ESA | EFTA Surveillance Authority

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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 EFTA SURVEILLANCE AUTHORITY

represented by
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acting as Agents,

IN CASE E-5/25

Rainer Silbernagl

v

University of Liechtenstein

in which the Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*) of the Principality of Liechtenstein 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 the second sentence of Article 38(3) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

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1 INTRODUCTION

1. The present written observations were prepared with support from Ciarán Burke, Senior Legal Officer of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("**ESA**").

2. The request for an advisory opinion by the Princely Supreme Court (the "**Request**") concerns the interpretation of the second sentence of Article 38(3) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "**General Data Protection Regulation**" or "**GDPR**").[1]

3. The national proceedings giving rise to the Request were brought by Rainer Silbernagl (the "**applicant**") against the University of Liechtenstein (the "**defendant**"). On 15 October 2019, the applicant signed an employment contract with the defendant to serve as a data protection officer ("**DPO**") with a work volume of 50% for an indefinite duration and on 16 October 2019, the applicant signed a supplementary contract to be employed as a postdoctoral researcher with a work volume of 30% for a fixed term until 30 June 2021.[2]

4. On 7 December 2020, the Rules on Employment and Remuneration for the University of Liechtenstein (the "**University Rules**") were amended.[3] These amendments encompassed the so-called "incompatibility rule", which established that employment as a postdoctoral researcher or research assistant may not be combined with any other employment at the university.[4] On 27 January 2021, the defendant informed the applicant of the termination of his employment relationship, with four months' notice in accordance with the employment contracts. Upon request, the defendant stated that

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pages 1–88.
[2] See the Request, page 4.
[3] In both contracts entered into between the applicant and the defendant, it was stated that the provisions set out in the University Rules applied, see the Request, page 4.
[4] The incompatibility rule was introduced by the defendant after the employment contract with the applicant was concluded. According to the referring court, the rule was not established because of the applicant but for other reasons, namely to encourage early-career researchers and on account of ongoing organisational changes, see the Request, page 5.

the termination was due to the incompatibility between the applicant's roles as a DPO and postdoctoral researcher, by reference to Articles 53(10) and 54a(9) of the University Rules.[5] The applicant's conduct during the period in which the employment relationship was in force was faultless and did not constitute a reason for the termination.[6]

5. The applicant contested the validity of his dismissal and brought proceedings against the defendant before the Princely Court. The applicant argued that pursuant to Article 38 of the GDPR and Article 7(4) of the Data Protection Act, a contractual relationship with a DPO may only be terminated where just cause is stated in writing, and that a reason constituting just cause was not asserted by the defendant.[7]

6. The defendant argued that the applicant's employment relationship as a DPO and as a postdoctoral researcher was ended because of the existing incompatibility and was unrelated to the applicant's performance as a DPO. The defendant argued that just cause is only a requirement if the DPO is terminated for performing his tasks, and that it did not attempt to circumvent the rights of the DPO.[8]

7. The Princely Court dismissed the applicant's claims, and the Princely Court of Appeal rejected the applicant's appeal against the judgment of the Princely Court. On appeal by the applicant on a point of law, the Princely Supreme Court declared that the contractual relationship between the applicant and the defendant concerning the former's appointment as DPO remained in force.[9] The Princely Supreme Court found, in summary, that the dismissal of a DPO requires just cause, irrespective of whether the dismissal is connected to the performance of his tasks.[10]

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[5] See the Request, pages 4–6.
[6] See the Request, pages 6–7.
[7] The applicant noted that he had not been asked to relinquish his time-limited appointment as postdoctoral researcher in order to eliminate the incompatibility constructed by the defendant, which would nevertheless cease to exist at the latest on 30 June 2021, see the Request, page 8.
[8] The defendant noted that the applicant was free to choose which career path he wished to follow and to reapply for the position as DPO, see the Request, page 9.
[9] Available at: https://www.ogh.li/files/attachments/08-cg-2021-120-ogh-2024-15.pdf (last visited 9 July 2025).
[10] See the Request, pages 10–11.

8. On appeal by the defendant, on the basis of Article 15[11] of the Act of 27 November 2003 on the Constitutional Court (*Gesetz über den Staatsgerichtshof; StGHG*),[12] the Constitutional Court set aside the judgment of the Princely Supreme Court. It found that the Supreme Court's decision had failed to adequately protect the defendant's rights under constitutional law and remanded the case for renewed consideration under the obligation to be bound by the legal opinion[13] of the Constitutional Court.[14] In summary, the Constitutional Court held that just cause is only required if the dismissal is connected to the performance of tasks pertaining to the function as a DPO. Meaning that, if the termination of employment is *not* connected with the exercise of the DPO's functions, it may be carried out in accordance with the usual requirements of national laws on employment contracts, which, in Liechtenstein, can also be without just cause.[15]

9. The parties seem to agree that the defendant terminated the applicant's employment contracts by way of ordinary termination with a notice but without just cause.[16] To ESA, it seems that the disagreement, both between the applicant and the defendant, and between the Princely Supreme Court and the Constitutional Court, concerns whether the applicant, as a DPO, could be dismissed by way of ordinary termination with notice, but *without* just cause, for reasons *unrelated* to the performance of his DPO tasks.

10. Against this background, the Princely Supreme Court decided to refer three questions concerning the interpretation of the second sentence of Article 38(3) of the GDPR to the EFTA Court.

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[11] Which allows for individual complaints to the Constitutional Court.
[12] The Act on the Constitutional Court (StGHG), available at: www.gesetze.li/konso/2004032000.
[13] See Article 54 of the StGHG titled "Binding nature of decisions", which states that: "The decisions of the Constitutional Court are binding on all state and municipal authorities, as well as all courts. In the cases covered by Articles 19, 21, and 23, the decision of the Constitutional Court has a generally binding effect." (Unofficial translation by ESA).
[14] See the Request, pages 12–13, and the judgment of the Constitutional Court, StGH 2024/056, available at: https://www.gerichtsentscheidungen.li/default.aspx?z=LlfS6ptY3Hm3v28dY7PkydrGn7D1bEUIxRi12O89m3ea1ryPmeM5sKbWL5HjSZmKNvbiM2d2nwe5VlsgGRMf4GAc-w2.
[15] See the Request, page 13.
[16] This was also noted by the Constitutional Court, see the Request, pages 13 and 21.

