ESA | EFTA Surveillance Authority

Brussels, 19 December 2024

Case No: 93014

Document No: 1492934

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by

Sigrún Ingibjörg Gísladóttir, Erlend Møinichen Leonhardsen
and Melpo-Menie Joséphidès,

Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-25/24

Dartride AS

v

Norwegian State,

represented by the Ministry of Justice and Public Security

(Staten v/Justis- og beredskapsdepartementet),

in which Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) requests an Advisory Opinion from the EFTA Court on whether a state can be held liable for damages for errors by courts in the application of EEA rules under the EEA Agreement and the principle of state liability, and if so, which decisions could give rise to such liability, and finally whether certain conditions found in the Norwegian Courts of Justice Act are compatible with that principle.

ESA | EFTA Surveillance Authority

Table of Contents

1 INTRODUCTION/THE FACTS OF THE CASE

1. The present written observations were prepared with support from Guðlaug Jónasdóttir, Joachim Nilsen Frislid and Gaukur Jörundsson, Legal Officers, of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("**the Authority**").

2. The Authority refers to the Request for an advisory opinion ("**the Request**") from the Borgarting Court of Appeal ("**the Referring court**") to the EFTA Court ("**the Court**"), for the more detailed factual background.

3. This case concerns a claim for damages brought by a private company, Dartride AS ("**Dartride**"), against the Norwegian Government, represented by the Ministry of Justice and Public Security ("**the Ministry**"), in Oslo District Court on 27 August 2023. In the claim, Dartride amongst other things argues that Borgarting Court of Appeal[1] and the Supreme Court of Norway[2] rendered decisions that were in breach of EEA law[3] and that this gives rise to liability of the Norwegian State.

4. By order of 22 January 2024, the Oslo District Court dismissed the case, amongst other things with the reasoning that there is "*no basis for obtaining damages for judicial decisions contrary to EEA law*" under the EEA Agreement.[4] Dartride appealed the order to the Referring court, which has submitted the Request to the Court, asking whether the State can be held liable for damages for errors by courts in the application of EEA rules under the EEA Agreement and the principle of State liability, and if so, which decisions could give rise to such liability, and finally whether certain conditions found in the Norwegian Court of Justice Act are compatible with that principle.

5. In the following, the Authority will set out its observations on the questions from the Referring Court.

---

[1] Judgment of Borgarting Court of Appeal, LB-2020-11829.
[2] Decision by the Supreme Court to not grant leave to appeal, HR-2021-546-U.
[3] An overview of the legal proceedings is provided in the Request, pages 2-4.
[4] The Request, page 2. See also Oslo District Court order of 22 January 2024, Case 23-124975TVI-TOSL/07, page 14.

2 EEA LAW

6. The fifteenth recital of the Preamble to the EEA Agreement ("**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"*

7. Article 1(1) of the EEA Agreement provides:

> "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."

8. Article 3 of the EEA Agreement provides:

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

9. Article 6 EEA provides:

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

10. Article 108(2) EEA provides:

> *"2. The EFTA States shall establish a court of justice (EFTA Court).*
>
> *The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:*
>
> *(a) actions concerning the surveillance procedure regarding the EFTA States;*
> *(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;*
> *(c) the settlement of disputes between two or more EFTA States."*

11. Article 2 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) is identical in substance to Article 3 EEA and provides:

> *"The EFTA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement."*

12. Article 31 of the SCA provides:

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

13. Article 33 SCA provides:

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

14. Article 34 SCA provides:

> "*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*"

3 NATIONAL LAW

15. Section 87 of the Constitution of the Kingdom of Norway[5] provides that:

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

16. Section 88(2) and (3) of the Constitution of the Kingdom of Norway provides that:

> "*The Supreme Court pronounces judgment in the final instance. Limitations on the right to bring a case before the Supreme Court may be prescribed by law.*
>
> (…)
>
> *The judgments of the Supreme Court may in no case be appealed*."

17. Section 200(3) of the Courts of Justice Act[6] provides:

> *"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."*

[5] Kongeriket Norges Grunnlov (Grunnloven), LOV-1814-05-17.
[6] Lov om domstolene (domstolloven), LOV-1915-08-13-5.

