JUDGMENT OF THE COURT

1 August 2019*

(Public procurement – Directive 89/665/EEC – Claim for compensation for the loss of profit – Gravity of the breach – Principles of equivalence and effectiveness)

In Case E-7/18,

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 the Supreme Court of Norway, (*Norges Høyesterett*), in the case between

Fosen-Linjen AS, supported by **the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*)**,

and

AtB AS

concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular Article 2(1)(c) thereof,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

— Fosen-Linjen AS ("Fosen-Linjen"), represented by Anders Thue, advokat;

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

— the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*) ("NHO"), represented by Morten Goller, advokat;

— AtB AS ("AtB"), represented by Goud Helge Homme Fjellheim, advokat;

— the Norwegian Government, represented by Pål Wennerås and Helge Røstum, advocates at the Attorney General (Civil Affairs), acting as Agents;

— the Finnish Government, represented by Henriikka Leppo, acting as Agent;

— the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Ewa Gromnicka and Erlend M. Leonhardsen, members of its Department of Legal & Executive Affairs, acting as Agents; and

— the European Commission (the "Commission"), represented by Luke Haasbeek and Petr Ondrůšek, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Fosen-Linjen, represented by Anders Thue and Christian Reusch; NHO, represented by Morten Goller; AtB, represented by Goud Helge Homme Fjellheim; the Norwegian Government, represented by Pål Wennerås and Helge Røstum; ESA, represented by Ewa Gromnicka and Erlend M. Leonhardsen; and the Commission, represented by Petr Ondrůšek; at the hearing on 13 May 2019,

gives the following

Judgment

I Legal background

EEA law

1 The first and second paragraphs of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads 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.*

2 Article 97(3) of the Court's Rules of Procedure ("RoP") provides:

> *Where a question referred to the Court for an advisory opinion is manifestly identical to a question on which the Court has already ruled or given an opinion, the Court may, after informing the court or tribunal which referred the question to it and hearing any observations submitted by the Governments of the EFTA States, the EFTA Surveillance Authority, the Union, the European Commission and the parties to the dispute, give its decision by reasoned order in which reference is made to its previous judgment or opinion.*

3 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) (the "Remedies Directive" or "the Directive"), is referred to at point 5 of Annex XVI (Procurement) to the Agreement on the European Economic Area ("the EEA Agreement").

4 The Remedies Directive was amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31, and EEA Supplement 2015 No 76, p. 918) ("Directive 2007/66"). Directive 2007/66 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 83/2011 of 1 July 2011 (OJ 2011 L 262, p. 54, and EEA Supplement 2011 No 54, p. 68) and is also referred to at point 5 of Annex XVI (Procurement). Constitutional requirements were indicated and fulfilled in September 2012. Consequently, the decision entered into force on 1 November 2012, and the time limit for the EFTA States to implement the Directive expired on the same date.

5 The third recital of the Remedies Directive reads:

> *Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement, or national rules implementing that law;*

6 The sixth recital of the Remedies Directive reads:

> *Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;*

7 At the relevant time, Article 1(1) of the Remedies Directive read:

> *This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and*

public service contracts, unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

8 Article 2(1)(c) of the Remedies Directive reads:

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(c) award damages to persons harmed by an infringement.

9 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and EEA Supplement 2009 No 34, p. 216) ("Directive 2004/18") was inserted at point 2 of Annex XVI to the EEA Agreement by Decision of the EEA Joint Committee No 68/2006 of 2 June 2006 (OJ 2006 L 245, p. 22, and EEA Supplement 2006 No 44, p. 18), which entered into force on 18 April 2007. Directive 2004/18 applied in the EEA at the relevant time. It has since been repealed and replaced by Directive 2014/24/EU (OJ 2014 L 94, p. 65, and EEA Supplement 2018 No 84, p. 556).

10 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) was inserted at point 5a of Annex XVI to the EEA Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994 (OJ 1994 L 160, p. 1, and EEA Supplement 1994 No 17, p. 1), which entered into force on 1 July 1994. Subsequently, Directive 92/13/EEC was amended, inter alia, by Council Directive 2006/97/EC of 20 November 2006 (OJ 2006 L 363, p. 107), which was added to point 5a of Annex XVI to the EEA Agreement by Joint Committee Decision No 132/2007 (OJ 2007 L 100, p. 1, and EEA Supplement 2008 No 19, p. 1) and by the previously mentioned Directive 2007/66.

11 Article 2(7) of Directive 92/13/EEC reads:

Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or

national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

National law

12 At the time of the tender competition, Article 2(1)(c) of the Remedies Directive was implemented in Norwegian law by Section 11 of the Act of 16 July 1999 No 69 on Public Procurement (*Lov 16. juli 1999 nr. 69 om offentlige anskaffelser*). Section 11 provided that, in the event of a breach of the rules under the Act or regulations enacted under it, the claimant was entitled to damages for the loss suffered as a consequence of the breach. The provision is reproduced without amendments to its substance in Section 10 of the Act of 17 June 2016 No 73 on Public Procurement (*lov 17. juni 2016 nr. 73 om offentlige anskaffelser*).

13 In a Norwegian Supreme Court judgment from 2001 (*Nucleus*), it was held that EEA law does not lay down any guidelines for national criteria for the basis of liability in damages claims for the positive contract interest, covering loss of reasonably expected profits. The Supreme Court set the requirement that there must be a sufficiently serious breach and a clear preponderance of evidence that the claimant would have been awarded the contract if the rules governing public procurement had been complied with.

14 In 2008 (*Trafikk & Anlegg*), the Norwegian Supreme Court arrived at the conclusion that EEA law does not provide any detailed substantive requirements in damages claims for the positive contract interest and that the criteria laid down in the *Nucleus* judgment satisfied the requirement for an effective legal remedy, as provided for in EEA law.

II Facts and procedure

15 The factual background of the case before the Supreme Court of Norway is sufficiently described in the Report for the Hearing and the Judgment in *Fosen-Linjen I* (Case E-16/16 *Fosen-Linjen AS* v *AtB AS* [2017] EFTA Ct. Rep. 617) and will only be repeated in the following to the extent necessary for the purposes of this case.

