EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
Belgium

Reykjavík, Iceland, 10 February 2020

COMPLAINT
TO THE EFTA SURVEILLANCE AUTHORITY CONCERNING
FAILURE TO COMPLY WITH EEA LAW

Complainant:
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1 COMPLAINT

The complainant holds that the Icelandic state has failed to comply with EEA law by having wrongfully implemented Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies (the "Directive"). Namely, that the Icelandic state is in breach of Article 6 of the Directive and Article 3 of the EEA Agreement, by not ensuring judicial or administrative procedures to enforce the obligations placed upon employers by the Directive.

2 FACTS GIVING RISE TO THE COMPLAINT

On 26 September 2019 a total of 102 employees of the Icelandic financial undertaking *Arion bank* were laid off. Most of these employees are members of the complainant.

In the lead up to the layoffs no actual consultation with employees' representatives took place. Only one union representative got an informal notification, about a week earlier, that the bank was contemplating laying off an unspecified number of employees. The representative was also told that he could not under any circumstance discuss this information with anyone, not even his union, as it should be considered highly confidential and subject to applicable rules on insider information.

The same representative was convened to a meeting with the directors of the bank a week later, in the afternoon of 25 September 2019, where he was given further accounts of the layoffs which had then been firmly determined and were to be executed the next morning. At this latter meeting, the representative was presented with statistical information on the number of employees who were to be subject to the layoffs, their age, seniority, division etc. Less than 24 hours later the bank started laying off the employees.

The representative never had any practical or reasonable opportunity to have any effect on the decision making of the bank, or to reach an agreement on the collective redundancies.

After these layoffs the complainant sought legal advice on if the bank had acted in accordance with Act No. 63/2000 on collective redundancies (the "Act"), which implemented the Directive into Icelandic law. The result was that the bank certainly did not comply with Articles 5 and 6 of the Act, which prescribe the minimum level of consultation required in the lead up to collective redundancies, cf. Article 2 of the Directive. However, that the Act did not provide for any useful or practicable procedures to remedy the breach or to enforce the obligation placed upon the bank by the Act.

3 LEGAL RATIONALE OF THE COMPLAINT

3.1 The employer's breach of the consultation obligation

Articles 5 and 6 of the Act implement the rules of Article 2 of the Directive into Icelandic law, i.e. the obligation of an employer to consult with workers' representatives when contemplating collective redundancies. This obligation has been firmly confirmed by the ECJ, e.g. by *Judgment No. C-383/92, Commission v. UK*:

> "Article 2 of the directive requires an employer contemplating collective redundancies to begin consultations with the workers' representatives with a view to reaching an agreement. Such consultations must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences. The employer is required to supply the workers' representatives with all relevant information and must in any event give in writing the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected (para. 10)."

Accordingly, it should be considered clear that the obligation placed on employers by Article 2 of the Directive should be construed so that employers shall provide workers' representatives with a reasonable and practicable opportunity to actually effect the decision making process of the employer, in the lead up to collective redundancies. The consultation can therefore not be only formal or a pretense. The objective of this obligation placed on employers is to mitigate and/or soften the effect of collective redundancies on employees. This has been repeated over and again in ECJ jurisprudence on the Article (see e.g. *Judgment No. C-201/15, para 28*).

It is the view of the complainant that Arion bank most certainly did not comply with these minimum standards when preparing and contemplating the collective redundancies which were affected on 26 September 2019. A workers' representative was only notified, about a week before, that the bank was contemplating laying off an undetermined number of workers. The representative was barred from discussing this information with anyone and not given any chance to partake in the decision-making process. He was then given further information less then 24 hours before the bank started handing out notices to employees, i.e. when the decision of the bank was final.

3.2 Remedies provided by the Act

Pursuant to Article 11 of the Act an employer, who intentionally breaches the rules of the Act, is liable for damages "in accordance with general rules". This requires, in accordance with general principles of Icelandic tort law, that the effected party must evidence certain damages caused by the employer's breach. Provided that each effected employee is certainly paid for the lay-off period in accordance with applicable collective agreements, which must be done in any case notwithstanding whether the employee is laid off as part of collective redundancies or not, this does nothing to enforce compliance with the rules of the Act as it would be next to impossible for any effected party to evidence any further damages suffered with a direct causal link to the employer's breach.

The result of this is that employers that intend to terminate a group of employees can easily avoid complying with the Act by paying the employees during the termination period, which they would still be required to do, even when laying off individual employees if there were no collective redundancies.

