REPORT OF THE EFTA COURT 2022

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The year 2022 marked a welcome return to normal in the sense that life, and by extension work at the EFTA Court, was no longer dominated by the COVID-19 pandemic. The Court was finally able to hold hearings on site after a period of more than two years with remote hearings, a most welcome change for everyone involved. This is not to say that the conduct of the remote hearings was unsuccessful. We decided to benefit from the experience gained during the pandemic by allowing participants in hearings in advisory opinion cases to continue to take part remotely.

In May 2022, the Court organised the second judicial summit of the EFTA pillar. Judges from the Supreme Courts of Iceland and Norway, and from two of the highest courts of Liechtenstein – the State Court, and the Administrative Court, joined us for the summit. The programme of the summit included important subjects such as, the limits to homogeneity, and the rule of law both in the EU and the EEA. This judicial summit has proven to be an excellent platform for exchanging of views and experiences between Supreme Court judges of all three EFTA States and the EFTA Court and underscored the importance of dialogue at the highest judicial level. This event will certainly be repeated with regular intervals for years to come.

The most significant judgment handed down by the Court last year was undoubtedly the judgment in the Telenor case. The case concerned Telenor's challenge to the EFTA Surveillance Authority's (ESA) decision fining the company almost 112 million EUR for an abuse of a dominant position in breach of Article 54 EEA. The fine was unprecedented in the history of the EEA and many times higher than the two previous fines imposed by ESA. The case was highly complex and voluminous. The abuse at stake was margin squeeze for stand-alone mobile broadband. Following a detailed examination of the challenged decision, the Court upheld ESA's decision in its entirety. The Court emphasised the importance of rigorous judicial review in order to safeguard judicial protection.

Turning to other judgments from 2022, I would like to highlight that the Court continued to receive requests for advisory opinions concerning complicated questions of social security law. In *Einarsdóttir*, the Court held that it was not compatible with the Social Security Coordination Regulation, that Iceland granted a worker, who had been active on the employment market in Denmark, only the minimum maternity benefits available to those who were economically inactive. In *A* we concluded that a transitional benefit accorded under Norwegian law constituted a family benefit for the purposes of the Coordination Regulations. As a result, it was not permissible to reject A's application on the basis that she had only been a member of the Norwegian social security system for two years. Social security coordination is a cornerstone of the free movement of persons and is essential in ensuring that those who have made use of their EEA right do not suffer negative consequences.

My colleague for over ten years, Per Christiansen, is stepping down from the bench in early 2023 after serving as a Judge at the EFTA Court since 2011. During his time at the Court many of the Court's most important judgments have been delivered and a marked increase in the number of cases lodged at the Court has taken place. He will be fondly remembered for his valuable contribution to the Court.

Recent events in Europe demonstrate that commitment to peace, democracy, human rights and the rule of law cannot be taken for granted – it requires constant dedication and conviction. These long-standing common values unite the European Union, its Member States and the EFTA States. I am happy to say that the EFTA States have time and again demonstrated their commitment to upholding these

common values. In such uncertain times, it is important to reaffirm respect for the rule of law at both international and national level. The importance of a rule-based international order cannot be overstated, and it is fundamental to securing lasting peace.

Páll Hreinsson
President

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2022

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EFTA COURT

Telenor ASA and Telenor Norge AS

v

EFTA Surveillance Authority

Case E-12/20

(Action for annulment of a decision of the EFTA Surveillance Authority – Competition – Article 54 EEA – Market definition – Abuse of dominant position – Margin squeeze)

Judgement of the Court of 5 May 2022

Telenor ASA and Telenor Norge AS ("Telenor") brought a direct action before the Court against the EFTA Surveillance Authority ("ESA"), seeking annulment of ESA's decision of 29 June 2020 finding that Telenor had infringed Article 54 of the EEA Agreement in three separate instances of margin squeeze. ESA imposed separate fines for each of these infringements. In total the fines amounted to EUR 111 951 000.

By the contested decision, ESA found that Telenor held a dominant position in the wholesale market for access to and handling of data on mobile networks. Furthermore, ESA found that Telenor abused its position by charging wholesale tariffs that entailed negative margins for several of Telenor's competitors in the retail market for the provision of stand-alone mobile broadband services to residential customers in Norway – a so called margin squeeze. The infringements related to instances of margin squeeze imposed by Telenor on Network Norway AS from 1 August 2008 to 31 August 2010; on Ventelo AS, Ventelo Norge AS and Ventelo Bedrift AS from 1 January 2008 to 30 November 2010; and on service providers from 1 January 2008 to 31 December 2012.