11. For further information about the factual circumstances of the case, ESA respectfully refers to the Request.[17]

2 EEA LAW

12. The GDPR was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 154/2018 of 6 July 2018,[18] and is referred to at point 5e of Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement. Constitutional requirements were indicated by Liechtenstein and the decision entered into force on 20 July 2018.

13. Recitals 10 and 97 to the GDPR read, in relevant parts:

> "*(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. […]*
>
> *(97) Where the processing is carried out by a public authority, except for courts or independent judicial authorities when acting in their judicial capacity, where, in the private sector, processing is carried out by a controller whose core activities consist of processing operations that require regular and systematic monitoring of the data subjects on a large scale, or where the core activities of the controller or the processor consist of processing on a large scale of special categories of personal data and data relating to criminal convictions and offences, a person with expert knowledge of data protection law and practices should assist the controller or processor to monitor internal compliance with this Regulation. In the private sector, the core activities of a controller relate to its primary activities and do not relate to the processing of personal data as ancillary activities. The necessary level of expert knowledge should be determined in particular according to the data processing operations carried out and the protection required for the personal data processed by the controller or the processor. Such data protection officers, whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner.*"

[17] The Request, pages 4–15.
[18] OJ L 183, 19.7.2018, page 23.

14. Article 37 of the GDPR, titled "Designation of the data protection officer", reads, in relevant parts:

> "*5. The data protection officer shall be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks referred to in Article 39.*
>
> *6. The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract.*"

15. Article 38 of the GDPR provides in paragraphs 3, 5 and 6:

> "*3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.*
>
> *[…]*
>
> *5. The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law.*
>
> *6. The data protection officer may fulfil other tasks and duties. The controller or processor shall ensure that any such tasks and duties do not result in a conflict of interests.*"

3 NATIONAL LAW

16. The Act of 4 October 2018 on Data Protection (*Datenschutzgesetz; DSG*)[19] (the "**Data Protection Act**") implements the GDPR in the Liechtenstein legal order.

17. Article 6 of the Data Protection Act reads, in relevant parts:

> *"(1) Public bodies shall designate a data protection officer. […]*
>
> *(4) The data protection officer may be a staff member of the public body, or fulfil the tasks on the basis of a service contract."*[20]

[19] The Data Protection Act is available at: https://www.gesetze.li/konso/2018272000 (last visited 2 July 2025).
[20] Translated by the Court, see the Request, page 16.

18. The University of Liechtenstein is an independent public law foundation and is referred to by the referring court as a public body.[21] The University appointed the applicant as its DPO on 15 October 2019.[22]

19. Article 7 of the Data Protection Act reads, in relevant parts:

> *"(3) The public body shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. The data protection officer shall directly report to the management of the public body. The data protection officer shall not be dismissed or penalised by the public body for performing the data protection officer's tasks.*
>
> *(4) The dismissal of the data protection officer shall be permitted only by applying Article 24 of the State Employee Act mutatis mutandis."*[23]

20. For employees covered by the State Employee Act (*Staatspersonalgesetz; StPG*),[24] Article 21 governs the termination of both fixed-term and permanent employment contracts, specifying the required form and the applicable notice periods. It reads, in relevant parts:

> "*1) Fixed-term and permanent employment contracts may be terminated by either party in writing. Termination by the Government shall take the form of an order.*
>
> *2) The employment relationship may be terminated:*
>
> *a) during the probationary period, without giving reasons, at the end of a week and subject to a notice period of seven days;*
> *b) after the end of the probationary period, at the end of one month, subject to a period of notice of:*
> *1. two months in the first year of service;*
> *2. three months from the second year of service.* […]."[25]

21. Article 22 provides that, following the completion of the probationary period, the employer must provide *objectively sufficient reasons* for terminating the employment relationship. It reads, in relevant parts:

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[21] See the Request, page 4, and the questions referred.
[22] See paragraph 3 of these written observations and the Request, page 4.
[23] Translated by the Court, see the Request, page 16.
[24] The State Employee Act is available at: https://www.gesetze.li/konso/2008144000/?version=13 (last visited 2 July 2025).
[25] Unofficial translation by ESA.

"*1) The Government may terminate an employment relationship after the end of the probationary period for objectively sufficient reasons. Such reasons include, in particular:*

a) Violation of important legal or employment obligations;
b) Defects in performance or conduct;
c) lack of personal or professional suitability to perform the agreed or assigned work;
d) unwillingness to perform the agreed work or any other reasonable work;
(e) essential operational or economic reasons, in particular in the event of a loss of financial resources, provided that the person concerned cannot be offered any other reasonable work;
f) loss of a statutory or contractual condition for employment;
g) Inability to perform duties due to illness or accident; Article 25 remains reserved. […]"[26]

22. While Articles 21 and 22 of the State Employee Act require that, after the end of the probationary period, a notice period be observed and objectively sufficient reasons be provided for termination, Article 24 governs termination *without* notice and requires just cause. Article 24 reads, in relevant parts:

"(1) The employment relationship may at any time be terminated by either party to the contract with just cause; such termination shall be effected in writing, stating the reasons for the termination. Termination by the Government shall be effected by way of an order.

(2) Just cause shall be defined, in particular, as any circumstance in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected.