The parties to the dispute

16 Fosen-Linjen is a small, local undertaking, which has operated two minor ferry services for approximately 15 years.

17 AtB administers the public transport services in Sør-Trøndelag county. The overall responsibility for public transport services in the county lies with Sør-Trøndelag County Authority (*Sør-Trøndelag fylkeskommune*). AtB does not operate the actual services, but instead procures transport services from privately owned operators, and acts as their contracting authority. It receives significant subsidies from the county in order to finance the operation of the service network.

The tender procedure

18 In June 2012, Sør-Trøndelag County Council (*Fylkestinget i Sør-Trøndelag*) decided to assign to AtB the task of preparing tender specifications and carrying out a tender procedure for the procurement of ferry services.

19 For this procedure, tenders were received from Fosen-Linjen, Norled AS ("Norled") and Boreal Transport Nord AS. After an extensive round of questions, responses and negotiations, Norled and Fosen-Linjen submitted revised tenders in November 2013.

20 AtB evaluated the tenders. The award criteria were "price" (50 per cent), "environment" (25 per cent) and "quality" (25 per cent). A score was awarded to each criterion on a scale from one to ten, and then weighted in accordance with the weight assigned to that criterion in the tender specifications.

21 By letter of 17 December 2013, AtB informed the interested parties that Norled would be awarded the contract.

22 Subsequently, Fosen-Linjen brought a case before Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*) and requested that court to issue an interim measure to stop the signing of the contract between AtB and Norled. The District Court prohibited the contract's signature. AtB appealed the District Court's decision, but it was upheld by Frostating Court of Appeal in an order of 17 March 2014.

23 By a letter of 30 April 2014, AtB informed the tenderers that it had decided to cancel the tender procedure following Frostating Court of Appeal's order. Fosen-Linjen did not contest this decision before the courts. Subsequently, AtB signed a contract with Norled for the operation of the relevant ferry service for 2015 and 2016. A new invitation to tender for this service was announced in 2015 and concerned the service's operations for 2017 and 2018. Another invitation to tender was announced at the beginning of 2016 and concerned operations from 2019 to 2029. Fosen-Linjen did not submit a tender in any of these procedures. At the oral hearing before the Court, the counsel for Fosen-Linjen explained that, since the contracts required the building of ships, the contract period covering only 2017 and 2018 would be too short to recoup a sufficient part of the required investment. Moreover, the contract notice for the period from 2019 to 2029 included several other routes and thus favoured operators larger than Fosen-Linjen.

The proceedings for damages before the Norwegian courts

24 In February 2014, Fosen-Linjen brought an action against AtB. In the subsequent proceedings, it claimed damages for the positive contract interest (loss of profit – *lucrum cessans*) or, in the alternative, for the negative contract interest (costs of bidding – *damnum emergens*).

25 By a judgment of 2 October 2015, the District Court found in favour of AtB and rejected the claim for damages with regard to both the negative and the positive contract interest sought.

26 The District Court held that there is a requirement under EEA law that award criteria should be linked to documentation. In the case at issue, the contracting authority had failed to require the necessary documentation. The District Court found that AtB, in the tender specifications, had not requested information about any of the parameters that were important for the calculation of fuel oil consumption, such as hull resistance, propulsive efficiency, transmission loss, hotel load and ship resistance. Furthermore, it held that none of the tenderers had understood the tender specifications to mean that they were required to document fuel oil consumption at the time of submitting the tender.

27 On 30 October 2015, Fosen-Linjen brought an appeal against the District Court's judgment before Frostating Court of Appeal.

28 By a letter of 24 October 2016, registered at the Court on 31 October 2016, Frostating Court of Appeal referred six questions to the Court. Questions 1 and 2 of the request read:

> 1. *Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts, is conditional on*
>
> > *(a) the existence of culpability and a requirement that the contracting authority's conduct must deviate markedly from a justifiable course of action?*
> >
> > *(b) the existence of a material error where culpability on the part of the contracting authority is part of a more comprehensive overall assessment?*
> >
> > *(c) the contracting authority having committed a material, gross and obvious error?*
>
> 2. *Should Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, be interpreted to mean that a breach of an EEA procurement law provision under which the contracting authority is not free to exercise discretion, constitutes in itself a sufficiently qualified breach that may trigger a right to damages on certain conditions?*

29 By its third question, Frostating Court of Appeal sought guidance on the standard of proof in relation to claims seeking compensation for loss of profit. According to Frostating Court of Appeal's request, the aggrieved tenderer is required to prove with "clear, that is, qualified preponderance of evidence", that he would have been awarded the contract, had the contracting authority not committed the error. The fourth question essentially concerned the issue of whether national rules, according to which the contracting authority may free itself from the claim for damages by invoking errors, other than those relied on by the aggrieved party, as a reason for cancelling the tender procedure, are in compliance with EEA law on public procurement. The second part of

the fourth question related to the national provisions on the burden of proof in that context. By its fifth and sixth questions, Frostating Court of Appeal sought to ascertain the relevant factors, linked to the principle of equal treatment, for determining whether a contracting authority's verification requirements for an award criterion complies with EEA public procurement law.

30 In its request, Frostating Court of Appeal expressed its difficulty in reconciling the judgments of the Court of Justice of the European Union ("ECJ") in *Commission* v *Portugal* (C-275/03, EU:C:2004:632) and *Strabag and Others* (C-314/09, EU:C:2010:567; "*Strabag*") with the same court's judgment in *Combinatie Spijker and Others* (C-568/08, EU:C:2010:751; "*Combinatie*").

