ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 23.12.2024

# Written observations by the Kingdom of Norway

represented by Kristin Hallsjø Aarvik, advocate at the Office of the Attorney General for Civil Affairs, in

**Case E-25/24 Dartride AS**

in which Eidsivating Court of Appeal has requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) on the interpretation of the EEA Agreement and the question of whether it contains a principle of State liability for infringements of EEA law by decisions of national courts.

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## 1 THE FIRST QUESTION

### 1.1 Introduction

(1) The national proceedings concern a claim for damages by Dartride against the Norwegian state for the alleged misapplication of EEA law by the Norwegian courts. Dartride contends that Borgarting Court of Appeal misapplied EEA law in its judgment in a case between Dartride and Oslo municipality. Dartride appealed that judgment to the Norwegian Supreme Court but was not granted leave to appeal.

(2) In its claim for damages due to the alleged misapplication of EEA law by the Norwegian courts, Dartride relies on the judgment by the Court of Justice of the European Union (CJEU)

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in case C-224/01 *Köbler*.[1] In *Köbler*, the CJEU established that the principle of State liability under the EU Treaty also applies, under certain conditions, where the breach of EU law at issue stems from a decision of a national court adjudicating at last instance (known as the Köbler doctrine or Köbler principle).[2] Therefore, the primary question is whether EEA law contains a principle of State liability that applies where the breach of EEA law arises from a decision by a national court in an EFTA State, equivalent to the Köbler doctrine.

(3) The Government contends that the Köbler doctrine does not constitute EEA law. There are fundamental and important differences between EU and EEA law and the two pillars under the EEA Agreement. As a result of these differences, the principle of homogeneity does not entail that the principle of State liability under the EEA Agreement must be aligned with EU law and apply where the breach of EEA law arises from a decision by a national court in an EFTA State.

## 1.2 The principle of State liability under EU and EEA law

### *1.2.1 State liability under the EU treaty framework (Francovich)*

(4) The principle of State liability was established by the CJEU in Joined cases C-6/90 & C-9/90 *Francovich and Others*, which addressed a Member State's failure to transpose EU law into national law. On the existence of State liability as a matter of principle, the CEJU referred to its landmark ruling in Case 26/62 *Van Gend en Loos*, establishing the principle of direct effect.[3] The CJEU held that a principle of State liability for loss and damage caused to individuals as a result of breaches of EU law, for which the State can be held responsible, was inherent in the system of the Treaty.[4] The basis for the principle of State liability was the principle of effective judicial protection and the principle of sincere cooperation in (then) Article 5 of the Treaty.[5]

(5) The conditions for State liability were further detailed in Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame*, which dealt with the incorrect transposition of EU law into national law by the national legislature.[6] First, the EU rule of law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage sustained.[7]

(6) Regarding the second condition, the decisive test for determining whether a breach of EU law is sufficiently serious is whether the Member State concerned manifestly and gravely

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[1] Judgment of the Court of 30 September 2003 in Case C-224/01 *Köbler* [2003] ECHR I-10239
[2] See also Judgment of the Court in 28 July 2016 in Case C-168/15 *Tomášová* ECLI:EU:C:2016:602 para. 20
[3] Judgment of the Court of 5 February 1963 in Case 26/62 *Van Gend en Loos* [1963] ECR 1
[4] Judgment of the Court of 19 November 1991 in Joined cases C-6/90 & C-9/90 *Francovich and Others* [1991] ECR I-5357 para. 35
[5] Ibid para. 36
[6] Judgment of 5 March 1996 in Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029 para. 36
[7] Ibid para. 51.

disregarded the limits on its discretion. Factors that the competent court may consider include the clarity and precision of the rule breached, the measure of discretion left by that rule to the authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and whether the position taken by an EU institution may have contributed towards the breach.[8]