(3) If the termination without notice proves to be wrongful or without justification, then the person concerned shall be entitled to compensation for what they would have earned if the employment relationship had been terminated with due notice. If reinstatement is not effected, then compensation in accordance with Article 23(1) shall be paid."[27]

23. For employees not covered by the State Employee Act, employment contracts are governed by § 1173a et. seq. of the Liechtenstein General Civil Code (*Allgemeines bürgerliches Gesetzbuch; ABGB*) (the "**General Civil Code**").[28]

[26] Unofficial translation by ESA.
[27] Translated by the Court, see the Request, page 17.
[28] The General Civil Code is available at: https://www.gesetze.li/konso/1003.001 (last visited 4 July 2025). Note that starting from § 1173a, employment contracts are regulated as a distinct section, with article numbering restarting from Article 1.

24. Article 45.1 of § 1173a of the General Civil Code, titled "Permanent employment relationship", concerns "Termination in general", and reads:

> "*1) An employment relationship of indefinite duration may be terminated by either party.*
>
> *2) The party giving notice must provide written reasons for the termination if the other party requests this.*" [29]

25. The notice period required for terminating an employment contract is governed by Article 45.2 of § 1173a, which sets out general rules (letter a), the notice periods applicable during the probationary period (letter b), and those applicable after the probationary period (letter c). The provision reads, in relevant parts:

> "*b) during the probationary period*
>
> *1) The employment relationship may be terminated at any time during the probationary period with a notice period of seven days to the end of a working week; the probationary period shall be the first month of an employment relationship. […]*
>
> *c) after the end of the probationary period*
>
> *1) The employment relationship may be terminated in the first year of service with a period of notice of one month, in the second up to and including the ninth year of service with a period of notice of two months, and thereafter with a period of notice of three months, each to the end of a month. […].*"[30]

26. According to Articles 45.1 and 45.2 of § 1173a of the General Civil Code, once the probationary period has ended, an employment contract may be terminated with adherence to a notice period. The employer is not required to provide reasons for the termination unless the employee requests them, and in such cases, the reasons must be provided in writing but are not subject to any substantive requirements.

27. Article 53 of § 1173a, titled "Termination without notice", provides that an employment contract may be terminated *without* notice for just cause.[31] The provision reads:

> "*1) For just cause, both the employer and the employee may terminate the employment relationship at any time without notice; they must provide written*

[29] Unofficial translation by ESA.
[30] Unofficial translation by ESA.
[31] ESA notes that Articles 53 and 56 of § 1173a of the General Civil Code, and Article 24 of the State Employee Act use the German phrase "*aus wichtigen Gründen*".

reasons for the termination of the contract without notice if the other party so requests.

2) In particular, any circumstance which, in good faith, makes it impossible for the person terminating the employment relationship to be expected to continue the employment relationship shall be deemed to be a just cause.

3) The court shall decide on the existence of such circumstances at its discretion, but may in no case recognise the employee's inability to perform his work through no fault of his own as an important reason." [32]

28. Article 56, letter b, of § 1173a, which governs cases of unjustified dismissal, reads, in relevant parts:

"*1) If the employer dismisses the employee without notice and without just cause, the employee shall be entitled to compensation for what he would have earned if the employment relationship had been terminated in compliance with the notice period or by expiry of the specified contractual term.*"

29. The University Rules applicable at the University of Liechtenstein,[33] (*Dienst-und Besoldungsordnung; DBO*)[34] provide:

"Article 53(10): *Employment as a postdoctoral researcher cannot be combined with any other university employment*

Article 54a(9): *Employment as a research assistant cannot be combined with any other university employment.''*

4 THE QUESTIONS REFERRED

30. The referring court has asked the Court the following questions:

1. *Must the second sentence of Article 38(3) of the GDPR be interpreted as meaning that it precludes a national provision such as, in the present case,*

[32] Unofficial translation by ESA.

[33] To ESA's understanding, these University Rules are made and applied by the University of Liechtenstein, and do not form part of Liechtenstein national law. At the same time, the Supreme Court emphasised in its judgement 08 CG.2021.120-ON 76 that "the service and remuneration regulations must follow statutory provisions such as Article 8 of the DSG and Article 38 of the GDPR, which are to be classified as general working conditions", see page 7.

[34] Translated by the Court, see the Request, page 4. The University Rules are available at: https://www.uni.li/de/legal (last visited 4 July 2025). ESA notes that there is a discrepancy in the numbering of the relevant Articles of the DBO in the Request (page 4 referring to Articles 53(10) and 53a(9), page 6 referring to Articles 53(10) and 54a(9)) and in the text of the DBO in their version in force on 15 December 2020 as made available on the University website (where these provisions are included as Articles 53(6) and 54(6)). In any event, this difference in numbering does not appear to be material given that the text is identical.

Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly?

2. *Must the second sentence of Article 38(3) of the GDPR as worded in German be interpreted as meaning that the term "dismissed" [in German "abberufen"] includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity of data protection officer ceases to exist?*

3. *Does the protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, require an interpretation of this provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact?*

5 LEGAL ANALYSIS

5.1 Preliminary remarks on the nature of the request for an advisory opinion and substance of the case

31. As set out above in paragraphs 8-9, the Constitutional Court remanded the case to the referring court for renewed consideration under the obligation to be bound by the legal opinion of the Constitutional Court. The referring court considers that its views on EEA law diverge from those of the superior Constitutional Court and requests the advisory opinion of the Court to ensure the effective legal protection of individuals.[35] Against this procedural background ESA makes the following preliminary remarks.

32. Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "**SCA**") provides for judicial cooperation between the Court and national courts. Under this system of cooperation,

[35] See the Request, pages 14–15.

which is intended as a means of ensuring a homogeneous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an advisory opinion on the interpretation of the EEA Agreement.[36] In the same manner, the CJEU has emphasised that the preliminary ruling procedure under Article 267 TFEU is a keystone of the judicial system established by the Treaties. It sets up a dialogue between the Court of Justice and the national courts having the object to secure uniform interpretation of EU law, thereby serving to ensure its consistency, full effect and autonomy.[37]

33. It is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[38] ESA submits that none of the grounds for refusing to give an advisory opinion apply in the present case.