18. Section 30-4 of The Dispute Act[7] provides that:

> *"1) Judgments cannot be appealed without leave. Leave can only be granted if the appeal concerns issues that are of significance beyond the scope of the current case or if it is important for other reasons that the case is decided by the Supreme Court.*
>
> *(2) The issue of leave shall be determined for each appeal. Leave may be limited to specific claims and to specific grounds of appeal, including to specifically invoked errors in the application of law, procedure or the factual basis for the ruling.*
>
> *(3) The issue of leave shall be determined by the Appeals Committee of the Supreme Court by way of decision. A decision to refuse leave or to grant limited leave requires unanimity."*

19. Section 31-4 of The Dispute Act provides that:

> "*A request to reopen a case may be made:*
>
> *a. if information on the facts in the case that was unknown when the case was ruled on suggests that the ruling would in all likelihood have been different, or*
>
> *b. if a binding ruling made by an international court or an opinion issued by the Human Rights Committee of the United Nations in respect of the same subject matter suggests that the ruling was based on an incorrect application of international law.*"

20. Section 1 of the EEA Act[8] provides that:

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

[7] Lov om mekling og rettergang i sivile tvister (tvisteloven), LOV-2005-06-17-90.
[8] Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven), LOV-1992-11-27-109.

21. Section 2 of the EEA Act provides that:

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

4 THE QUESTIONS REFERRED

22. Against this background, the Referring court has asked the Court 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*?"**

5 LEGAL ANALYSIS

5.1 Preliminary remarks

23. By its questions, the Referring Court in essence raises the issue of whether the principle of State liability for breaches of EEA law is considered to entail that the State can be held liable for errors by national courts in application of EEA law and, if so whether certain conditions for such liability in Norwegian law are compatible with EEA law.

24. As will be elaborated upon below, ESA submits that the principle of State liability for breaches of EEA law applies to all organs of the State. Before elaborating on the reasoning underlying that position, ESA would like to note that it had an infringement case against Iceland (No. 75004) that touched upon this subject matter, following the judgment of the Court in case E-2/10 (*Þór Kolbeinsson v the Icelandic State*). In that case, ESA issued a letter of formal notice[9] and a reasoned opinion,[10] before closing the case,[11] following legislative amendments in Iceland.

25. In its infringement case, ESA took the position that the principle of State liability formed an integral part of the EEA Agreement and that it entailed that the State could be held liable for any breaches attributable to the State, regardless of whether the breach is caused by the legislative, executive or judiciary. In this respect, ESA, amongst other things, referred to its written observations in Case E-2/10 and *obiter dicta* found in paragraph 77 of the judgment in the case, where the Court said:

> *"The issue of State liability for losses resulting from incorrect application of EEA law by national courts falls outside the scope of this question. The Court observes, however, that if States are to incur liability under EEA law for such an infringement as alleged by the Plaintiff, the infringement would in any case have to be manifest in character, see for comparison Köbler, cited above, paragraph 53."*[12]

26. The case was closed on 23 June 2021 after Iceland extended the possibility to reopen adjudicated cases to include rulings of international courts, which was considered to bring the Icelandic legislation sufficiently in compliance with EEA law in so far as effective judicial protection under EEA law was ensured.[13]

5.2 First Question

27. In the first question, the Referring Court asks whether the principle of State liability entails that the State can be held liable for damages for errors by the courts in the application of the EEA rules. ESA submits that the question must be answered in the positive.

---

[9] Document No 752617.
[10] Document No 775380.
[11] Document No 1154422.
[12] Case E-2/10 *Kolbeinsson,* paragraph 77.
[13] Document No 1154422.

