JUDGMENT OF THE COURT
5 June 2025*

(*State liability – Infringements attributable to a national court – Notion of court adjudicating at last instance – Effective judicial protection – Homogeneity*)

In Case E-25/24,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), in the case between

Dartride AS

and

the Norwegian State, represented by the Ministry of Justice and Public Security (Staten v/Justis- og beredskapsdepartementet),

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Ola Mestad (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Dartride AS ("Dartride"), represented by Anders Flatabø, advocate;
- the Norwegian Government, represented by Kristin Hallsjø Aarvik, acting as Agent;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Icelandic Government, represented by Hendrik Daði Jónsson, Þorvaldur Heiðar Þorsteinsson and Jóhanna Katrín Magnúsdóttir, acting as Agents;

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Romina Schobel, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Sigrún Ingibjörg Gísladóttir, Erlend Møinichen Leonhardsen and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Friedrich Erlbacher and Corneliu Hoedlmayr, acting as Agents,

having heard oral arguments of Dartride, represented by Anders Flatabø; the Norwegian Government, represented by Ida Thue, acting as Agent; the Icelandic Government, represented by Hendrik Daði Jónsson; ESA, represented by Sigrún Ingibjörg Gísladóttir and Erlend Møinichen Leonhardsen; and the Commission, represented by Friedrich Erlbacher and Corneliu Hoedlmayr, at the hearing on 5 February 2025,

gives the following

J U D G M E N T

I INTRODUCTION

1 This request for an advisory opinion concerns the existence of and conditions for State liability for the actions of national courts. The request has been made in proceedings between Dartride and the Norwegian State before Eidsivating Court of Appeal in which Dartride claims damages for an alleged infringement of EEA law by a national court.

II LEGAL BACKGROUND

EEA law

2 The fourth, eight and fifteenth recitals of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement") read:

> *CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;*
>
> ...

CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;

...

WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;

3 Article 1(1) EEA reads:

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

4 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

5 Article 6 EEA reads:

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

6 Article 106 EEA reads:

In order to ensure as uniform an interpretation as possible of this Agreement, in full deference to the independence of courts, a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice of the European Communities and the Court of First Instance of the European Communities and the

Courts of last instance of the EFTA States shall be set up by the EEA Joint Committee. This system shall comprise:

(a) transmission to the Registrar of the Court of Justice of the European Communities of judgments delivered by such courts on the interpretation and application of, on the one hand, this Agreement or, on the other hand, the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community, as amended or supplemented, as well as the acts adopted in pursuance thereof in so far as they concern provisions which are identical in substance to those of this Agreement;

(b) classification of these judgments by the Registrar of the Court of Justice of the European Communities including, as far as necessary, the drawing up and publication of translations and abstracts;

(c) communications by the Registrar of the Court of Justice of the European Communities of the relevant documents to the competent national authorities, to be designated by each Contracting Party.

7 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

National law

8 Section 87 of the Constitution of the Kingdom of Norway *(Kongeriket Norges Grunnlov)* ("the Norwegian Constitution") reads:

The ordinary courts of justice are the Supreme Court, the courts of appeal and the district courts. They hear and make decisions in civil cases and criminal cases.

9 Section 88 of the Norwegian Constitution reads, in extract:

The Supreme Court pronounces judgment in the final instance. Limitations on the right to bring a case before the Supreme Court may be prescribed by law.

...

The judgments of the Supreme Court may in no case be appealed.

10 Section 30-4(1) and (3) of the Act relating to mediation and procedure in civil disputes *(Lov om mekling og rettergang i sivile tvister (tvisteloven))* ("the Dispute Act") reads, in extract:

Leave to appeal against judgment

(1) Judgments cannot be appealed without leave. Leave can only be granted if the appeal concerns issues that are of significance beyond the scope of the current case or if it is important for other reasons that the case is decided by the Supreme Court.

...

(3) The issue of leave shall be determined by the Appeals Committee of the Supreme Court by way of decision. A decision to refuse leave or to grant limited leave requires unanimity.