By its application, Telenor sought to annul ESA's decision in whole or in part, or to annul or reduce the fines imposed. In particular, Telenor submitted that ESA erred when defining the retail market for

residential stand-alone mobile broadband (the relevant downstream market), that its conduct did not constitute an abuse, that ESA's power to impose a fine on the basis of the infringements relating to Network Norway and Ventelo was time-barred, that ESA erred in fact and in law when calculating the fines and that the fines should be reduced due to mitigating circumstances, in particular the length of the proceedings, and for reasons of proportionality.

The Court found that ESA had not erred in law. ESA had not failed to provide sufficient evidence to substantiate its conclusions, nor made any errors with regard to the definition of the relevant market. Neither had ESA erred in its finding that Telenor had abused its dominant position by imposing wholesale tariffs that would entail a negative margin for an equally efficient competitor. Since the Court found that ESA had substantiated the finding of infringements relating to Network Norway and Ventelo lasting until 31 August 2010 and 30 November 2010, respectively, ESA's power to impose fines was not time-barred.

Regarding the fines imposed, the Court found that Telenor was aware of the essential facts that justified the finding of a dominant position in the relevant market and the abuse of that position. As such, Telenor could not have been unaware of the anti-competitive nature of its conduct. Further, ESA had not erred in its calculation of the fines neither by not reducing the fines due to mitigating circumstances nor for reasons of proportionality. In relation to the length of the proceedings, the Court found that there had not been any undue delays or periods of inactivity in the context of the administrative proceedings. Although additional administrative and investigative steps inevitably added to the duration of the procedure, in the Court's view, the duration was reasonable in light of the volume and complexity of the case and to ensure respect for Telenor's rights of defence, as well as to establish the basis for a thorough investigation. Consequently, the Court dismissed Telenor's application in its entirety. «

https://eftacourt.int/cases/e-12-20/

PRA Group Europe AS

v

The Norwegian Government, represented by the Tax Administration

Case E-3/21

(Freedom of establishment – Direct taxation – Group contribution rules – Limitation on the deductibility of interest payments to affiliated parties – Comparable situations – Another tax advantage)

Judgment of the Court of 1 June 2022

The case concerned a request from Oslo District Court (*Oslo tingrett*) for an advisory opinion. Oslo District Court referred questions concerning whether the Norwegian rules on the limitation of deductibility of interests in combination with the group contribution rules were compatible with Articles 31 and 34 of the EEA Agreement.

The case before the national court concerned the PRA Group, including the holding company PRA Group Europe Holding S.à.r.l. ("PRA Holding") and its wholly owned subsidiary PRA Group Europe Subholding AS ("PRA Subholding"), which is subject to tax in Norway and financed by a combination of loan and equity capital from PRA Holding. In its tax returns for the fiscal years 2014 and 2015, PRA Sub-

holding claimed a full tax deduction for that debt interest. The claim was denied on the grounds that Section 6-41(3) of the Norwegian Tax Act limited the deductible amount to 30 per cent of the company's EBITDA (general income or uncovered loss for the year before the limitation of deductions under this Section, plus interest expenses and tax depreciation, and less interest income). Following the merger of PRA Holding and PRA Subholding, the latter sought the amendment of the tax assessments for the fiscal years 2014 and 2015. This was dismissed by the Tax Office on 7 July 2017, which upheld the previous tax assessment, and an appeal of that decision was dismissed by the Tax Appeal Board on 24 June 2020. On 8 September 2020, PRA lodged proceedings before Oslo District Court, seeking to be allowed a full tax deduction for interest payments on debt owed to affiliated companies.

The referring court sought guidance on whether it is a restriction of the

freedom of establishment when national legislation only allows a company liable to taxation in Norway, that is in a group with Norwegian-based companies, to apply group contribution rules to lessen or remove the impact of the limited interest deduction rules. The referring court also enquired whether a foreign EEA company which is part of a group with a Norwegian-based company, is in a comparable situation to that of a Norwegian-based company which is part of a group with another Norwegian-based company. Furthermore, it asked whether it is relevant for the comparability assessment that no actual group contribution had been made. Finally, the referring court sought advice on which overriding reasons in the public interest may justify such a restriction.

The Court held that the combination of the limited interest deduction and the group contribution rules constitutes an obstacle to the freedom of establishment. The Court held that Norwegian-based companies, which form part of a group with companies of other EEA States are placed at a disadvantage vis-à-vis companies in entirely Norwegian-based groups. Only the latter are able to lessen or remove the impact of the limited interest deduction rules through the application of intragroup contribution rules. In this respect, the Court held that the internal and cross-border situations are comparable. The fact that no actual group contribution had been made from the foreign EEA-based company to the Norwegian-based company is immaterial for this comparability assessment.