28. The principle of State liability for breaches of EU law has long been recognized by the Court of Justice of the European Union ("**CJEU**"). Thus, in the seminal joined cases of Joined Cases *Brasserie de Pêcheur/Factortame III,* the CJEU held:

> "*As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals*."[14]

29. Thus, the CJEU already then appeared to have confirmed, at least in principle, that State liability in the EU could arise regardless of which branch of the State the breach was attributable to, including the judiciary.[15] This has been reaffirmed in subsequent cases. For instance, in Case C-278/20 *Commission v Spain*, where the CJEU held that:

> "*the principle of State liability for loss and harm caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based* (…).
>
> *That principle applies to any case of infringement of EU law by a Member State, irrespective of the body of the Member State whose action or omission is the cause of that infringement,* (…)."[16]

30. The principle of State liability under EEA law was recognised by the Court in the case of *Sveinbjörnsdóttir.*[17] There, the Court found with reference to Article 1(1) EEA, that "*one of the main objectives of the Agreement is to create a homogeneous*

---

[14] Joined Cases C-46/93 and C-48/93 *Brasserie de Pêcheur/Factortame III*, EU:C:1996:79, paragraph 34.
[15] Indeed, the CJEU held already in Case 77/69 *Commission v Belgium*, EU:C:1970:34, paragraph 15 that the obligations arising from Article 95 of the EEC treaty (i.e. the equivalent to Article 14 EEA) and the liability of a Member State under Article 169 of the EEC treaty (i.e. the equivalent to Article 31 SCA) "*arises whatever the agency of the state whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution*."
[16] Case C-278/20 *Commission v Spain*, EU:C:2022:503, paragraphs 29-30 (internal references omitted).
[17] Case E-9/97 *Sveinbjörnsdóttir.*

EEA. This homogeneity objective is also expressed in the fourth and fifteenth recitals of the Preamble to the EEA Agreement."[18]

31. Further, the Court held that "*[a]nother important objective of the EEA Agreement is to ensure individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement.*"[19] It emphasised that the EEA Agreement is to a great extent intended for the benefit of individuals and economic operators, and that the proper functioning of the agreement is dependent on those parties being able to rely on the rights intended for their benefit.[20]
32. Analysing these two objectives, the Court concluded that:

> *"the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own."*[21] *The Court found "that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive."*[22]

33. The case of *Sveinbjörnsdóttir* concerned implementation of a Directive, and the Court concluded in its operative part that incorrect implementation of the Directive gave rise to liability. In paragraph 62 the Court concluded more generally that:

> *"It follows from all the forgoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage cause to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible."*[23]

34. The principle of State liability was further developed in the case of *Karlsson*[24]*.* In that case, the Court reiterated that:

> *"[…] In Sveinbjörnsdóttir, the EFTA Court concluded that it is a principle of the EEA Agreement that an EEA State is obliged to provide for compensation*

[18] Ibid, paragraph 49.
[19] Ibid, paragraph 57, with reference to Recital (4) (8) and (15) of the Preamble to the EEA Agreement. That objective was also empathised by the Court in Case E-11/22 *RS*, paragraph 43.
[20] Ibid*,* paragraph 58.
[21] Ibid, paragraph 59.
[22] Ibid, paragraph 60.
[23] Ibid*,* paragraph 62.
[24] *Case E-1/04 Karlsson*

for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible. […]"[25]

35. ESA notes that no reservation or distinction was made between different branches of the State, and whether a breach is attributable to the legislature, the government or the judiciary. On the contrary, the emphasis is on breaches that the State can be held responsible for, which would include the judiciary.[26]

36. In the case of *Karlsson*, the EFTA Court also addressed arguments that relate to the nature of EU law compared to that of EEA law. The court found that the absence of recognition of direct effect for EEA rules does not preclude the existence of an obligation on the State to provide compensation for loss and damage caused to individuals and economic operators as a result of breaches of obligations under the EEA Agreement for which that State can be held responsible.[27] The Court went on to say in this respect that the principle:

"differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive."[28]

37. After *Karlsson*, the CJEU in *Köbler* reaffirmed specifically with respect to the domestic judiciary[29] what it stated generally in *Brasserie de Pêcheur/Factortame III*.[30] The principle of State liability "*is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance […]*"[31]

38. In the joined cases of *European Union v Guardian Europe*, the CJEU noted that:

"*in the context of the principle of liability on the part of a Member State for damage caused to individuals as a result of infringements of EU law for*

