EIDSIVATING LAGMANNSRETT

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EFTA Court
1 rue du Fort Thüngen
L-1499 Luxemburg
Luxembourg

Deres referanse	Vår referanse	Dato
	24-032314ASK-ELAG	27.09.2024

Request for an advisory opinion in Case 24-032314ASK-ELAG, *Dartride AS* v *Norwegian State, represented by the Ministry of Justice and Public Security*

1 Background to the request

Pursuant to section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) hereby requests an advisory opinion from the EFTA Court in *Dartride AS* v *Norwegian State, represented by the Ministry of Justice and Public Security*.

The parties to the case before Eidsivating Court of Appeal are:

Appellant:	Dartride AS Nedre Skøyen vei 11 0276 Oslo
Counsel:	Advokat Anders Flatabø RUV Anders Christian Flatabø P.O. Box 2469 Solli 0202 Oslo
Respondent:	Norwegian State, represented by the Ministry of Justice and Public Security (*Staten v/Justis- og beredskapsdepartementet*) P.O. Box 8005 Dep 0030 Oslo
Counsel:	Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*) Advokat Kristin Hallsjø Aarvik P.O. Box 8012 Dep 0030 OSLO

On 27 August 2023, Dartride AS brought proceedings against the Norwegian State, represented by the Ministry of Justice and Public Security, claiming that the State is liable for damages to Dartride AS. The case was filed with Oslo District Court (*Oslo tingrett*). The stated basis for the damages claim was that Borgarting Court of Appeal (*Borgarting lagmannsrett*) and the Supreme Court of Norway (*Norges Høyesterett*) had delivered decisions contrary to EEA law (Court of Appeal's judgment of 19 November 2020 and the Supreme Court's decision of 10 March 2021 not to grant leave to appeal the Court of Appeal's judgment).

The third paragraph of section 200 of Act No 5 of 13 August 1915 relating to the Courts of Justice (Courts of Justice Act) (*Lov 13 August 1915 nr. 5 om domstolene (domstolloven)*) lays down the parameters for bringing an action for damages against the State as a result of error in judicial decisions. According to the legislative wording, an action may not be brought unless the conditions laid down in letter (a), (b) or (c) are satisfied. The parties are in agreement that none of those conditions is satisfied in the present case.

By order of 22 January 2024, Oslo District Court dismissed the action. The District Court found that there was no "*basis for obtaining damages for judicial decisions contrary to EEA law*", and that the case should therefore be dismissed since none of the alternatives in the third paragraph of section 200 of the Courts of Justice Act was relied on. Dartride AS has appealed against that dismissal order.

Consequently, Eidsivating Court of Appeal must rule on whether there are obligations under EEA law entailing that the action must be heard by the court despite the limitations laid down in the third paragraph of section 200 of the Courts of Justice Act.

The Court of Appeal has decided that an advisory opinion is to be sought from the EFTA Court because the case raises questions concerning the interpretation of EEA law about which there is some doubt.

For the sake of completeness, the Court of Appeal points out that one of the three Appeal Court Judges who delivered Borgarting Court of Appeal's judgment of 19 November 2020 is Michael Reiertsen, who is now a Judge at the EFTA Court.

2 Facts

In May 2019, Dartride AS 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 AS was that Oslo Municipality's decision was contrary to Article 31 of the EEA Agreement on freedom of establishment. The background to the action was inter alia a statement of 22 February 2017 by the EFTA Surveillance Authority ("ESA") to the effect that criteria for allocation of taxi permits were contrary to Article 31 of the EEA Agreement.

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

By judgment of 19 November 2020, Borgarting Court of Appeal dismissed Dartride AS'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 alleged to be on the basis of infringement of the EEA Agreement. The claim for damages ought to have been brought against the State, not Oslo Municipality. The Court of Appeal considered that such a finding in favour of Oslo Municipality was not contrary to EEA law and the principle of effectiveness.

The Court of Appeal's judgment was appealed to the Supreme Court 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 (*tvisteloven*).

In October 2021, Dartride AS filed 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 AS leave to appeal: see section 30-4 of the Dispute Act.

By writ of summons of 27 August 2023, Dartride AS 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.

