grounds of loss of confidence alone, which could arise as a result of the Minister simply disagreeing with the way the organisation is being managed. They are therefore under a de facto obligation to take management decisions in accordance with the expectations of a supervisory board and shareholders as was the case in *Balkaya*.
40. In light of the above case law of the CJEU, the Icelandic State maintains that the Board members of Icelandic Health Insurance are to be considered workers in the meaning of Directive 98/95/EC if the Act on Collective Redundancies would be found to be applicable in this case.
41. In addition, Recital 11 of the Directive states that it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer. In the present case, it should be taken into account that the Minister could decide to close down Icelandic Health Insurance, or any other public organisation that is governed by the Ministry, which would include members of the Board losing their positions. With a reference to the advisory opinion of Advocate General Bot in *Danosa* it is argued that the situation of the Board members is, in light of the above, closer to that of an employee than that of a self-employed person, since they are liable to have their working relationship with the organisation terminated if the Minister disagrees with decisions taken by them in the performance of their duties.<sup>19</sup>
42. In light of the above, the Icelandic State concludes that Council Directive 98/59/EC and in essence point (i) (a) of paragraph 1 of Article 1 of the Directive, must be interpreted as meaning that it precludes a national law or practice that does not take into account, in the calculation provided for by that provision of the number of workers employed, the members of the board of directors of a legal entity, such as the members of the Board of directors in the referred case, that are an integral part of it, perform their duties under the direction and subject to the supervision of another body that is a part of that legal entity and receive remuneration in return for the performance of their duties.

### *Question 2*

43. Article 6 of Directive 98/59/EC provides that EEA States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to the workers' representatives and/or workers.
44. Directive 98/59/EC was implemented in Iceland through the Act on Collective Redundancies. Article 11 of the Act provides that an employer, who intentionally or negligently breaches the rules of that Act, is liable for payment of damages in

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<sup>19</sup> Opinion of Advocate General Bot in case C-232/09 *Danosa*, delivered on 2 September 2010.

accordance with general rules. The preparatory works to Article 11 state that those provisions are intended to ensure correct application of the Act.

45. As stated in Article 11 of the Act damages shall be awarded in accordance with general rules. The culpa rule is one of the fundamental principles in Icelandic tort law. Under this rule, a person can be held liable for causing harm either intentionally or negligently. The application of the culpa rule corresponds broadly to principles of negligence in the common law jurisdictions.
46. In its judgment *Commission v United Kingdom*, the CJEU held that EEA States must ensure that infringements of EEA law are penalized under conditions, both procedural and substantive, which make the penalty effective, proportionate, and dissuasive.<sup>20</sup> The CJEU further held that “*By providing that a ‘protective award’ may be set off in full or in part against any amounts otherwise payable by an employer to an employee under the latter’s contract of employment or in respect of breach of that contract, the United Kingdom legislation largely deprived that sanction of its practical effect and its deterrent value. Moreover, an employer will not be penalized even moderately or lightly by the sanction except and only to the extent to which the amount of the ‘protective award’ which he is ordered to make exceeds the sums which he is otherwise required to pay to the person concerned.*”<sup>21</sup>
47. The Icelandic State is of the view in light of this case law, that the referring Court is essentially asking whether a provision such as Article 11 of the Collective Redundancy Act provides for an effective remedy in case of non-compliance with the rules on information and consultation in the event of collective redundancies that has practical effect and deterrent value.
48. Article 6 of Directive 98/59/EC requires EEA States to introduce judicial and/or administrative procedures for enforcing the obligations under the Directive that are available to the workers themselves or their representatives but does not develop that obligation further.
49. Therefore, the EEA States have discretion to choose between the different solutions suitable for achieving the Directive’s objectives and to lay down detailed arrangements for those procedures, including procedural rules governing actions for safeguarding those rights.
50. It has been established by the case law of the CJEU that when a Member State provides for such a specific form of sanctions for failure to fulfil the obligations derived from a Directive, they must ensure that such infringements are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and that, in any event, the penalty is effective, proportionate and dissuasive.<sup>22</sup>
51. To this day there is no case law before Icelandic Courts that directly addresses the conditions for liability under Article 11 of the Act.<sup>23</sup> However, case law indicates that infringement of the information and consultation obligations of the Act may be the

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<sup>20</sup> Case C-383/92 *Commission v United Kingdom*, EU:C:1994:234, paragraph 40.

<sup>21</sup> *Ibid*, paragraph 42.

<sup>22</sup> Case C-12/08 *Mono Car Styling*, EU:C:2009:466, paragraph 34; and judgment of the EFTA Court of 13 June 2012 in Case E-11/12 *Koch and Others*, [2013] EFTA Ct. Rep. 272, paragraph 121.

<sup>23</sup> See judgment of the Icelandic Supreme Court in Case 196/2001 and judgment of the Reykjavik District Court in Case E-3257/2020. The Supreme Court judgment pre-dated the entry into force of the Act, and in the latter judgment by the Reykjavik District Court the case was dismissed due to the issue not being a collective redundancy.

object of an independent claim for pecuniary damages. In addition, the Icelandic Supreme Court has ruled on payment for non-pecuniary loss in the context of damages for dismissal, in cases unrelated to collective redundancies. In this context, the Icelandic State points out that, unlike the situation in Case C-383/92 *Commission v United Kingdom*, Article 11 of the Act does not provide that awards granted on its basis can be off-set in full or in part against any amounts otherwise payable by an employer to a worker.<sup>24</sup>

52. In comparison, damages due to unlawful dismissal are at least the equivalent of payment of salaries during the notice period. They are usually higher. In addition to damages, the case law on unlawful dismissals has established payment for so called non-pecuniary loss.
53. In light of the above, the Icelandic State fully implemented Article 6 of the Directive by providing workers and/or their representatives with the right to claim compensation for infringement of the Directive's obligations, as in Article 11 of the Act on Collective Redundancies.
54. The answer to Question 2 must therefore be as follows: In circumstances such as those in the present case, the EEA Agreement and Directive 98/59/EC must be interpreted as not precluding a national rule which provides workers and/or their representatives with the right to claim compensation for infringements of the Directive's obligation after an infringement has been incurred, provided, that the right to compensations for loss granted cannot be off-set in full or in part against any amounts otherwise payable by an employer to a worker.

## V. ANSWERS TO THE REFERRED QUESTIONS

55. In view of the above the Icelandic Government respectfully submits that the EFTA Court answers the questions from the national court as follows:

### *The first question*

Council Directive 98/59/EC and in essence point (i) (a) of paragraph 1 of Article 1 of the Directive, must be interpreted as meaning that it precludes a national law or practice that does not take into account, in the calculation provided for by that provision of the number of workers employed, the members of the board of directors of a legal entity, such as the members of the board of directors in the referred case, that are an integral part of it, that perform their duties under the direction and subject to the supervision of another body that is a part of that legal entity and receive remuneration in return for the performance of their duties.

### *The second question*

In circumstances such as those in the present case, the EEA Agreement and Directive 98/59/EC must be interpreted as not precluding a national rule which provides workers and/or their representatives with the right to claim compensation for infringements of the Directive's obligation after an infringement has been incurred, provided, that the

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<sup>24</sup> Case C-383/92 *Commission v United Kingdom*, EU:C:1994:234, paragraph 18.

right to compensations for loss granted cannot be off-set in full or in part against any amounts otherwise payable by an employer to a worker.

Reykjavik, 6 May 2024

On behalf of the Icelandic State



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