[25] Case E-4/01 *Karlsson,* paragraph 25.
[26] In this regard, ESA notes that in accordance with Article 3 EEA, national 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, see Case E-11/22 *RS,* paragraph 44 and Case E-14/20 *Litti-Link AD*, paragraph 74 and case law cited.
[27] Case E-4/01 *Karlsson*, paragraph 29.
[28] Ibid, paragraph 30.
[29] Case C-224/01 *Köbler*.
[30] I.e. that state liability in the EU could arise regardless of which branch of government the breach which gave rise to a damage was attributable to, see note 14 above.
[31] Case C-224/01 *Köbler*, response to question 1

which the Member State can be held responsible, the Court has held that that principle is also applicable where the alleged infringement stems from a decision of a court of the Member State adjudicating at last instance."[32]

39. Thus, it seems clear that the CJEU has considered the general principle of State liability to include infringements that stem from a national court adjudicating at last instance. ESA submits that this in itself is sufficient to consider that the Courts' findings in *Sveinbjörnsdóttir* and *Karlsson*, in light of the homogeneity principle, extend in EEA law to the situation where the alleged infringement stems from a decision of a court of an EFTA State adjudicating at last instance. There is, moreover, no case law from the Court indicating otherwise.
40. ESA notes, however, there may be an important distinction between EEA law and EU law in that under Article 267 of the Treaty on the Functioning of the European Union ("**TFEU**") there is an obligation for courts of last instance in the EU to refer cases to the CJEU for a preliminary ruling. In contrast, such a treaty obligation is not spelled out in Article 108(2) EEA or Article 34 of SCA, although courts against whose decisions there is no judicial remedy under national law are bound by the duty of loyalty under Article 3 EEA.[33]
41. The obligation to refer came into consideration in *Köbler*, both in legal and factual terms as the case concerned a situation where a national court had withdrawn a request for a preliminary ruling of the CJEU. ESA however submits that this was not a decisive factor of consideration when establishing the scope of the principle. In fact, many of the reasons underpinning the CJEU's reasoning in *Köbler* are very much present in EEA law.
42. In *Köbler,* the CJEU first pointed to the fact that it had repeatedly held that States were liable for damage caused to individuals as a result of breaches of EU law "*for which the State is responsible*".[34] As referred to above, this is the same language as used when establishing the principle of State liability in the case of *Sveinbjörnsdóttir* by this Court. Additionally, the CJEU referred to *Brasserie du Pêcheur and Factortame,* where it had noted that in international law a State is viewed as a single entity, irrespective of which branch of government is in breach.

[32] Joined Cases C-447/17 P and C-479/17 P, *European Union v Guardian Europe,* EU:C:2019:672, paragraph 74.
[33] See *Case E-18/11 Irish bank, paragraphs 55-58.*
[34] Case C-224/01 *Köbler*, paragraph 30.

This, the CJEU held in *Brasserie du Pêcheur and Factortame,* and repeated in *Köbler*, must apply *a fortiori* where State authorities are bound in performing their tasks to comply with EU law.[35] ESA submits that this is equally applicable in EEA law.

43. Furthermore, in *Köbler* the CJEU noted that:

> "*In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those 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 Community law attributable to a decision of a court of a Member State adjudicating at last instance*."[36]

44. ESA submits that this logic applies equally in EEA law.

45. Finally, in *Köbler*, the CJEU noted the nature of a judgment of a court of last instance, which normally cannot be corrected and therefore "*individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights*."[37]

46. ESA submits that the judiciary serves the same function in EEA law and that in order to ensure effective judicial protection of rights conferred to individuals under the EEA Agreement, it is essential that they are able to rely on the application of those rights in courts.[38] Indeed, ESA submits that if individuals were deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their EEA rights in the instances where an alleged infringement stems from a decision of a court of an EFTA State adjudicating at last instance, this would undermine the objective of the EEA Agreement "*to ensure individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement"* as the Court identified in *Sveinbjörnsdottir*.[39]

---

[35] Joined Cases C-46/93 and C-48/93 *Brasserie de Pêcheur/Factortame III,* paragraph 34, Case C-224/01 *Köbler*, paragraph 32.
[36] C-224/01 *Köbler*, paragraph 33.
[37] Ibid, paragraph 34.
[38] Case E-15/10 *Posten Norge,* paragraph 86, and Joined Cases E-11/19 and E-12/19 *Adpublisher*, paragraph 50.
[39] Case E-9/97 *Sveinbjörnsdóttir*, paragraph 57. This was reiterated recently in Case E-11/22 *RS*, paragraph 43.