Pursuant to Article 12 of the Act, breaches against Articles 5 – 7 of the Act may be punishable by fines to be paid to the treasury. No further instruction on how the fine mechanism should be enforced is provided, neither by the Act nor by explanatory notes. The only thing noted in the explanatory notes is that Article 12 of the Act should, in addition to Article 11 of the Act, contribute the correct implementation of the Directive. Accordingly, it is unclear if the effected parties, or their respective unions, can file a suit or in any other manner request that an employer should be made to pay a fine. Furthermore, it is unclear if and how any public authority can demand a fine. Accordingly, to the best of the complainant's knowledge, a fine has never been imposed under the Article. This clearly goes to show that the rule does nothing to ensure employers' compliance with the Act. It must be noted here that the general rule of Icelandic law is that only public authorities, in most cases prosecution authorities, can enforce punitive sanctions. Private parties can, in contrast, only demand such sanctions when expressively prescribed by law. The complainant, or individual affected employees, can accordingly not impose such sanctions.

Article 6 of the Directive prescribes that member states shall ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to workers or their representatives. Failure to provide for effective sanctions in the event of a breach should be considered as a breach of Article 3 of the EEA agreement, cf. e.g. *ECJ Judgment No. C-383/92, para. 44.*

Furthermore, in the opinion of the complainant, it follows from the aim of the Directive, which is to provide greater protection to workers in the event of collective redundancies, that workers or their representatives should have reasonable judicial or administrative remedies available when employers act in breach of the

rules provided by the Directive. Accordingly, for the implementation of the Directive to be considered satisfactory, each member state must provide such remedies to ensure the protection which the Directive is intended to provide.

The complainant holds, that by not ensuring any useful or practicable remedies or resorts for workers or their unions, when the rules of the Act are certainly breached, that the Icelandic state acted in breach of Article 6 of the Directive and therefore Article 3 of the EEA agreement.

3.3 Other relevant jurisprudence

In *ECJ Judgment No. C-55/2002* the Court declared that, by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic failed to fulfil its obligations under Articles 1 and 6 of the Directive.

In *ECJ Judgment No. C-383/92* the Court stated that national rules which merely require an employer to consult trade union representatives about proposed dismissals, to "consider" representations made by such representatives and, if he rejects them, to "state his reasons", whereas Article 2(1) of the directive requires the workers' representatives to be consulted "with a view to reaching an agreement" and Article 2(2) lays down that such consultation must "at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences", fail correctly to transpose the Directive. The Court also reiterated that where a Community directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the TFEU requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. In the case where an employee may be entitled to payment of various amounts under his contract of employment and by reason of its breach, an award which may be set off against such amounts cannot be regarded as sufficiently deterrent for an employer who, in the event of collective redundancies, fails to comply with his obligations under the Directive to consult and inform his workers' representatives.

In the opinion of Advocate General Mengozzi, in *ECJ case no. C-12/08*, para 43, it states that The Directive does not, per se, create or confer any rights, either individual or collective. It provides that Members States must establish a number of safeguards of a procedural nature in relation to collective redundancies. It further provides, by Article 6 in particular, that Member States must create appropriate mechanisms 'for the enforcement of *obligations* under this Directive'.

4 CORRESPONDENCE WITH ICELANDIC AUTHORITIES

On 7 October 2019 the complainant sent a letter to the Icelandic Directorate of Labour, giving notice of the complainants view that Arion bank had acted in breach of Articles 5 and 6 of the Act and asking about the Directorate's view on if the bank had complied with other rules of the Act.

The Directorate sent their answer on 18 October 2019, giving their view that the bank had sufficiently notified the Directorate in accordance with Article 7 of the Act and that Article 8 did not in their view provide for a prolonged lay-off period.

The complainant has had no further correspondence with courts or public authorities on this matter.

The complainant has had no earlier correspondence with the EFTA Surveillance Authority on this matter.

5 EVIDENCE ATTACHED

The complainant attaches the following evidence to this complaint:

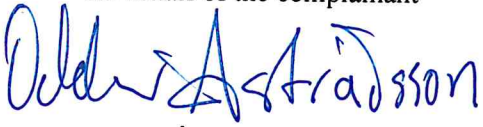
1. Copy of a sample lay-off notice sent by Arion bank on 26 October 2019 (in Icelandic)
2. Email sent by the CEO of Arion bank to employees on 26 October 2019 (in Icelandic)
3. Workers' representative's accounts of the lead up to the lay-offs, undated (in Icelandic)
4. Complainant's letter to the Directorate of Labour, dated 7 October 2019 (in Icelandic)
5. Directorate of Labour's letter to the complainant, dated 18 October 2019 (in Icelandic)
6. Legal memo dated 15 October 2019 (in Icelandic)
7. Act No. 63/2000 on collective redundancies

6 CONFIDENTIALITY

The complainant authorizes the EFTA surveillance Authority to disclose his identity in its contacts with the Icelandic authorities.

Reykjavík, Iceland, 10 February 2020

On behalf of the complainant



Oddur Ástráðsson, attorney