The Court further held that a restriction which arises from the combination of the interest deduction and the group contribution rules may be justified by the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, if national law does not provide the taxpayer with the opportunity to demonstrate that the transaction took place on terms corresponding to what would have been agreed had the relationship between the parties been one at arm's length, it goes beyond what is necessary to pursue that objective. «

https://eftacourt.int/cases/e-3-21/

Sýn hf.

v

EFTA Surveillance Authority

Case E-4/21

(Action for annulment of a decision of the EFTA Surveillance Authority – Article 61(3)(c) EEA – State aid – Admissibility – Obligation to initiate formal investigation procedure – Statement of reasons)

Judgment of the Court of 1 June 2022

Sýn hf. brought a direct action before the Court against the EFTA Surveillance Authority ("ESA") seeking an annulment of ESA's decision of 26 March 2021 on State aid to Farice ehf. for investment in a third submarine cable connecting Iceland to Europe.

In the contested decision, ESA found that the aid to Farice ehf. constituted State aid within the meaning of Article 61(1) of the EEA Agreement. ESA further stated that it had no doubts that the State aid was compatible with the functioning of the EEA Agreement under Article 61(3)(c) EEA and had therefore no objections to the implementation of the measure.

ESA requested the Court to dismiss the application as inadmissible on the grounds that Sýn hf. was not an "interested party" within the meaning of Article 1(h) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The Court disagreed and found that Sýn hf.'s interests could be adversely affected by the grant of the State aid and found the application admissible.

The application for annulment was based on two pleas. First, that ESA had failed to open the formal investigation procedure under Article 1(2) of Part I of Protocol 3 SCA, given that ESA should have had doubts with regard to the compatibility of the aid with the functioning of the EEA. Second, that ESA had failed to fulfil its obligations under Article 16 SCA adequately to state reasons, including failure to apply the principles of the relevant guidelines, in the assessment.

The Court recalled that the lawfulness of a decision not to raise objections depends on whether the assessment of the information and evidence which ESA had at its disposal during the preliminary examination phase should objectively have raised doubts as to the compatibility of the measure. The Court also noted that ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties concerning the measure.

The Court found that Sýn hf. had established that ESA was aware of documents that called into question the information at its disposal and on which it relied in the contested decision, without going beyond a mere examination of the information submitted by the Icelandic authorities. Furthermore, the Court held that the incomplete nature of the assessment of the scope of application of the guidelines adopted by ESA had to be considered as another indication that ESA encountered serious difficulties in its preliminary examination. The Court thus concluded that there was a body of objective and consistent evidence that demonstrated that ESA adopted the contested decision despite the fact that ESA should have had doubts. Consequently, the Court found that the contested decision had to be annulled, and there was no need to examine the second plea. «

https://eftacourt.int/cases/e-4-21/

Anna Bryndís Einarsdóttir

v

the Icelandic Treasury

Case E-5/21

(Articles 6 and 21 of Regulation (EC) No 883/2004 – Social security – Migrant worker – Equality of treatment – Calculation of maternity benefit)

Judgment of the Court of 29 July 2022

Reykjavik District Court (*Héraðsdómur Reykjavíkur*) requested an advisory opinion concerning the interpretation of Regulation (EC) 883/2004 on the coordination of social security systems ("the Regulation").

The case before the national court concerned a decision of the Icelandic Maternity/Paternity Leave Fund not to take Ms Einarsdóttir's income earned in Denmark into account when determining the amount of her maternity benefit. The basis for that decision was that according to Icelandic law, the calculation of maternity benefit was to be based only on income earned on the domestic labour market.