34. Moreover, the questions referred must be construed in light of the information contained in the Request, and while any assessment of the facts of the case is a matter for the national court or tribunal, the Court, in order to provide a useful answer to the national court, may, in the spirit of cooperation with national courts and tribunals, provide the latter with all the guidance that it deems necessary.[39]

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[36] See Case E-18/11 *Irish Bank*, paragraphs 53 and 54, and case law cited; see also Case E-21/16 *Pascal Nobile*, paragraph 23, and case law cited; Case E-16/16 *Fosen-Linjen I*, paragraph 42; Case E-7/18 *Fosen-Linjen II*, paragraph 47; Case E-3/24 *Margrét Rósa Kristjánsdóttir* v *Icelandic Health Insurance (Sjúkratryggingar Íslands)*, paragraph 31; Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands* v *íslenska ríkið*, paragraph 22; and Case E-11/20 *Eyjólfur Orri Sverrisson* v *The Icelandic State*, paragraph 33.

[37] Case C-430/21 *RS*, EU:C:2022:99, paragraph 73.

[38] See Case E-3/24 *Margrét Rósa Kristjánsdóttir* v *Icelandic Health Insurance (Sjúkratryggingar Íslands)*, paragraph 32; Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands* v *íslenska ríkið* paragraph 23, and Case E-11/20 *Eyjólfur Orri Sverrisson* v *The Icelandic State*, paragraph 34.

[39] See Case E-7/19 *Tak – Malbik ehf.* v *the Icelandic Road and Coastal Administration and Þróttur ehf.*, paragraph 45.

35. In its case law, the Court has reiterated that it is of substantial importance to the uniform interpretation and effective application of EEA law and to the realisation of the objective of the EEA Agreement of a homogeneous European Economic Area that questions on the interpretation of EEA law are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity.[40] ESA submits that the same considerations apply to advisory opinions requested in cases that have previously been the subject of a judgment by a higher national court.

36. As the Court has emphasised, as established under Article 3 EEA, it is the responsibility of national courts and tribunals, in particular, to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective.[41] The Court has also held that it is inherent in Protocol 35 EEA that national courts and tribunals must give full effect to implemented EEA rules that are unconditional and sufficiently precise, and disregard any national rule or case law maintaining the legal effects of legislation that infringes such implemented EEA rules, as such a limitation is not compatible with EEA law.[42]

37. The CJEU has recognised that EU law does not preclude national rules or practices making constitutional court decisions binding on ordinary courts, provided that national law guarantees the independence of that court, which is essential to ensure effective judicial protection.[43] Nevertheless, the CJEU has held that the effectiveness of the preliminary ruling mechanism, and thus of EU law itself, would be in jeopardy if the ruling of a constitutional court on a plea of unconstitutionality could discourage a national court from exercising its discretion or fulfilling its obligation under Article 267 TFEU to refer questions concerning the interpretation or validity of EU law, as needed, in order to assess the compatibility of national law.[44]

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[40] See Case E-3/12 *Staten v/Arbeidsdepartementet* v *Stig Arne Jonsson*, paragraph 60, and case law cited and Case E-10/23 *X* v *Finanzmarktaufsicht*, paragraph 44. See Case E-25/24 *Dartride AS* v *Norwegian State*, paragraph 67.
[41] See e.g. Case E-14/20 *Liti-Link AG*, paragraph 74 and case law cited.
[42] See Case E-10/23 *X* v *Finanzmarktaufsicht*, paragraph 46 and Case E-11/22 *RS*, paragraphs 44 and 50 and case law cited.
[43] See e.g. Case C-430/21 *RS*, paragraph 44.
[44] See, to that effect, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, EU:C:2010:363, paragraph 45; Case C-614/14 *Ognyanov*, EU:C:2016:514, paragraph 25; and Case C-564/19 *IS (Illegality of the order for reference)*, EU:C:2021:949, paragraph 73; Case C-430/21 *RS*, paragraph 65.

38. In this context, the Court has held that national rules binding a national court, on points of law, by the rulings of a superior court cannot prevent that national court from using its discretion to request an advisory opinion from the Court.[45] Accordingly, a national court under Article 34 SCA can request an advisory opinion, in circumstances in which a legal question, that constitutes the subject of the request for an advisory opinion, has already been answered in an earlier set of proceedings by a higher-ranking national court with binding effect in accordance with national procedural law.[46]

5.2 The first and second questions

5.2.1 Introduction

39. Under Liechtenstein law (see section 3 above), employment contracts[47] may be terminated either with or without notice. It is ESA's understanding that for contracts governed by the State Employee Act, termination *with notice*[48] requires *objectively sufficient reasons*,[49] while termination *without notice*[50] requires *just cause*.[51] For all other employees, the termination of employment contracts is governed by the General Civil Code. In such cases, if a contract is terminated *with notice*,[52] the reasons must be provided in writing if requested, but there are no *substantive requirements for the reasons* provided by the employer;[53] however, if the contract is terminated *without notice,*[54] *just cause* is required.[55]

40. Furthermore, Article 7, fourth paragraph of the Data Protection Act provides that the dismissal of a DPO of a public body is only permitted by applying Article 24 of the State Employee Act *mutatis mutandis*. However, that provision does not clarify

