EUROPEAN COMMISSION

Brussels, 19 December 2024
sj.i(2024)10613449 – CH/al

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Friedrich ERLBACHER, Legal Adviser, and Corneliu HOEDLMAYR, Member of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 01/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-25/24

Dartride AS c/ Norwegian State, represented by the Ministry of Justice and Public Security

in which the Lagmannsrett (Eidsivating) ("the Referring Court") has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereafter referred to as "SCA") concerning the application of the principle of non-contractual liability of the State in cases of judicial breaches of the EEA Agreement.

TABLE OF CONTENTS

1. INTRODUCTION

1. The principle of non-contractual liability of the State is not laid out in the EEA Agreement (also referred hereafter to as "EEA") and has been developed by the EFTA Court as a general principle of the EEA Agreements' "distinct legal order of its own" in its landmark judgement *Sveinbjörnsottir* ([1]). While with that ruling it was in principle confirmed that the principle of state liability is common to both EU and EEA law, unlike the ECJ in *Köbler* ([2]), the EFTA Court did to date not apply this principle to the liability of the State for judicial breaches of the EEA Agreement. This request for advisory opinion in essence seeks to determine the possibility and the conditions for such liability.

2. LAW

2.1. EEA Agreement

2. In the context of these observations the following provisions of the EEA Agreement are relevant:

3. The fifteenth recital of the Preamble to the EEA reads:

"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".

4. Article 1(1) of the EEA Agreement reads:

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

([1]) Request for an advisory opinion from the EFTA Court by Hérasdómur Reykjavíkur (Reykjavík City Court) by decision of that court of 12 November 1997 in the case of *Erla María Sveinbjörnsdóttir v. Government of Iceland* (Case E-9/97).

([2]) Judgment of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI:EU:C:2003:513.

5. Article 34 of the EFTA Surveillance and Court Agreement ("SCA") reads:

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

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

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

2.2. Norwegian Law

6. In the context of these observations the following provisions of Norwegian law are relevant:

7. Section 200(3) of the Courts of Justice Act provides ([3]):

"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."

3. FACTS AND THE QUESTIONS ASKED

8. The Referring Court sought an advisory opinion regarding a question of interpretation of the EEA Agreement to the EFTA Court pursuant to Article 34 SCA in a case relating to a claim of damages. The damages proceedings before the Referring Court were preceded by a long and complex series of disputes against two separate plaintiffs (the Oslo Municipality and the Norwegian State). The initial origin of these disputes was the refusal of the municipality of Oslo to grant Dartride (a Norwegian version of Uber) a taxi permit.

([3]) Lov om domstolene (domstolloven), LOV-1915-08-13-5.

9. The applicant, Dartride AS, had originally brought proceedings before the Oslo District Court against the Oslo Municipality in May 2019 in relation to taxi permits. In November 2019, that court dismissed the action. The applicant appealed the case before the Borgarting Court of Appeal, which dismissed the case in November 2020, finding notably that an action for damages could not be brought against the municipality, but would have to be filed against the Norwegian State. Subsequently, the applicant appealed that decision to the Supreme Court, which again dismissed the case, in March 2021.

10. In October 2021, the applicant filed proceedings against the Norwegian State. The stated basis for the damages claim was that Borgarting Court of Appeal and the Supreme Court of Norway 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). These proceedings were again dismissed, having been found time-barred, by the Oslo district court, in November 2022. In March 2023, and June 2023, the Borgarting Court of Appeal and the Supreme Court upheld that dismissal for the same reason.

11. In August 2023, Dartride brought a new action against the Norwegian State, alleging numerous errors in the previous judgments as a reason, and a disregard for EEA law. By decision of January 2024, the Oslo District Court dismissed that action, notably finding that there was no legal basis, under EEA law, to obtain damages for judicial decisions. In February 2024, the applicant appealed also that decision to the Borgarting Court of Appeal. That court referred the matter to the Eidsivating Court of Appeal on the ground that it could undermine confidence in the judiciary if it were to revisit its own decisions.