31 The Court delivered its judgment in *Fosen-Linjen I* on 31 October 2017. The operative part of the judgment reads as follows:

> 1. *The award of damages according to Article 2(1)(c) of Directive 89/665/EEC does not depend on whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error or whether it is attributable to the existence of a material, gross and obvious error. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including, in particular, the condition of a causal link.*
>
> 2. *Directive 89/665/EEC does not preclude a requirement according to which the award of damages is conditional on the aggrieved tenderer proving with clear, that is, qualified preponderance of evidence that he should have been awarded the contract had the contracting authority not committed the error, as long as the principles of equivalence and effectiveness are respected.*
>
> 3. *Directive 89/665/EEC does not preclude national law that exempts a contracting authority from liability for positive contract interest where the tender procedure, due to an error by the contracting authority, was cancelled in compliance with EEA public procurement law, even where that error was not invoked during the tender procedure and is different from the error invoked by the claimant. It is for the contracting authority to prove the existence of such an error and justify its decision to withdraw the tender procedure.*
>
> 4. *The award criteria of a tender procedure must be formulated in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way. The contracting authority is furthermore obliged to verify whether the information submitted by the tenderer is plausible, in the sense that the respective tenderers are capable of providing what was offered in the bid, and whether that bid corresponds to the*

> *requirements set out by the contracting authority. The verification requirement must comply with the principle of proportionality. As long as all tenderers are treated equally, the contracting authority may have regard to any information provided in the tender in order to make an effective verification of the information linked to the award criteria. It is for the referring court, having regard to the principles of equal treatment, transparency, and proportionality, to determine whether these conditions were complied with in the underlying tender procedure.*

32 After the Court's judgment in *Fosen-Linjen I*, Frostating Court of Appeal decided the case in a judgment of 2 March 2018. According to the referring court, Frostating Court of Appeal interpreted the Court's judgment in *Fosen-Linjen I* to the effect that any breach of public procurement law is in itself sufficient for there to be a basis of liability for the "positive contract interest". However, Frostating Court of Appeal found that the question of a State's right to regulate the contracting authority's liability has not been decided unambiguously by the ECJ, that there are diverging views on this issue throughout the EEA, and that the Court's judgment in *Fosen-Linjen I* "does not appear to be clearly correct" on this point. On that basis, Frostating Court of Appeal decided that damages for the "positive contract interest" are contingent on there being a sufficiently serious breach, as established by the Supreme Court of Norway in its case law. In the view of Frostating Court of Appeal, that finding was consistent with the judgments of the ECJ in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) and *Brasserie du Pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79; "*Brasserie du Pêcheur*"), to which the ECJ referred in *Combinatie* (cited above).

33 On the substance of the case, Frostating Court of Appeal held that there had been errors in the invitation to tender. However, AtB had lawfully cancelled the procedure based on those errors. Since the cancellation was lawful, there was no causal link for the claim for damages for the positive contract interest.

34 Both AtB and Fosen-Linjen appealed against the judgment of Frostating Court of Appeal to the Supreme Court of Norway. Fosen-Linjen also filed an ancillary cross-appeal. By decision of 19 June 2018, the Appeals Selection Committee of the Supreme Court granted leave to appeal.

35 In the proceedings before the Supreme Court of Norway, NHO intervened in support of Fosen-Linjen. Furthermore, the Norwegian Government, represented by the Ministry of Justice and Public Security, was granted leave to participate in the proceedings to the extent necessary to safeguard the Government's interests in a potential conflict between national rules and international obligations.

36 By a letter of 19 November 2018, registered at the Court on the same day, the Supreme Court of Norway submitted the following question to the Court:

> *Does Article 2(1)(c) of the Remedies Directive require that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest?*

37 In its request, the Supreme Court of Norway expresses reservations as to whether the Court's judgment in *Fosen-Linjen I* should be read as setting out the criteria for a basis of liability for damages for the "positive contract interest". According to the Supreme Court of Norway, the Court did not specifically address important issues in *Fosen-Linjen I.* In particular, ambiguity remains in relation to Court's understanding of the level of harmonisation under Article 2(1) of the Remedies Directive, the principle of effectiveness and the relevance of the standard for liability for damages of the EU institutions in their public procurement activities for the standard of liability of contracting authorities of an EEA State. Finally, the Supreme Court of Norway noted that both the Supreme Court of the United Kingdom and the Supreme Court of Sweden have recently adopted a standard of liability which corresponds to the ECJ's findings in *Combinatie* (reference is made to the judgment of the Supreme Court of the United Kingdom in *Nuclear Decommissioning Authority* v *EnergySolutions EU Ltd* (2017) UKSC 34, paragraphs 21-27; and the judgment of the Supreme Court of Sweden (*Högsta domstolen*) of 18 May 2016 in Case 3852-14 (NJA 2016 p. 358), paragraph 13). Neither of those courts found it necessary to refer questions to the ECJ.

38 In these circumstances, and "in the interests of dialogue between the EFTA Court and the national courts" the Supreme Court of Norway seeks "clarification and amplification, or possibly a reconsideration, of the requirements imposed by Article 2(1)(c) of the Remedies Directive for the basis of liability in damages claims for positive contract interest".

39 The oral hearing was originally scheduled to take place on 21 March 2019. Since Judge Christiansen was prevented from sitting on that day, the hearing was postponed by the President and rescheduled for 13 May 2019.

40 By a letter of 10 May 2019, registered at the Court on the same day, Fosen-Linjen asked the Court to consider whether the three Judges can be considered, both individually and collectively as a panel of Judges, to have the required impartiality to participate in the present case.

41 On 11 May 2019, it became apparent that Judge Christiansen would not be able to take part in the hearing on 13 May 2019. President Hreinsson and Judge Hammermann decided to appoint ad hoc Judge Ola Mestad to replace Judge Christiansen and to complete the Court for the hearing. On the same day, Judge Hammermann and ad hoc Judge Mestad examined the reasons submitted by Fosen-Linjen in its letter of 10 May 2019 alleging a lack of impartiality of the President in the present case. By Decision of 11 May 2019, Judge Hammermann and ad hoc Judge Mestad dismissed Fosen-Linjen's arguments in relation to the President as unsubstantiated. In addition, the President and ad hoc Judge Mestad did not identify any reasons which could lead to the disqualification of Judge Hammermann in the assessment of the present case. By letter of the same date, the Registrar informed those parties who had previously notified the Court of their attendance at the hearing of the decision to appoint an ad hoc judge to replace Judge Christiansen and to complete the Court in the present case. In the same letter the parties were informed that the Court had decided that the claims made by Fosen-Linjen in its letter of 10 May 2019 were unsubstantiated.