The referring court sought guidance on whether income received in other

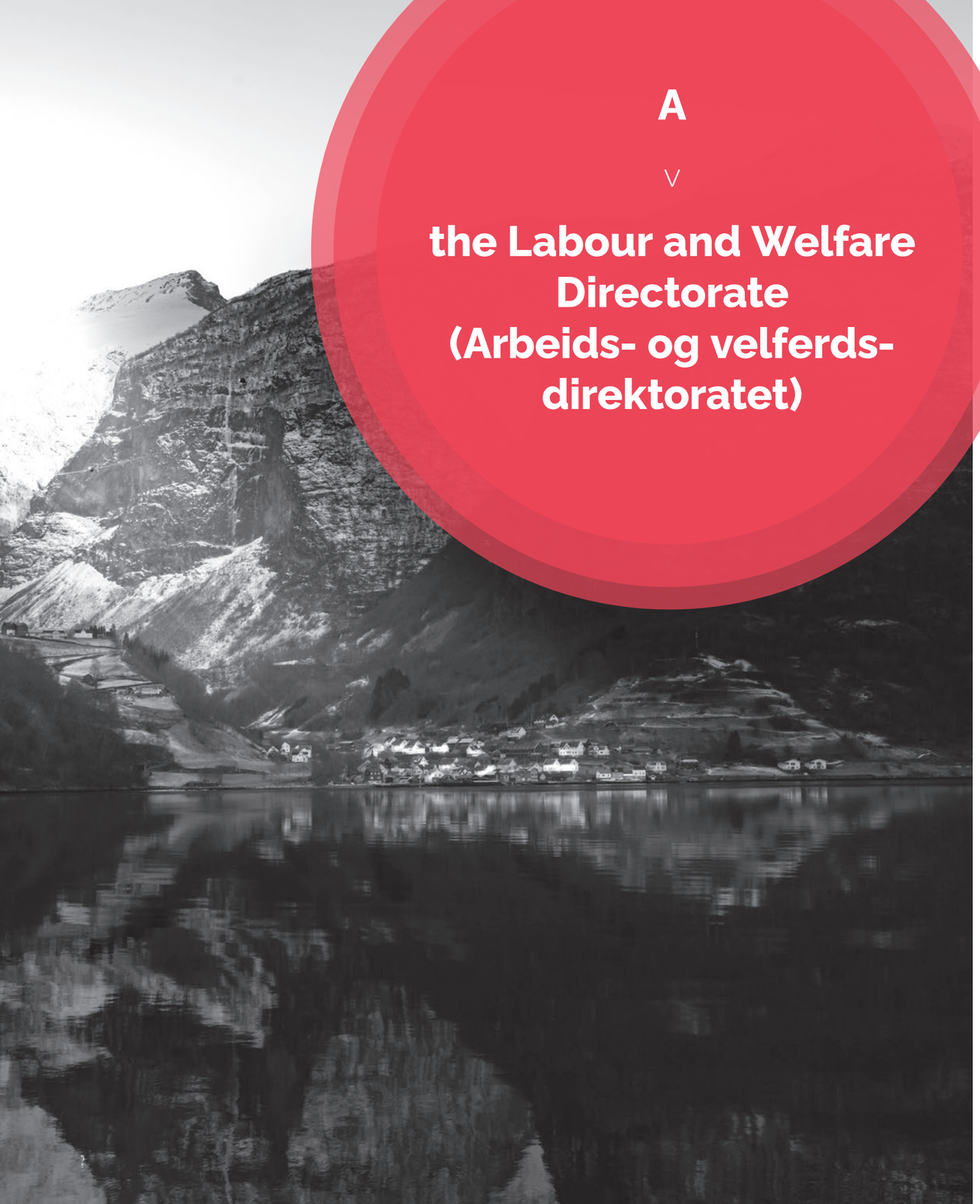
EEA States should be taken into account when calculating maternity/paternity benefits. The first part of the referred question concerned whether Article 6 of the Regulation obliges an EEA State to calculate the benefit in question on the basis of a person's aggregated wages on the labour market across the entire EEA. The second part of the question was whether a calculation that was based on a person's aggregate wages only on the domestic labour marked is an infringement of Article 29 of the EEA Agreement.

The Court noted that Article 6 of the Regulation concerns the entitlement to benefits, and not how benefits are calculated. Furthermore, that pursuant to Article 21(2) and (3) of the Regulation, the calculation of cash benefits is linked to the income paid in the domestic labour market. Accordingly, the competent institution is not obliged to calculate the amount of a benefit such as that at issue in the main proceedings, on the basis of income received in another EEA State.

However, the Court held that Article 21 of the Regulation must be interpreted in light of Article 29 EEA, which entails that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised their right to free movement. Thus, the Court found that attributing no income to periods of employment completed in other EEA States is incompatible with Article 21(2) and (3).

The Court therefore concluded that Article 21(2) and (3), interpreted in accordance with the objective set out in Article 29 EEA, requires that the amount of a benefit, such as that at issue in the main proceedings, granted to a migrant worker who, during the reference period set out in national law only had income in another EEA State, must be calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which that benefit is sought. «

https://eftacourt.int/cases/e-5-21/



A

v

the Labour and Welfare Directorate (Arbeids- og velferds-direktoratet)

Case E-2/22

(Regulation (EC) No 883/2004 – Social security – Family benefits – Transitional benefits – Requirement of occupational activity)

Judgment of the Court of 29 July 2022

The Norwegian National Insurance Court (*Trygderetten*) requested an advisory opinion from the Court concerning the interpretation of Regulation (EC) No 883/2004 on the coordination of social security systems ("the Regulation").

The case concerned a decision by the Norwegian Labour and Welfare Administration (NAV) to reject the grant of a transitional benefit to A. A, a Swedish national, was expecting a child. The basis for the rejection was that the National Insurance Act required three years' prior membership in Norway's social security system. At the time, A had only been a member for just under two years.

By its first question, the National Insurance Court asked whether a benefit such as the transitional benefit

constitutes a family benefit within the meaning of point (j) of Article 3(1) of the Regulation, or a non-contributory cash benefit within the meaning of Article 3(3), read in conjunction with Article 70. The Court observed that there is a close link between family expenses and a benefit such as in the main proceedings. Such a benefit alleviates the financial burden involved in the maintenance of one or more children by a single parent and mitigates the financial disadvantages in giving up income from occupational activity. The Court therefore found that a benefit such as the transitional benefit constitutes a family benefit under point (j) of Article 3(1).