47. In *Köbler*, the CJEU went on to say that the obligation to refer (now in Article 267 TFEU) exists precisely to protect these rights of individuals and prevent them from being infringed.[40] However, the CJEU did not limit the scope of the principle to instances where the reference procedure, and in particular the obligation of the courts of last instance to refer, is not respected. On the contrary, the obligation to request a preliminary ruling is referred to only as one of several factors to consider when determining whether the breach is manifest.[41] In other words, the failure to comply with the duty to make a reference for a preliminary ruling is not linked to the existence of State liability for an alleged infringement attributable to a national court. Instead, it is a factor which is used to determine whether the infringement in question is sufficiently serious for the liability threshold required under EU law to be fulfilled.
48. To further illustrate this, ESA notes that under the "acte clair" doctrine national courts of last instance in the EU do not have an obligation to refer cases in which the applicable law is sufficiently obvious (i.e. the interpretative question is not open to reasonable doubt).[42] States can nonetheless become liable for infringements in those circumstances, even though there is no obligation to refer. Indeed, under the *Köbler doctrine,* the first factor to determine in assessing whether a breach is considered manifest is "the degree of clarity and precision of the rule infringed."[43] Therefore, if the EU law question at issue is not in doubt, it would seem that the liability threshold would more easily be fulfilled in case of wrongful interpretation by a national court of last instance, despite the fact that in such a situation there

[40] Case C-224/01 *Köbler*, paragraph 35.
[41] Ibid, paragraph 55. Reference is made here for comparison to the arguments made by Germany and the Netherlands in paragraph 18 of the judgment. See also Case C-173/03 *Traghetti del Mediterraneo,* EU:C:2006:391, paragraph 31 and Case C-379/10 *Commission v Italy*, where the CJEU held:
"1) *La République italienne,*
– en excluant toute responsabilité de l'État italien pour les dommages causés à des particuliers du fait d'une violation du droit de l'Union commise par une juridiction nationale statuant en dernier ressort, lorsque cette violation résulte d'une interprétation des règles de droit ou d'une appréciation des faits et des preuves effectuée par cette juridiction, et
– en limitant cette responsabilité aux seuls cas du dol ou de la faute grave,
conformément à l'article 2, paragraphes 1 et 2, de la loi n° 117 sur la réparation des dommages causés dans l'exercice des fonctions juridictionnelles et la responsabilité civile des magistrats [legge n. 117 (sul) risarcimento dei danni cagionati nell' esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati], du 13 avril 1988, a manqué aux obligations qui lui incombent en vertu du principe général de responsabilité des États membres pour violation du droit de l'Union par l'une de leurs juridictions statuant en dernier ressort."
[42] Joined cases C-72/14 and C-197/14 *van Dijk,* EU:C:2015:564, paragraph 55 and Case C-561/19 *Consorzio Italian Management,* EU:C:2021:799, paragraph 33 and case law cited.
[43] Case C-224/01 *Köbler*, paragraph 55.

is in principle no obligation to refer. The principle of state liability for judicial infringements can therefore certainly arise independently of the obligation to refer.

49. ESA notes that the principle of State liability was established in EEA law despite the lack of recognition of primacy and direct effect of EEA law in a manner identical to EU law, even though those were contributing factors to the establishment of the principle in EU law. In a similar manner, even though the judicial dialogue is formulated differently in EEA law as compared with EU law, this does not alter the conclusion with regard to the existence of the principle of State liability in EEA law.

50. On the contrary, the necessity for the principle may be considered higher in EEA law precisely because there is no equivalent in the EEA and SCA to the treaty obligation of highest Courts to refer pursuant to Article 267 TFEU, which is established with a view to ensuring the correct application of EU law by the courts. Since there is no treaty obligation under EEA law to refer cases where the interpretation is not obvious under the *acte clair* doctrine, then that means that the national court will need to be even more diligent to ensure homogeneity in the application of EU and EEA law. Given that in the EEA individuals cannot rely on primacy or direct effect or applicability in the same way as in the EU, the need for a strong safety net in the form of State liability is necessary to ensure the effectiveness of EEA law and the adequacy of the means of enforcement. After all, individuals are entirely reliant on the correct implementation and application of EEA law at the national level.