42 The hearing took place on 13 May 2019.

43 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Preliminary observations

Admissibility

44 The dispute in the main proceedings has already given rise to the Judgment in *Fosen-Linjen I*. As grounds for submitting a second request for an advisory opinion, the Supreme Court of Norway stated that it seeks "clarification and amplification, or possibly a reconsideration, of the requirements imposed by Article 2(1)(c) of the Remedies Directive for the basis of liability in damages claims for positive contract interest".

45 Furthermore, AtB argues that "the EFTA Court should reconsider" the conclusion reached in *Fosen-Linjen I*. ESA, too, submits that there are "a number of grounds for nuancing, or, if the Court should wish so, overturning the whole [*Fosen-Linjen I*] judgment or certain aspects of it".

46 The Norwegian Government submits that the request for an advisory opinion is admissible, since the only substantive requirement imposed by Article 34 SCA is that the question referred concerns the interpretation of EEA law, which is fulfilled in the present case.

47 In this regard, the Court recalls that Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them. Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an Advisory Opinion on the interpretation of the Agreement (see Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 53 and 54, and case law cited; see also Case E-21/16 *Pascal Nobile* [2017] EFTA Ct. Rep. 554, paragraph 23, and case law cited; and *Fosen-Linjen I*, cited above, paragraph 42).

48 It is thus important that questions on the interpretation of the EEA Agreement are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity (see Case E-3/12 *Staten v/Arbeidsdepartementet* v *Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136, paragraph 60, and case law cited).

49 Indeed, pursuant to Article 34 SCA, a further request in the same case may also be justified, inter alia, when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new

considerations which might lead to a different answer to a question submitted earlier. However, it is not permissible to use the right to refer questions as a means of contesting the validity of the earlier judgment (see Case E-6/01 *CIBA* [2002] EFTA Ct. Rep. 281, paragraph 12, and case law cited).

50 As stated above in paragraph 44, it is evident that the Supreme Court of Norway does not seek to contest the validity of *Fosen-Linjen I*, but merely seeks clarification as to whether Article 2(1)(c) of the Remedies Directive requires that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for a head of damage which concerns the "positive contract interest".

51 Accordingly, the present request for an advisory opinion is admissible.

Form of the Court's opinion

52 Fosen-Linjen submits that this case concerns the same question as *Fosen-Linjen I* (reference is made to *Fosen-Linjen I*, cited above), and should be answered with an order simply referring to that previous judgment, in line with Article 97(3) RoP.

53 According to Fosen-Linjen, the EFTA Court has already – and in the same case – answered the question referred by the Supreme Court. The dispute does not, therefore, raise any questions of interpretation of EEA law that cannot be resolved on the basis of the EFTA Court's case law.

54 NHO supports the written observations of Fosen-Linjen. It argues that an order under Article 97(3) RoP, by reference to *Fosen-Linjen I*, should suffice in the case at hand.

55 The Norwegian Government submits that neither part of the question referred is "manifestly identical" to the questions answered in *Fosen-Linjen I*.

56 In its request of 24 October 2016, Frostating Court of Appeal referred six questions to the Court concerning the interpretation of the Remedies Directive. Its first question concerned the compatibility with EEA law of certain conditions of national law on the award of damages. By its second question, Frostating Court of Appeal asked whether a breach of a provision of EEA procurement law, which leaves no discretion to the contracting authority, could constitute in and of itself a "sufficiently qualified breach" triggering a right to damages. As can be inferred from the wording of the questions, as set out in paragraph 28 above, the first and second questions referred in *Fosen-Linjen I* were not limited to the conditions applicable to a specific head of damage, such as the loss of profit and/or the "positive contract interest", but concerned the national conditions for damage claims following mistakes by the contracting authority in the procurement procedure more broadly. Conversely, as can be inferred from paragraph 44 above, the wording of the question of the Supreme Court of Norway in the present case seeks clarification in relation to the compatibility with EEA law of certain national conditions which apply only to a damages claim for the "positive contract interest".

57 Consequently, the questions previously referred by Frostating Court of Appeal and the question presently referred to the Court by the Supreme Court of Norway are not manifestly identical.

58 It follows that the conditions for applying Article 97(3) RoP are not fulfilled. Thus, the Court will give its response by way of a judgment.

IV Answer of the Court

Observations submitted to the Court

59 *Fosen-Linjen* refers to the findings of the Court in *Fosen-Linjen I*, and states that a simple breach of public procurement law is in itself sufficient to trigger liability according to Article 2(1)(c) of the Remedies Directive. Further, it is clear from the judgment that rules on State liability do not apply in public procurement cases (reference is made, inter alia, to *Fosen-Linjen I*, cited above, paragraph 64 and the operative part).

60 Fosen-Linjen notes that the Remedies Directive does not mention liability for the positive contract interest as such. It is Norway which has chosen this form of liability to comply with the Remedies Directive's requirement for effective remedies. Thus the Supreme Court's question could correctly be answered both positively and negatively, depending on how it is understood, and should therefore be rephrased.

61 Fosen-Linjen submits that if the system only makes available the recovery of bid costs, this would clearly not be sufficient to comply with the requirements of Article 1(1) and 2(1)(c) of the Remedies Directive. In the EU, it is considered necessary to allow access to a claim of damages for the loss of opportunity and the result must be the same under the EEA Agreement, whether the result is based on the Remedies Directive or fundamental principles of effective judicial protection (reference is made, inter alia, to the judgment in *EUIPO* v *European Dynamics Luxembourg and Others*, C-376/16 P, EU:C:2018:299, paragraph 80).

62 In this regard, Fosen-Linjen states that a national system must allow for the recovery of any interest, including the positive contract interest (reference is made, inter alia, to the judgment in *Fosen-Linjen I*, cited above, paragraphs 75, 76 and 90).