### *1.2.2 State liability under the EEA Agreement (Sveinbjörnsdóttir)*

(7) The principle of State liability under the EEA Agreement was established by the Court in case E-9/97 *Sveinbjörnsdóttir*, which concerned the incorrect implementation of a directive by an EFTA State.[9] The Court based this principle on the homogeneity objective and the principle of loyalty in Article 3 EEA.[10] Although the Court did not reference the CJEU's case-law on State liability, it held that the conditions for State liability under the EEA Agreement and the relevant factors were the same as those set out in *Brasserie*.[11]

(8) The principle of State liability was reaffirmed in case E-4/01 *Karlsson*. The Court held that an EFTA State could, in principle, be held liable for breaches of its obligations under both secondary acts of EEA legislation and the main part of the EEA Agreement.[12] Although State liability under EU law is seen as a necessary corollary of the direct effect of EU law provisions[13], the Court did not consider the lack of direct effect of EEA law to preclude the existence of such liability in the EEA. It noted that the finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case-law of the CJEU on the principle of State liability under EU law. Therefore, the application of these principles may not necessarily be in all respects coextensive.[14]

## 1.3 The principle of State liability for judicial decisions under EU law (Köbler)

(9) In *Köbler*, the referring court asked whether the case-law on State liability applies where the conduct allegedly contrary to EU law is a decision by a supreme court of a Member State.[15]

(10) The CJEU answered this affirmatively. Building on the basis for State liability under the Treaty established in *Brasserie*, the CJEU highlighted, first, the essential role played by the judiciary in the protection of rights derived by individuals from EU law. It held that the full effectiveness of those rights would be undermined, and their protection weakened, if individuals could not, under certain conditions, obtain reparation when their rights are

[8] Ibid para. 55-56.
[9] Advisory opinion of the Court of 10 December 1998 in Case E-9/97 *Sveinbjörnsdóttir*, Report of the EFTA Court 1998, 95
[10] Ibid para. 60-61.
[11] Ibid para. 65-66.
[12] Judgment of the Court of 30 May 2002 in Case E-4/01 *Karlsson* para. 32, Report of the EFTA Court 2002, 248
[13] *Brasserie* para. 22.
[14] *Karlsson* para. 29-32
[15] *Köbler* para. 14

affected by an infringement of EU law attributable to a decision by a national court adjudicating at last instance.[16] Second, the CJEU emphasised that it is in particular to prevent rights conferred on individuals by EU law from being infringed that, under (now) Article 267(3) TFEU, a court against whose decision there is no judicial remedy under national law is required to make a reference to the CJEU.[17] The CJEU did not find that recognising State liability for decisions by a court adjudicating at last instance was precluded by principles of legal certainty and res judicata, judicial independence and authority, or the absence of a court competent to adjudicate such disputes.[18]

(11) The CJEU stated that State liability for loss or damage caused by a decision of a national court adjudicating at last instance that infringes EU law is governed by the normal conditions for State liability.[19] However, regarding whether the breach is sufficiently serious, the CJEU emphasised the need to consider the specific nature of the judicial function and to the legitimate requirements of legal certainty. State liability for an infringement of EU law by a decision of a national court adjudicating at last instance can, therefore, only be incurred in the exceptional case where the court has manifestly infringed the applicable law.[20] This condition provides for a higher threshold than the condition of a sufficiently serious breach. Relevant factors in the assessment include, in particular, the clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, if applicable, by an EU institution, and the national court's non-compliance with its obligation to make a reference for a preliminary ruling under Article 267(3) TFEU.[21]

## 1.4 State liability for judicial decisions is not a principle of EEA law

### *1.4.1 The Court has not established that the Köbler doctrine is EEA law*

(12) Dartride argues that the Court has already established that the principle of State liability applies where the breach of EEA law stems from a decision by a national court in an EFTA State adjudicating at last instance, referring to case E-2/10 *Kolbeinsson.* The Government disagrees.