[45] Case E-10/23 *X* v *Finanzmarktaufsicht*, paragraph 47; compare also Case C-689/13 *PFE*, EU:C:2016:199, paragraph 32 and case law cited.
[46] Case E-10/23 *X* v *Finanzmarktaufsicht,* paragraph 48.
[47] For the purposes of section 5.2 of these written observations, ESA refers to 'employment contract' as employment contracts in force following the completion of the probationary period.
[48] See Article 21.2.b of the State Employee Act.
[49] See Article 22.1 of the State Employee Act (in German: "*aus sachlich hinreichenden Gründen*").
[50] See Article 24.1 of the State Employee Act.
[51] See Articles 24.1 and 24.2 of the State Employee Act (in German: "*aus wichtigen Gründen*").
[52] See Article 45.2.c of § 1173a of the General Civil Code.
[53] See Article 45.1.2 of § 1173a of the General Civil Code (in German: "*begründen*").
[54] See Article 53.1 of § 1173a of the General Civil Code.
[55] See Articles 53.1 and 53.2 of § 1173a of the General Civil Code (in German: "*aus wichtigen Gründen*", "*wichtiger Grund*").

whether this applies to terminations with notice, without notice, or both.[56] Likewise it does not specify whether it applies exclusively to dismissals related to tasks specifically pertaining to the exercise of the employee's functions as a DPO (hereinafter "**DPO tasks**"), or whether it also encompasses other reasons for termination of the employment contract. The Princely Supreme Court held that termination of a DPO's employment contract requires just cause,[57] whereas the Constitutional Court held that just cause is required only if the termination is based on reasons related to the performance of DPO tasks.[58]

41. By its first and second questions, which ESA will address together, the referring court essentially asks whether the protection offered to DPOs under the second sentence of Article 38(3) of the GDPR applies exclusively to dismissals related to the performance of their tasks, and, if so, whether that provision must be interpreted as precluding a national rule under which DPOs employed by public bodies may be dismissed only for just cause, even where the dismissal is *not* related to the performance of their tasks.

42. To answer these questions, ESA will first clarify what is covered by the expression "dismissed or penalised … for performing his tasks" in the second sentence of Article 38(3) of the GDPR. Second, ESA will address the extent of EEA States' discretion to extend the safeguards enjoyed by DPOs under the second sentence of Article 38(3) of the GDPR.[59]

43. As is clear from settled case law, in interpreting a provision of EEA law, it is necessary to consider not only its wording, by considering the latter's usual meaning in everyday language, but also the context in which the provision occurs, and the objectives

[56] In the present case, the applicant was dismissed with notice. It appears that both parties agree that the applicant was dismissed without just cause, as confirmed by both the Princely Supreme Court and the Constitutional Court, see pages 11 and 13 of the Request.
[57] As held by the Princely Supreme Court, in its interpretation of Article 24 of the Data Protection Act in light of Article 38 of the GDPR, see the Request, pages 10–11.
[58] As held by the Constitutional Court, in its interpretation of Article 24 of the Data Protection Act in light of Article 38 of the GDPR, see the Request, page 13. Compare also paragraphs 7-8 of these written observations.
[59] Compare Opinion of Advocate General Richard de la Tour in Case C-534/20 *Leistritz AG* v *LH*, EU:C:2022:62, paragraph 20.

pursued by the rules of which it is part.[60] ESA recalls that where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.[61]

5.2.2 Protection afforded to DPOs by the GDPR

44. At the outset, ESA notes that the GDPR does not define the terms 'dismissed', 'penalised' and 'for performing his tasks' featuring in the second sentence of Article 38(3) thereof.[62]

45. The **wording** of the prohibition against dismissing or penalising DPOs, as set out in Article 38(3) of the GDPR, ensures that DPOs are protected from any decision that would terminate or adversely affect the performance of their duties.[63] A measure that terminates a DPO's employment contract, and thereby also ends their function as DPO, may constitute such a decision.[64] This prohibition applies equally to DPOs employed by the controller or processor and to those engaged via a service contract.[65]

46. However, the wording of the provision imposes a limitation: it prohibits the termination of a DPO's employment contract solely on grounds related to the performance of his or her tasks.[66]

47. The **objective** pursued by the second sentence of Article 38(3) of the GDPR is to ensure that DPOs – regardless of whether they are employees of the controller or processor – can perform their duties and tasks independently.[67] Such independence

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[60] See Case C-534/20 *Leistritz*, EU:C:2022:495, paragraph 18, Case C-453/21 *X-FAB Dresden*, EU:C:2023:79, paragraph 19, Case C-560/21 *ZS*, EU:C:2023:81, paragraph 14 and Case C-357/20 *Magistrat der Stadt Wien (Grand Hamster – II)*, EU:C:2021:881, paragraph 20. See also Case E-13/23 *EFTA Surveillance Authority* v *The Kingdom of Norway*, paragraph 68.
[61] See Case E-17/24 *Söderberg*, paragraph 40 and case law cited; Joined Cases E-1/24 and E-4/24 *TC and AA*, paragraph 92.
[62] See Case C-534/20 *Leistritz*, paragraph 20.
[63] See Case C-534/20 *Leistritz*, paragraph 21.
[64] See Case C-534/20 *Leistritz*, paragraph 22.
[65] See Case C-534/20 *Leistritz*, paragraphs 23 and 24.
[66] See case C-534/20 *Leistritz*, paragraph 25 and compare it to the Opinion of Advocate General Richard de la Tour in Case C-534/20 *Leistritz*, paragraph 42, where he considered that there is no provision of EU (EEA) law capable of serving as a basis for special and concrete protection for DPOs against contractual termination on grounds *not* related to the performance of their tasks, even when termination of the employment relationship inevitably results in those tasks being brought to an end.
[67] See recital 97 of the GDPR. That objective is also apparent from the first and third sentences of Article 38(3) of the GDPR.

must necessarily enable them to carry out those tasks in accordance with the GDPR's overarching objective: to ensure a high level of protection of natural persons within the EEA by ensuring a consistent and homogeneous application of the rules safeguarding their fundamental rights and freedoms in relation to the processing of personal data.[68]

48. Protecting DPOs against any decision that terminates their duties on the grounds of performing those duties primarily serves to preserve the functional independence of the DPO and, thereby, to ensure the effective application of the GDPR. However, the second sentence of Article 38(3) of the GDPR is not intended to regulate the broader employment relationship between a controller or processor and its staff members.[69]