63 Fosen-Linjen notes that although, at first glance, *Strabag* and *Combinatie* may be difficult to reconcile, it is not surprising that the ECJ did not carry out a review under the effectiveness angle in the latter case, as it simply had no reason to do so. Fosen-Linjen submits that applying the State liability doctrine could render the damages provisions in the Remedies Directive superfluous, and would in fact run contrary to the aim of the Remedies Directive, which is to strengthen existing mechanisms (reference is made to the judgment in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 74). Accordingly, a "sufficiently serious breach" of law cannot be required as a condition for the award of damages.

64 However, Fosen-Linjen submits that, even if the notion of State liability were to apply, it must be construed in line with the principle of effectiveness following the approach adopted by the ECJ in *Strabag*. This would be fully compliant with the ECJ's approach in *Combinatie* and the application of State liability, since the principle of effectiveness limits procedural autonomy (reference is made to the judgment in *Combinatie*, cited above, paragraph 92).

65 In this regard, Fosen-Linjen argues that a requirement of a qualified breach is precluded by the Remedies Directive and the principle of effectiveness.

66 Furthermore, Fosen-Linjen contends that the contracting authority cannot exonerate itself from potential liability by referring to a discretionary margin if there is no or limited discretion at play (reference is made to Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092, paragraphs 129 and 130, and to the judgment in *Strabag*, cited above, paragraph 41).

67 Consequently, a breach of a rule, under which a contracting authority is not free to exercise any discretion, constitutes a sufficiently serious breach that gives a right to damages under the Remedies Directive if the other conditions for claiming damages are also fulfilled.

68 *NHO* submits that should the Court choose to deviate from *Fosen-Linjen I*, it should alter its conclusions as little as possible. First, it follows from ECJ case law that Article 2(1)(c) of the Remedies Directive precludes national legislation which makes the right to damages conditional on that infringement being culpable. Second, a contracting authority cannot rely on the excuse of legal error to avoid liability.

69 Further, NHO argues that it should be clear that the principle of State liability as such is not directly applicable. Rather, the question is whether *Combinatie* must be understood to mean that the liability of a contracting authority under Directive 2004/18 is assimilated to that of the State, and consequently that a test of "sufficiently serious" can be applied.

70 If the Court concludes nevertheless that the doctrine on State liability can be assimilated or applied by analogy to breaches of procurement law, NHO considers it crucial that the test of "sufficiently serious" is applied in the context of its procurement law setting and taking into account the principle of effectiveness. This would entail that the criterion of sufficiently serious breach cannot be construed as establishing a high threshold to obtain damages for the positive contract interest.

71 *AtB* argues that Article 2(1)(c) of the Remedies Directive is an expression of the State liability principle, and that the Directive is an instrument of minimum harmonisation (reference is made to the judgment in *Combinatie*, cited above). AtB submits that it is peculiar that, in *Fosen-Linjen I*, no distinction was made between heads of damage, as this distinction is fundamental in most European countries. Further, it remains open to interpretation what the precise requirement is as regards a direct causal link.

72 In that regard, AtB notes that the wording of Article 2(1)(c) of the Remedies Directive and Article 2(1)(d) of Directive 92/13/EEC go no further than to set out a mere constitutive requirement of damages. That is further strengthened by a contextual interpretation, since Article 2(7) of Directive 92/13/EEC, unlike Article 2(1)(c) of the Remedies Directive, requires strict liability in damages claims for bid costs.

73 AtB argues that the Remedies Directive is an example of minimum harmonisation, citing, inter alia, the sixth recital of the Directive and case law of the ECJ (reference is made to the judgments in *Hochtief AG*, C-300/17, EU:C:2018:635, paragraph 35, and *Symvoulio Apochetefseon Lefkosias*, C-570/08, EU:C:2010:621, paragraph 37). Furthermore, very few Member States apply a doctrine of strict liability for public procurement rules.

74 AtB submits that the judgment in *Combinatie* encompasses the most thorough considerations regarding the interpretation of Article 2(1)(c) of the Remedies Directive. In that judgment, the ECJ found that Article 2(1)(c) of the Remedies Directive gives expression to the principle of State liability (reference is also made to the judgment in *Nuclear Decommissioning Authority* v *EnergySolutions EU Ltd* [2017] UKSC 34). AtB submits that, in *Fosen-Linjen I*, the Court undermines the principle of homogeneity and Article 6 EEA by departing from settled case law without justification or even deliberation as to why *Combinatie* is inapplicable.

75 AtB understands *Strabag* as reiterating *Brasserie du Pêcheur* (reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraphs 78 to 80), namely stating that Member States cannot introduce a fixed requirement of fault as a condition of State liability. AtB submits that there are no contradictions between the rulings in *Strabag* and *Combinatie*. If the Court finds that the aforementioned judgments are incompatible, AtB contends that *Combinatie* should take precedence, both in the light of the substance of the ruling and the rule on *lex posterior* (reference is made to the judgment in *Hochtief*, cited above, paragraphs 35-37).

76 Further, AtB submits that the contract in the main proceedings is a contract for a non-priority service, and thus not subject to the detailed procedural rules of Directive 2004/18. It follows, therefore, that the procuring authority enjoys a margin of discretion, which must be determined with reference to EEA law (reference is made, inter alia, to the judgments in *Haim*, C-424/97, EU:C:2000:357, paragraphs 38 and 40, and *Brasserie du Pêcheur*, cited above, paragraph 59). Thus, the principle of State liability is well suited to handle breaches of public procurement rules, in particular where such breaches rely on the infringement of general principles.

77 Moreover, AtB asserts that the same conditions for liability for damages must apply to Member States and EU institutions alike, unless there is specific justification for divergence (reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraph 42). The conditions for damages are quite restrictive for EU institutions and the threshold for establishing EU institutional liability is high (reference is made, inter alia, to the judgments in *Agriconsulting Europe* v *Commission*, T-570/13, EU:T:2016:40, paragraphs 32, 95 and 96, and *AFCon Management Consultants and*

Others v *Commission*, T-160/03, EU:T:2005:107, paragraphs 90 and 93). AtB submits that the principle of effectiveness cannot justify variable protection for tenderers depending on whether it is a national authority or an EU institution responsible for the breach.