The Court further found that the transitional benefit is not a non-contributory cash benefit under Article 3(3) read in conjunction with Article 70. Such benefits are those solely listed in Annex X to the Regulation and the transitional benefit does not appear in that annex.

By its second question, the National Insurance Court asked whether it is relevant for the assessment that there is a requirement of occupational activity for continued entitlement to the benefit from when the youngest child turns one year old. The Court observed that the fact that a benefit may also have other functions, for example to encourage employment and education necessary for entry into the job market by means of an occupational activity requirement, does not remove such a benefit from the scope of the Regulation, as long as it covers at least one or more of the risks listed in Article 3(1). Thus, the Court found that such a requirement of occupational activity is not relevant for the assessment. «

https://eftacourt.int/cases/e-2-22/

EFTA Surveillance Authority

v

Iceland

Case E-3/22

(Failure by an EFTA State to fulfil its obligations – Failure to comply – Regulation (EC) No 1069/2009 and Commission Regulation (EU) No 142/2011)

Judgment of the Court of 29 July 2022

On 28 January 2022, the EFTA Surveillance Authority ("ESA") brought an action seeking a declaration from the Court that Iceland had failed to fulfil its obligations under the Acts referred to at points 9b and 9c of Part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), namely Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 and Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-prod-

ucts and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive as amended and adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement, by failing to prevent the direct disposal of fallen stock (Category 3 slaughterhouse waste and home slaughter waste in authorised landfills without prior processing) and the burial on-site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the statutory conditions for such disposal method being met.

On 3 October 2018, ESA issued a letter of formal notice in which it concluded that Iceland had failed to fulfil its obligation under Article 4(3) of Regulation 1069/2009 and Article 32(1) of Regulation 142/2011 to maintain a system of official controls and under Article 4(4)(b) of Regulation 1069/2009 to have an adequate system in place on its territory to ensure that fallen stock, slaughterhouse waste (other than Category 1 specific risk material) and home slaughter waste is disposed of in landfills only after prior processing (in accordance with the requirements of Articles 12(c), 13(c) and 14(c) of Regulation 1069/2009); and to ensure that fallen stock or home slaughter waste is not buried on site, except where specifically authorised pursuant to Articles 19 or 20 of Regulation 1069/2009, and in accordance with Articles 12, 13 and 14 of that Regulation.

On 29 April 2020, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinion within three months of its receipt. On 20 October 2021, ESA decided to refer the matter to the Court.

It was undisputed that by the expiry of the time limit set in the reasoned opinion, Iceland had failed to prevent the direct disposal of fallen stock, Category 3 slaughterhouse waste and home slaughter waste in authorised landfills without prior processing, in

accordance with the requirements of Articles 12(c), 13(c) and 14(c) of Regulation 1069/2009, as well as the burial on site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the conditions of Articles 19 or 20 of that Regulation being met, contrary to Articles 12(c), 13(c) and 14(c). It was also undisputed that there had been a continuing lack of recognition by the competent authorities of their respective statutory responsibilities, and that the system for disposal of animal by-products was inadequate to permit disposal in accordance with the relevant EEA law or the absence of relevant official controls. Furthermore, Iceland did not provide any information suggesting that the prohibited disposal practices are the subject of targeted official controls or measures taken against relevant operators or that adequate changes (infrastructural or other) were made to the Icelandic animal by-products disposal system to enable disposal in accordance with EEA law requirements.

Thus, the Court held that Iceland had failed to fulfil its obligations under the Acts referred to at points 9b and 9c in Part 7.1 of Chapter I of Annex I to the EEA Agreement by failing within the time prescribed to adopt the measures necessary to: (i) implement and maintain a system of official controls in accordance with Article 4(3) of Regulation 1069/2009; (ii) establish an adequate system on its territory to ensure that animal by-products are treated in accordance with that regulation, as prescribed by Article 4(4)(b) of Regulation 1069/2009; and (iii) control the entire chain of collection, transport, use and disposal of animal by-products as required by Article 32(1) of Regulation 142/2011. «

https://eftacourt.int/cases/e-322/

EFTA Surveillance Authority

v

Iceland

Case E-6/22

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Regulation (EU) No 2016/778)

Judgment of the Court of 17 November 2022

The EFTA Surveillance Authority ("ESA") sought a declaration that Iceland failed to make Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines ("the Regulation"), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order as required by Article 7 EEA.

On 10 November 2020, ESA issued a letter of formal notice that Iceland had

failed to fulfil its obligations under Article 7 EEA by failing to make the Regulation part of its internal legal order. On 8 January 2021, Iceland responded to the letter of formal notice by informing ESA that the Regulation had not yet been implemented.