49. This interpretation is further supported by a **contextual** reading of the provision. The GDPR was adopted on the basis of Article 16 TFEU, which concerns the protection of natural persons with regard to the processing of personal data and the free movement of such data. Beyond the specific protection of the DPO provided in the second sentence of Article 38(3) of the GDPR, rules concerning protection against the termination of a DPO's employment contract do not relate to the protection of natural persons or the free movement of personal data but rather fall within the scope of social policy.[70]

50. Against this background, the CJEU has consistently held that the second sentence of Article 38(3) of the GDPR applies only to dismissals – including the termination of a DPO's employment contract – related to the performance of DPO tasks.[71]

51. The next question to be assessed is whether EEA States may extend those safeguards by requiring that a controller or processor may only terminate a DPO's

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[68] See Case C-534/20 *Leistritz*, paragraph 26.
[69] See Case C-534/20 *Leistritz*, paragraph 28. The Article 29 Data Protection Working Party Guidelines on Data Protection Officers also explained that "*As a normal management rule and as it would be the case for any other employee or contractor under, and subject to, applicable national contract or labour and criminal law, a DPO could still be dismissed legitimately for reasons other than for performing his or her tasks as a DPO (for instance, in case of theft, physical, psychological or sexual harassment or similar gross misconduct)*", 16/EN WP 243 rev.01, revised and adopted on 5 April 2017, these Guidelines were endorsed by the EDPB on 25 May 2018 during its first plenary meeting, available at: www.edpb.europa.eu/our-work-tools/our-documents/guidelines/data-protection-officer_en (last visited 8 July 2025), page 16.
[70] See Case C-534/20 *Leistritz*, paragraph 31.
[71] See Case C-534/20 *Leistritz*, paragraph 28, Case C-453/21 *X-FAB*, paragraph 27, and Case C-560/21 *ZS*, paragraph 22.

employment contract for *just cause*, even when the termination is *not* related to the performance of DPO tasks.

5.2.3 EEA States' discretion to extend the safeguards provided to DPOs

52. The second sentence of Article 38(3) of the GDPR regulates the rules on the dismissal of DPOs, but only in so far as the dismissal relates to the performance of their tasks, which is presumed to be proper.[72] Although the provision sets out minimum requirements, it does not prevent EEA States from maintaining or introducing more stringent protective measures, provided that these measures are compatible with EEA law.[73] Accordingly, EEA States may decide to strengthen the independence of DPOs by imposing additional safeguards concerning the termination of their employment contracts.[74]

53. Each EEA State retains the competence[75] to lay down specific provisions on the termination of a DPO's employment contract, provided that such rules comply with EEA law and, in particular, the protection afforded to DPOs under the GDPR.[76] Provisions aimed at protecting a DPO against dismissal fall within the scope of safeguarding natural persons with regard to the processing of personal data only insofar as such rules are intended to preserve the DPO's functional independence, in accordance with the second sentence of Article 38(3) of the GDPR.[77]

54. However, such increased protection cannot undermine the achievement of the GDPR's objectives. That would be the case if such measures prevented a controller or processor from dismissing a DPO who no longer possessed the professional qualities required under Article 37(5) of the GDPR, or who failed to perform his or her tasks in accordance with the provisions of that regulation.[78]

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[72] See Opinion of Advocate General Richard de la Tour in Case C-534/20 *Leistritz*, paragraphs 39 and 40.
[73] See Case C-534/20 *Leistritz*, paragraph 33.
[74] Compare Opinion of Advocate General Richard de la Tour in Case C-534/20 *Leistritz*, paragraph 42.
[75] See Case C-534/20 *Leistritz*, paragraph 32.
[76] See Case C-534/20 *Leistritz*, paragraph 34 and compare Opinion of Advocate General Richard de la Tour in Case C-534/20 *Leistritz*, paragraph 44.
[77] See Case C-453/21 *X-FAB*, paragraph 30.
[78] See Case C-534/20 *Leistritz*, paragraph 35, Case C-453/21 *X-FAB*, paragraphs 32-33, and Case C-560/21 *ZS*, paragraph 27.

55. The CJEU has consistently held that EEA States may apply a 'just cause' requirement for dismissal of a DPO, even when the termination is not related to the performance of DPO tasks, provided that such legislation does not undermine the achievement of the objectives of the GDPR, in particular the functional independence of the DPO.[79]

5.2.4 The protection afforded DPOs under Liechtenstein law

56. As set out above, the protection offered to DPOs under the second sentence of Article 38(3) of the GDPR applies only to dismissals related to the performance of DPO tasks. However, EEA States may extend that protection, for example, by adopting a national provision under which a public body may dismiss a DPO in employment *only* for just cause, even where the dismissal is *not* related to the performance of DPO tasks, provided it does not undermine the achievement of the objectives of the GDPR.

57. As the jurisdiction of the Court is limited to the interpretation of EEA law, it is for the national court to assess the precise scope of the reference to EEA law in national law.[80] It is for the referring court to determine whether Liechtenstein law permits the termination of a DPO's employment contract solely for just cause, even in circumstances where the termination is not related to the performance of DPO tasks.