78 AtB argues that, to the extent that *Fosen-Linjen I* might be interpreted as entailing that State liability does not apply when the State acts in a private capacity, the ECJ has explicitly stated that State liability can be engaged where there is no exercise of public authority (reference is made to the judgments in *A.G.M-COS.MET*, C-470/03, EU:C:2007:213, paragraphs 91 and 93; *Fuß*, C-429/09, EU:C:2010:717; and *EUIPO* v *European Dynamics Luxembourg and Others*, cited above).

79 Finally, AtB submits that, contrary to the reasoning of *Fosen-Linjen I*, when assessing the effectiveness of a remedy, the correct approach is to look at the national remedies system as a whole (reference is made, inter alia, to the judgments in *Peterbroeck, Van Campenhout & Cie*, C-312/93, EU:C:1995:437, paragraph 14; *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35; and *Unibet*, C-432/05, EU:C:2007:163).

80 *The Norwegian Government* contends that an affirmative answer to the question referred would flout the principle of homogeneity, and impede both legal certainty and the functioning of the internal market. Further, it stresses that not only the result, but also the reasoning, must be in line with the principle of homogeneity.

81 Further, the Norwegian Government argues that the Court must firstly answer the second part of the question – whether Article 2(1)(c) of the Remedies Directive requires the EEA States to make loss of profit available as a head of damage. If not, the standard of liability falls outside the scope of EEA law (reference is made, inter alia, to the judgments in *Kremzow*, C-299/95, EU:C:1997:254, paragraphs 18-19, and *Bulthuis-Griffioen*, C-453/93, EU:C:1995:265).

82 In that regard, the Norwegian Government submits that the Remedies Directive lays down minimum conditions to be met by the Member States (reference is made, inter alia, to the judgments in *Strabag*, cited above, paragraph 33, and *Combinatie*, cited above). Since these minimum conditions give specific expression to the right to an effective remedy they also apply to the EU institutions (reference is made to the order in *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 28).

83 Further, the Norwegian Government contends that remedies for infringements of EEA law are within the procedural autonomy of the Member States, restricted by the principles of equivalence and effectiveness (reference is made to the judgments in *Rewe*, 33/76, EU:C:1976:188, paragraph 5, and Case E-10/17 *Nye Kystlink* [2018] EFTA Ct. Rep. 293, paragraph 73). Moreover, the case law of the General Court concerning the responsibility of EU institutions for loss of profit is applicable (reference is made to the judgment in Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575, paragraph 71).

84 In this regard, the Norwegian Government argues that the public procurement rules do not give a tenderer a right to enter into a contract. Since a tenderer does not have a valid

claim to enter into contract, the requirement of direct causation of loss is not fulfilled (reference is made, inter alia, to the judgments in *Embassy Limousines* v *European Parliament*, T-203/96, EU:T:1998:302, paragraphs 54 and 96, and *Citymo* v *Commission*, T-271/04, EU:T:2007:128, paragraphs 161-164).

85 The Norwegian Government further argues that such a conclusion does not contradict the principle of effectiveness. It submits that the principle of effectiveness applies after three basic conditions are met, including a "direct causal link" (reference is made to the judgments in *Brasserie du Pêcheur*, cited above, paragraphs 65-67; and *EUIPO* v *European Dynamics Luxembourg and Others*, cited above, paragraph 91). Moreover, ECJ case law does not consider that excluding loss of profit contradicts the principle of effectiveness. Compensation for loss of profit in public procurement is not required since other types of harm are eligible for compensation (reference is made to the judgment in *Agriconsulting Europe* v *Commission*, cited above, paragraph 99). Consequently, neither Article 2(1)(c) of the Remedies Directive nor the principle of effectiveness requires a Member State to make claims for loss of profit available.

86 Further, the Norwegian Government contends that *Combinatie* and *Strabag* are compatible since the two judgments answer different questions. *Strabag* reaffirms that *culpa* is not the determining factor for liability, while *Combinatie* states that the principle of State liability applies (reference is made to the judgments in *Strabag*, cited above, paragraphs 44-45, and in *Combinatie*, cited above, paragraphs 87 and 92). Moreover, the judgment in *Combinatie* was rendered after *Strabag*, and the ECJ was well aware of the latter, which was discussed by the Advocate General and cited by the ECJ.

87 Following the principles of precedent, homogeneity and *acte éclairé* (reference is made to the judgment in *CILFIT*, 283/81, EU:C:1982:335, paragraph 14), Article 2(1)(c) of the Remedies Directive must be interpreted in conformity with *Combinatie*, namely that a right to reparation arises when the breach is sufficiently serious.

88 *The Finnish Government* submits that the question referred should be answered in the negative. First, the Remedies Directive harmonises neither the rules on liability for breaches of EEA law nor the criteria for determining a contracting authority's responsibility for its conduct (reference is made to the judgments in *Fosen-Linjen I*, cited above, paragraph 70, and *Combinatie*, cited above, paragraph 90). Second, observing the principles of equivalence and effectiveness in no way requires that any breach of the rules governing public procurement must in itself be sufficient for there to be a basis of liability for the positive contract interest (reference is made to the judgment in *Combinatie*, cited above, paragraph 91).

89 In that regard, the Finnish Government contends that, under Norwegian law, it is not practically impossible or excessively difficult to obtain damages based on Article 2(1)(c) of the Remedies Directive.

90 Further, the Finnish Government submits that the aforementioned interpretation is not precluded by ECJ case law, such as *Strabag*, as that case dealt with national provisions

very different to those under review in the current case (reference is made to the judgment in *Strabag*, cited above, paragraphs 7, 25, 30, 41 to 42 and 45). In particular, in the current case, the tenderer does not face the risk of being deprived of his right to damages or of obtaining damages only belatedly.