On 7 July 2021, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinion within three months following its notification, that is, no later than 7 October 2021. On 23 March 2022, ESA decided to refer the matter to the Court.

In its defence, submitted on 29 July 2022, Iceland did not dispute the facts as brought forward in the application, or the declaration sought by ESA. However, Iceland asserted that the implementation of Regulation 2016/778 into the national legal order had been finalised: on 15 June 2022 the Icelandic Parliament approved Act No 48/2022 which provided a legal basis for the implementation of Regulation 2016/778. The new legislation entered into force on 7 July 2022. Subsequently, a regulation implementing Regulation 2016/778 into the Icelandic legal order was published on 19 July 2022 and entered into force on the same day.

The Court held that Iceland had failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Act referred to at point 19bi of Annex IX (Financial Services) to the EEA Agreement (Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines), as adapted by Protocol 1 to the EEA Agreement. «

https://eftacourt.int/cases/e-06-22/

EFTA Surveillance Authority

v

Iceland

Case E-7/22

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Regulatory framework for markets in financial instruments)

Judgment of the Court of 17 November 2022

The EFTA Surveillance Authority ("ESA") sought a declaration that Iceland had failed to adopt the measures necessary to make certain Acts concerning the regulatory framework for markets in financial instruments, incorporated into Annex IX (Financial Services) to the Agreement on the European Economic Area by Decisions No 85/2019 and No 100/2019 of the EEA Joint Committee, part of its internal legal order as required by Article 7 of that Agreement.

ESA issued 22 letters of formal notice on 23 July 2020 (concerning Regulation 2017/568), 31 August 2020 (concerning Regulations 2017/575, 2017/576, 2017/585, 2017/586, 2017/1018, 2017/1799, 2017/1943, 2017/953, 2017/981, 2017/1111, 2017/1944, and 2017/1945), 8 October 2020 (concerning Regulation 2017/583) and 23 February 2021 (concerning Regulations 2016/2022, 2017/2194, 2016/824, 2017/980, 2017/988, 2017/1093, 2017/2382, and 2019/462) in which it concluded that Iceland had failed to fulfil its obligations under Article 7 EEA, by failing to make the Regulations part of its internal legal order. Iceland did not reply to the letters of formal notice. On 7 July 2021, ESA delivered 22 reasoned opinions, maintaining the conclusions set out in its letters of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinions within three months following their notification, i.e. by 7 October 2021.

On 5 October 2021, Iceland replied to the 22 reasoned opinions jointly.

Iceland informed ESA that the timeline foreseen for implementation of the Regulations was from November 2021 to January 2022. On 18 February 2022, Iceland informed ESA that the timeline foreseen was now from March to June 2022. On 23 March 2022, ESA decided to refer the matter to the Court, with its application lodged at the Court on 3 June 2022.

Iceland submitted that the facts of the case, as brought forward in the application, are correct and undisputed, and that it does not dispute the declaration sought by ESA. Iceland submitted that it had implemented 21 of the 22 Regulations into its national legal order by mid July 2022.

The Court held that Iceland had failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Acts referred to at points:

31bag	(Regulation 2016/2022),
31bak	(Regulation 2017/568),
31bar	(Regulation 2017/575),
31bas	(Regulation 2017/576),
31baz	(Regulation 2017/583),
31bazb	(Regulation 2017/585),
31bazc	(Regulation 2017/586),
31bazp	(Regulation 2017/1018),
31bazt	(Regulation 2017/1799),
31bazu	(Regulation 2017/1943),
31bazz	(Regulation 2017/2194),
31bad	(Regulation 2016/824),
31bazk	(Regulation 2017/953),
31bazl	(Regulation 2017/980),
31bazm	(Regulation 2017/981),
31bazn	(Regulation 2017/988),
31bazq	(Regulation 2017/1093),
31bazs	(Regulation 2017/1111),
31bazv	(Regulation 2017/1944),
31bazw	(Regulation 2017/1945),
31bazze	(Regulation 2017/2382),
31bazt	(Regulation 2019/462)

of Annex IX to the EEA Agreement, as adapted by Protocol 1 to the EEA Agreement. «

https://eftacourt.int/cases/e-07-22/

EFTA Surveillance Authority

v

Iceland

Case E-8/22

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Capital requirements framework for banks)

Judgment of the Court of 17 November 2022

The EFTA Surveillance Authority ("ESA") sought a declaration that Iceland had failed to adopt the measures necessary to make certain Acts concerning the capital requirements framework for banks, incorporated into Annex IX (Financial Services) to the Agreement on the European Economic Area by Decisions No 80/2019, 81/2019, 82/2019, 83/2019 and 17/2020 of the EEA Joint Committee, part of its internal legal order as required by Article 7 of that Agreement.