58. If the referring court finds that Liechtenstein law extends the safeguards provided to DPOs under the second sentence of Article 38(3) of the GDPR to include dismissals not related to the performance of their tasks, it is settled case law that provisions or concepts taken from EEA law must be interpreted uniformly, irrespective of the circumstances in which they are applied.[81]

59. If the referring court determines that, under Liechtenstein law, the protection granted to DPOs under Article 38(3) of the GDPR does not extend to dismissals unrelated to the performance of their tasks – and that a DPO's employment contract may be terminated with notice but without just cause – it must ensure, in light of the principles

[79] See Case C-534/20 *Leistritz*, paragraph 36, Case C-453/21 *X-FAB*, paragraph 36, and Case C-560/21 *ZS*, paragraph 31.
[80] Compare Case E-9/22 *Verkfræðingafélag Íslands and Others*, paragraph 25, Case E-2/23 *A Ltd*, paragraph 36, and Case E-3/24 *Margrét Rósa Kristjánsdóttir* v *Icelandic Health Insurance (Sjúkratryggingar Íslands)*, paragraph 33.
[81] *Ibid*.

of equivalence and effectiveness, that such a dismissal does not circumvent the protection afforded to DPOs under the second sentence of Article 38(3) of the GDPR.[82]

60. Where national legislation allows for the termination of a DPO's employment contract for any reason with a notice, there is an inherent risk of circumventing the protection afforded under Article 38(3) of the GDPR. This could enable controllers or processors to remove a DPO under the pretext of lawful termination, even where the real motive relates to the performance of the DPO's statutory tasks. Such practices would undermine the DPO's functional independence, which Article 38(3) expressly protects, and could deter DPOs from fulfilling their role effectively, thereby compromising the broader objectives of the GDPR.

61. An EEA State may choose whether or not to extend the protection under Article 38(3) of the GDPR to terminations *unrelated* to the performance of DPO tasks. However, in either case – especially if it chooses not to extend such protection – the applicable rules on termination must not be used to circumvent the safeguards that Article 38(3) of the GDPR requires in relation to the DPO's performance of their duties.[83]

62. Effective judicial protection, including the right to fair trial is a general principle of EEA law.[84] ESA submits that it necessarily includes the right to mount an effective defence, especially in order to avoid circumvention of the obligations stemming from EEA law. This includes, in particular, having the national court review whether or not the termination is related to the performance of DPO tasks.[85]

63. As noted by the referring court, allowing employers to terminate a DPO without statutory safeguards – such as requiring just cause – may enable them to remove DPOs they find undesirable, thereby undermining the role and independence of the

[82] Compare Case E-11/23 *Låssenteret AS* v *Assa Abloy Opening Solutions Norway AS*, paragraphs 44 and 53, Case E-2/19 *D and E*, paragraph 57, and Case E-10/20 *ADCADA Immobilien AG PCC in Konkurs* v *Finanzmarktaufsicht*, paragraph 51. Compare also Case C-534/20 *Leistritz*, paragraph 35, Case C-453/21 *X-FAB*, paragraph 32, and Case C-560/21 *ZS*, paragraph 27.
[83] Compare Case E-18/24, *The Norwegian State* v *Greenpeace Nordic, Nature and Youth Norway*, paragraphs 106–111.
[84] See Joined Cases E-11/19 and E-12/19, *Adpublisher,* paragraph 50. See also case E-25/24 *Dartride AS* v *Norwegian State*, paragraphs 75 and 79.
[85] See Case E-25/24 *Dartride AS* v *Norwegian State*, paragraphs 75 and 79. See also Case E-14/24, *Elmatica AS* v *Confidee AS and Vidar Olsen*, paragraph 29.

DPO.[86] It is therefore for the national court to ensure that the enhanced protection against dismissal under the second sentence of Article 38(3) of the GDPR is not undermined or circumvented when the termination of a DPO's employment contract under national law effectively results in their removal from the DPO role.

64. In conclusion, ESA submits that the second sentence of Article 38(3) of the GDPR must be interpreted as applying to the dismissal of a DPO, including the termination of a DPO's employment contract, in so far as it relates to the performance of that officer's tasks. Moreover, the second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may terminate the employment contract of a DPO only with just cause, even if the contractual termination is not related to the performance of DPO tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR.

5.3 The third question

65. By its third question, the referring court essentially asks whether the functional independence of the DPO, as enshrined in the second sentence of Article 38(3) GDPR, requires that any dismissal contrary to this provision, including termination of the employment relationship, be deemed void and the employment relationship to be maintained.

66. In the absence of relevant EEA rules and in accordance with the principle of national procedural autonomy, it is for the national legal order of each EEA State to lay down rules governing the legal procedures to ensure the protection of the rights that individuals acquire under EEA law, while respecting the principles of equivalence and effectiveness.

67. This entails that the procedural rules governing the protection of rights under EEA law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of

[86] See the Request, page 11.

effectiveness).[87] It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness.[88] In addition, EEA law requires that national legislation does not undermine the right to effective judicial protection.[89] These principles apply equally to the GDPR.[90]

68. The GDPR includes a chapter on remedies, liability and penalties (Chapter VIII). Within this chapter, Article 82 of the GDPR provides for a right to compensation for any person who has suffered damage as a result of an infringement of the GDPR, although the corresponding recital appears to confine this right to damage suffered as a result of processing, which is not at stake in the present case.[91]

69. Furthermore, Article 83(4)(a) of the GDPR provides for the possibility of administrative fines being imposed in case of an infringement of, *inter alia*, Article 38 GDPR. However, it follows from Article 83(7) of the GDPR that it is not mandatory[92] for EEA States to impose such administrative fines on public authorities and bodies, and the Request indicates indeed that under Liechtenstein law, no fines are imposed on public bodies such as the University of Liechtenstein.[93]

70. Moreover, ESA understands that EEA law does not provide for a remedy maintaining an employment relationship in the event of a dismissal contrary to Article 38(3) of the GDPR. Article 84 of the GDPR nevertheless specifies that EEA States shall lay down the rules on other penalties applicable to infringements of the GDPR, in particular for infringements which are not subject to administrative fines, and provides that such