91 *ESA* states that there are number of grounds for nuancing or, if the Court should wish to do so, overturning *Fosen-Linjen I*, or certain aspects of it in view of the homogeneity principle.

92 In that regard, ESA submits that Article 2(1)(c) of the Remedies Directive only prescribes that the power to award damages must be available. No guidance is provided by the Directive to the concept of damage, specific types of it and the liability standard (reference is made to the judgment in *Combinatie*, cited above, paragraph 86, and the Opinion of Advocate General Cruz Villalón in *Combinatie*, C-568/08, EU:C:2010:515, point 106).

93 ESA argues that the wording of Article 2(1)(c) of the Remedies Directive and the purpose of the Directive itself cannot suggest that any breach of the rules is sufficient for there to be a basis of liability for the positive contract interest. Article 2(1)(c) only requires that it should be possible to award damages, which is in line with the nature of the Directive as a minimum harmonisation instrument (reference is made, inter alia, to the judgments in *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42, and *Hochtief*, cited above, paragraph 36).

94 ESA contends that the principal limits upon the procedural autonomy of Member States flow from the principle of equivalence and the principle of effectiveness (reference is made to the judgment in *Combinatie*, cited above, paragraph 92, and the judgment in *Stefan Rudigier*, C-518/17, EU:C:2018:757, paragraph 61). These principles entail that rules governing liability under Article 2(1)(c) of the Remedies Directive must not be less favourable than those governing similar domestic liability, and that national procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (reference is made to *Nye Kystlink*, cited above, paragraphs 73, 110 and 111).

95 ESA notes that while the Court held in *Fosen-Linjen I*, in general terms, that a simple breach of public procurement law is sufficient to trigger the liability of the contracting authority, provided that other conditions are met, the Court did not address the question of whether this pertains to the liability for the positive contract interest.

96 Turning to the judgment in *Strabag*, ESA submits that ECJ limited its conclusions to national rules regarding *culpa* and did not expressly take a position on the general standard of liability under Article 2(1)(c) of the Remedies Directive. In its judgment in *Combinatie*, the ECJ held that the general principle of State liability applied (reference is made to the judgments in *Strabag*, cited above, paragraphs 33, 35, 39, 40 and the operative part, and *Combinatie*, cited above, paragraphs 85-92). It follows that the right to damages under Article 2(1)(c) is subject to the procedural autonomy of Member States, provided that the principles of equivalence and effectiveness are complied with

(reference is made, inter alia, to the judgment in *Norbrook Laboratories Ltd*, C-127/95, EU:C:1998:151, paragraph 111). Thus, an answer in the affirmative to the question referred would be incompatible with this case law of the ECJ.

97 ESA submits that, in view of the homogeneity principle, the Court and ESA must pay due account to the rulings of the ECJ which means that provisions framed in the same way in the EEA Agreement and under EU law are to be construed in the same way (reference is made to Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 20). Where there is divergence, there must be compelling grounds for differing interpretations (reference is made to the judgment in Joined Cases E-9/07 and 10/07 *L'Oréal Norge AS* v *Per Aarskog AS and Others* [2008] EFTA Ct. Rep. 259, paragraphs 27, 31 and 37). ESA submits that, to the extent that the Court in *Fosen-Linjen I* may be seen to diverge from the ECJ regarding the application of principles of State liability in procurement cases in *Combinatie* and rely instead on the judgment in *Strabag* and the principle of effectiveness, the Court did not provide grounds for such divergence.

98 Moreover, ESA argues that since the relevant procurement rules are identical in the EEA and the EU and should be interpreted and applied in the same way by the Court and the ECJ, the Court should thus answer the question referred in the negative.

99 The *Commission* contends that the single question referred to the Court raises two distinct issues that must be considered separately. The first concerns the degree of seriousness of a breach necessary to trigger liability. The second is whether the damages awarded may be limited to a negative contract interest, or whether they include a positive contract interest.

100 For the Commission, it is clear that the first question was resolved by the Court in *Fosen-Linjen I*, where it was concluded that the gravity of a breach is irrelevant for the award of damages (reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 80). It further submits that there are no specific factual or legal elements in the request which would put this conclusion of the Court into question.

101 Regarding the second question, the Commission argues that the judgment in *Fosen-Linjen I* requires clarification, particularly whether the damages must always include a positive contract interest where there is a causal link.

102 In this regard, the Commission contends that Article 2(1)(c) of the Remedies Directive does not exclude any head of damage (reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, point 112). Furthermore, reading Article 2(1)(c) together with its *chapeau*, and the sixth recital of the Remedies Directive, makes it clear that the Article enshrines the need for procedures to ensure that damages can be awarded, but does not cover complex issues relating to the heads of damage and the causal link.

103 The Commission submits that given the similarity of the regulatory framework provided by the Remedies Directive and by Directive 92/13/EEC, the latter should also be

considered by the Court (reference is made to Article 2(1)(d) of Directive 92/13/EEC, which requires the Member States to ensure that there is a possibility to "award damages to persons injured by the infringement"). In this regard, the Commission argues that the EU legislative bodies did not intend to harmonise any aspect regarding damages other than the provisions regarding bidding costs laid down in Article 2(7) thereof and that, therefore, all other aspects of the award of damages are left to the national law of the Member States (reference is made to the tenth recital of Directive 92/13/EEC). According to the Commission, this conclusion applies *a fortiori* to the Remedies Directive.

104 The Commission further submits that despite the fact that the Remedies Directive is intended to provide for "effective remedies" (reference is made to the fourth recital of the Remedies Directive), the question of effectiveness should not be confused with the issue of whether the Remedies Directive actually harmonises heads of damage. The Commission submits that the recitals of the Remedies Directive and of Directive 2007/66 emphasise pre-emptive remedies, i.e. remedies invoked before any damage occurs (reference is made to the fifth recital of the Remedies Directive and recitals 3-12 and 21 of Directive 2007/66). Thus, it seems inconceivable to the Commission that the EU legislative bodies intended to provide through Article 2(1)(c) of the Remedies Directive for the harmonisation of such complex matters as the heads of damage, the causal link and the quantification of damage whilst not providing any explanations or justifications on these issues.