(13) In *Kolbeinsson,* the Court explicitly stated that the issue of State liability for losses due to the incorrect application of EEA law by national courts was outside the scope of the question from the national court.[22] The Court observed, however, that *if* EFTA States are to incur liability under EEA law for such infringements, the infringement would in any case have to be

[16] *Köbler* para. 33
[17] Ibid para. 35
[18] Ibid para. 37-48
[19] Ibid para. 51-52
[20] Ibid para. 53
[21] Ibid para. 54-55
[22] *Kolbeinsson*, para. 77.

manifest in character, referencing *Köbler*.[23] The Government contends that these statements do not imply that the Court has adopted the Köbler doctrine. A recognition under EEA law of the Köbler doctrine requires a detailed examination of its legal basis in the EU, and the differences between EU and EEA law and the respective pillars.

### *1.4.2 The Köbler doctrine is distinct from the principle of State liability in EU and EEA law*

(14) As is apparent from *Köbler*, State liability for infringements of EU law by decisions of national courts is partly derived from the general principle of State liability established in *Francovich*. However, it is equally apparent that the Köbler doctrine differs from the Francovich principle on essential points, making it appropriate to refer to the former as a separate doctrine or distinct strand of case-law. First, the Francovich principle applies to all State authorities. The Köbler doctrine is limited to national courts adjudicating at last instance.

(15) Second, the Francovich principle is based on general public interests such as effectiveness of EU law, legal protection and sincere cooperation. In addition to these interests, the Köbler doctrine relies on the obligation on courts against whose decisions there is no judicial remedy under national law to make a reference for a preliminary ruling under Article 267(3) TFEU.

(16) Third, the Francovich principle requires that the breach of EU law is sufficiently serious. Under the Köbler doctrine, it is clarified that such a breach requires that the national court has *manifestly* infringed the applicable EU law.

(17) Fourth, the Francovich principle stipulates relevant factors for determining whether the breach is sufficiently serious. Under the Köbler doctrine, the relevant factors to establish a manifest breach of EU law include those in *Francovich. In addition*, those factors include the non-compliance by the national court with its obligation to make a reference for a preliminary ruling under Article 267(3) TFEU.

(18) Hence, although the Köbler doctrine is established by the CJEU in connection to the Francovich principle of State liability, it is a distinct form of liability with its own specific legal basis, justification, and conditions.

(19) As regards the EEA, the Court's recognition of the principle of State liability under the EEA Agreement in *Sveinbjörnsdóttir* picked up on the CJEU's reasoning in *Francovich*. However, the Court has in its reasoning not included the Köbler doctrine. This requires an independent assessment of the doctrine's legal basis and the principle of homogeneity.

### *1.4.3 The principle of homogeneity*

(20) As set out in Article 1(1) EEA and the fourth recital in the preamble, the aim of the EEA Agreement is to create a dynamic and homogenous European Economic Area. Further, the

[23] Ibid, with reference to *Köbler* para. 53

fifteenth recital states that in full deference to the independence of the courts, the Contracting Parties' objective is to arrive at and maintain a uniform interpretation and application of the Agreement and those provisions of EU law which are substantially reproduced in it, and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.

(21) To this end, it follows from Article 6 of the EEA Agreement that provisions of EEA law, insofar as they are identical in substance to corresponding rules of EU law, shall, in their interpretation and implementation, be interpreted in conformity with the relevant rulings of the CJEU given prior to the date of the signature of the Agreement. The homogeneity principle, therefore, applies where EEA law provisions are "identical in substance" to corresponding provisions of EU law. If they are not, they should not necessarily be construed in the same way.

(22) That the objective of homogeneity relies on the existence of corresponding provisions and the principle of homogeneity in Article 6 EEA was also emphasised by the Court in *Sveinbjörnsdóttir*.[24] In *Sveinbjörnsdóttir*, the Court did not follow the suggestion from some of the parties to rely on Article 6 EEA and the principle of homogeneity. However, the basis for State liability was found in the principles of judicial protection and loyalty as set out in the EEA Agreement, principles corresponding to those relied on by the CJEU in *Francovich*. The conditions for State liability and relevant factors in the assessment of those conditions could, therefore, also be the same.