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[87] Case E-25/24 *Dartride AS* v *Norwegian State*, paragraph 79. Similar principles apply in relation to penalties for infringement of EEA law: compare, Case 68/88, *Commission* v *Greece*, EU:C:1989:339**,** paragraphs 23–24, and Case C-574/15, *Mauro Scialdone*, EU:C:2018:295, paragraphs 28–29.
[88] Joined Cases E-1/24 and E-7/24, *TC and AA*, paragraphs 77 and 99.
[89] Case E-14/24, *Elmatica AS* v *Confidee AS and Vidar Olsen*, paragraph 29 and Case E-11/23, *Låssenteret AS* v *Assa Abloy Opening Solutions Norway AS*, paragraph 44.
[90] Compare, Case C-683/21, *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949, paragraph 66; Case C-300/21, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, EU:C:2023:370, paragraphs 53 and 54; Case C-507/23, *Patērētāju tiesību aizsardzības centrs*, EU:C:2024:854, paragraphs 31–36.
[91] Recital 146 of the GDPR links the right to compensation to damage which a person may suffer as a result of processing that infringes the GDPR, whereas Article 82 of the GDPR refers more generally to damage as a result of an infringement of the GDPR. Certain judgments of the CJEU also refer to damage suffered by the "data subject", compare Case C-300/21, *Österreichische Post (Non-material damage in connection with the processing of personal data)*, paragraphs 31–40.
[92] Compare Case C-683/21, *Nacionalinis visuomenės sveikatos centras*, paragraphs 68–69.
[93] Request, page 24.

penalties shall be effective, proportionate and dissuasive.

71. In the absence of relevant EEA rules,[94] it is therefore for the national legal order of Liechtenstein to determine the procedural consequences attached to, and the remedies available against a dismissal contrary to the second sentence of Article 38(3) of the GDPR, subject to compliance with the principles of equivalence and effectiveness, as well as with the right to effective judicial protection.

72. ESA notes that Article 3 EEA requires EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law. It is inherent in the objectives of the EEA Agreement that national courts are bound, as far as possible, to interpret national law in conformity with EEA law.[95] Consequently, they must, as far as possible, apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law.[96] Where there has been a breach of EEA law, it is for the national court, as far as possible, to interpret and apply the relevant provisions of national law in such a way that it is possible to nullify the consequences of that breach of EEA law.[97]

73. As regards the principle of equivalence, certain parts of the Request suggest that under Liechtenstein law, the only remedy available in the context of an analogous domestic action against a dismissal contrary to applicable national rules would be compensation.[98] This is for the referring court to ascertain and not a matter of EEA law. In this scenario, the principle of equivalence would not require dismissals contrary to Article 38(3) of the GDPR to be void or the employment relationship to be maintained.

74. In contrast, if national rules governing similar actions in Liechtenstein were to render the termination void, then the principle of equivalence would require this remedy to be

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[94] Other than, potentially, Articles 82 and 84 GDPR (see paragraphs 68–70 above).
[95] See Case E-2/21 *Norep AS* v *Haugen Gruppen AS,* paragraphs 43-44.
[96] See Case E-25/13 *Gunnar Engilbertsson* v *Íslandsbanki hf*., paragraph 159 and case law cited and Joined Cases E-11/19 and E-12/19, *Adpublisher,* paragraph 63.
[97] Case E-18/24, *The Norwegian State* v *Greenpeace Nordic, Nature and Youth Norway*, paragraph 106.
[98] See the Request, pages 25–26, referring to the position of the Constitutional Court of Liechtenstein according to which it would be disproportionate and alien to Liechtenstein law for a dismissal to be void and the employment relationship to be maintained in circumstances such as the present case.

also applicable to actions based on an infringement of Article 38(3) of the GDPR. In light of the case law referred to in paragraph 67 above, it is for the referring court to determine which remedies are available under the applicable national rules and to assess whether they comply with the principle of equivalence.

75. As regards the principle of effectiveness, the question arises whether national rules which only provide for remedies of compensatory nature or, in any event, do not allow for the dismissal to be void and the employment relationship to be maintained, render the exercise of rights conferred by Article 38(3) of the GDPR either impossible in practice or excessively difficult.

76. The question as to whether national legislation renders the application of EEA law impossible or excessively difficult must be analysed by reference to the proceedings as a whole, the way in which they are conducted and their particular features, along with, where relevant, the principles underlying the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[99]

77. It is for the national court to determine whether the absence of a remedy that would require dismissals contrary to Article 38(3) of the GDPR to be void and the employment relationship to be maintained renders the exercise of rights conferred by Article 38(3) of the GDPR impossible in practice or excessively difficult.

78. ESA submits that, as part of this examination, the referring court must also take into account whether the available remedies are, taken as a whole, sufficiently effective to ensure compliance with the functional independence of the DPO enshrined in the second sentence of Article 38(3) of the GDPR. It cannot be excluded that a merely symbolic compensatory remedy would not be in line with the principle of effectiveness if, for example, the consequences for the employer are so limited that the employer may be incentivised to consciously accept them as “the price to pay” to be able to

[99] See Joined Cases E-1/24 and E-7/25 *TC and AA,* paragraph 99; compare also Case C-582/23 *Wiszkier*, EU:C:2025:518, paragraph 42 and the case law cited.

dismiss the DPO despite the substantive conditions for such a dismissal not being met.[100]

79. In conclusion, ESA submits that the second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which does not require that dismissals contrary to this provision are void and result in the maintenance of the employment relationship between the employer and the DPO, provided that the principles of equivalence and effectiveness are complied with.

6 CONCLUSION

80. Accordingly, ESA respectfully submits to the Court that the answer to the Request should be as follows:

1. The second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may terminate the employment contract of a data protection officer only with just cause, even if the contractual termination is not related to the performance of that officer's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR.

2. The second sentence of Article 38(3) of the GDPR must be interpreted as applying to the dismissal of a data protection officer, including the termination of a data protection officer's employment contract, in so far as it relates to the performance of that officer's tasks.

3. The second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which does not require that dismissals contrary to this provision are void and result in the maintenance of the employment relationship between the employer and the data protection officer, provided that the principles of equivalence and effectiveness are complied with.

[100] See also in this regard the concerns set out in the Request, pages 24–26.

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