51. National courts play an essential role in EEA law, which has been described by the Court to be "*in particular to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective*"[44] and they are as such the guarantor for individuals to be able to rely on EEA rights.[45] ESA submits that it would therefore create an apparent liability gap if the acts of omissions of only two out of the three branches of government in the EFTA States were subject to State liability under EEA law. Indeed, absence of State liability for acts of the judiciary would seem to create a situation where an EFTA State could be liable under the State liability principle for a decision of its administration where that decision were not to be challenged before the domestic courts. At the same time, if a parallel case were challenged before the courts and the courts held in

[44] Case E-14/20 *Litti-Link AD*, paragraph. 74.
[45] See also AG Leger in Köbler paragraph 59.

the same way as the administration, the State would not be subject to State liability. This would then create a paradoxical liability gap for the EEA national who pursued their claim before the courts.[46] Additionally, State liability for the acts of the judiciary would be the only way to ensure liability for failure by the courts of last instance to comply with the specific duties of national courts under EEA law, such as conform interpretation and the duty to disapply "*any provision of national law that is contrary to a provision of the EEA Agreement, which is or has been made part of the respective national legal order*."[47]

52. With respect to the aforementioned, ESA submits that the first question must be answered in the positive. Further, and with reference to *Kolbeinsson* paragraph 77, ESA principally submits that the same conditions should be considered to apply as were set out in *Köbler* paragraph 53, including that the infringement would have to be manifest in character. The Court may consider, given the characteristics of the EEA legal order set out above, that when giving guidance on the manifest criterion, the needs of the EEA need to be calibrated to ensure effective judicial protection and adequate means of enforcement across the EEA.

5.3 Second question

53. Since the first question is answered in the positive, ESA below suggests a response to the second question.

5.3.1 Question 2.a

54. By part (a) of its second question, the Referring court asks which decisions by national courts can trigger liability for EEA states.

55. In EU law it is well established that the principle of State liability for judicial infringements applies to decisions of "last instance".[48] It is settled case law that "*a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law*".[49] In other

[46] In the same vein, AG Leger in Köbler paragraph 70 said: "*It is impossible to see how a Member State could prima facie escape all liability for the acts or omissions of its supreme courts when, specifically, those courts are responsible for applying and ensuring compliance with Community law. That would amount to an insuperable paradox."*
[47] Case E-11/22 *RS*, paragraph 41. For the duty of conform interpretation, see e.g. Case E-4/01 *Karlsson*, paragraph 28.
[48] Case C-224/01 *Köbler,* paragraph 59.
[49] Case C-224/01 *Köbler,* paragraph 34, Case C-173/03 *Traghetti del Mediterraneo,* paragraph 31 and Case C-3/16 *Aquinto, EU:C:2017:209,* paragraph 34.

words, the principle of State liability applies to decisions that cannot be appealed. ESA submits that the same applies in EEA law.

56. ESA submits that the principle should only apply to courts of last instance given the nature of the principle as described in *Köbler*, i.e. that the principle is meant to respond to a final judicial decision that cannot be corrected, as described above. This is also in line with the construction of the judiciary, where a mistake or wrong interpretation of a lower court is generallt addressed with an appeal. Only if such attempts to assert the correct interpretation of EEA law fail can, and should, State liability come into consideration.