12. The Referring Court sought advice on the following questions:

    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?

4. ANALYSIS

4.1. Question 1

13. By the first question the Referring Court essentially asks whether, in analogy to the *Köbler* case law of the Court of Justice, the principle of non-contractual state liability can also encompass the liability for damages incurred as a result of errors in the application of EEA law by courts.

14. The EFTA Court has developed the principle of state liability vis-à-vis private parties in the *Sveinbjörnsdóttir* case subject to the following conditions: First, the provision of the EEA Agreement in question must be intended to confer rights on individuals; Secondly, the breach on the part of the State concerned must be sufficiently serious; Thirdly, there must be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties ([4]). These conditions are the same as for a state liability vis-à-vis private parties in EU law as established pursuant to the consistent case law *Brasserie de Pecheur* of the Court of Justice ([5]).

15. While the EEA Agreement does not provide for a codified right of non-contractual liability referring to general principles common to the laws of the Member States (comparable to Article 215 TFEU) and does, pursuant to Article 7 and Protocol 35

([4]) Request for an advisory opinion from the EFTA Court by Hérasdómur Reykjavíkur (Reykjavík City Court) by decision of that court of 12 November 1997 in the case of *Erla María Sveinbjörnsdóttir v. Government of Iceland* (Case E-9/97), para 66.

([5]) Judgment of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90, ECLI:EU:C:1991:428; Judgment of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, C-46/93, ECLI:EU:C:1996:79, para 51; Judgment of 26 March 1996, *The Queen v H. M. Treasury, ex parte British Telecommunications plc*, C-392/93, ECLI:EU:C:1996:131; Judgment of 26 March 1996, *The Queen v H. M. Treasury, ex parte British Telecommunications plc*, C-392/93, ECLI:EU:C:1996:131; Judgment of 23 May 1996, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*, C-5/94, ECLI:EU:C:1996:205; Judgment of 23 May 1996, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*, C-5/94, ECLI:EU:C:1996:205; Judgment of 8 October 1996, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland*, C-178/94, ECLI:EU:C:1996:375; Judgment of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, C-424/97, ECLI:EU:C:2000:357.

EEA, not entail a transfer of legislative powers, the EFTA court in *Sveinbjörnsdóttir* anchored the principle of state liability mainly in the effectiveness of the EEA Agreement's requirements of homogeneity (Articles 1, 6, 105, 105, 106, 108 EEA, Article 3 SCA) and right to equal treatment providing individuals with the right not to be discriminated based on their nationality in comparison to the rights granted to EU nationals under Union law (Recitals 4, 8, 15 EEA) ([6]). In that context the EFTA Court also qualified the EEA agreement as a "*distinct legal order on its own*" capable of providing for an (unwritten) right to compensation of individuals and economic operators as its underlying general principle ([7]).

16. In *Köbler* the Court of Justice extended the Union's principle of state liability as outlined above also to be applicable to a decision of a national court adjudicating at last instance which infringes a rule of Union law ([8]). The Court of Justice found such liability to be subject to the same conditions as the ones outlined under paragraph 14. However, as regards the second condition of a sufficiently serious infringement of Union law, the court further required that "[i]*n order to determine whether the infringement is sufficiently serious (...), the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest*" ([9]).

17. Whether a judicial infringement of Union law is manifest or not can be determined on the basis of various factors. The Court of Justice specified in particular the following such factors: "*the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a* [Union] *institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article* [267 TFEU]*"* ([10]).

18. In addition to the reasons for establishing the state liability in the contexts referred to in paragraph 14, the Court of Justice further underpinned the liability of the

---

([6]) *Sveinbjörnsdóttir op. cit., paras 47, 52-58.*

([7]) *Sveinbjörnsdóttir,* op. cit., para 59.