ESA issued 14 letters of formal notice, in total, in which it concluded that Iceland had failed to fulfil its obligations under Article 7 EEA, by failing to make the Regulations part of its internal legal order. Letters of formal notice were sent on 10 November 2020 (concerning Regulation 2019/439), others on

12 March 2021 (concerning Regulations 2016/98, 710/2014, 2016/99, 2016/100, 527/2014, 604/2014, 1152/2014, and 2016/861), 28 March 2021 (concerning Regulations 2017/180, 620/2014, and 2017/1486), and 31 March 2021 (concerning Regulations 2016/2070, and 524/2014).

On 6 May 2021, Iceland responded to the letters of formal notice by informing ESA that the Regulations had yet to be implemented. Iceland further stated that it planned to present a bill to Parliament in autumn 2021 in order to implement the Regulations.

On 7 July 2021, ESA delivered 14 reasoned opinions, maintaining the conclusions set out in its letters of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinions within three months following their notification, that is, no later than 7 October 2021.

On 27 August 2021, Iceland responded to the 14 reasoned opinions jointly. Iceland stated that a working group, appointed by the Minister for Finance and Economic Affairs, was preparing a legislative proposal for submission to Parliament in autumn 2021, pursuant to which the Central Bank of Iceland would be empowered to implement the Regulations. On 23 March 2022, ESA decided to refer the matter to the Court, with its application lodged on 3 June 2022.

In its defence, Iceland submitted that the facts of the case as brought forward in the application were correct and undisputed, and that it did not dispute the declaration sought by ESA. Iceland asserted, however, that the implementation of the Regulations into its national legal order had been finalised as they had been published and were in force as of 1 July 2022.

The Court held that Iceland had failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Acts referred to at points 14e (Regulation 2016/98), 14b (Regulation 710/2014), 14f (Regulation 2016/99), 14ae (Regulation 2016/100), 14g (Regulation 527/2014), 14i (Regulation 604/2014), 14k (Regulation 1152/2014), 14al and 14i (Regulation 2016/861), 14n (Regulation 2017/180), 14m (Regulation 2016/2070), 14o (Regulation 524/2014), 14p (Regulation 620/2014), 14m (Regulation 2017/1486 and Regulation 2019/439) of Annex IX to the EEA Agreement, as adapted by Protocol 1 to the EEA Agreement. «

https://eftacourt.int/cases/e-08-22/

2022

News and Events

EFTA COURT

Oral hearings – remote participation

During the first half of 2022, oral hearings of the Court continued to be conducted remotely as they had been for the two previous years due to the COVID-19 pandemic. From the autumn, however, oral hearings took place at the premises of the Court in Luxembourg, which was a welcomed development and change for all those involved.

In 2022, the Court adopted a decision regarding hybrid oral hearings. The decision provides that parties in the main proceedings and interested persons participating in oral hearings in Advisory Opinion cases, pursuant to Article 34 SCA, may participate in the hearing via video conference equipment or similar, provided that such participation is technically feasible. This has already proven to be a useful change for those participants.

The Court also decided to continue with the practice started during the pandemic, of streaming the oral hearings, and other public sittings, i.e. for delivery of judgments, live on its website.

Judicial Summit of the EFTA Pillar

On 19-20 May 2022, the EFTA Court held the second Judicial Summit of the EFTA pillar. Judges from the Supreme Courts of Iceland and Norway, and from two of the highest courts of Liechtenstein – the State Court, and the Administrative Court, joined the judges of the EFTA Court, and the Registrar, for the summit. This time the programme included important subjects such as the limits to homogeneity and the rule of law in the EU and the EEA.

As before, the judicial summit proved to be a great platform for exchanging views between Supreme Court judges of the three EEA EFTA States and the EFTA Court.

Other events

Visit to the European Court of Human Rights

A delegation from the EFTA Court, headed by the President of the Court, Páll Hreinsson, Judge Bernd Hammermann, and the Registrar of the Court, Ólafur Jóhannes Einarsson, visited the European Court of Human Rights in Strasbourg the 15 September 2022. They were welcomed by an ECtHR delegation headed by the President, Robert Spano, the Vice-President, Síofra O´Leary (now President of the ECtHR), Judges Arnfinn Bårdsen, Carlo Ranzoni and Georges Ravarani, and the Registrar, Marialena Tsirli.

The Presidents and Judges of both Courts, and the Registrar of the EFTA Court, gave talks about current legal issues regarding human rights and EEA law, inter alia about the latest developments in the ECtHR case-law regarding judicial independence and the rule of law, status of fundamental rights under the EEA Agreement and the EEA and fundamental rights in general. The talks were followed by an enthusiastic and substantive discussion on these topical and important issues.

The EEA Agreement, the ECHR and the EU Charter of Fundamental Rights – A Multifaceted Relationship?