57. Further, based on the Request, ESA notes that the Norwegian Government states that it is "*unclear whether decisions of the Supreme Court refusing leave to appeal may constitute a basis for potential liability for damages*".[50] The Government notes that the Supreme Court has not ruled on the substance of EEA law.[51]

58. ESA submits that such a decision by the highest court to refuse appeal must be regarded as a decision by a court of last instance, regardless of whether the court has decided the case based on the merits of the EEA law in question. That is provided that the application of EEA law was subject to appeal, and that the court had the competence rule on that matter. If the court in question had competence to correct the unlawful application of EEA law, then it is, in accordance with Article 3 EEA, under a general obligation to "*provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective*".[52] In that case, it falls within the definition of a court adjudicating in last instance, that being "*the last judicial body before which individuals may assert the rights conferred on them by"* EEA law.[53] After all, it would risk rendering the principle entirely ineffective, if the principle of State liability could only apply to the exceptional cases where the highest courts grant leave to appeal.[54]

[50] The Request, page 11.
[51] Ibid.
[52] Case E-11/22 *RS*, paragraph 44.
[53] Case C-224/01 *Köbler,* paragraph 34, Case C-173/03 *Traghetti del Mediterraneo,* paragraph 31 and Case C-3/16 *Aquinto,* paragraph 34. (Emphasis added). That courts of final instance that do not grant leave to appeal fall within this definition also follows from the case law of the CJEU (although this case law is in the context of obligations under Article 267), see C-99/00 *Lyckeskog*, paragraph 16-18 and C-144/23 *KUBERA*, paragraph 36-40.
[54] See also Case C-173/03 *Traghetti del Mediterraneo*, paragraph 46.

59. Furthermore, the case of *Hochtief* demonstrates that the CJEU also interprets the concept of a national court adjudicating in final instance in this manner. In that case the CJEU applied *Köbler* liability based on the national court's decision to reject an application to review a final court decision by the highest instance.[55] Neither the final decision to reject the application for review, nor the court decision under review, included an assessment of the substance of the EU law in question.[56] In ESA's view, this confirms that a court is considered adjudicating in last instance even if it does not review the substance of the EEA law in question.

60. ESA submits that the same must apply in EEA law, i.e. that decisions of a court of last instance includes a court decision by that court that cannot be appealed or an appeal request has been denied.

5.3.2 Question 2.b

61. By part (b) of its second question, the Referring court asks whether it is compatible with EEA law that the filing of a lawsuit concerning damages for errors by the courts in their application of EEA law are made subject to fulfilment of conditions laid down in the third paragraph of Section 200 of the Courts of Justice Act.

62. As a preliminary remark, ESA notes that in absence of EEA rules governing the matter, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law (principle of procedural autonomy). However, procedural rules governing actions for damages arising from infringement of rights under EEA law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness).[57]

63. Further, the CJEU has held in the case of *Traghetti* that national law may set criteria for the nature and degree of infringement required to establish State

[55] Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe*, paragraph 44.
[56] Ibid. The national court proceedings are explained in paragraph 11-22. The review conducted by the Supreme Court and the Constitutional Court in the initial case is explained in paragraphs 16-17, and the review of those decisions conducted by the High Court is explained in paragraphs 20-22.
[57] Case E-3/24 *Margrét Rósa Kristjánsdóttir*, paragraph 53. From the CJEU, see Case C-160/14 *João Filipe Ferreira da Silva e Brito*, paragraph 50; Case C-168/15 *Tomášová*, paragraphs 38-39.

liability for breaches of EU law by a national court of last instance.[58] However, the CJEU also underlined that "*under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the Köbler judgment.*"[59] This finding was confirmed by the CJEU in Case C-379/10 *Commission v Italy*, paragraph 42.

64. ESA submits that the same applies in EEA law. In ESA's understanding, the Norwegian conditions under third paragraph of Section 200 of the Courts of Justice Act only provide a very limited basis for claiming damages under the principle of State liability and impose stricter requirements than a manifest infringement of applicable law.

65. Alternatives (b) and (c) both relate to specific cases and circumstances, that being temporary decisions and decisions where a public official is convicted of a criminal offence in relation to the decision, respectively. The alternative listed in letter (a) is a more general condition, which allows for actions for damages when the decision concerned has been "*revoked or amended*". In ESAs understanding, court decisions that have reached the status of *res judicata*[60] can only be revoked or amended by being reopened.[61]

66. The Norwegian rules on the reopening of civil court cases are set out in Chapter 31 of the Dispute Act. Specifically, the conditions for reopening a case based on substantive errors in the judicial decision are set out in Section 31-4.