([8]) Judgment of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI:EU:C:2003:513, para 52.

([9]) *Köbler*, op. cit., para 53 and 59.

([10]) *Köbler*, op.cit., para 55.

judiciary by its essential role played in the protection of the rights derived by individuals from Union rules; the full effectiveness of state liability rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Union law attributable to a decision of a court of a Member State adjudicating at last instance([11]).

19. In this context emerges also why it is required that an infringement capable of justifying the liability of the judiciary can only be committed by a court adjudicating at last instance. It is that only that court is by definition the last judicial body before which individuals may assert the rights conferred on them by Union law and a final decision of such a court cannot thereafter normally be corrected. Individuals shall not be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights ([12]).

20. The Commission takes the view that same line of argument as applied by the Court of Justice in *Köbler* to extend state liability to infringements of Union law by the national judiciary must also apply to the extension of the general principle of state liability developed by the EFTA Court with regard to infringements of the EEA Agreement by the judiciary in the EEA EFTA States.

21. While the scope, institutional setup and effect of the Treaties and of the EEA Agreement are different, in particular in that the EEA Agreement does not entail any transfer of legislative powers and does not provide for direct effect as per Article 7 of the EEA Agreement and Protocol 35 to the EEA Agreement, the effective application of the principles of homogeneity and equal treatment on which the EFTA Court has based the existence of a general principle of state liability (see paragraph 15 above) require in the same way – or even to a larger extent ([13]) – as in

([11]) *Köbler*, op.cit., para 33.

([12]) *Köbler*, op.cit., para 34.

([13]) Since the EEA Agreement does not entail any transfer of legislative powers and does not provide for direct effect as per Article 7 EEA Protocol 35 EEA, it can be argued that the principles of homogeneity and its effective application require even more in the EEA than in the EU state liability rules, see Hammermann, "*The Surveillance and Court Agreement Looking Back, Looking Ahead"*, in "*The EFTA Court: Developing the EEA over three Decades*", edited by the EFTA Court, Bloomsbury Publishing Plc 2024, page 58 with reference to: Magnusson, "*State Liability in EEA Law: Towards Parallelism or Homogeneity*?".

the Union's legal order that errors of interpretation and application of the EEA Agreement affecting legal rights of individuals under that agreement can be remedied through the compensation of the damages incurred in result of the error.

22. In this context it should be recalled and stressed that the Union's case law on state liability applies in particular where EU rules confer rights upon individuals without direct effect, such as was the case in the seminal case *Francovich* ([14]). In the Commission's view the absence of direct application of the EEA Agreement cannot be inferred against a full application of state liability rules. On the contrary, given that state liability is the last and, in the absence of direct effect, only resort by which individuals can assert the rights to equal treatment conferred upon them as a result of the homogenous application of the EEA Agreement in all of the EEA countries ([15]), state liability becomes the main and essential pillar for its effectiveness.

23. The requirement of an effective homogenous application of the EEA Agreement also by the national judiciary of the EEA EFTA States has been recently confirmed by the EFTA Court when finding that such courts are under a general obligation to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective ([16]). The EFTA Court found that in accordance with Article 3 EEA, it is the responsibility of national courts and tribunals, in particular, to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective. In that respect, the EFTA Court recalled that it is inherent in Protocol 35 EEA that national courts and tribunals must give full effect to implemented EEA rules, which are unconditional

---

([14]) *Francovich*, op. cit., paras 26, 32-34.

([15]) In this context, it is worth to note that in the Union, the judicature even accepted that published internal rules of conduct applied uniformly by the administration produce legal effects which can be relied upon by individuals in court proceedings and bind the judge by means of the principle of equal treatment. If such rules already suffice to create binding legal effects and thereby establish defendable individual rights in court proceedings, the rules of the sui generis legal order of the EEA Agreement which are uncontested in their high ranking normative character cannot stay unapplied and in stark contradiction to the principle of equal treatment by a national judge without at least a remedy of compensation; see for illustration of this effect of the equal treatment principle Judgment of 28 June 2005, *Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities*, C-189/02P, ECLI:EU:C:2005:408, para 211.

([16]) Request for an Advisory Opinion from the EFTA Court by Verwaltungsgerichtshof des Fürstentums Liechtenstein dated 26 September 2022 in the case of *RS v Steuerverwaltung des Fürstentums Liechtenstein* (Case E-11/22) 2023/C 49/05, paras 44, 56, 57.

and sufficiently precise, and disregard any national rule or case law maintaining the legal effects of legislation that infringes such implemented EEA rules, as such a limitation is not compatible with EEA law ([17]).

24. The EFTA Court also confirmed that duty when abiding to the EEA Agreement implies that a national court must maintain the discretion to seek an advisory opinion pursuant to Article 34 SCA even in cases in which a higher-ranking national court (*in casu* the Liechtenstein Constitutional Court) has already given a diverging interpretation on the same question of interpretation of the EEA Agreement and national rules ([18]). In the Commission's view, it emerges from this finding, that even absent the requirement of an obligation to refer cases to the EFTA Court which would be fully comparable to Article 267 TFEU, the effectiveness of judicial protection with regard to individual rights under the EEA Agreement must allow for the same standard of reparation of damages as with regard to the standard applied by the EFTA Court in *Sveinbjörnsdóttir* regarding infringements by other state authorities than the judiciary. Any other solution would allow for a gap in the effectiveness of homogeneity and equal treatment of individual rights provided for by the EEA Agreement when these would be litigated before EEA courts, for which there is no room under the case law *RS* and *X*.

25. The Commission concludes from the above, that the general principle of state liability under the EEA Agreement should equally apply to infringements of the EEA Agreement by the judiciary under the following conditions: (1) A national court adjudicating at last instance infringed a rule of the EEA Agreement; (2) The provision of the EEA Agreement in question must be intended to confer rights on individuals; (3) The judicial infringement of Union law is manifest; and (4) there is a causal link between the breach of that rule and the loss and damage suffered by the injured parties.

4.2. Question 2a

26. By the second question the Referring Court asks the errors of which national court can trigger liability for EEA EFTA States.

([17]) *RS*, op. cit., para 46.

([18]) Request for an Advisory Opinion from the EFTA Court by Beschwerdekommission der Finanzmarktaufsicht in the case of *X v Finanzmarktaufsicht* (Case E-10/23), paras 46-48.

27. For the reasons already put forward in the context of its analysis of Question 1, the Commission submits that damages or breaches of EEA law by the judiciary can equally be claimed only in cases where a national court adjudicating at last instance infringed a rule of the EEA Agreement.

28. The Commission first recalls that the Court of Justice has ruled that the term "court adjudicating at last instance" in the sense of the Köbler case-law (see paragraph 16 above) is to be understood as a court or tribunal against whose decisions there is no judicial remedy under national law ([19]).

29. It will be for the national judge to ascertain whether this condition of the Köbler case-law is fulfilled in the main case. The Commission merely further notes that it is not possible based on the facts submitted in the context of the proceedings before the EFTA Court to establish, whether the judicial remedies against the initial decision of refusal of a taxi concession have been exhausted, whether a breach of EEA law had been committed in the context of such decisions, and, if yes, what its nature was.

4.3. Question 2b

30. With its Question 2b, the Referring Court asks in essence whether EEA law precludes the application of a national rule such as the third paragraph of section 200 of Act No 5 of 13 August 1915 relating to the Courts of Justice which lays down the parameters for bringing an action for damages against the State as a result of error in judicial decisions and provides for three alternative cases where such an action can be brought: (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.