On 6 October 2002, Mr Robert Spano, President of the European Court of Human Rights gave a speech, at the invitation of the EFTA Court, at the European Convention Centre in Luxembourg, in the presence of an audience of over 100 people, including the President of the EFTA Court, Páll Hreinsson, Judge Bernd Hammermann, President of the Court of Justice of the EU, Mr Koen Lenaerts, the President of the General Court of EU, Mr Marc Van der Woude, judges from both the Court of Justice of the EU and the General Court, and advocate-generals of the CJEU. The

speech was entitled The EEA Agreement, the ECHR and the EU Charter of Fundamental Rights – A Multifaceted Relationship?

President Hreinsson welcomed the distinguished audience and introduced President Spano and his remarkable work throughout the years. He mentioned, in particular, Spano´s contribution in the international field as a Judge and the President of the European Court of Human Rights during the turbulent times of late, through to his dedication to the protection of human rights and the rule of law in Europe.

In his talk, President Spano described the intricate relationship between the EEA Agreement, the ECtHR and the EU Charter of Fundamental Rights. He gave an historical overview of different phases of the evolution of the European Court of Human Rights and the Convention of Human Rights, and how historical development underlined the synergy between the ECtHR, CJEU and the EFTA-pillar of the EEA Agreement. In his view, this synergy between the systems needs to be safeguarded at all times. He also underlined the importance of human rights and international rule-based order in these turbulent times.

President Spano´s insight into the development of fundamental rights and his emphasis on the vital collaboration between the European courts inspired the audience to engage in an animated discussion at the end of his talk.

Swearing in of Members of the EFTA Surveillance Authority

On 19 January 2022, during a public sitting of the EFTA Court, Mr Arne Røksund from Norway took the oath as a new member of the EFTA Surveillance Authority. He is also the President of the Authority.

On the same occasion, Mr Árni Páll Árnason from Iceland took the oath as a new member of the EFTA Surveillance Authority.

The third ESA college member, Stefan Barriga, took his oath of office in October 2021.

College members of the EFTA Surveillance Authority are appointed by common accord of the Governments of the three EFTA States parties to the EEA Agreement, for a period of four years.

Visits to the Court

Throughout the year, the Court welcomed numerous groups and individuals interested in learning about the functioning and the activities of the Court.

President Hreinsson received the Icelandic Minister for Foreign Affairs, Þórdís Kolbrún Reykfjörð Gylfadóttir, together with Ambassador Kristján Andri Stefánsson, at the Court in April. In May, Judge Christiansen and Judge Hammermann welcomed the EFTA Secretary-General, Henri Gétaz, EFTA Deputy Secretary-General, Hege Hoff and Director Volker Täube from the EFTA Statistical Office.

Other notable visits included the Icelandic Parliamentary Ombudsman, Skúli Magnússon, accompanied by his staff, Professor Halvard Haukeland Fredriksen who gave a talk at the Court, several groups of judges and lawyers from Norway, as well as student groups from several European universities and trainees from the EFTA organisations.

2022

Judges and Staff

Judges and Staff

The members of the Court in 2022 were as follows:

Mr Páll Hreinsson, President (nominated by Iceland)
Mr Per Christiansen (nominated by Norway)
Mr Bernd Hammermann (nominated by Liechtenstein)

The judges are appointed by common accord of the Governments of the EFTA States.

Mr Ólafur Jóhannes Einarsson is the Registrar of the Court.

Ad hoc Judges of the Court are:

Nominated by Iceland:
Ms Ása Ólafsdóttir, hæstaréttardómari (Supreme Court Judge)
Mr Gunnar Þór Pétursson, Reykjavik University (Professor)

Nominated by Liechtenstein:
Ms Nicole Kaiser, Rechtsanwältin (lawyer)
Mr Martin Ospelt, Rechtsanwalt (lawyer)

Nominated by Norway:
Mr Ola Mestad, University of Oslo (Professor)
Ms Siri Teigum, Advokat (lawyer)

In addition to the Judges, the following persons were employed by the Court in 2022:

Ms Annette Lemmer, Receptionist/Administrative Assistant
Ms Bryndís Pálmarsdóttir, Senior Administrator
Ms Candy Bischoff, Administrative Assistant
Mr Gjermund Fredriksen, Financial Officer
Ms Hanna Faksvåg, Legal Secretary
Mr Hans Ekkehard Roidis-Schnorrenberg, Legal Secretary
Mr Håvard Ormberg, Legal Secretary
Ms Hrafnhildur Mary Eyjólfsdóttir, Personal Assistant
Ms Katie Nsanze, Administrative Assistant
Ms Kerstin Schwiesow, Personal Assistant
Mr Kristján Jónsson, Legal Secretary
Mr Michael-James Clifton, Legal Secretary
Mr Ólafur Ísberg Hannesson, Legal Secretary
Mr Ólafur Jóhannes Einarsson, Registrar
Ms Silje Næsheim, Personal Assistant
Mr Thierry Caruso, Caretaker/Driver