67. First, pursuant to Section 31-4 (a) , a case may be reopened if "*information on the facts in the case that was unknown when the case was ruled suggests that the ruling would in all likelihood have been different*". In ESA's understanding, this entails that only factual errors can provide grounds for reopening of a case, not errors with respect to the application of law.[62]

---

[58] Case C-173/03 *Traghetti del Mediterraneo* , paragraph 44.
[59] Ibid.
[60] In Norwegian law "rettskraftig".
[61] NOU 2001:32 A *Rett på sak,* page 500 (English translation): "*The Dispute Resolution Committee particularly emphasizes that the limitations on lawsuits are intended to prevent circumvention of the law's rules on legal remedies: Allowing compensation claims in cases where the contested decision has not been overturned or amended provides an opportunity for a "rematch" on issues that, according to the system of the law, are presumed to be finally resolved, subject to the limitations associated with the right to request reopening*." (Emphasis added)
[62] See for instance Rt-2009-625, paragraph 11 and HR-2021-236-U, paragraph 8.

68. Second, pursuant to Section 31-4 (b), a case may be reopened "*if a binding ruling made by an international court* (…) *in respect of the same subject matter suggests that the ruling was based on an incorrect application of international law*". ESA notes that this criterion seems too narrow from the point of view of EEA law. First, it is unclear whether "*binding ruling*" would be interpreted by national courts to include advisory opinions of the EFTA Court and given the requirement for a "binding ruling" there is a risk that it would not.[63] Second, although "*the same subject matter*" could apply to a judgment in an infringement case in certain instances, this would seem to limit considerably the instances whereby a case could be reopened based on incorrect application of EEA law. It could, after all, become clear that a national court of last instance had made an error in the application of EEA law in other instances. This condition for a binding ruling of an international court thus seems tailored more towards cases similar to those that end with a judgment at the European Court of Human Rights and seems too narrowly phrased to ensure that individuals can have their cases reopened when an error has been made in the application of EEA law.

69. Consequently, it appears as that Section 31-4 of the Norwegian Dispute Act only provides very limited grounds for reopening a case. Therefore, the possibility to have a case "*revoked or amended*" under alternative (a) of the third paragraph of Section 200 of the Courts of Justice Act, thus conditioning the admissibility of a lawsuit based on infringements of EEA law in that case, also is very limited. In ESA's view, subject to the verification of the national court, these rules seem to be more stringent than the manifest error-standard, as set out in *Köbler* and subsequent case law. It would therefore appear that these rules are incompatible with EEA law principle of state liability.[64]

70. At any rate, ESA submits that it is contrary to the principle of effectiveness to make claims for damages based on judicial infringements of EEA law subject to conditions such as those set out in the third paragraph of Section 200 of the Courts of Justice Act.

[63] ESA notes here that advisory opinions of the EFTA Court have not been considered as formally binding by the Norwegian Supreme Court, see case of HR-2021-1453-S, paragraph 64.
[64] See, similarly, Case C-379/10 *Commission v Italy*, EU:C:2011:775, paragraph 48 and operative part.

71. ESA notes in this respect that it is for the Referring court to determine the content of national rules and to draw the necessary conclusions from the principle of effectiveness. However, based on the available information, ESA considers that conditions such as the ones in Section 200 of the Courts of justice Act make it impossible or excessively difficult to claim damages based on judicial infringements of EEA law. They therefore also appear to be contrary to the principle of effectiveness. Thus, it is not compatible with EEA law to subject obtaining damages for errors by the courts in their application of the EEA rules to the fulfilment of the conditions laid down in the third paragraph of section 200 of the Courts of Justice Act.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to answer the referred questions as follows:

1. The EEA Agreement and the principle of State liability under EEA law entail that the State is liable for damages for errors by the courts in the application of the EEA rules where the EEA rule infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damaged sustained by the injured parties;

2.a. It is a decision by a national court adjudicating at last instance, which triggers liability of that EEA State for errors in the application of EEA law.

2.b. It is not compatible with EEA law to subject obtaining damages for errors by the courts in their application of the EEA rules to the fulfilment of the conditions laid down in the third paragraph of section 200 of the Courts of Justice Act.

Sigrún Ingibjörg Gísladóttir Erlend Møinichen Leonhardsen

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority