EFTA Court

22nd December 2024

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statue of the EFTA Court and Article 90 (1) of the Rules of Procedure of the EFTA Court, by

Dartride AS represented by
Attorney at law Anders Flatabø

IN CASE E-25/24-5

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

Oslo Advokat RUV AS
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1. Introduction

(1) Reference is made to the invitation from the EFTA Court on 23 October 2024, to submit written observations within 23 December 2024. These written observations have been submitted within due time according to Article 39 (2) of the Rules of Procedure.

(2) This request for an advisory opinion presents the Court with the issue of whether the established rules of State Liability under EEA Law also apply to National Courts within the EFTA countries, in cases where there is a manifest breach of EU/EEA Law in accordance with the Köbler doctrine[1]. Furthermore, the request seeks to clarify in the event that rules of State Liability under EEA Law do apply to National Courts within the EFTA countries, whether the application of such a doctrine is limited to a court adjudicating at "last instance", and what such a limitation does entail if the case is not admitted to the Supreme Court after a selection process.

2. Background (factual timeline)

(3) Dartride AS hereby gives a short summary and chronological timeline of factual events to provide some background as to why Dartride decided to invoke State Liability for the Judiciary and ask for redress based on a judicial decision from the Borgarting Court of Appeal of 19 November 2020 manifestly breaching EEA law. The facts in this case are also important when assessing the need for State Liability for the Judiciary within EEA law, because the facts show that Dartride AS have brought the question of redress for clear infringements of EEA art. 31, which is incorporated as *lex superior* National law and supersedes other National law such as Norwegian transport legislation, before the courts 8 times (including the Supreme Court twice). Not one of these 8 times has any of the courts expressed any assessments or prejudicated upon if the rights of Dartride AS from EEA art. 31 were violated, and the courts have not given importance to that the effectiveness of rights under EEA art. 31, should supersede National Law uncertainty as to who is the correct subject of liability under Norwegian civil procedural law. The facts in this case therefore underline the need for an effective recourse of being able to hold the Judiciary responsible for manifest infringements of EEA rights, when National case law instead of addressing whether EEA law was violated, creates procedural entanglements

[1] See C-224/01 Köbler section 53

which hinder an effective interpretation of the EEA Agreement. A pretty good summary of the background of this case has also been given in the article "*Holmen, Matias Tvermyr; Heggen, Tollef Otterdal (2024): No principle of State liability for breaches of EEA law attributable to the Judiciary? Some reflections of the seventh round of the Dartride saga*"[2].

(4) Dartride AS is a Norwegian taxi company, which was established on 17 October 2016. Its owners had for many years tried to apply for taxi licences through other companies, but the applications were all rejected due to the practice of numeral limitation on taxi licenses within a taxi district in Norway, where the local municipalities decided if there was need of more taxis. The Municipality of Oslo had at the time not allowed new taxi licenses since 2003 resulting in a monopoly with exclusive rights for licence holders giving Oslo one of the most expensive taxi prices in the world. In 2014 one of the owners of Dartride an experienced taxi driver named Roger D. Pettersen filed a complaint with ESA (The EFTA Surveillance Authority) holding that the practice of limiting taxi licenses and not allowing new competitors to the market was in breach of the EEA Agreement art. 31 (freedom of establishment).

(5) 22 February 2017: ESA (The EFTA Surveillance Authority) gives a Reasoned Opinion [3] that holds that the Norwegian Act of Transportation's limitation on taxi licences and requirement of affiliation with a dispatch centre was in breach of the EEA Agreement art. 31 (freedom of establishment). ESA determines that the allocation of exclusive rights can only be made in license districts where the market cannot provide taxi services around the clock on a commercial basis, where taxi license holders also were subject to an obligation of providing taxi services at unprofitable times and at maximum prices to ensure sufficient taxi coverage in sparsely populated areas. ESA in its Reasoned Opinion also ordered Norway to implement the necessary measures to attain conformity within two months. Following this Reasoned Opinion from ESA, Dartride immediately applies for 960 taxi licenses in big cities and urban areas in 13 districts where no exclusive taxi licensing rights could be held underlining in all applications the interpretation set forth in the Reasoned Opinion from ESA of 22 February 2017 and holding that the company also fulfils at the time alleged trans-national requirements, since one of its shareholders is a Danish national.

(6) 15 March 2017: The Ministry of Transport (Samferdselsdepartementet) writes to all the taxi districts' authorities and inform them that the existing National practice and rules still apply until new taxi legislation is given - notwithstanding the findings of the Reasoned Opinion from ESA of 22 February 2017. The Ministry of Transport states

[2] https://www.efta-studies.org/post/no-principle-of-state-liability-for-breaches-of-eea-law-attributable-to-the-Judiciary

[3] See ESA Reasoned Opinion Case No: 74881 Document No: 818034 Decision No: 041/17/COL

that it will take its time to review the premises for the decision from ESA and examine whether there is any legal room to manoeuvre. The result from this is that the municipalities in 2017 reject outright or refrain from processing Dartride's applications for taxi licenses until The Ministry of Transport have clarified what the new rules are.

(7) 8 May 2019: Dartride sues the taxi authority for Oslo district (Municipality of Oslo) as a pilot case to establish that their refusal to grant Dartride 150 taxi licences is in violation of the EEA Agreement art. 31 pursuant to ESA's Advisory Opinion. The Municipality of Oslo is chosen as the preferred subject of liability instead of the State after consulting professors and lawyers who are experts on EEA Law, since EEA art. 31 was already direct Norwegian law, and must supersede the Norwegian transport law directly as *lex superior* according to the Norwegian EEA Act §§ 1 and 2[4]. The main part of the EEA Agreement had been made direct national law and *lex superior* under protocol 35[5], where "*the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases*". It was therefore believed by Dartride that the Municipality of Oslo could not hide behind National Transport Legislation and administrative practise, since the Municipality is independently responsible to apply EEA art. 31 directly as *lex superior* in conformity with EEA law notwithstanding any discrepancies between National taxi legislation or practise and EEA law. The Ministry of Transport also had denied by letter of 17 November 2017 to Roger D. Pettersen that the State had any competence to instruct local municipal taxi authorities, since the authorities' competence was given the Municipality directly in the Norwegian Act of Transportation, meaning that the liability for an EEA conform decision *de jure* belonged to the municipal taxi districts and not the State. Choosing the Municipality of Oslo as the subject of responsibility was therefore a carefully considered legal decision, where the alternative of suing the State and The Ministry of Transport was deemed would not carry, since the State in such a law suit would argue that it could not be at fault because EEA art. 31 was already implemented fully as Norwegian law and as *lex superior* to the National transport legislation according to the Norwegian EEA Act §§ 1 and 2.

(8) 21 November 2019: The Municipality of Oslo is acquitted by the Oslo Municipal Court, due to the Court holding that Dartride did not fulfil its burden of proof that it would have been granted taxi licenses even if The Municipality of Oslo had followed ESA's Advisory Opinion[6]. The decision was appealed to The Borgarting Court of Appeal, since the question of whether licenses would have been obtained with an EEA conform interpretation was a legal and not factual question, if ESA's Reasoned Opinion was understood correctly. It should also be mentioned that the owners and

[4] Lov 27. november 1992 nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) §§ 1 and 2

[5] Agreement on the European Economic Area - Protocol 35 on the implementation of EEA rules

[6] Case TOSLO-2019-72205

management of Dartride in any event were experienced and active taxi drivers at the time of application who fulfilled the requirements for a taxi license, provided that no numerical limitations were practised. The conditions for obtaining a taxi license without numerical limitations in place were very simple and limited to the applicant having to be between 20 and 74 years old and having held a regular driver's license for at least two consecutive years. The applicant additionally must have approved taxi driver competence, and there were requirements of no prior convictions and a registered business operation. All these conditions were met by Dartride in the years 2017-2020. In any event, the Oslo Municipal Court was clearly wrong to acquit on lack of causation under national tort law so to avoid to adjudicate on whether there had been a breach of EEA art. 31, since the CJEU has stated as a prerequisite in C-432/05 Unibet that "*the examination of the compatibility of that law with Community law takes place irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link in the claim for damages*" [7]. This means that the court was not allowed to not discuss if EEA art. 31 had been breached, but it nonetheless applied national law in a way that made the court avoid exactly that question.