11 Section 31-4 of the Dispute Act reads:

Reopening on grounds of errors in the ruling

A request to reopen a case may be made:

a. if information on the facts in the case that was unknown when the case was ruled on suggests that the ruling would in all likelihood have been different, or

b. if a binding ruling made by an international court or an opinion issued by the Human Rights Committee of the United Nations in respect of the same subject matter suggests that the ruling was based on an incorrect application of international law.

12 The third paragraph of Section 200 of the Act on Courts (*lov om domstolene (domstolloven)*) ("the Courts of Justice Act") reads:

An action for damages in relation to liability incurred by a public official or the State in the context of a judicial decision may not be brought unless:

a. the decision is quashed or amended,

b. the decision has lapsed with the effect that a timely appeal against it could not be heard or adjudicated upon, or

c. the public official is convicted of a criminal offence in relation to the decision.

III FACTS AND PROCEDURE

13 In May 2019, Dartride brought an action against Oslo Municipality (*Oslo kommune*), claiming damages for a failure to issue taxi permits in the spring of 2017. One of the bases for liability put forward by Dartride was that Oslo Municipality's decision was contrary to Article 31 EEA on the right of establishment. The background to the action was, inter alia, a reasoned opinion of 22 February 2017 by ESA to the effect that criteria for allocation of taxi permits in Norway were contrary to Article 31 EEA.

14 By judgment of 21 November 2019, Oslo District Court found in favour of Oslo Municipality on the ground that a causal link between the alleged financial loss and a potential basis for liability in the form of an unlawful refusal of the taxi permit application had not been established. An appeal against the District Court's judgment was lodged by Dartride with Borgarting Court of Appeal.

15 By judgment of 19 November 2020, Borgarting Court of Appeal dismissed Dartride's appeal. The Court of Appeal found in favour of Oslo Municipality, taking the view that, under Norwegian civil procedural law, the Municipality was not the correct defendant in an action claiming liability for damages based on alleged infringements of the EEA Agreement, since it was the Norwegian State which was responsible for ensuring that the contested transport rules were in compliance with Article 31 EEA. The claim for damages ought to have been brought against the State, not Oslo Municipality.

16 The Court of Appeal's judgment was appealed to the Supreme Court of Norway which, by decision of 10 March 2021 of the Appeals Committee, refused to grant leave to appeal pursuant to Section 30-4 of the Dispute Act.

17 In October 2021, Dartride initiated legal proceedings against the Norwegian State, represented by the Ministry of Transport (*Staten v/Samferdselsdepartementet*), claiming damages for failure to issue taxi permits. By judgment of 4 November 2022, Oslo District Court found that the claim against the State was time-barred. By judgment of 15 March 2023, Borgarting Court of Appeal dismissed the appeal on the same ground. By decision of 21 June 2023, the Appeals Committee of the Supreme Court refused to grant Dartride leave to appeal.

18 On 27 August 2023, Dartride filed an action against the Norwegian State, represented by the Ministry of Justice and Public Security, claiming damages for infringement of EEA law by a national court.

19 As the basis for its claim for damages, Dartride argued that, by its judgment of 19 November 2020, Borgarting Court of Appeal infringed EEA law by finding in favour of the defendant, Oslo Municipality. By finding that, under Norwegian civil procedural law, the Norwegian State was the correct defendant for the damages claim filed by Dartride, even though Article 31 of the EEA Agreement applies as Norwegian law and enjoys priority over the Professional Transport Act (*yrkestransportloven*) and accompanying regulations, Borgarting Court of Appeal infringed EEA law. At the time

of delivery of judgment, the damages claim against the State was in any event time-barred.

20 The Norwegian State submitted a response on 28 September 2023, asking for the case to be dismissed and, in the alternative, that the District Court find in favour of the State. In a pre-trial conference on 24 November 2023, the District Court decided that an oral hearing would be held to address the dismissal issue. The hearing was held at Oslo District Court on 4 January 2024.

21 By order of 22 January 2024, Oslo District Court held that the action should be dismissed pursuant to the third paragraph of Section 200 of the Courts of Justice Act. The District Court found that, under EEA law, there "is no basis for obtaining damages for judicial decisions contrary to EEA law". The District Court found that the principle of homogeneity does not entail that State liability under the EEA Agreement extends to decisions of the courts and that nor can any such liability be inferred from the principles of effectiveness, loyalty and equivalence.