105 Consequently, the Commission submits that these issues remain within the procedural autonomy of the Member States (reference is made, inter alia, to the judgment in *Combinatie*, cited above, paragraph 90; the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, point 89; and the judgment in *Stefan Rudigier*, cited above, paragraph 61).

106 The Commission submits that Article 2(1)(c) of the Remedies Directive does not preclude national law pursuant to which, as in the present case, a breach of public procurement law, which is not sufficiently serious, results in the award of damages in the form of compensation for bidding costs only, where there is a casual link despite the cancellation of the procurement procedure, and where the tenderer chose not to participate in a later procurement procedure before the same contracting authority concerning the same services and largely the same period as that for which damages are sought, provided that a broader compensation is not required in those circumstances in accordance with the principle of equivalence.

Findings of the Court

107 By its question, the referring court asks whether Article 2(1)(c) of the Remedies Directive must be interpreted as requiring that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for the positive contract interest.

108 This question concerns the level of harmonisation provided for by the Remedies Directive, and rules regarding the award of damages for the loss of profit.

109 As set out in the sixth recital of the Remedies Directive, one of the aims of the Directive is to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement. Adequate review procedures, as formulated in the directive, must not necessarily be homogenous or identical, they must merely satisfy minimum conditions, which are required by the Directive in order to ensure compliance with EEA law. It follows that the Remedies Directive is an instrument of minimum harmonisation (compare the judgment in *Hochtief*, cited above, paragraphs 35-39, and case law cited; compare also the judgments in *Strabag*, cited above, paragraph 33, and case law cited; *Combinatie*, cited above, paragraph 86; and *Symvoulio Apochetefseon Lefkosias*, cited above, paragraph 37).

110 Article 1(1) and (3) of the Remedies Directive requires the EEA States to take the measures necessary to guarantee reviews which are effective and as rapid as possible against decisions of the contracting authorities which are incompatible with EEA law and to ensure the wide availability of reviews with respect to any person having, or having had, an interest in obtaining a particular contract and who has been, or risks being, harmed by an alleged infringement. To that end, Article 2(1)(c) of the Remedies Directive requires EEA States to ensure that the measures taken concerning the review procedures include provision for powers to award damages to persons harmed by an infringement.

111 However, neither Article 2(1)(c) nor any other provision of the Remedies Directive lays down specific conditions for the award of damages, which encompass specific heads of damage and the standard of liability in particular (see *Fosen-Linjen I*, cited above, paragraph 69; compare the judgment in *Combinatie*, cited above, paragraph 86, and the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, point 106).

112 For comparison, Article 2(7) of Directive 92/13/EEC explicitly refers to damages representing the costs of preparing a bid or of participating in an award procedure. Loss of profit as a head of damage, is, however, as is the case under the Remedies Directive, not addressed in Directive 92/13/EEC.

113 The Court recalls that, in the absence of EEA rules governing the matter, it is for the legal order of each EEA State, in accordance with the principle of the procedural autonomy of the EEA States, to determine the criteria on basis of which harm caused by an infringement of EEA law in the award of public contracts must be assessed (see *Fosen-Linjen I*, cited above, paragraph 70).

114 As such, EEA States enjoy discretion in determining the criteria on the basis of which damage for loss of profit arising from an infringement of EEA law on the award of public contracts is determined and estimated, provided that the principles of equivalence and effectiveness are respected. This means that those rules must not be less favourable than those governing similar domestic actions and they must not render practically

impossible or excessively difficult the exercise of rights conferred by EEA law (see Case E-6/17 *Fjarskipti* [2018] EFTA Ct. Rep. 78, paragraph 31; compare also the judgments in *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraph 74, and *eVigilo*, C-538/13, EU:C:2015:166, paragraph 39).

115 In order to ensure the effectiveness of Article 2(1)(c) of the Remedies Directive, a person harmed by an infringement of public procurement law should, in principle, be able to seek compensation for loss of profit (see *Fosen-Linjen I*, cited above, paragraph 90; compare also the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, points 108 and 112).

116 Indeed, the total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of EEA law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible (compare the judgment in *Brasserie du Pêcheur*, cited above, paragraph 42; and the judgment in *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 96).

117 The standard of liability is not harmonised by the Directive. However, according to the principle of State liability, an EEA State may be held responsible for breaches of its obligations under EEA law when three conditions are 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 *HOB-vín ehf.*, cited above, paragraph 121, and case law cited).

118 Furthermore, compliance with the principle of effectiveness requires, in particular, that national rules cannot subject the award of damages to a finding and proof of fault or fraud (compare the judgment in *Strabag*, cited above, paragraphs 39 and 40; the judgment in *Commission* v *Portugal*, C-70/06, EU:C:2008:3, paragraph 42; and *Fosen-Linjen I*, cited above, paragraph 75).

119 This does not mean that certain objective and subjective factors connected with the concept of fault under a national legal system cannot be relevant in the assessment of whether a particular breach is sufficiently serious. However, the obligation to make reparation for loss or damage caused to individuals cannot depend on a condition based on any concept of fault going beyond that of a sufficiently serious breach of EEA law (compare the judgments in *Brasserie du Pêcheur*, cited above, paragraphs 78 and 79, and *Fuß*, cited above, paragraph 67).

120 The requirement of a sufficiently serious breach as a minimum standard is considered sufficient for the purposes of safeguarding the rights of individuals, since it is the threshold applied for the award of damages for injuries caused by failure to act on the part of the EEA States, and where it is the result of the adoption of a legislative or administrative act in breach of EEA law (see, for example, Case E-4/01 *Karl K. Karlsson* v *Iceland* [2002] EFTA Ct. Rep. 240, paragraph 32, and case law cited).

121 In light of the foregoing, the Court finds that the answer to the question referred must be that Article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules.

V Costs

122 The costs incurred by the Finnish Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT

in answer to the question referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement.

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 1 August 2019.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President