31. The order of reference does not contain any elements further detailing the application in practice of the above-mentioned criteria and their interpretation in the context of Norwegian procedural rules which would have been particularly useful in view of the statement noted on page 2 of the request for advisory opinion that "*the*

([19]) Judgment of 9 September 2015, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, C-160/14, ECLI:EU:C:2015:565, para 60.

parties are in agreement that none of those conditions is satisfied in the present case".

32. For the reasons already put forward in the context of its analysis of Question 1, the Commission submits that the principle of effectiveness outlined above (paragraph 23, 24) requires in analogy to the ECJ's case law that the domestic legal system must not hamper the effectiveness of the application of the liability principle and must "*under no circumstances […] impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of Köbler*" ([20]).

33. On this basis, the Commission submits furthermore that, if indeed none of the alternative cases provided for in the third paragraph of section 200 of Act No 5 of 13 August 1915 relating to the Courts of Justice under which state liability can be claimed allows individuals to establish the liability for the infringements of EEA law and this procedural rule is the only avenue under Norwegian law to claim damages for judicial infringements, the principle of effectiveness would in all evidence be violated by the setup of the Norwegian procedural rules applicable to damages for judicial infringements ([21]).

34. Looking, in the alternative, at the possible interpretations of the three cases provided for in the third paragraph of section 200 of Act No 5 of 13 August 1915 relating to the Courts of Justice, the Commission merely recalls, as the first of these alternatives is concerned, that the ECJ has already decided that the principle of State liability for judicial breaches precludes national law from requiring, as a precondition for awarding damages, the setting aside of the decision given by a court adjudicating at last instance which caused the loss or damage when such setting aside was, in practice, impossible ([22]). As the second alternative is concerned, the Commission merely recalls that the ECJ has decided that the principle of res judicata does not preclude recognition of the principle of State

([20]) Judgment of 13 June 2006, *Traghetti del Mediterraneo SpA v Repubblica italiana*, C-173/03, ECLI:EU:C:2006:391, para 44. This finding was confirmed by the CJEU in Judgment of 24 November 2011, *European Commission v Italian Republic*, C-379/10, ECLI:EU:C:2011:775.

([21]) See in that context Judgment of 28 June 2022, *European Commission v Kingdom of Spain*, C-278/20, ECLI:EU:C:2022:503., in particular para 82.

([22]) Judgments in *Ferreira da Silva e Brito*, C-160/14, EU:C:2015:565, para 50; *Fuß*, C-429/09, EU:C:2010:717, paragraph 62 and the case-law cited.

liability for decisions of a court of last instance ([23]). With regard to the third alternative, the Commission takes the view that requiring a criminal conviction in the context of a judicial error would clearly impose a much stricter condition than those in the *Köbler* case-law.

5. CONCLUSION

35. In the light of the foregoing, the Commission considers that the questions referred to the Court of Justice for a preliminary ruling by the Lagmannsrett (Eidsivating) should be answered as follows:

1. The EEA Agreement and the principle of state liability under EEA law entail that the State can be liable for damages for infringements of the EEA Agreement by the judiciary where a national court adjudicating at last instance infringes a rule of the EEA Agreement, that rule is intended to confer rights on individuals, the judicial infringement of EEA law is manifest and there is a causal link between the breach of that rule and the loss and damage suffered by the injured parties.

2. The EEA Agreement and the principle of state liability under EEA law must be interpreted in a way that damages or breaches of EEA law by the judiciary can be claimed only in cases where a national court adjudicating at last instance infringed a rule of the EEA Agreement.

   The effective application of the principles of homogeneity and equal treatment as established in the EEA Agreement requires that the domestic legal system must not impose conditions stricter than those established in reply to the first question for the bringing of an action for damages for infringements of the EEA Agreement by the judiciary.

Friedrich ERLBACHER Corneliu HOEDLMAYR

Agents for the Commission

([23]) Judgments of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI:EU:C:2003:513, para 34 and 40; Judgment of 24 October 2018, *XC and Others v Generalprokuratur*, C-234/17, ECLI:EU:C:2018:853, para 58.