22 On 2 February 2024, Dartride appealed against that judgment to Borgarting Court of Appeal. The Norwegian State submitted a defence on 23 February 2024. On 16 April 2024, Borgarting Court of Appeal decided to refer the appeal case to Eidsivating Court of Appeal under Section 38 of the Courts of Justice Act, on the ground that it could undermine public confidence in the administration of justice if Borgarting Court of Appeal were to hear a case on damages alleging that it has made an error giving rise to liability.

23 Against this background, on 5 July 2024, Eidsivating Court of Appeal decided to request an advisory opinion from the Court. The request, dated 27 September 2024, was registered at the Court on the same date. Eidsivating Court of Appeal has referred the following questions to the Court:

> *1. Do the EEA Agreement and the principle of State liability under EEA law entail that the State can be liable for damages for errors by the courts in the application of the EEA rules?*
>
> *2. If question 1 is answered in the affirmative:*
>
> *a. Which decisions by national courts can trigger liability for EEA States?*
>
> *b. Is it compatible with EEA law for the possibility of filing a lawsuit concerning damages for errors by the courts in their application of the EEA rules to be subject to fulfilment of conditions laid down in the third paragraph of section 200 of the Courts of Justice Act?*

24 Reference is made to the written observations published at the Court's website for a fuller account of the arguments and proposed answers submitted to the Court.

Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV ANSWER OF THE COURT

Questions 1 and 2.a

25 By its first question, the referring court asks in essence whether the EEA Agreement and the principle of State liability under EEA law entail that the State can be liable for damages for errors made by its courts in the interpretation and application of EEA law. By Question 2.a, the referring court asks, if Question 1 is answered in the affirmative, which decisions by national courts can trigger liability for EEA States. The Court finds it appropriate to address these two questions together.

The principle of State liability under EEA law

26 It follows from settled case law that the principle of State liability is a general principle of EEA law and must be seen as an integral part of the EEA Agreement as such. The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the European Court of Justice ("ECJ"), of the principle of State liability under EU law. Therefore, the application of the principles may not necessarily be coextensive in all respects (see, inter alia, the judgments of 11 December 2012 in *HOB-vín ehf.*, E-2/12, paragraphs 119 and 120 and case law cited, of 10 December 1998 in *Sveinbjörnsdóttir*, E-9/97, paragraphs 62 and 63, and of 30 May 2002 in *Karlsson*, E-4/01, paragraphs 25 and 30 and case law cited).

27 The principle of State liability under EEA law entails that an EFTA State is obliged to provide for compensation for loss and damage caused to individuals and economic operators as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible (see the judgment in *HOB-vín ehf.*, E-2/12, cited above, paragraph 119 and case law cited). As such, the principle of State liability is applicable in any case in which an EFTA State breaches EEA law whatever the organ of the State whose act or omission was responsible for the breach.

28 It should be recalled that the general aim of the EEA Agreement, as laid down in Article 1(1) EEA, is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition and the respect of the same rules, with a view to creating a homogeneous European Economic Area (see the judgment in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 47). In *Sveinbjörnsdóttir*, the Court held that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive (see the judgment in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 60). As was subsequently confirmed in *Karlsson,* an EEA State may, in principle, be held liable for breaches of its obligations under acts incorporated into the annexes and protocols to the EEA Agreement as well

as the main part of the EEA Agreement (see the judgment in *Karlsson*, E-4/01, cited above, paragraph 32 and case law cited).

29 A further basis for the obligation of the Contracting Parties to provide for compensation is to be found in Article 3 EEA under which the Contracting Parties are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under the EEA Agreement (see the judgment in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 61). In this respect, it must be noted that national courts are also under an obligation to fulfil their duty of loyalty under Article 3 EEA, which includes providing legal protection of the rights individuals derive from the EEA Agreement and ensuring that those rights are fully effective (see the judgment of 4 July 2023 in *RS*, E-11/22, paragraph 44, and the judgment of 28 September 2012 in *Irish Bank*, E-18/11, paragraph 58).

30 The Court has repeatedly held that access to justice and effective judicial protection are essential elements in the EEA legal framework. The objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EEA nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement (see the judgment of 13 June 2013 in *Beatrix Koch and Others*, E-11/12, paragraphs 116 and 117 and case law cited).

31 In light of the essential role played by the judiciary in the protection of the rights derived by individuals under EEA law, as is apparent from the fourth, eighth and fifteenth recitals of the EEA Agreement, the full effectiveness of EEA law is liable to be jeopardised and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain redress when their rights are affected by an infringement of EEA law attributable to a decision of a court of an EEA State adjudicating at last instance (compare the judgment of 30 September 2003 in *Köbler*, C-224/01, EU:C:2003:513, paragraph 33).

32 It should be emphasised that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by EEA law. Since an infringement of those rights by a final decision of such a court cannot, as a general rule, be corrected, individuals must not be deprived of the possibility of rendering the State liable in order, in that way, to obtain legal protection of their rights (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 34).

33 It follows from the requirements inherent in the protection of the rights of individuals relying on EEA law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 36).

34 Accordingly, the Court holds that there is no reason why the scope of the principle of State liability under EEA law should be narrower than under EU law. It follows from the judgment in *Köbler* that the principle that EU Member States are obliged to make

good damage caused to individuals and economic operators by infringements of EU law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of EU law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 59). As observed by ESA and the Commission at the hearing, if the principle of State liability did not extend to a breach of EEA law by a court adjudicating at last instance, there would be a significant gap in the protection of the rights enjoyed by individuals under EEA law.

35 The Icelandic, Liechtenstein and Norwegian Governments have submitted that since EEA law does not contain a provision equivalent to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union ("TFEU"), providing for a duty on courts adjudicating at last instance to refer questions of interpretation of EU law to the ECJ, the principle of State liability under EEA law cannot be extended to cover alleged infringements of EEA law that stem from decisions of national courts adjudicating at last instance. In particular, those Governments submit that the principle of State liability, as set out by the ECJ in *Köbler*, C-224/01, cited above, is inseparably linked to the existence of the third paragraph of Article 267 TFEU.

36 Those arguments cannot be accepted. As pointed out by ESA and the Commission, the finding of the ECJ in *Köbler* that the principle of State liability under EU law extends to infringements of EU law stemming from decisions of national courts adjudicating at last instance cannot be understood to have been based on the existence of the third paragraph of Article 267 TFEU. Rather, the ECJ attaches significance to non-compliance by a national court with its obligation to make a reference for a preliminary ruling under that paragraph in relation to the assessment of whether there has been a manifest infringement of the applicable law (compare the judgment in *Köbler*, C-224/01, cited above, paragraphs 53 to 55). The third paragraph of Article 267 TFEU thus plays a role in the assessment of the seriousness of the breach rather than being one of the constituent elements for the existence of liability for judicial decisions rendered by national courts in the EU adjudicating at last instance.

37 The Icelandic Government has submitted that the principle of State liability for damage caused to individuals by infringements of EEA law cannot be applied to decisions of a national court adjudicating at last instance as it would be incompatible with the principle of *res judicata*.

38 The importance of the principle of *res judicata* cannot be disputed. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 38).

39 However, recognition of the principle of State liability for a decision of a court adjudicating at last instance does not have the consequence of calling into question a decision as being *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for redress of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in EEA law requires such redress, but not revision of the judicial decision which was responsible for the damage (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 39).

40 It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 40).

41 The Icelandic and Norwegian Governments have submitted, with reference to, in particular, the fifteenth recital of the EEA Agreement and Article 106 EEA, that to acknowledge that the principle of State liability extends to judicial breaches of EEA law would be incompatible with the independence of the judiciary.

42 First, it must be noted that Article 106 EEA concerns the establishment of a system of exchange of information concerning the judgments of the Court, the ECJ, the General Court and the courts of last instance of the EFTA States in order to ensure as uniform an interpretation as possible of the EEA Agreement, in full deference to the independence of courts. That system concerns, in particular, the transmission, classification and communication of the judgments of those courts. It follows from Article 106 EEA that the system shall be set up by the EEA Joint Committee. However, as pointed out by the Norwegian Government at the hearing, this system has never been set up.

43 The aim of the system of exchange of information concerning judgments laid down in Article 106 EEA is to ensure homogeneity under an international treaty *sui generis* without a single judicial mechanism and on the EFTA side without a binding preliminary ruling mechanism. The wording of Article 106 EEA reflects these characteristics, however, it cannot be understood as imposing any limits on the principle of State liability under EEA law extending to judicial decisions.

44 Second, the fifteenth recital of the EEA Agreement states that, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in it and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.

45 The fifteenth recital of the EEA Agreement must be understood in its proper context. The institutional system of the European Economic Area foresees two courts at the

international level, the EFTA Court and the ECJ, interpreting common rules. It is an inherent consequence of such a system that from time to time those two courts may come to different conclusions in their interpretation of the rules (see the judgment of 8 July 2008 in *L'Oréal Norge AS*, Joined Cases E-9/07 and E-10/07, paragraph 28). Accordingly, the fundamental objective of the EEA Agreement, which is to establish a dynamic and homogenous European Economic Area, can only be pursued in full deference to the independence of the courts interpreting the common rules within that institutional system. However, the EFTA Court has nevertheless recognised that the objective of homogeneity requires that it adjusts its case law in line with that of the ECJ unless differences in the scope and purpose between EU law and EEA law constitute compelling grounds for divergent interpretations (see the judgment in *L'Oréal Norge AS*, Joined Cases E-9/07 and E-10/07, cited above, paragraphs 29 and 31). Both the Court and the ECJ have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the TFEU are interpreted uniformly (compare the judgment of 1 April 2004 in *Bellio*, C-286/02, EU:C:2004:212, paragraph 34 and case law cited).

46 Thus, contrary to the arguments submitted by the Icelandic and Norwegian Governments at the hearing, neither the fifteenth recital of the EEA Agreement nor the judicial set-up of the European Economic Area can be understood as precluding that an EFTA State may be held liable for the decision of a court adjudicating at last instance.

47 The Norwegian and Icelandic Governments have further argued that State liability for decisions by national courts only makes sense within a legal order with federal characteristics such as the EU legal order. However, that argument must be rejected. National courts are competent to adjudicate claims for State liability and, therefore, holding the State liable for actions of the judiciary does not place this Court in a hierarchically superior position within the domestic legal system of the EFTA States.

48 Furthermore, as regards the Norwegian Government's assertion that the national courts of EU Member States do not have the final say on the interpretation of EU law and that the situation is different in the EFTA pillar, the Court notes that if ESA considers an EFTA State – including its national courts – to have failed to fulfil an obligation under the EEA Agreement or SCA, it may bring the matter before the Court under Article 31 SCA. The Court's judgment in such cases is binding on the EFTA State concerned pursuant to Article 33 SCA.

49 In this regard, it must be noted that it is contrary to the principle of effectiveness for an EFTA State to make compensation of loss or harm caused to an individual as a result of a breach of EEA law conditional on a prior judgment by the Court finding that breach of EEA law attributable to that EFTA State. Similarly, compensation for the loss or harm caused by a breach of EEA law attributable to an EFTA State cannot be made conditional on the requirement that the existence of such a breach must be clear from an advisory opinion delivered by the Court (compare the judgment of 28 June 2022 in *Commission* v *Spain*, C-278/20, EU:C:2022:503, paragraph 104 and case law cited).

50 Nor can any of the other arguments submitted based on the independence and authority of the judiciary be upheld.

51 As to the independence of the judiciary, it follows from the case law of the ECJ that the maintenance of independence and impartiality is an essential part of ensuring effective judicial protection required under the second subparagraph of Article 19(1) of the Treaty on European Union and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (compare the judgment of 7 September 2023 in *Asociația "Forumul Judecătorilor din România"*, C-216/21, EU:C:2023:628, paragraph 61). The same considerations have to be taken into account as a matter of EEA law and the Court recalls that the principle of judicial independence is one of the fundamental values of the administration of justice (see the decision of the Court of 14 February 2017 in *Pascal Nobile*, E-21/16, paragraph 16).

52 Moreover, the principle of State liability for judicial decisions does not concern the personal liability of the judge but the liability of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to EEA law does not call into question the independence of a court adjudicating at last instance (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 42).

53 As to the argument based on the diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called into question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, redress for the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 43).

54 The Icelandic Government has further submitted that the application of the principle of State liability to decisions of a national court adjudicating at last instance is precluded by the difficulty of designating a court competent to determine disputes concerning the redress of infringements resulting from such decisions.

55 In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by EEA law, the principle of State liability under EEA law must apply in regard to decisions of a national court adjudicating at last instance, it is for the EEA States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 45).

56 According to settled case law, in the absence of EEA law, it is for the internal legal order of each EEA State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended to safeguard fully the rights which individuals derive from EEA law, while respecting the requirements flowing from the principles of equivalence and effectiveness (see the judgment of 9 August 2024 in

Låssenteret, E-11/23, paragraph 44 and case law cited, and compare the judgment in *Köbler*, C-224/01, cited above, paragraph 46).

57 As to the Norwegian Government's argument that other mechanisms under the EEA Agreement, such as the principle of homogenous interpretation, sufficiently safeguard individual rights under EEA law, this line of argument would, in principle, also hold in the context of EU law, where the ECJ has nevertheless recognised State liability for judicial decisions. As argued by ESA, the lack of a formal obligation for national courts to refer cases to the Court underscores the necessity of such a principle under EEA law.

58 Lastly, the Icelandic Government's argument that the possibility of reopening cases renders the principle of State liability redundant must be rejected. Whether liability or the reopening of a case are the most effective remedy available depends on the legal framework of each EEA State and the specific circumstances of the individual case. Reopening of cases, however, remains an exceptional measure, often subject to strict conditions under national law, and may not always ensure adequate judicial protection. Therefore, the existence of national mechanisms for reopening cases does not call into question the need for a principle of State liability for judicial decisions under EEA law.

59 Furthermore, the scope of the principle of State liability under EEA law cannot vary depending on the remedies available under national procedural law, which will inevitably be different in the various legal systems of EEA States. Accordingly, while it cannot be excluded that in certain cases, the reopening of a case may be more favourable for an individual, that fact does not affect the possibility of the principle of State liability under EEA law extending to judicial breaches of EEA law. As noted above, the principle of State liability under EEA law does not require the revision of a judicial decision.

60 Finally, given the Icelandic Government's reference to a closure decision of ESA in a case concerning State liability for judicial acts, the Court notes that it is not bound by ESA's assessment of whether Icelandic legislation actually complies with EEA law. Therefore, there is no need to examine this decision further.

61 It follows from the foregoing that the principle according to which EEA States are liable to afford reparation for damage caused to individuals as a result of infringements of EEA law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each EEA State to designate the court competent to adjudicate on disputes relating to such reparation.

Conditions governing State liability

62 As to the conditions that must be satisfied for State liability under EEA law, the Court has held that three conditions must be met: firstly, the rule of law infringed must be intended to confer rights on individuals and economic operators; secondly, the breach must be sufficiently serious; and, thirdly, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured

party (see the judgments in *HOB-vín ehf.*, E-2/12, cited above, paragraph 121, and in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 66).

63 State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of EEA law, as set out above, is governed by the same conditions (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 52).

64 With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty. State liability for an infringement of EEA law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable EEA law (see the judgment of 10 December 2010 in *Þór Kolbeinsson*, E-2/10, paragraph 77, and compare the judgment in *Köbler*, C-224/01, cited above, paragraph 53).

65 In order to determine whether that condition is satisfied, the national court hearing a claim for compensation must take account of all the factors which characterise the situation put before it (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 54).

66 Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by an EEA or EU institution and whether the court in question decided to make use of the advisory opinion mechanism pursuant to Article 34 SCA (see the judgment in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 69, and compare the judgment in *Köbler*, C-224/01, cited above, paragraph 55).

67 As noted by all the parties at the hearing, the advisory opinion mechanism under Article 34 SCA facilitates judicial dialogue and constitutes an opportunity for national courts to ensure effective judicial protection under EEA law. The Court has consistently held 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 dynamic and homogenous 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 (see the judgment of 9 August 2024 in *X*, E-10/23, paragraph 44 and case law cited). Since a national court is more likely to commit a manifest error when it does not seek an advisory opinion, the absence of such a request may be particularly relevant in determining whether the error of law was excusable (compare the opinion of Advocate General Léger of 8 April 2003 in *Köbler*, C-224/01, EU:C:2003:207, points 139 and 153).

68 In any event, an infringement of EEA law will be sufficiently serious where the decision concerned was made in manifest breach of the relevant case law of the EFTA Court or

the ECJ in the matter (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 56 and case law cited).

69 The three conditions mentioned above are necessary and sufficient to establish a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (compare the judgment in *Köbler*, C-224/01, cited above, paragraph 57 and case law cited).

70 Subject to the existence of a right to obtain compensation which is founded directly on EEA law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the provision that the conditions for reparation of loss and damage laid down by the national law must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (see the judgment in *Karlsson*, E-4/01, cited above, paragraph 33 and case law cited, and compare the judgment in *Köbler*, C-224/01, cited above, paragraph 58 and case law cited).

Court adjudicating at last instance

71 It is evident from the request and the written observations submitted to the Court that the referring court also seeks guidance on the interpretation of the requirement that the decision stems from a national court adjudicating at last instance.

72 The requirement that the decision stems from a national court adjudicating at last instance must be interpreted as referring to a decision of a national court against whose decision there is no judicial remedy under national law. Since no domestic remedy lies against a judicial decision of a court adjudicating at last instance, an action for damages against the State is the appropriate means of redress serving to ensure that the infringed right is restored and that effective judicial protection of the rights which individuals and economic operators derive from EEA law is thereby provided. The same does not apply as regards decisions of lower courts since a domestic remedy lies against them under national law – namely, an appeal – and therefore infringements of EEA law arising from those decisions may be corrected or put right (compare the judgment of 5 September 2019 in *European Union* v *Guardian Europe*, Joined Cases C-447/17 P and C-479/17 P, EU:C:2019:672, paragraphs 77 and 78).

73 In the present case, it follows from the request that the main proceedings concern a judgment rendered by a Norwegian court of appeal that allegedly infringed EEA law. The plaintiff in that case, Dartride, sought leave to appeal the judgment at issue to the Supreme Court of Norway. However, the Supreme Court refused Dartride's application for leave to appeal.

74 It follows that Dartride exhausted all domestic remedies against the judicial decision which it considered to infringe its rights under EEA law and that the Supreme Court was, in fact, the last judicial body before which it could assert those rights and thus the national court that adjudicated at last instance.

75 As regards the submission of the Norwegian and Icelandic Governments that the principle of State liability should be confined to decisions on the merits by courts of last instance, it must be borne in mind that national courts are bound under the principle of sincere cooperation in Article 3 EEA, for the matters within their jurisdiction, to ensure the full effectiveness of EEA law when they determine the disputes before them (see the judgment in *RS*, E-11/22, cited above, paragraph 41 and case law cited). It is evident that State liability cannot arise only in the rare instance where the Supreme Court grants leave to appeal and subsequently manifestly breaches EEA law. Such a limitation would deprive the right to redress of any practical effect.

76 In order to determine whether the Supreme Court of Norway committed a sufficiently serious breach in the present case – either by refusing leave to appeal or by failing to adopt other available measures, such as setting aside the judgment of Borgarting Court of Appeal – the referring court must take account of all the factors which characterise the situation put before it. This includes Oslo District Court's substantive assessment of the claim, as well as Borgarting Court of Appeal's reasoning in dismissing the appeal.

Conclusion

77 In the light of the foregoing, the answers to Questions 1 and 2.a must be that the principle according to which EEA States are liable to afford reparation for damage caused to individuals and economic operators as a result of infringements of EEA law for which they are responsible is also applicable where the alleged infringement stems from a decision of a national court adjudicating at last instance. State liability for an infringement of EEA law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable EEA law. In circumstances such as those of the main proceedings, where all domestic remedies against a judicial decision which is alleged to have infringed EEA law have been exhausted, the condition that a decision was rendered by a national court adjudicating at last instance must be considered to be satisfied.

Question 2.b

78 By Question 2.b, the referring court asks in essence whether it is compatible with EEA law to subject the possibility of filing a claim concerning damages for errors by the courts in their application of EEA law to the fulfilment of the conditions laid down in the third paragraph of Section 200 of the Courts of Justice Act. It follows from the request that that provision provides that such an action may not be brought unless: (a) the decision is quashed or amended; (b) the decision has lapsed with the effect that a timely appeal against it could not be heard or adjudicated upon, or (c) the public official is convicted of a criminal offence in relation to the decision.

79 It is settled case law that, in the absence of EEA rules governing the matter, in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. Such rules must respect the principles of equivalence and effectiveness. This

entails that the procedural rules governing actions for damages arising from infringement of the rules of the EEA Agreement must thus 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 effectiveness). Accordingly, EEA law requires that national legislation does not undermine the right to effective judicial protection. It is for the referring court to assess whether the national rules in question respect these principles (see the judgment of 26 February 2025 in *Elmatica*, E-14/24, paragraph 29 and case law cited).

80 It must be observed that conditions such as those laid down in Section 200 of the Courts of Justice Act impose additional conditions to those required under EEA law for the principle of State liability.

81 As regards the condition under point (a) of the third paragraph of Section 200 of the Courts of Justice Act that the decision has been quashed or amended, the Court notes that EEA law precludes a provision of national law which requires, as a precondition, the setting aside of the decision given by the court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible (compare the judgment of 9 September 2015 in *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 60).

82 As regards the condition under point (c) of the third paragraph of Section 200 of the Courts of Justice Act that the public official is convicted of a criminal offence in relation to the decision, such a condition unduly restricts the possibility of redress. EEA law precludes national legislation which limits State liability for damage caused to individuals and economic operators by an infringement of EEA law attributable to a court adjudicating at last instance solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the EEA State concerned in other cases where a manifest infringement of the applicable law was committed (compare the judgment of 13 June 2006 in *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 46).

83 The imposition of such conditions under national law which are in addition to those required under EEA law would amount to depriving the principle of State liability of all practical effect with regard to manifest infringements of EEA law for which national courts adjudicating at last instance were responsible (compare the judgment in *Traghetti del Mediterraneo*, C-173/03, cited above, paragraph 40).

84 Although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of EEA law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable EEA law (compare the judgment in *Traghetti del Mediterraneo*, C-173/03, cited above, paragraph 44).

85 A right to obtain redress will therefore arise, if there has been a manifest infringement of the applicable EEA law. The three conditions for EEA State liability, as set out above, are necessary and sufficient to found a right for individuals and economic operators to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions pursuant to national law (compare the judgment in *Traghetti del Mediterraneo*, C-173/03, cited above, paragraph 45).

86 In the light of the foregoing, the answer to Question 2.b must be that EEA law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals or economic operators by an infringement of EEA law attributable to a court adjudicating at last instance by imposing additional conditions such as that (i) a decision must be quashed or amended, (ii) a decision must have lapsed with the effect that timely appeal against it could not be heard or adjudicated upon, or (iii) a public official is convicted of a criminal offence in relation to the decision.

V COSTS

87 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Eidsivating Court of Appeal hereby gives the following Advisory Opinion:

1. **The principle according to which EEA States are liable to afford reparation for damage caused to individuals and economic operators as a result of infringements of EEA law for which they are responsible is also applicable where the alleged infringement stems from a decision of a national court adjudicating at last instance.**

   State liability for an infringement of EEA law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable EEA law.

   In circumstances such as those of the main proceedings, where all domestic remedies against a judicial decision which is alleged to have infringed EEA law have been exhausted, the condition that a decision was rendered by a national court adjudicating at last instance must be considered to be satisfied.

2. **EEA law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals or economic operators by an infringement of EEA law attributable to a court adjudicating at last instance by imposing additional conditions such as that (i) a decision must be quashed or amended, (ii) a decision must have lapsed with the effect that timely appeal against it could not be heard or adjudicated upon, or (iii) a public official is convicted of a criminal offence in relation to the decision.**

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 5 June 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President