(9) 1 November 2020: All numerical limitations on taxi licenses are finally removed by law 19 June 2020 no. 94 (effective from November 1, 2020)[8] 3 ½ years after the Reasoned Opinion from ESA of 22 February 2017, after extensive legislative preparation and several rounds of public hearing, before proclaiming amendments to the Transport Act § 9 and the Transport Regulations § 37 first paragraph second sentence making the legislation fully in accordance with the Reasoned Opinion from ESA of 22 February 2017. Dartride's tort claim therefore is limited to operating loss within the period from applying in February/March 2017 until the revocation of all numerical limitations by amendments put in force on 1st of November 2020, as well as the economic loss of goodwill of being the first mover in the taxi market with app technology, if they had been granted licences in 2017 with EEA conform administrative decisions. After 1 November 2020 we also got to see that taxi companies that applied for licences received them in urban areas, demonstrating that the technical decision of Oslo Municipal Court in 2019 holding that Dartride did sufficiently prove that it would have been granted taxi licenses with an EEA conform practise, was wrong.

(10) 19 November 2020: The Municipality of Oslo is acquitted due to the Borgarting Court of Appeal holding that the Norwegian State (and not the Municipality of Oslo) is the only correct subject of responsibility for a tort claim based on an EEA breach of art. 31 under Norwegian procedural law, since it is the government which is responsible for ensuring that the Norwegian transport rules are in compliance with EEA art. 31,

[7] C-432/05 Unibet paragraph 59

[8] Lov 19. juni 2020 nr. 84 om endringer i lov om endringer i yrkestransportlova (oppheving av behovsprøvingen for drosje mv. – utsatt iverksettelse)

and because the letter of 15 March 2017 (mentioned in paragraph 5) from the Ministry of Transport to the taxi authorities was "*some kind of instruction*"[9]. The Borgarting Court of Appeal is explicit in that it is Norwegian litigation procedural law which warrants that the claim must be made towards the State, and not Norwegian tort law. The Borgarting Court of Appeal holds that referring Dartride to pursue the claim of damages for breach of EEA art. 31 against the State instead does not violate EEA law and the principle of effectiveness, since Dartride would not be any worse legally from pursuing the State *in lieu* of the Municipality of Oslo. However, the Borgarting Court of Appeal firstly overlooked that EEA art. 31 was already Norwegian law according to the Norwegian EEA act §§ 1 and 2, where the Municipality of Oslo had to let EEA art. 31 supersede Norwegian transport law as *lex superior* notwithstanding non-conformity with EEA art. 31 of National transport legislation and practise. Secondly, the Borgarting Court of Appeal overlooks that any claims against the State pr. 19 November 2020 were already time barred due to the Norwegian 3 years statute of limitations, when concluding that Dartride is not put in a worse legal position from having to sue the State instead of the Municipality. By ruling that only the State is the correct subject of responsibility for an EEA tort claim in this case, the decision from Borgarting Court of Appeal also entails that all other Municipal taxi authorities were incorrect subjects by way of legal force. Dartride's claim for reparations for breach of EEA art. 31 was thus effectively thrown out from the courts, since all claims against the State were already time-barred 6 months prior to the decision that only the State was the correct subject of responsibility under Norwegian litigation law. As mentioned under paragraph 8, it was also wrong in any event also here to apply national law (this time procedural law) in a way that made the court avoid discussing the claim that EEA art. 31 had been breached in this case, cf. C-432/05 Unibet[10]. Dartride appeals the decision to The Norwegian Supreme Court on 16 December 2020.

(11) 10 March 2021: The Norwegian Supreme Court does not admit Dartride's appeal[11]. The reasons for not admitting the case are unknown, since the Norwegian Supreme Court selects which cases it wishes to adjudicate upon and does not give reasons for why a case is not admissible other than a standard statement that the case is of no principle interest outside the case itself.

(12) 5 July 2021: After Dartride's case against the Municipality of Oslo was final without any assessment of whether EEA art. 31 had been breached or not, ESA (The EFTA Surveillance Authority) writes to the Ministry of Justice to ask whether private parties have legal certainty under Norwegian law as to where to forward tort claims against the authorities based on EEA Law.

[9] Case LB 2020-11829
[10] C-432/05 Unibet paragraph 59
[11] Case HR-2021-546-U

(13) 8 September 2021: The Ministry of Justice replies that Dartride's case was a special situation, whereas normally a Municipality indeed can be sued for breaches of EEA Law when rejecting an application[12]. The reason the claim against the Municipality of Oslo was referred to litigation against the State instead in Dartride's case, was explained in the reply as follows: "*The procedural issues are regulated by the Dispute Act. As noted by the Court of Appeal in the abovementioned judgment, the Dispute Act does not contain any provisions that explicitly regulate against which public body the claimant should file a claim for damages. While section 1-5 determines which public body is the correct subject for claims regarding the validity of an administrative decision, it does not specify the proper party against whom to file a claim for damages. In lack of any specific regulation, the question must be considered in light of general principles of admissibility, which are found mainly in section 1-3 of the Act*". In addition, it was argued: "*In line with municipalities' individual duty of loyalty and obligation to interpret Norwegian law in an EEA-conform way, a municipality is the correct subject for a claim for damages where the breach is caused by the municipality itself. However, this may be different in the special situation where the municipality has based its decision directly on legislation which is in conflict with Norway's obligations under the EEA Agreement. The breach of EEA law, and the corresponding loss for the party concerned, is in such a situation caused by the State, and a claim for damages may therefore in these circumstances always be directed at the State*".

(14) 25 October 2021: Dartride sues the State represented by the Ministry of Transport (Samferdselsdepartementet) in accordance with the premises of the verdict of 19 November 2020 from Borgarting Court of Appeal case LB 2020-11829 that only the State is responsible for the municipalities' refusal of taxi licences to Dartride.

(15) 4 November 2022: The Oslo Municipal Court rules that any tort claim against the State was time barred by spring 2020, since Dartride in the view of the Court knew enough factually to litigate against the State in the spring of 2017[13]. The argument that Dartride did not know that only the State could be held responsible for breach of EEA law in this case before the decision of Borgarting Court of Appeal pr. 19 November 2020 is disregarded as ignorance of the law – notwithstanding that this premise is legally incorrect and the EEA law professors Halvard Haukeland Fredriksen and Gjermund Mathisen[14] explicitly had stated that the decision of Borgarting Court of Appeal pr. 19 November 2020 was wrong because EEA art. 31 was already direct Norwegian Law that supersede the transport legislation as *lex superior*, and that it infringed upon the principle of equivalence treating Dartride's claim differently because it was based on EEA rights. The Oslo Municipal Court also held that Norwegian rules on time barring was in accordance with the principles of

[12] https://www.stortinget.no/globalassets/pdf/eu_open/esa_svar_erstatningskrav_kommuner_sept2021.pdf
[13] Case 21-150525TVI-TOSL/06
[14] See «EØS-Rett» (2022) 4th edition pages 476 and 477

effectiveness and equivalence, and that it was therefore not necessary to interpret the statute requirements of knowledge more flexibly to accommodate the principles of effectiveness and equivalence as suggested in E-10/17 «Nye Kystlink»[15]. The EFTA Court, in sections 116 and 122 of E-10/17 "Nye Kystlink", established that the application of time barring rules in the specific case must not make it *'impossible or excessively difficult'* to have the question of an EEA law infringement assessed, where the rule must be *'combined with an obligation to investigate for the injured parties'*." The Court did not consider as relevant the Catch 22 in that Dartride could not have litigated against the State in 2017, since the State in such an event would have argued that there were no implementation challenges to hold the State accountable for, since EEA art. 31 already was direct Norwegian law *lex superior* according to the Norwegian EEA act §§ 1 and 2. Dartride would also point out that the time-barring rules applied also could be in violation of the principle of effectiveness under EU law as laid out in C-278/20 (Commission vs Spain)[16].

(16) 15 March 2023: The Borgarting Court of Appeal rejects Dartride's appeal and reaffirms that Dartride knew sufficiently about the facts to litigate against the State in the spring of 2017 and demonstrated ignorance of the law in choosing the Municipality as the subject of responsibility, meaning that the claims against the State were time barred 3 years later in the spring of 2020[17]. The decision was appealed to The Norwegian Supreme Court on 5 April 2023.

(17) 21 June 2023: The Norwegian Supreme Court does not admit Dartride's appeal as the legal questions at hand are deemed not to be of principle interest[18].

(18) 27 August 2023: Dartride sues the Ministry of Justice with a tort claim for manifest breach of EEA law with legal basis in the Köbler doctrine, since the Borgarting Court of Appeal in 2020 rejected a timely litigated claim for damages against a correct subject of responsibility under EEA law, and instead referred the plaintiff to pursue an already time barred claim against the State. The effect of the court decision was that no Norwegian Court ever discussed Dartride's assertion that EEA law was breached in 2017 after ESA informed how EEA art. 31 should be interpreted with regards to numerical limitations on taxi licenses. It is not contested that litigation was timely pursued in 2019 against the Municipality of Oslo. An interesting point is also that the State in both rounds of court cases have never argued that Dartride was wrong to sue the municipality for breaching EEA art. 31 in 2017 (for obvious reasons). It has been sufficient to argue that Dartride had the possibility and sufficient knowledge to also sue the State in 2017 in spite of our arguments that Dartride would have lost such a case against the State in 2017, due to the fact that EEA art. 31

[15] See E-10/17 «Nye Kystlink» paragraph 116 and 122
16 Case C-278/20 (Commision vs Spain) paragraph 186
17 Case 22-189531ASD-BORG/02
18 Case HR-2023-1162-U (23-058792SIV-HRET)

was already implemented as Norwegian national *lex superior* law superseding any non-conform transport legislation by the State. The Dartride case therefore shows the logical fallacy in that Dartride by the State is viewed to have been correct to sue the Municipality of Oslo in 2017 under EEA law but showed legal ignorance of Norwegian procedural law when it chose not to sue the State in 2017.

(19) 29 September 2023**:** The Ministry of Justice replies that the Köbler doctrine is not EEA law, and secondly that if so, it only applies when The Norwegian Supreme Court has admitted a case to adjudication. The Ministry of Justice therefore holds that the case should be dismissed according to the Norwegian Courts Act § 200 third section. The parties agree because of this that the Court should first review the question of admissibility in separate proceedings.

(20) 11 October 2023: Dartride asks the Oslo Municipal Court to request an Advisory Opinion from the EFTA court, since no definite answer has been given by the EFTA court or EEA national courts whether the Köbler doctrine does apply within the EEA, and also for lower court instances.

(21) 2 November 2023: The Ministry of Justice replies that there is no need for an Advisory Opinion from the EFTA courts, since there are ample legal decisions regarding the application of the Köbler doctrine.

(22) 24 November 2023: The Oslo Municipal Court decides that there is no need for an Advisory Opinion from the EFTA courts.

(23) 22 January 2024: The Oslo Municipal Court dismisses the civil tort case in accordance with the Norwegian Courts Act § 200 third section on the grounds that State Liability for National Courts in correspondence with the Köbler doctrine does not exist in EEA law[19]. It holds that the system differences between the EU and the EEA, with especially the EU obligation at last instance to refer a question to the Court of Justice of the European Union (CJEU) under Article 267 TFEU, and the absence of direct effect, are too great to allow the principles of effectiveness, right to redress, homogeneity and loyalty to be conclusive in transferal of the Köbler doctrine to EEA law or make relevant adaptations to the EEA/EFTA system. Furthermore, the Court holds that the EU obligation at last instance to refer questions to the CJEU is so central for the application of the Köbler doctrine, that other grounds of liability cannot exist in legal systems, where such an obligation to refer does not exist. The Court also writes that the statements in E-2/10 (Kolbeinsson) paragraph 77 were hypothetical, and therefore were an *obiter dictum*, which should be given limited weight.

[19] Case 23-124975TVI-TOSL/07

(24) 2 February 2024: Dartride appeals the dismissal of the case from The Oslo Municipal Court to the Borgarting Court of Appeal. On 16 April 2024 the case was transferred to Eidsivating Court of Appeals, since the main grounds for State liability against the courts were the decision from the Borgarting Court of Appeal of 19 November 2020. Request for an advisory opinion to the EFTA Court was reiterated in the appeal, and Dartride pointed to the uncertainty with which The Oslo Municipal Court argued existed.

(25) 5 July 2024: The Eidsivating Court of Appeal decides to make a request for an advisory opinion to the EFTA Court in Case 24-032314ASK-ELAG regarding whether we have State Liability for National Courts under EEA law and its scope, and the request is formally sent to the EFTA Court on 27 September 2024.

3. National law

(26) Dartride will not describe relevant Norwegian National Law to a large extent in its Written Observations, as this has been done by The Eidsivating Court of Appeal in the request to the EFTA Court on 27 September 2024 section 3.1 and will also most likely be outlined in the submission from the Ministry of Justice of Norway.

(27) However, Dartride would like to point out that it follows from the Norwegian Supreme Court Decision in HR-2005-713-A[20] "Allseas" and the principle of effectiveness that, if there exists State Liability for the Courts under EEA law, Norwegian procedural rules such as the Norwegian Courts Act § 200 third paragraph, will have to yield to the rules set by EEA law to ensure effectiveness.

(28) The obligation to EEA conformity in this area of access to the courts goes beyond harmonizing National law with EU/EEA legal acts such as Directives and Regulations. EEA conformity would for access to the courts be an immediate obligation even though the wording in the Norwegian Courts Act § 200 third paragraph might be clear and unambiguous, and we therefore use the word "yield" instead of harmonization.

(29) It is also important to point out that the basic doctrine of State liability under EEA law already has been firmly established under Norwegian National law (albeit not comprising the Judiciary as of yet)[21]. In the Supreme Court Decision "Finanger II"[22] the Norwegian Supreme Court outlines the evolvement of State Liability within EEA law from the CJEU decision C-46/93 og C-48/93 Brasserie du Pêcheur and Factortame to the development of such rules within the EEA by the EFTA Court in E-9/97 Sveinbjörnsdóttir and E-4/01 Karlsson. In section 52 the Norwegian Supreme Court in

[20] See HR-2005-713-A 'Allseas' section 36
[21] HR-2005-1690-P – Rt-2005-1365 (Finanger II)
[22] HR-2005-1690-P – Rt-2005-1365 sections 45-49

plenum states that it agrees with this development and supports the effect-oriented interpretation of the EEA Agreement by the EFTA Court. The full Norwegian Supreme Court adopted a legal development towards State Liability based on considerations of homogeneity, loyalty, and effectiveness. The Norwegian Supreme Court noted that the principle of State liability in EEA law should be the same as that in EU law because individuals would otherwise not enjoy the same guaranteed rights in the two legal orders.

(30) Dartride would also like to point out that the principle of loyalty in Article 3 of the EEA Agreement is incorporated directly as Norwegian National Law according to the EEA Act sections 1 and 2, since Article 3 is part of the main part of the EEA Agreement[23]. Norwegian courts are therefore obligated - also under National law as *lex superior* - to *'take all general or specific measures suitable to fulfill the obligations arising from this agreement*'."

(31) There is strong consensus among legal theorists in Norway that we have State Liability also for the Judiciary under EEA law[24].

(32) Dartride also would like to address the recourse of reopening of civil cases under Norwegian law, since this is mentioned by the Ministry of Justice as a way to circumvent the hindrance of the Norwegian Courts Act § 200 third paragraph. It was also mentioned as a remedial recourse by ESA in the follow-up assessment to Kolbeinsson that "*Iceland's legal regime for the re-opening of court cases, as amended by Act No 47/2020, provides for a remedy, which is not less effective than a pure liability action based on the principle of State liability for judicial breaches*"[25]. The recourse of reopening civil cases under Norwegian law is restricted and is not and was never attainable in this case. Reopening can be requested under the Civil Procedure Act § 31-3[26] where the party was not lawfully summoned, the judges were not eligible to serve, the judges acted criminally, a witness gave false testimony or if it is established that the case handling has violated a convention that is comprised by the Human Rights Act under Norwegian law. Under the Civil Procedure Act § 31-4 a reopening can also be requested[27]:

[23] Lov 27. november 1992 nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) §§ 1 and 2

[24] Halvard Haukeland Fredriksen «Offentligrettslig erstatningsansvar ved brudd på EØS-avtalen» section 2.5, «Tvisteloven og EØS-avtalen» by Halvard Haukeland Fredriksen TFR-2008-289 page 314. «Statlig erstatningsansvar for nasjonale domstolers brudd på EØS-retten?» by Halvard Haukeland Fredriksen LOR-2006-485 page 595, Halvard Haukeland Fredriksen and Gjermund Mathisen «EØS-Rett» (2022) 4th edition page 474. Pål Wennerås, "State liability for decisions of courts of last instance in environmental cases", (2004) 16 Journal of Environmental Law page 329.

[25] ESA Decision 23 June 2021 Case No: 75004 Document No: 1154422 Decision No: 131/21/COL page 13

[26] Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 31-3

4[27] Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 31-4

"*a. if information about actual circumstances that were unknown when the case was decided indicates that the decision would most likely have been different, or b. if a binding decision by an international court or a statement from the UN Human Rights Committee in the same case circumstances indicates that the decision was based on an incorrect application of international law*".

Firstly, there is under the Civil Procedure Act § 31-6 first section[28] a 6 months deadline for submitting a motion for reopening "*within six months after the party became aware of the circumstances on which the request is based, or should have acquired knowledge of these circumstances.*" Had Dartride filed for reopening in 2023 after it became legally final that tort claims against the State were time-barred by spring 2020, it would have been argued that Dartride "*should have acquired knowledge of these circumstances earlier*" at least when the Ministry of Justice indicated that the claim against the State was time-barred in the reply to the notice of planned litigation of 4 June 2021. Secondly, under Civil Procedure Act § 31-5 second section[29] reopening cannot be requested on grounds "*that the party should have raised during the ordinary proceedings, on appeal, or in a request for renewal*".

(33) It is also relevant for understanding the Norwegian legal system, that the Norwegian Supreme Court is not required to adjudicate on the subject matter of an appeal, since consent from the Supreme Court is required under the Civil Procedure Act § 30-4 first section[30], which reads: "*An appeal against a judgment cannot be made without consent. Consent shall only be given when the appeal concerns questions that have significance outside of the current case, or if other reasons make it particularly important to have the case decided by the Supreme Court*". Furthermore, the Supreme Court never explains why consent was not given, so there is no way of knowing why the case was not of sufficient legal interest to the Supreme Court.

(34) Finally, Dartride would also like to point out that State Liability for the Judiciary under EEA law has been acknowledged in a civil tort case before The Oslo Municipal Court[31] TOSLO-2019-136131 (Bastø Fosen AS vs The Ministry of Justice). It is cited from section 4.3 of the ruling:

'In the EU Court's judgment in case C-244/01 (Köbler) [should probably be C-224/01 (Köbler), editor Lovdata's note], it is stated in paragraph 53 that such liability will only be relevant "in the exceptional case where the court has manifestly infringed the applicable law." The consideration for a necessary safeguarding of the function and purpose of res judicata rules suggests that judicial liability should be limited to the most obvious breaches of EEA law.'"

[28] Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 31-6
[29] Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 31-5
30 Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 30-4
[31] See Case TOSLO-2019-136131

It should be noted that State Liability for the Judiciary was not discussed further in case TOSLO-2019-136131 due to the findings that the State over all had not acted sufficiently negligent and therefore it was not necessary to discuss if there was a manifest breach.

4. EEA Law

(35) Reference is made to the request to the EFTA Court on 27 September 2024 from the Eidsivating Court of Appeal section 3.3. Dartride therefore sees no need to formally cite the general principles and the preamble of the EEA Agreement etc., which the EFTA Court will know very well. Dartride will therefore limit its outline of EEA law to the law directly discussed under section 6 "Legal Analysis".

5. The question referred

(36) The Eidsivating Court of Appeal in Norway has referred the following questions to the EFTA court for an advisory opinion:

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?

(37) The reasons which have prompted the national court to refer the questions to the EFTA Court, are given under section 1 in the request of 27 September 2024, where the Eidsivating Court of Appeal explains that request is made, since "*the case raises questions concerning the interpretation of EEA law about which there is some doubt*". The case which the Eidsivating Court of Appeal refers to is the judgment of Oslo Municipal Court of 22 January 2024 in case 23-124975TVI-TOSL/07[32].

[32] See paragraph 23

6. Legal analysis

(38) Question 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?

(39) This question pertains to whether the established principles of State liability under the EEA Agreement also apply to the decisions of National Courts in the EFTA states.

(40) Dartride submits that State liability under the EEA Agreement firmly established as EEA law in E-9/97 Sveinbjörnsdóttir and E-4/01 Karlsson, also extends itself to judicial decisions, albeit limited to the "*exceptional case where the court has manifestly infringed the applicable law*" [33]. The arguments in C-224/01 Köbler show that the decision of the EU Court of Justice to include the judiciary within the scope of State liability was a natural and necessary extension of the rules first established by the EU Court of Justice in C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame. That C-224/01 Köbler is viewed as an extension of the rules of State liability can be seen in the CJEU's statements that the State under international law incurs liability 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*", and that this principle applies even stronger (*a fortiori*) in the Community law legal order[34].

(41) The EFTA Court stated in E-9/97 Sveinbjörnsdóttir that "*the principle of State liability must be seen as an integral part of the EEA Agreement as such*"[35]. The EFTA Court also points out in E-9/97 Sveinbjörnsdóttir that effective possibility for claiming compensation (redress) when the state has failed to fulfil its obligations, is a central principle for the enforcement of the EEA Agreement[36]. Correspondingly, the importance of redress under the EEA Agreement also by principle must apply to compensation for manifest EEA law breaches by the courts, cf. corresponding statements for the importance of redress for EU in C-6/90 and C-9/90 Francovich[37], to which the EU Court of Justice also referred in C-224/01 Köbler. These principles have also been reaffirmed in E-2/12 HOB-vin[38] and E-8/07 Nguyen[39]. Dartride argues there must be a balanced parallel opportunity for redress also under EEA law, when Courts manifestly infringe EEA law.

(42) EEA art. 31 undoubtedly conferred individual rights on Dartride to have their applications for taxi licenses being reviewed without the premise of numeral

[33] Case C-224/01 Köbler paragraph 53
[34] Case C-224/01 Köbler paragraph 32
[35] Case E-9/97 Sveinbjörnsdóttir paragraph 63
[36] Case E-9/97 Sveinbjörnsdóttir paragraph 62
[37] Case C-6/90 and C-9/90 Francovich paragraphs 36 and 37
[38] Case E-2/12 HOB-vin paragraphs 119 and 120
[39] Case E-8/07 Nguyen paragraph 31

limitations on taxi licenses in 2017, but the Courts in Norway refrained in all 3 cases brought before 8 instances from expressly deliberating on if there was a violation of EEA art. 31, thus highlighting that there is no other recourse for redress than State liability for the courts to have the question examined. There also must be some sanctions against the State if the courts manifestly either deliberately or negligently disregard EEA law, which confers specific rights and obligations on to individuals.

(43) Dartride holds that the EFTA Court already has confirmed the existence of State liability for the judiciary as a corollary to the EEA Agreement in an *obiter dictum* in E-2/10 Kolbeinsson[40], following a concrete effect-oriented interpretation of the EEA Agreement. Dartride holds that The EFTA Court in paragraph 77 of E-2/10 Kolbeinsson by referring to the Köbler case and mentioning possible conditions "*if States are to incur liability under EEA law for*" judicial infringements, suggested that if the Court had been given the opportunity to answer whether State liability encompassed the judiciary under EEA law in the Kolbeinsson case, the answer would have been affirmative.

(44) ESA (the EFTA Surveillance Authority) has similarly taken "*the view that the principle of State liability for breaches of EEA law by a court adjudicating at last instance forms part of EEA law*", but at the same time underlining that "*the conditions of the principle are strict and the threshold for its application is high*"[41]. Since ESA is the authority appointed to ensure that the EFTA states fulfil their obligations under the EEA Agreement[42], their interpretation and assessment that the EFTA states have such obligations under the EEA Agreement should carry some weight.

(45) ESA (the EFTA Surveillance Authority) also in its written observations to the EFTA Court in of E-2/10 Kolbeinsson held that the general principle of State liability under the EEA Agreement extends to liability for judicial breaches [43]. This is also mentioned in E-2/10 Kolbeinsson[44]:

(46) ESA (the EFTA Surveillance Authority) also in a Reasoned Opinion to Iceland on 20 January 2016, rejected Iceland's objections that the EFTA Court's statement in paragraph 77 of E-2/10 Kolbeinsson was unclear to whether the judiciary was comprised within the rules of State liability[45]. In paragraph 38 ESA argues the following: "*In the view of the Authority, it is, moreover, not even necessary to refer to paragraph 77 in Case E-2/10 Kolbeinsson. This paragraph does not establish, but*

[40] Case E-2/10 Kolbeinsson, paragraph 77
[41] ESA (the EFTA Surveillance Authority) Case No: 75004 Document No: 1154422 Decision No: 131/21/COL
[42] EEA agreement art. 108
[43] ESA Letter of formal notice to Iceland 17 June 2015 Case No:75004 Document No: 752617
[44] Case E-2/10 Kolbeinsson paragraph 74
[45] ESA (the EFTA Surveillance Authority) Reasoned Opinion to Iceland January 20, 2016. Case No:75004 Document No: 775380 Decision No: 016/16/COL paragraphs 37 and 38

rather confirms how the general principle of State liability under the EEA Agreement should be understood. The conclusions made by the Authority in the letter of formal notice and in this reasoned opinion would be the same even if paragraph 77 in Case E-2/10 Kolbeinsson did not mention State liability for losses resulting from incorrect application of EEA law by national courts".

(47) When first establishing State liability under EEA law in E-9/97 Sveinbjörnsdóttir, the EFTA Court emphasized "*the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities*"[46]. The Court also held that "*the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own*" and that the EEA Agreement therefore "*goes beyond what is usual for an agreement under public international law*"[47]. The absence of State liability for judicial breaches would contradict the EEA Agreement's objectives of homogeneity, loyalty, and effective legal protection and equal treatment for individuals and economic operators, if State liability for judicial breaches of EU/EEA law only is possible in the EU. These principles aim to ensure uniform interpretation and application of EU/EEA law with EU and EFTA states, and State liability is seen as integral to maintaining these standards. The principle of homogeneity dictates that EEA citizens should have to as large an extent as possible similar rights, recourse and protections as EU citizens, notwithstanding differences in the legal systems.

(48) Of special importance to how to emphasize homogeneity and the protection of individual rights under both systems in this case, Dartride would point to E-11/12 Koch [48], where the EFTA Court stated that *"The Court has repeatedly held that the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA*". The EFTA Court in relation to this, deemed access to the Courts to be of the highest importance to ensure the effectiveness of individual rights[49]: "*Access to justice and effective judicial protection are essential elements in the EEA legal framework (see Case E-2/02 Bellona v ESA [2003] EFTA Ct. Rep. 52, paragraph 36; and in relation to the EU see Case C-432/05 Unibet [2007] ECRI-2271, paragraph 37). This can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement*". Subsequently, the EFTA Court has therefore thus far not let the system differences in the EU and the EEA legal orders affect its position that

[46] Case E-9/97 Sveinbjörnsdóttir paragraph 60
[47] Case E-9/97 Sveinbjörnsdóttir paragraph 59
48 E-11/12 Koch paragraph 116
49 E-11/12 Koch paragraph 117

the rights and obligations conferred on citizens and economic operators should be the same[50].

(49) The EFTA Court's argumentation in E-9/97 Sveinbjörnsdóttir shows, that the Court's justification for EEA State liability is broadly formulated in general terms, attributed to the actions of the State and consequently should also apply to breaches of EEA obligations caused by national courts. When the EFTA Court argues with the EEA Agreement's objective of a homogeneous interpretation and application of EEA law throughout the entire EEA area, homogeneity is an objective that could be threatened not only by breaches from the legislature and administration but also from national courts' grave misinterpretation of EEA law or disregarding relevant EEA law.

(50) Furthermore, the EFTA Court's methodical legal analysis in both E-9/97 Sveinbjörnsdóttir and E-4/01 Karlsson shows that the EFTA Court does not incorporate EU Court of Justice case law into EEA law as such, but by way of interpretation finds that similar principles also follow from the EEA Agreement. This can be seen clearly in paragraph 62 of in E-9/97 Sveinbjörnsdóttir: "*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*". Thus, the Court is not asked to adopt C-224/01 Köbler directly as EEA law, but rather to decide whether the same principles apply to the judiciary under the already established rules of State liability under the EEA Agreement, and if so to what extent in consideration of legal system differences. This could be described as an effect-oriented interpretation of the EEA Agreement in accordance with current legal developments from the EU Court, where decisive emphasis is placed on the objectives of homogeneity, effectiveness, and loyalty.

(51) In E-9/97 Sveinbjörnsdóttir the EFTA Court disregarded objections that Norway was not obligated to abide by more than what was agreed upon at the entry of the EEA Agreement in 1992 and that the EEA Agreement "*does not impose an obligation on the EFTA States to make good loss and damages caused to individuals by failure to implement correctly in their national legislation provisions of EEA legislation*"[51]. Norway also pointed out that since state liability was developed by the EU Court and there were system differences, principles of state liability from C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame could not be transferred into EEA law.

(52) The EFTA Court first acknowledged in paragraph 46 of E-9/97 Sveinbjörnsdóttir that the EEA Agreement does not contain any adopted provisions regarding state liability

50 E-26/13 The Icelandic State v Atli Gunnarsson [2014] EFTA Ct. Rep. 254, para. 59 and E-28/15 Yankuba Jabbi v the Norwegian Government, represented by the Immigration Appeals Board [2016] EFTA Ct. Rep. 575.
[51] E-9/97 Sveinbjörnsdóttir paragraph 44

for failure to implement a directive but then began to discuss in paragraph 47 the purpose of the EEA Agreement in Article 1 and the preamble, where considerations for a functioning EEA Agreement were pointed out. Finally, in its discussion, the EFTA Court referred to crucial considerations for homogeneity and loyalty obligations under Article 3 of the EEA in paragraphs 60 and 61, concluding that such state liability exists despite liability for breaches of the EEA Agreement not being part of what was agreed upon at its inception in 1992.

(53) Since E-9/97 Sveinbjörnsdóttir addressed the failure to implement directives, Norway attempted a rematch in E-4/01 Karlsson, where it was argued from Norway's side that the state liability established in C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame, as accepted by the EFTA in E-9/97 Sveinbjörnsdóttir paragraph 63, only encompassed liability for inadequate implementation of directives and not for breaches of the main part of the EEA Agreement[52]. The EFTA Court also rejected these objections in E-4/01 Karlsson, stating in paragraph 32 that an EEA state can be held liable for any breach of EEA law if the three conditions for state liability mentioned in E-9/97 Sveinbjörnsdóttir paragraph 63 are met.

(54) In E-9/97 Sveinbjörnsdóttir paragraph 63, it was also pointed out that "*It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers*". The same is reiterated in E-4/01 Karlsson paragraph 26. It is stated in both E-9/97 Sveinbjörnsdóttir and E-4/01 Karlsson that state liability can be directly derived from the EEA Agreement.

(55) The Norwegian law professor Halvard Haukeland Fredriksen argues in this respect that "*the above-mentioned effect-oriented conception of homogeneity suggests that the principle of State liability does encompass breaches of EEA law caused by national courts. Given the very limited role which the ECJ attributed to the duty of national courts of last instance to request preliminary rulings under Article 267 TFEU in its reasoning in Köbler, it does not seem convincing to apply the lack of such a duty under Article 34 SCA as an argument against EEA State liability for judicial wrongdoing*"[53].

(56) For the same reasons, the methodical approach of affirming EEA law by way of interpreting rights and obligations under the EEA Agreement also allows for the EFTA Court to make specific EEA legal adjustments when interpreting the scope of State liability for the courts under EEA law, in spite of the legal systems being different in some areas with i.e. direct effect and an obligation to refer in last instance under article 267(3) TFEU in the EU. The EFTA Court itself and the effect-oriented interpretation approach outlined in E-9/97 Sveinbjörnsdóttir was acknowledged by

[52] E-4/01 Karlsson paragraphs 31 and 32

[53] Halvard Haukeland Fredriksen "The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown" page 324

the CJEU in Case C-140/97 Rechberger[54]. The statements in the EFTA Court Advisory Opinion of Irish bank of partner like relationship, which the Oslo Municipal Court emphasized in its judgment that EEA law does not have State liability for the courts [55], addresses the relationship between the EFTA court and the national courts and refers to the non-binding effect of the decisions from the EFTA court. Therefore, the EFTA Court relies on the national courts to loyally implement its decisions, which is pointed out in paragraph 58. Dartride therefore holds that the statements in E-18/11 Irish Bank do not affect the legal basis for an effect-oriented interpretation approach outlined in E-9/97 Sveinbjörnsdóttir.

(57) Dartride would also like to point out that an equally clear and important condition when signing the EEA Agreement in 1992 was that Stortinget (the Norwegian Parliament) would not be subjected to any supranational level either. Today nobody questions the legality in that the principles of State liability encompass the legislature notwithstanding Norway having taken this exception in 1992.

(58) The EFTA Court held in case E-4/01 Karlsson that the principle of State liability under EU law "*may not necessarily be in all respects coextensive*" with EEA law[56]. This principle was also reaffirmed in E-2/12 HOB-vin[57]. Also, in E-4/01 Karlsson it was specifically pointed out that "*The absence of recognition of direct effect for EEA rules does not preclude the existence of an obligation on the State to provide for 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*". Dartride holds that the EFTA Court in E-4/01 Karlsson and E-2/12 HOB-vin reaffirms that the Court has legal basis to apply modifications to EU law in its interpretations to accommodate differences between the two legal systems when considering transferal of EU law through an effect-oriented interpretation of the EEA Agreement. Homogeneity in relation to this therefore does not mean that case law rules must be identically transferred in an all or nothing approach in areas where legal system differences are significant, but rather that conformity should be adhered to as much as possible and loyally within the legal systems' framework. With regards to homogeneity, it has been argued that differences between the EU and EEA legal systems might warrant adaptations when applying State liability for the judiciary, but that differences cannot by themselves warrant non-transferal [58].

(59) Dartride holds that the obligation to refer at last instance under article 267(3) TFEU, which the EFTA states do not have, does not preclude the transferal of C-224/01 Köbler to an extent which ensures some form of State liability for the judiciary under

[54] Case C-140/97 Rechberger paragraph 39
[55] Case E-18/11 Irish Bank paragraphs 57 and 58
[56] Case E-4/01 Karlsson, paragraph 30.
[57] Case E-2/12 HOB-vin paragraph 120
[58] M Elvira Méndez-Pinedo, EC and EEA Law: A Comparative Study of the Effectiveness of European Law (Europa Law Publishing 2009) page 289.

EEA Law. The point that C-224/01 Köbler must be seen as "*a kind of sanction against national courts of last instance breaching their duty to request preliminary rulings on the interpretation of EU law*", was argued by the Norwegian State in E-2/10 Kolbeinsson[59], but was found to be subordinate to the objectives of fulfilling the EEA Agreement as seen in the *obiter dictum* in paragraph 74 in E-2/10 Kolbeinsson. Another system difference which has been pointed out is that the preliminary rulings are binding upon the National court, while the advisory opinions of the EFTA court under SCA art. 34[60] are not binding upon the National court.

(60) Dartride also holds that the existence of State liability for the courts under C-224/01 Köbler by the reasoning of the CJEU is not primarily warranted by a failure to request binding preliminary rulings on the interpretation of EU law in the last instance under article 267(3) TFEU. It is the need to protect the rights of individuals, obtaining redress in the national courts for damage and to ensure the effectiveness of those rules that primarily warrants State liability for the courts under C-224/01 Köbler[61]. Furthermore, it can be understood directly from paragraphs 54 and 55 in Köbler that State liability for the courts is not limited to breaches of the obligation to refer. In paragraph 54 it is stated that "*the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it*" and in paragraph 55 it is stated that "*Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community 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 234 EC*". In C-224/01 Köbler[62] it is also clearly stated that the purpose of the obligation to refer is "*to prevent rights conferred on individuals by Community law from being infringed*". It is therefore not surprising that liability in C-224/01 Köbler was partially based on breaches of this safeguard intended to ensure correct interpretations at last instance. Dartride in this respect holds that breach of the obligation to refer therefore is mentioned as one of many factors for State liability for the courts, although one acknowledges that the failure to refer is indeed an important factor of much weight. To draw a parallel, the failure to comply with formal procedural legal obligations designed to prevent damage is normally a solid starting point when establishing a culpa responsibility norm in tort law, and therefore breach of formal obligations to refer under EU law would naturally be emphasized heavily by the CJEU.

[59] Case E-2/10 Kolbeinsson paragraph 70
[60] EFTA Surveillance and Court Agreement art. 34
[61] Case C-224/01 Köbler paragraphs 33, 36 and 45
[62] Case C-224/01 Köbler paragraph 35

(61) The CJEU has also reaffirmed that the conditions of State liability for the courts and State liability for other organs of State are the same[63], which means that failure to request preliminary rulings on the interpretation of EU law at last instance under article 267(3) TFEU should be considered by the EFTA Court in relation to EEA law as a supplemental factor in the EU system when reviewing State liability for the courts under EU law. Furthermore, it should be self-evident that this supplemental factor in a State liability assessment for the courts in the EU is not put in place to limit the scope of State liability only to cases where the obligation to refer has been breached. The CJEU by stating that the conditions of State liability are the same thus demonstrate that State liability for the courts has its legal basis in the existing principle of State liability outlined in C-46/93 og C-48/93 Brasserie du Pêcheur and Factortame, and not in the obligation to refer under article 267(3) TFEU.

(62) The notion that the reasoning for State liability for the courts has legal basis outside the failure to refer can also be understood from the CJEU's deliberations in Case C-173/03 Traghetti [64]. In C-173/03 Traghetti it is stated in paragraph 35 that general legal interpretation can also constitute a manifest infringement of Community law: In Opinion of Advocate General Leger in Case C-173/03 Traghetti[65], it was explicitly stated that the obligation to refer is just one of many assessment criterias under C-224/01 Köbler "*in addition to those which the Court defined in Brasserie du Pecheur and Factortame*". Furthermore, it was stated that the EU Court has refrained from establishing any hierarchy among various relevant considerations but emphasizes that the obligation to refer holds particular importance[66]. Thus, one can deduce that breaches of the obligation to refer weigh heavily in on an assessment under EU State judicial liability, but that State liability for the courts under C-224/01 Köbler is neither limited to nor solely justified by breaches of this obligation.

(63) In Dartride's view there is fundamentally no reason to distinguish between State liability for the legislative, executive, and judicial powers as emphasized by the CJEU in C-224/01 Köbler[67]. The special independence of the courts and the importance of respecting the legal force of a decision are taken into account through the stricter material conditions for liability for court decisions, as the plaintiff must demonstrate that the disregard of EEA law was "*manifest in character*" as opposed to "*sufficiently serious*" for State liability outside of the courts, cf. C-224/01 Köbler paragraph 53 for EU and E-2/10 Kolbeinsson paragraph 77 for EEA. The CJEU also stated the following in relation to this in C-224/01 Köbler[68]:

[63] Case C-224/01 Köbler paragraph 52 and C-168/15 Tomasova paragraph 23
[64] Case C-173/03 Traghetti del Mediterraneo paragraph 35
[65] Opinion of Advocate General Leger in Case C-173/03 Traghetti delivered on 11 October 2005 paragraph 69
[66] Ibid paragraph 70
[67] Case C-224/01 Köbler paragraph 32
[68] Case C-224/01 Köbler paragraph 48

"*It should be added that, although considerations to do with observance of the principle of res judicata or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damages caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility*".

(64) The EU Court of Justice has also made it clear that state liability for judicial breaches does not imply personal liability for the judges involved[69]. Instead, it is the State that is held liable for the breach, which helps maintain the independence and impartiality of the judiciary. Furthermore, State liability for judicial breaches should be considered as running costs for upholding the EEA Agreement and should also motivate the courts to ensure EU/EEA conform decisions.

(65) In closing on this question, Dartride would like to point out that next to considerations of homogeneity the principle of effectiveness strongly suggests that State liability under EEA law should extend itself to the judiciary. In C-224/01 Köbler it is stated that "*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*"[70]. The importance of attaining "*full effectiveness of Community rules*" through the possibility of claiming damages is also established in Case C-6/90 and C-9/90 Francovich[71], C-46/93 og C-48/93 Brasserie du Pêcheur and Factortame[72] and C-173/03 Traghetti del Mediterraneo[73]. Dartride would like to point out that any absence of State liability for the courts under EEA law, would greatly reduce the effectiveness of rules conferring individual rights under the EEA Agreement, and would be particularly noticeable in the area of access to the courts (the right to trial and time-barring of EEA based tort claims), since this legal area to a large extent is governed by National case law at the discretion of the presiding judges and often lacks legal certainty. Without the prospect of State liability, national courts might also be less inclined to ensure strict adherence to EEA law, as there would be no national consequences for manifest infringements. State liability for the courts would also in our estimation encourage cases to be referred to the EFTA Court more often.

[69] Case C-224/01 Köbler paragraph 42
[70] Case C-224/01 Köbler paragraph 33
[71] Case C-6/90 and C-9/90 Francovich paragraph 33, 34 and 39
[72] Case C-46/93 og C-48/93 Brasserie du Pêcheur and Factortame paragraphs 49 and 52
[73] Case C-173/03 Traghetti del Mediterraneo paragraph 31

(66) Question 2a: If question 1 is answered affirmatively, which decisions by national courts can trigger liability for EEA States?

(67) This question pertains to whether also court instances below the Supreme Court can be held accountable in EFTA States if the first question is answered affirmatively, since the EU version of State liability for the courts is limited to "*a decision of a national court adjudicating at last instance*"[74].

(68) Firstly, If the obligation to refer at last instance under Article 267(3) TFEU is the basis for delimiting State liability to a court adjudicating at last instance also under EEA law, it makes no sense to differentiate between the Norwegian Supreme Court and lower court instances under EEA law, since Norwegian Courts have the same rights and no obligation to ask the EFTA Court for an advisory opinion under SAC art. 34 at their own discretion. So, if the obligation to refer is not deemed as an absolute prerequisite for State liability under question 1, there is little justification to view the Norwegian Supreme Court differently from lower courts.

(69) Secondly, the EFTA Court should notice that it is specified in paragraph 34 of Köbler C-224/01 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*'". Since nobody has a legal right to have an appeal of their EEA claim adjudicated upon by the Norwegian Supreme Court (see paragraph 33), as the Norwegian Supreme Court selects its cases and extremely rarely admits civil cases to adjudication, Dartride holds that the Norwegian Supreme Court only partially can be considered a "*judicial body before which individuals may assert the rights conferred on them by Community law*", because an appeal to the Norwegian Supreme Court will not ensure an effective remedy to "*assert the rights conferred on them by Community law*". A practical example is that Dartride twice appealed to the Norwegian Supreme Court where it was argued the first time that it was contrary to EEA law to rule that only the State could be sued for the acts of the Municipality for a claim based on EEA law made *lex superior* national law. The second time it was argued in the appeal to be contrary to EEA law and the doctrine of effectiveness as interpreted in E-10/17 «Nye Kystlink»[75] to not show flexibility and view the subsequent claim against the State as time-barred. Dartride's cases were in both instances deemed of no principle interest outside the case itself notwithstanding the alleged breaches of EEA law.

(70) Furthermore, it follows from the discussions above under question 1 (paragraphs 40, 41 and 65) that the need for redress, homogeneity and effectiveness of individual rights within the EEA framework supersede any inconvenience or legal uncertainty regarding practising State liability slightly differently within the EEA for all courts.

[74] Case C-224/01 Köbler paragraph 53
[75] See E-10/17 «Nye Kystlink» paragraph 116 and 122

Dartride holds that the legal inconvenience and legal uncertainty for individuals would be greater, if the EU and the EFTA states practice completely different rules regarding State liability, where one system has State liability for the courts and the other does not. Conformity in judicial decisions would over time be expected to develop differently within the two systems. As referred to under paragraph 48, the EFTA court deemed in E-11/12 Koch[76] that access to justice and effective judicial protection "*are essential elements in the EEA legal framework*", and that this "*can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement*". In addition, as has been argued under question 1, the EFTA Court has rejected the notion that system differences prevent the development of EEA law in accordance with EU Court of Justice case law in E-9/97 Sveinbjörnsdóttir[77].

(71) Dartride also finds support of the view that State liability for the courts within the EEA would comprise all courts in the mentioned *obiter dictum* in E-2/10 Kolbeinsson paragraph 77, where State liability for the courts is worded as a liability for «*national courts*» in plural and not as «*a court adjudicating at last instance*", as described by the CJEU in C-224/01 Köbler paragraph 53. Dartride would argue that the wording "*national courts*" and omission of "*last instance*" in paragraph 77 is deliberate and made to signal that State liability for the courts under EEA law is not limited to "*last instance*".

(72) Moreover, when interpreting the EEA Agreement with an effect-oriented approach, there is nothing preventing the EFTA Court from compromising between the different interpretations of the parties; also with reference to the EFTA Court holding in case E-4/01 Karlsson[78] and E-2/12 HOB-vin[79] that the principle of State liability under EU law "*may not necessarily be in all respects coextensive*" with EEA law. The Norwegian legal theorist professor Hallvard Haukeland Fredriksen has suggested that the most correct approach would be that State liability for the courts under EEA law in principle also includes the lower courts, but due to the system of appeal, it is required that all available (ordinary) legal remedies are exhausted before any claim for compensation can be considered"[80]. This interpretation of the EEA Agreement would be similar to the requirements of bringing a case before the European Court of Human Rights (ECHR), where all domestic remedies in the Member State concerned must have been exhausted[81].

[76] E-11/12 Koch paragraph 117
[77] Case E-9/97 Sveinbjörnsdóttir. paragraphs 44, 46, 47, 60, and 61
[78] Case E-4/01 Karlsson, paragraph 30.
[79] Case E-2/12 HOB-vin paragraph 120
[80] Halvard Haukeland Fredriksen «Offentligrettslig erstatningsansvar ved brudd på EØS-avtalen» page 532.
[81] Convention for the Protection of Human Rights and Fundamental Freedoms art. 35 nr. 1

(73) It can also be argued that in legal systems where the individual does not have the right to adjudication at last instance and is denied this, the review of the case when its admissibility is being considered by the Supreme Court should be considered as "*adjudicating at last instance*" to attain homogeneity and effectiveness. Dartride finds support for this argument in that the EU Commission has stated that the obligation to refer also applied to when an appeal is considered for admission by the higher courts in Sweden[82].

(74) The viewpoint is that the Supreme Court is presumed, in any event, to have assessed whether EEA law has been breached sufficiently upon reviewing the admissibility of the appeal and therefore would have had the opportunity to prevent further breach of EEA law. It is in Dartride's view not unreasonable to accept that the Supreme Court's reviewal of admissibility of an appeal should be considered as adjudication in this context when admission is denied, so to adhere to the need for homogeneity and effectiveness under the EEA Agreement.

(75) It must be mentioned that also the Court of Appeal has the right to deny admission of an appeal under the Civil Procedure Act § 29-13[83], but this either presupposes that the monetary claim is below 250.000 kroner, or that three judges of the Court of Appeal unanimously find it likely that the appeal will not be successful. In the event that the Court finds that the appeal will not be successful, there are minimum requirements (unlike the decisions of the Supreme Court) to give some legal justification as to why the appeal is denied under the standards of Article 6 (1) ECHR.

(76) Question 2b: If question 1 is answered affirmatively, 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?

(77) This question pertains to whether Norway can keep its civil procedure legislation unamended in the Courts of Justice Act § 200 third paragraph, which limits access to the courts for cases where compensation for manifestly wrongful EEA based judicial decisions is claimed. The question is also construed as an invitation to the EFTA Court to state something about how to implement the findings of the Court, if question no. 1 is answered in the affirmative.

(78) In English, the Courts of Justice Act § 200 third paragraph has the following wording:

"*A claim for compensation regarding the liability of a public official or liability of the public in connection with judicial decisions cannot be raised unless:*

[82] Case C-99/00 Lyckeskog paragraph 13 and 18
[83] Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven) § 29-13

a. the decision has been overturned or modified,
b. the decision has lapsed with the effect that a timely appeal against it could not be processed or decided, or
c. the official has been found guilty by a court of a criminal offense related to the decision".

(79) As can be seen, there is no exemption in the Courts of Justice Act § 200 third paragraph for cases where there have been manifest infringements of EEA law, meaning that under National law a claim for compensation based on State liability for a judicial decision under EEA law, will be rejected according to the wording of the paragraph, which is what happened with the decision of 22 January 2024 of the Oslo Municipal Court[84]. As a starting point, as is well known, the EFTA States have national procedural autonomy, but that procedural autonomy is limited by EEA law, particularly through the principles of equivalence and effectiveness, see C-13/01 Salafero[85] and C-432/05 Unibet[86].

(80) Therefore, as mentioned under paragraph 27 the Norwegian Supreme Court has in its decision HR-2005-713-A – Rt-2005-597 (Allseas) established that National procedural law would yield to EEA law governing access to the courts. This is formulated as follows (translated) in paragraph 36: "*The main question in the case is therefore whether it follows from Norway's obligations under the EEA Agreement that the plaintiffs have the right to bring a lawsuit before the courts in this matter. If that is the case, the lawsuit must be allowed regardless of what follows from Norwegian procedural rules, in accordance with the EEA Act § 1 and § 2*". The Norwegian Supreme Court furthermore explains in paragraph 38 this by the notion that procedural rights under EEA law and national law must be the same: "*Based on the obligation of loyalty, as per the EC Treaty Article 10 and the EEA Agreement Article 3, the ECJ, in addition to the principle of equivalence, i.e., there has developed what is called the effectiveness doctrine, where national rights and EU/EEA rights must be treated equally in procedural terms. The effectiveness doctrine entails that everyone must be ensured effective access to have their rights under the treaties, in this case the EEA Agreement, examined for any violations. This principle has evolved over time. It can be thought to have somewhat different scopes within EU and EEA law, respectively, although I do not see that this has any significance in our case*."

(81) Dartride therefore holds that if State liability for the courts were to be established, it would mean that the courts would have to allow cases to adjudication to determine whether there has been a manifest breach of EEA law by the judicial decision in question notwithstanding what the Courts of Justice Act § 200 third paragraph prescribes. As mentioned in paragraph 8, it follows from C-432/05 Unibet that "*the*

[84] Case 23-124975TVI-TOSL/07
[85] Case C-13/01 Salafero paragraph 54
[86] Case C-432/05 Unibet paragraph 43

examination of the compatibility of that law with Community law takes place irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link in the claim for damages" [87]. This must also apply to procedural law and mean that there in any event has to be an examination of alleged material breaches of individual rights conferred by EEA law. However, if the presiding court after a full examination of the case would come to the conclusion that the prerequisites for State liability for the courts (in particular the condition of manifest breach) are not satisfied, then the case could be lawfully dismissed under the Courts of Justice Act § 200 third paragraph – as there would be no grounds for State liability in the case. The problem today with the Courts of Justice Act § 200 third paragraph is primarily that it also prevents a review of whether EEA law has been manifestly breached by a judicial decision, due to the fact that the Oslo Municipal Court and the Ministry of Justice have not acknowledged the existence of State liability for the courts under EEA law.

(82) Moreover, in the EU the CJEU has stated in C-173/03 Traghetti del Mediterraneo[88] that "*Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court*". Dartride assumes that the view of the CJEU that the legislation itself cannot exclude State liability for the courts under Community law has to do with the direct binding effect of CJEU case law such as C-224/01 Köbler. The assessment for EFTA States' right to keep its legislation should be different due to the legal system differences with regard to the EFTA Court decisions not being directly binding as pointed out in E-18/11 Irish Bank relying on the loyalty of National Courts[89]. Dartride finds that this could mean that the EFTA states can keep their legislation unamended even if the first question is answered in the affirmative as long as the interpretation when presented with a case of State liability for a court decision is loyal and in accordance with the findings of this Court allowing admission of the case and yielding to EEA law as pointed out in HR-2005-713-A – Rt-2005-597 (Allseas).

(83) In relation to this, Dartride agrees that it would be prudent and advisable to attain better legal certainty and effectiveness by amending the Courts of Justice Act § 200 third paragraph with an exemption for when a case with an EEA based compensation claim can be admitted to the courts, which aligns with the scope of State liability for the courts which the EFTA Court would find, provided that the EFTA court should answer the first question affirmatively.

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[87] C-432/05 Unibet paragraph 59

88 Case C-173/03 Traghetti del Mediterraneo paragraph 46

89 Case E-18/11 Irish Bank paragraphs 57 and 58

7. Conclusion

(84) Accordingly, for the reasons set out above, Dartride respectfully requests the EFTA Court to rule that:

1. State liability under EEA law extends itself to judicial decisions in cases where the breach of EEA law has been "manifest in character".
2. Such State liability for judicial decisions encompasses all court instances under EEA law, or alternatively, judicial decisions from all instances when all legal remedies have been exhausted.
3. The Courts of Justice Act § 200 third paragraph should explicitly allow for cases that satisfy the requirements under 1 and 2.

8. Signature of the agent

Oslo, the 22nd of December 2024

Anders Flatabø
Attorney at Law