By way of basis for the damages claim, Dartride AS argued that, by its judgment of 19 November 2020, Borgarting Court of Appeal infringed EEA law by finding in favour of the decision-making authority, Oslo Municipality, by the Court of Appeal considering that, under Norwegian civil procedural law, the State is the correct defendant for the damages claim filed by Dartride, even though Article 31 of the EEA Agreement applies as Norwegian law, with priority over the Professional Transport Act (*yrkestransportloven*) and accompanying regulations: see sections 1 and 2 of the EEA Act (*EØS-loven*). At the time of delivery of judgment, the damages claim against the State was in any event time-barred: see the Borgarting Court of Appeal's judgment of 15 March 2023.

The State submitted a response on 28 September 2023, asking for the case to be dismissed and, in the alternative, that the 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 in Oslo District Court on 4 January 2024.

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 liability for damages applies in the EEA and that nor can any such liability be inferred from the principles of effectiveness, loyalty and equivalence.

On 2 February 2024, Dartride AS appealed against that judgment to Borgarting Court of Appeal. The State submitted a response 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 confidence if Borgarting Court of Appeal were to hear a case on damages alleging that it has made an error giving rise to liability.

On 5 July 2024, Eidsivating Court of Appeal decided to request an advisory opinion from the EFTA Court in connection with the case.

3 Legal background to the case

3.1 Relevant Norwegian legislation and case-law of the Supreme Court of Norway

Section 87 of the Constitution of the Kingdom of Norway (*Kongeriket Norges Grunnlov*) is worded as follows:

> *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.*

The first and third paragraphs of section 88 of the Constitution are worded as follows:

> *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.*

Section 30-4(1) and (3) of the Act relating to mediation and procedure in civil disputes (The Dispute Act) *(Lov om mekling og rettergang i sivile tvister (tvisteloven)*) is worded as follows:

> ***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.

Section 31-4 of the Dispute Act is worded as follows:

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.*

The third paragraph of section 200 of the Courts of Justice Act is worded as follows:

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.

In paragraph 38 of Case HR-2016-2195-S, the Supreme Court stated the following:

The purpose behind the limitation on bringing actions provided for in the third paragraph of section 200 is, in other words, to prevent circumvention of the overall scheme of the procedural legislation. The core position is that a judicial decision should be challenged using legal remedies. If the decision is not challenged, or cannot be challenged, then it follows from the enforceability rules that it becomes binding as between the parties on its merits, irrespective of any imperfections there may be. The losing party may not then – as a further remedy – bring an action against the State in relation to the decision.

In paragraph 44, the Supreme Court stated that the courts are to undertake an independent examination of whether the third paragraph of section 200 of the Courts of Justice Act precludes an action for damages in relation to the claim in question from being brought. Actions which, in reality, involve a "rematch" about the correctness of a judicial decision are to be dismissed: see paragraph 46 et seq.

Section 1 of Act No. 109 of 27 November 1992 on the implementation in Norwegian law of the Main Part of the Agreement on the European Economic Area, etc. ("the EEA Act") (*lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde mv. av 27. november 1992 nr. 109 (EØS-loven)*) is worded as follows:

> *The provisions in the Main Part of the Agreement on the European Economic Area shall apply as Norwegian law, with those amendments as follow from the Protocol Adjusting the Agreement on the European Economic Area of 17 March 1993, the Agreement expanding the European Economic Area of 14 October 2003, the Agreement on the participation of Bulgaria and Romania in the European Economic Area of 2007 and the Agreement on the participation of Croatia of 2014. The same shall apply to Articles 1 to 3 of Protocol 25 on competition regarding coal and steel.*

Section 2 of the EEA Act is worded as follows:

> *Legislative provisions which serve to fulfil Norway's obligations under the Agreement shall, in the event of conflict, take priority over other provisions governing the same matter. The same shall apply if a regulation which serves to fulfil Norway's obligations under the Agreement is in conflict with another regulation, or comes into conflict with subsequent legislation.*

In Case HR-2005-1690-P (Rt-2005-1365) (*Finanger II*), the Supreme Court held that it followed from the EEA Agreement that the State could be liable for damages for incorrect implementation of a directive. The Supreme Court referred to the EFTA Court's statements in Case E-9/97 *Sveinbjörnsdóttir*, as reiterated in Case E-4/01 *Karlsson*, and observed that the EFTA Court's reasoning was convincing.

The significance of the EFTA Court's statements has been articulated in the Supreme Court's case-law: see Case HR-2023-301-A, paragraph 74 with further references. The Supreme Court stated that "*even though the EFTA Court's interpretation statements are not formally binding, the national court must attach considerable weight to what the EFTA Court has said about how EEA law is to be construed*". The EFTA Court's interpretation of EEA law should not be departed from unless there are "*good, compelling reasons for doing so*".

3.2 Relevant EU law and case-law of the EU Court of Justice

Article 267 of the Treaty on the Functioning of the European Union (ex Article 234 TEC) is worded as follows:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*

In Joined Cases C-6/90 and C-9/90 *Francovich*, the EU Court of Justice ("ECJ") held that a Member State can be held liable for damages for losses suffered by individuals as a result of the State's infringement of obligations under EU law.

In Case C-224/01 *Köbler*, the ECJ held that, subject to certain conditions, the principle of Member States' liability for damages for infringements of obligations under EU law also includes decisions of national courts adjudicating at last instance (answer to question 1):

> *The principle that Member States are obliged to make good damage caused to individuals by infringements of Community 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 Community 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. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.*

3.3 Relevant EEA law and case-law of the EFTA Court

The preamble to the EEA Agreement is worded inter alia as follows:

> *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;*

Article 3 of the EEA Agreement is worded as follows:

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

Article 6 of the EEA Agreement is worded as follows:

> *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.*

Article 108(2) of the EEA Agreement is worded as follows:

> *The EFTA States shall establish a court of justice (EFTA Court).*
>
> *The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:*
>
> *(a) actions concerning the surveillance procedure regarding the EFTA States;*
>
> *(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;*
>
> *(c) the settlement of disputes between two or more EFTA States.*

Article 31 SCA is worded as follows:

> *If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.*

Article 33 SCA is worded as follows:

> *The EFTA States concerned shall take the necessary measures to comply with the judgments of the EFTA Court.*

Article 34 SCA is worded as follows:

> *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.*

In Case E-9/9[7], the EFTA Court found that the EEA Agreement comprised a principle to the effect that EEA States are liable for damages suffered by individuals as a result of the State's infringements of obligations under EEA law. Those statements were reiterated in Case E-4/01 *Karlsson.*

In Case E-2/10 *Kolbeinsson*, the EFTA Court stated in paragraph 77:

The Court notes that it must answer the second question based on the premise spelled out by the national court, namely that the infringement of EEA law, if indeed there is any, has been caused by incorrect implementation of EEA law, i.e. a breach on the part of the legislature. The issue of State liability for losses resulting from incorrect application of EEA law by national courts falls outside the scope of this question. The Court observes, however, that if States are to incur liability under EEA law for such an infringement as alleged by the Plaintiff, the infringement would in any case have to be manifest in character, see for comparison Köbler, cited above, paragraph 53.

4 Parties' submissions on the EEA law issues

4.1 Appellant's submissions

The appellant submits that the established State liability under the EEA Agreement also encompasses limited liability for judicial decisions. In Case C-224/01 *Köbler* and Case C-173/03 *Traghetti*, the ECJ has held that there can be liability where a court is adjudicating "*at last instance*" in those cases where the infringement of [EU] law is "*manifest in character*". In the appellant's submission, the EFTA Court has, in an *obiter dictum* in paragraph 77 of its judgment in Case E-2/10 *Kolbeinsson*, confirmed that there can be liability for judicial decisions under EEA law on the basis of a purposive interpretation of the EEA Agreement.

Liability for judicial decisions as found in Case C-224/01 *Köbler* is a natural extension of the State liability that was first established by the ECJ in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*. Subsequently, in both Case E-9/97 *Sveinbjörnsdóttir* and Case E-4/01 *Karlsson*, it was held that the same State liability that obtains in the EU can be inferred directly from the EEA Agreement, and State liability was accepted as part of the EEA Agreement by Norway in the Supreme Court's judgment in Case HR-2005-1690-P (Rt-2005-1365) (*Finanger II*). Thus, it is logical, on the basis of an *in concreto* interpretation of the EEA Agreement and the Agreement's objectives of homogeneity, loyalty, effective legal protection for individuals and effective enforcement, that State liability in the EEA also encompasses the courts, as it does in EU law.

It is subject to the EEA Agreement's objectives of homogeneity, loyalty and effectiveness that the liability for judicial decisions as held in Case C-224/01 *Köbler* and Case C-173/03 *Traghetti* is based in part on the obligation to refer for a court ruling "*at last instance*" under the third paragraph of Article 267 TFEU, which we do not have in the EEA. In Case C-173/03 *Traghetti*, it is stated in paragraph 35 that general interpretation of provisions of law can also amount to a manifest infringement of [EU] law. In paragraphs 32 and 33 in Case C-224/01 *Köbler*, the ECJ was clear on the point that no distinction should be drawn between the legislature and the judiciary for the purposes of State liability, and that considerations of effectiveness suggest that courts should not be exempt. Furthermore, it is apparent from paragraphs 53 through 55 in Case C-224/01 *Köbler* that liability for judicial decisions under EU law is based on an overall liability assessment.

In paragraph 63 of its judgment in Case E-9/97 *Sveinbjörnsdóttir*, the EFTA Court stated that "*the principle of State liability must be seen as an integral part of the EEA Agreement as such*". The EFTA Court further stated, in paragraph 62 of Case E-9/97 *Sveinbjörnsdóttir* and in Case E-4/01 *Karlsson*, that the effective possibility of obtaining redress when the State has failed to fulfil its obligations is a key principle for enforcing the EEA Agreement (which must also, in principle, apply to damages for manifest failures by the courts to fulfil their EEA law obligations): see, correspondingly, for the EU, Joined Cases C-6/90 and C-9/90 *Francovich*, paragraphs 36 and 37.

With regard to the structural differences between the EU and the EEA, including the obligation for courts ruling "*at last instance*" to make a reference and direct effect, in Case E-4/01 *Karlsson*, paragraphs 29 and 30, the EFTA Court observed that the EEA need not be entirely coextensive with the EU in all respects. The EFTA Court does not methodically incorporate the ECJ's case-law as such but, as a rule, finds that the same principles also follow from an *in concreto* interpretation of the EEA Agreement: see the reasons for State liability in Case E-9/97 *Sveinbjörnsdóttir* and Case E-4/01 *Karlsson*. The line of argument to the effect that structural differences preclude the development of EEA law in accordance with of the ECJ's case-law in the absence of an express provision so stipulating was, moreover, considered and rejected by the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir*: see paragraphs 44, 46, 47, 60 and 61.

Hence, in the interpretation of the EEA Agreement, it is considered contrary to the EEA Agreement's objectives of homogeneity, loyalty and effectiveness to put forward structural differences between the EU and the EEA as justification for not having liability for judicial decisions in the EEA at all. For the same reason, nor can EEA nationals be completely deprived of any equivalent opportunities to seek damages such as those enjoyed by EU citizens under [EU] law. Consequently, liability for judicial decisions under EEA law must presumably also encompass decisions from lower instance courts, or at least apply when the case is appealed to the Supreme Court, even if leave to appeal is not granted. The Supreme Court is in any event assumed, when leave to appeal is not granted, to have examined whether EEA law has been infringed: see Case C-99/00 *Lyckeskog*, paragraphs 13 and 18, and Case C-32/12, *Soledad Duarte Hueros*, paragraph 42. The position that lower instance courts can be subject to liability for judicial decisions under EEA law is also supported by the EFTA Court's reference in paragraph 77 in Case E-2/10 *Kolbeinsson* to State liability for "*national courts*" and not for "*a court adjudicating at last instance*", per the ECJ.

Concerns about the legal force of judicial decisions and the independence of the judiciary are presumably sufficiently addressed inasmuch as the infringement of EU/EEA law for liability for judicial decisions must be "*manifest in character*" as compared to "*sufficiently serious*" for the usual State liability: see Case C-224/01 *Köbler*, paragraph 53, for the EU and Case E-2/10 *Kolbeinsson*, paragraph 77, for the EEA.

4.2 Respondent's submissions

The State submits that the action for damages must be dismissed under the third paragraph of section 200 of the Courts of Justice Act. It does not follow from the EEA Agreement that State liability for damages encompasses judicial decisions.

The EEA Agreement's objective of homogeneity is based on the presence of corresponding provisions and the principle of homogeneity in Article 6 of the EEA Agreement: see Case E-9/97 *Sveinbjörnsdóttir*. There are, however, important and fundamental differences between EU and EEA law suggesting that neither the objective nor the principle of homogeneity provides a basis for liability for judicial decisions in the EEA, similarly to the EU.

When the ECJ held in Case C-224/01 *Köbler* that, subject to certain conditions, the principle of State liability for damages also encompasses decisions by national courts adjudicating at last instance, it was based in particular on the fact that it is not possible to appeal such decisions and that national courts adjudicating at last instance are under an obligation to make a reference to the ECJ under the third paragraph of Article 234 EC (now Article 267 TFEU): see paragraphs 34–35. It was also based on the fact that the ECJ's decisions are binding for national courts in the Member States.

Under Article 34 SCA, national courts in the EFTA States may, but are not obliged to, request an advisory opinion from the EFTA Court – not even when adjudicating at last instance. This reflects that the integration under the EEA Agreement is less extensive than under the EU Treaties: see Case E-18/11 *Irish Bank*. Nor are the EFTA Court's advisory opinions binding on national courts, although in practice great weight is attached to them. The absence of an obligation to make a reference and the fact that the EFTA Court's advisory opinions are not binding entails that the procedure provided for in Article 34 SCA is "*fundamentally different*" from the (now) Article 267 TFEU: see the ECJ's Opinion 1/[91], paragraph 58.

Failure to observe the obligation to make a reference is, moreover, a key factor to be taken into account in the assessment of the basis of liability under the *Köbler* doctrine: see paragraphs 54–55. This key factor is absent in the EEA law context, and use of the *Köbler* doctrine in the EEA context may lead to different, rather than the same, rules for liability obtaining in the EU and the EEA.

Nor can liability for damages for judicial decisions be inferred from the principles of loyalty and effectiveness.

Liability for damages following *Köbler* applies only to decisions of national courts adjudicating at last instance who are under an obligation to make a reference: see *Köbler*, paragraphs 33–35, subsequently confirmed and explained in Case C-168/15 *Tomasova*, paragraphs 20–21 and point 1 of the operative part, and Case C-3/16 *Aquino*, paragraph 2, question 1, read in conjunction with paragraphs 30–36. Decisions of a court of appeal can be appealed, and the court of appeal is accordingly not a court adjudicating at last instance. It is also uncertain whether decisions of the Supreme Court refusing leave to appeal may constitute a basis for potential liability for damages. The Supreme Court has not ruled on the decision at last instance, since neither the Appeals Committee, nor (still less) the Supreme Court as an appellate court, has ruled on the substantive (EEA law) merits of the appeal case.

In that connection, Dartride AS's reliance on Case C-99/00 *Lyckeskog* is irrelevant, as that case concerned the question of a national court's obligation to make a reference, not liability for damages for judicial decisions. Case C-32/12 *Soledad Duarte Hueres* is similarly irrelevant. That case concerned the obligation of national courts to raise submissions of its own motion and relates to the specific requirements imposed in that connection under the Consumer Rights Directive.

Even if it were to follow from the EEA Agreement that judicial decisions are capable of triggering State liability for damages, EEA law does not preclude a provision such as the third paragraph of section 200 of the Courts of Justice Act. The provision does not preclude State liability for damages for errors committed by the courts, but presupposes that the judicial decision is quashed or amended. A decision can be quashed or amended through the rules on reopening of cases.

5 Questions referred to the EFTA Court

Eidsivating Court of Appeal has examined the parties' submissions on EEA law and has decided to refer the following questions to the EFTA 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?

The questions have been drafted on the basis of a joint proposal from the parties to the case.

Eidsivating Court of Appeal

Kjersti Lund
Court of Appeal Judge

(digital signature)