(23) In this case, the question is whether: i) there is a corresponding legal basis in the EEA Agreement for recognising State liability for judicial decisions by national courts in the EEA, like the Köbler doctrine in the EU; and ii) whether the application of State liability for judicial decisions can, based on provisions in the EEA Agreement, correspond to that in the EU.

#### *1.4.4 The differences between EU and EEA law and the two pillars*

(24) As previously mentioned, the CJEU held that State liability for decisions by a court adjudicating at last instance is justified by (i) the essential role played by the judiciary in protecting rights derived by individuals from EU law, which (ii) in turn obliges courts against whose decisions there is no judicial remedy under national law to make a reference for a preliminary ruling under Article 267(3) TFEU. This cannot in full be transposed to the EEA Agreement.

(25) According to Article 267(1) TFEU, the CJEU has jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties; and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Article 267(2) states that where such a question is raised before any court or tribunal of a Member State, that court or

[24] *Sveinbjörnsdóttir* para. 52-54 and 56

tribunal may request the CJEU to give a ruling if it considers it necessary to enable it to give judgment.

(26) Article 267(3) specifies that where such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU. According to the CJEU's settled case-law, a national court or tribunal against whose decisions there is no judicial remedy under national law cannot be relieved of this obligation unless it has established that the question raised is irrelevant, the EU law provision in question has already been interpreted by the CJEU, or the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.[25]

(27) In comparison, Article 34 of the SCA states that the Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Further, it states that when such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may request the Court to give an advisory opinion if it considers it necessary to enable it to give judgment. The procedure in Article 34 SCA is, therefore, different from Article 267 TFEU in respect of aspects of great relevance to the case at hand.

(28) First, national courts are not obligated to request an advisory opinion from the Court. It is at the discretion of the national courts whether to do so. Accordingly, the Court has held that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of all the circumstances of the case, both the need for an advisory opinion to enable it to deliver judgment and the relevance of the questions it submits to the Court.[26]

(29) The differences between Article 267 TFEU and Article 34 SCA were emphasised by the Court in Case E-18/11 *Irish Bank*:

> *When drafting Article 34 SCA, the EFTA States were inspired by Article 267 TFEU. There are, however, differences. According to the wording of Article 34 SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court. This reflects not only the fact that the depth of integration under the EEA Agreement is less far-reaching than under the EU treaties (see [Sveinbjörnsdóttir] paragraph 59). It also means that the*

[25] See e.g., Judgment of the Court of 6 October 1982 in Case 283/81 *Cilfit and Others*, EU:C:1982:335, para. 21 and Judgment of the Court (Grand Chamber) of 6 October 2021 in Case C-561/19 *CMI,* EU:C:2021:799, para. 66

[26] Judgment of the Court of 28 September 2012 in Case E-18/11 *Irish Bank*, [2012] EFTA Ct. Rep. 592, para. 55, and Judgment of the Court of 9 August 2024 in Case E-10/23 *X and the Financial Market Authority* para. 43

> *relationship between the Court and the national courts of last resort is, in this respect, more partner-like.*[27]

(30) Second, the Court has jurisdiction to give *advisory* opinions on the interpretations of the EEA Agreement. These opinions are not binding on the national courts of the EFTA States. In contrast, preliminary rulings by the CJEU are binding both on the national referring court and on all other courts in all the Member States.[28]

(31) The procedure in Article 34 SCA was also described as fundamentally different to that in Article 267 TFEU by the CJEU in its Opinion 1/91:

> *Accordingly, this procedure is characterized by the fact that it leaves the EFTA States free to authorize their courts or tribunals to refer questions to the Court of Justice and does not make such a reference obligatory in the case of courts of last instance in those States. Furthermore, there is no guarantee that the answers given by the Court of Justice in such proceedings will be binding on the courts making the reference. This procedure is fundamentally different from that provided for in Article [267] of the Treaty.*[29]

(32) The fact that, under the EEA Agreement, national courts are not obligated to request a preliminary ruling from the Court, and that the Court's judgments are advisory to national courts, means that there are fundamental differences between EU and EEA law and the two pillars.

(33) Although the Court's opinions are advisory rather than binding, they are nevertheless of great importance to national courts. For example, the Norwegian Supreme Court has consistently held that, in their interpretation of EEA law, national courts should attach considerable importance to the Court's opinions on the interpretation of EEA law. The Supreme Court has stated that national courts must, therefore, normally apply the Court's interpretation and cannot disregard an advisory opinion unless there are weighty and compelling reasons for doing so.[30]

(34) However, although the national courts of the EFTA States in practice generally applies the Court's interpretation of EEA law, the fundamental difference remains that this is not due to a legal obligation equivalent to that under EU law. The fact that national courts of the EFTA States are ultimately not obliged to apply the Court's interpretation of EEA law, does not align with the concept of State liability for infringements of EEA law in decisions by national courts.

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[27] *Irish Bank* para. 57
[28] Judgment of the Court of 3 February 1977 in Case 52/76 *Benedetti v Munari*, EU:C:1977:16
[29] Opinion 1/91 of the Court of 14 December 1991 [1991] ECR I-6079 para. 58
[30] Judgment of the Supreme Court of Norway of 16 December 2016, HR-2016-2554-P Holship, para. 77, and Judgment of the Supreme Court of Norway of 2 July 2021, HR-2021-1453-S NAV, para. 64-65

### *1.4.5 The importance of the obligation in Article 267(3) under the Köbler doctrine*

(35) The obligation of national courts adjudicating at last instance to request a preliminary ruling under Article 267(3) TFEU has influenced almost every aspect of the Köbler doctrine:

- State liability for infringement of EU law attributable to a decision by a court against whose decision there is no judicial remedy under national law was established based, inter alia, on that court's obligation to make a reference to the CJEU.[31]

- The national courts subject to the Köbler doctrine correspond to the national courts subject to the obligation in Article 267(3) TFEU, i.e., national courts adjudicating at last instance.

- One factor which the competent court must consider when deciding on State liability for court decisions is whether the court in question has complied with its obligation to request a preliminary ruling under Article 267(3) TFEU.[32]

- Non-compliance with the obligation to make a reference for a preliminary ruling may itself give rise to State liability for the decision by the national court adjudicating at last instance.[33]

- While non-compliance with the obligation to make a reference for a preliminary ruling is one out of several relevant factors in determining whether there is a manifest error of EU law, it is arguably often a particularly important factor.

    - Even if there is no hierarchy of factors for the competent court to consider, the criterion concerning the obligation to make a reference for a preliminary ruling is indeed of "particular importance".[34]

    - To determine whether the error of law at issue is excusable or inexcusable, "particular attention" should be paid to the position taken by the supreme court regarding the obligation to request a preliminary ruling.[35]

    - The obligation to request a preliminary ruling is relevant regardless of whether the provision of law is unclear and imprecise or clear and precise.[36]

    - The extent to which a supreme court disregarded its obligation to make a reference for a preliminary ruling will, therefore, affect the delicate

[31] *Köbler* para. 35
[32] Ibid para. 54-55
[33] Opinion of Mr Advocate General Léger of 11 October 2005 in Case C-173/03 *Traghetti del Mediterraneo SpA v. Repubblica Italiana* [2006] ECR I-05177, para. 78-79, who was also the Advocate General in *Köbler*.
[34] Ibid para. 70
[35] Ibid para. 71
[36] Ibid para. 72-73

assessment of whether the infringement of EU law gives rise to State liability.[37]

- The importance of the obligation in Article 267(3) TFEU is also confirmed by how the CJEU in paragraph 55 of *Köbler* addressed the disregard of the obligation to request a preliminary ruling, which suggests that State liability cannot be excluded where a breach of EU law is attributable to a supreme court combined with a failure to comply with that obligation.[38]

### *1.4.6 No principle of State liability for judicial decisions under the EEA Agreement in the absence of an obligation like Article 267(3) TFEU*

(36) The fundamental differences between EU and EEA law entail that the EEA Agreement does not include a doctrine equivalent to that in Köbler, establishing a principle of State liability for decisions by a national court adjudicating at last instance.

(37) First, the Köbler doctrine is inseparably linked to Article 267(3) TFEU. However, the EEA Agreement does not impose an obligation on national courts adjudicating at last instance to make a reference for a preliminary ruling. This reflects that the depth of integration under the EEA Agreement is less far-reaching than under the EU Treaties.[39]

(38) As set out by the CJEU in *Van Gend en Loos*, the EU is a legal order of international law for the benefit of which states have limited their sovereign rights. While the Court has held that the EEA Agreement is a sui generis agreement, it does not establish a supranational legal order. The purpose of the EEA Agreement is *not* to limit sovereign rights of the EFTA States in the same manner as the EU Treaty limits sovereign rights of EU Member States. One expression of this is the differences between Article 267 TFEU and Article 34 SCA.

(39) The procedure in Article 267 TFEU is the keystone in the judicial system set up by Treaty to ensure uniform interpretation of EU law.[40] In this respect, the Köbler doctrine can be seen as an expression of the CJEU's understanding of itself as the highest judicial authority in a federal judicial hierarchy. The EEA Agreement does not give rise to a comparable hierarchy between the CJEU and the Court on the one hand, and the national courts of the EFTA States on the other. On the contrary, Article 34 SCA makes clear that the EFTA States were not prepared to subordinate their national courts, neither to the CJEU nor the Court. This also follows from the fifteenth recital to the EEA Agreement and the fourth recital to the SCA, pursuant to which the objective of homogeneity is in full deference to the independence of the national courts of the EFTA States.[41]

[37] Ibid para. 74
[38] Ibid para. 75
[39] *Irish Bank* para. 57 and *Sveinbjörnsdóttir* para. 59
[40] *Kubera* para. 33
[41] Halvard Haukeland Fredriksen «Offentligrettslig erstatningsansvar ved brudd på EØS-avtalen» (2013) p. 68-69

(40) The Government contends that the less far-reaching depths of integration under the EEA Agreement means that the principle of State liability in EEA law is less far-reaching than for its EU counterparts. This is, inter alia, confirmed in *Karlsson*, where the Court noted that the finding that State liability was an integral part of EEA law, and not based on EU case-law, implied that the principles need not in all respects be coextensive.[42] While the lack of direct effect did not preclude the Court from establishing a principle of State liability under the EEA Agreement, there is, in the absence of an obligation like Article 267(3) on the national courts of the EFTA States, insufficient legal basis in the EEA Agreement to extend the principle of State liability to judicial decisions by national courts. Nor can this be deduced from the object and purpose of the EEA Agreement, like in *Sveinbjörnsdóttir*.

(41) Second, it is not possible to establish a principle of State liability for judicial decisions under the EEA Agreement that corresponds to the Köbler doctrine in the EU, due to the absence of an obligation like Article 267(3) TFEU in the EEA Agreement.

(42) In *Sveinbjörnsdóttir* the Court could not, due to the lack of direct effect and primacy in EEA law, base its finding of a State liability under the EEA Agreement directly on the CJEU's case-law. The Court rather emphasised that the EEA Agreement is an agreement sui generis and derived State liability from the principles of judicial protection and loyalty as set out in the EEA Agreement. Even though these principles were also relied on by the CJEU in *Francovich*, there are hence differences in the legal basis in the EU and EEA, respectively. The Court, however, held, and has consistently held, that the conditions for State liability under the EEA Agreement are the same as those under the Treaty. Indeed, the objective of ensuring equal treatment of individuals and economic operators were essential for the Court's introduction of the principle of State liability in *Sveinbjörnsdóttir*. Differences in the basis in the EU and EEA for the principle of State liability did not result in different conditions for State liability in the EU and EEA. The conditions for a possible State liability for judicial decisions in the EU and EEA would, however, have to be different.

(43) Under the Köbler doctrine, non-compliance with the obligation to make a reference for a preliminary ruling is a factor which the competent court "must take account of". Moreover, non-compliance may in itself give rise to State liability for the decision of the national court adjudicating at last instance and is, in every case, of particular importance.

(44) The absence of this central criterion in the context of the EEA Agreement means that the assessment of State liability for judicial decisions will have to differ from that in the EU. As set out in section 1.4.5 above, compliance with the obligation to make a reference for a preliminary ruling will significantly affect the delicate assessment of State liability for judicial decisions in the EU. As there is no equivalent obligation in the EEA, the assessment would inevitably have to be different. Recognising a doctrine in the EEA equivalent to the Köbler doctrine would, therefore, not ensure homogeneity. It would result in divergences between

[42] *Karlsson* para. 39-32

the EU and the EFTA pillar, as the latter lacks this factor of particular importance under the Köbler doctrine.

(45) Finally, it is recalled that the protection of rights derived by individuals from EEA law by national courts is first and foremost ensured through other principles or mechanisms in the EEA Agreement. These include, e.g., the principle of loyalty in Article 3 EEA, which requires national courts to do whatever lies within their competence to interpret and apply national law in conformity with obligations under the EEA Agreement[43], and the principle of homogeneity in Article 6, which ensures that EEA law is interpreted in accordance with the rulings of the CJEU on the corresponding provisions of EU law. Further, Protocol 35 of the EEA Agreement states that for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases. Norway has introduced such a statutory provision in national law. The principle of precedence of EEA law follows from Section 2 of the Norwegian EEA Act.

(46) If a breach of EEA law is nevertheless due the interpretation and application of EEA law by national courts, the EFTA Surveillance Authority can initiate infringement proceedings against the EFTA State pursuant to Article 31 SCA. If the EFTA State concerned does not comply with the Authority's reasoned opinion, the Authority may bring the matter before the Court. The Court will then deliver a judgment which is binding on that EFTA State and it is required, pursuant to Article 33 SCA, to take the necessary measures to comply with the judgment of the Court. This includes amendments to national legislation incorporating EEA law, to ensure that it reflects the Court's interpretation.

### 1.5 Conclusion

On this basis, the Government submits that the EEA Agreement and the principle of State liability under EEA law does not entail that an EFTA State can be liable for damages for infringements of EEA law by decisions of national courts.

## 2 QUESTION 2(A)

### 2.1 Introduction

(47) By question 2(a), the national court asks which decisions by a national court that may trigger State liability for the incorrect interpretation or application of EEA law.

(48) As set out above, the Government contends that the principle of State liability under the EEA Agreement does not apply where the breach of EEA law arises from judicial decisions. However, the second question in the request for an advisory opinion presumes that State

[43] Case E-10/23 X para. 46

liability for judicial decisions can be established under the EEA Agreement. It is under that premise that the Government presents it views under this question and question 2(b) below.

### 2.2 State liability for judicial decisions is limited to decisions by a court adjudicating at last instance

(49) State liability for infringement of EU law attributable to a decision by a court against whose decision there is no judicial remedy under national law is inseparably linked to that court's obligation to make a reference to the CJEU. The national courts subject to the Köbler doctrine, therefore, correspond to the national courts subject to the obligation in Article 267(3) TFEU. The Köbler doctrine is, therefore, limited to decisions by a court adjudicating at last instance.[44]

(50) The Government contends that a principle of State liability for judicial decisions by a national court under the EEA Agreement must be limited in the same way. There are no grounds to justify a more extensive State liability for decisions by national courts for EFTA States compared to that of EU Member States.

(51) Whether a national court is a court adjudicating at last instance depends on whether there is a judicial remedy against its decisions under national law. If decisions by the court in question can be appealed under national, that court is not a court adjudicating at last instance. This is confirmed by e.g. case C-99/00 *Lyckeskog*[45] and case C-3/16 *Aquino*[46].

(52) In *Lyckeskog*, the CJEU held that decisions of a national appellate court that can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is not judicial remedy under national law. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.[47] The CJEU held that since, under the Swedish system, parties always have the right to appeal to the supreme court (Högsta domstol) against a decision by the appellate court (Hovrätt), the appellate court cannot be classified as a court delivering a decision against which there is no judicial remedy.[48]

(53) This was reiterated in Case C-144/23 *Kubera*.[49] Decisions of a national court or tribunal which can be challenged by the parties before the national supreme court are not decisions of "a court or tribunal of a Member State against whose decision there is no judicial remedy under national law" within the meaning of Article 267 TFEU. The fact that the examination of

[44] *Köbler* para. 50, *Tomášová* para. 20, Judgment of the Court of 5 September 2019 in Joined cases C-447/17 P and C-497/17 P *Guardian Europe* para. 74, cf. para 76
[45] Judgment of the Court of 4 June 2002 in Case C- 99/00 *Lyckeskog* [2002] ECR I-04839 para. 16-17
[46] Judgment of the Court of 15 March 2017 in Case C-3/16 *Aquino*, EU:C:2017:209, para. 34-37
[47] *Lyckeskog* para. 16.
[48] Ibid para. 17
[49] Judgment of the Court (Grand Chamber) of 15 October 2024 in Case C-144/23 *Kubera*

the merits of such challenges is subject to a procedure under which leave to bring that appeal is granted by that national supreme court does not have the effect of depriving the parties of a judicial remedy. The existence of such a procedure cannot therefore transform the lower court or tribunal whose decision may be challenged in such an appeal into a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law and which, as a result, is under the obligation in Article 267 TFEU.[50]

(54) In Norway, the general courts consist of the Supreme Court, the Courts of Appeal, and the District Courts.[51] Parties always have the right to appeal decisions by the Courts of Appeal to the Supreme Court.[52] However, in respect of appeals of judgments, an examination of the merits is subject to leave by the Appeals Committee of the Supreme Court. Leave to appeal a judgment is only granted if the appeal concerns an issue of significance beyond the current case or if it is important for other reasons that the case is decided by the Supreme Court.[53]

(55) Dartride argues that the Norwegian state is liable for the alleged infringement of EEA law by Borgarting Court of Appeal in its judgment 21 November 2019. However, there is a judicial remedy against that judgment. Indeed, Dartride appealed the judgment of Borgarting Court of Appeal to the Supreme Court on 10 March 2021. The fact that appeal is subject to leave does not transform Borgarting Court of Appeal to a court adjudicating at last instance. Nor does the decision 10 March 2021 to refuse leave transform the judgment of Borgarting Court of Appeal to a decision by a court adjudicating at last instance. The case-law referred to above confirms that whether a national court is a court adjudicating at last instance depends on whether there is *formally* a judicial remedy against its decisions under national law. It does not depend on the circumstances in a particular case, such as whether leave to appeal is in fact granted.

### 2.3 Decisions to refuse leave by the court adjuducating at last instance

(56) In the alternative, Dartride argues that the decision of 10 March 2021 by the Appeals Committee of the Supreme Court not to grant Dartride leave to appeal, is a decision by a court adjudicating at last instance which may trigger State liability for infringement of EEA law.

(57) In the Government's view, it is not clear whether a decision by a national supreme court to refuse leave to appeal may trigger State liability for judicial decisions under the Köbler doctrine in the EU. The Government contends that in any event, a principle of State liability

[50] *Kubera* para. 39
[51] Section 87 of the Constitution of the Kingdom of Norway
[52] Section 30-1 (1) of the Dispute Act
[53] Section 30-4 (1) of the Dispute Act. Pursuant to Section 30-4 (3), a decision to refuse leave requires unanimity.

for judicial decisions under the EEA Agreement can hardly, in the absence of an obligation like Article 267(3) TFEU, include such decisions.

(58) The wording in *Köbler* is a "decision of a court … adjudicating at last instance". To adjudicate means to arbitrate or decide. In *Tomasova*, the CJEU referred to the court "ruling" at last instance. This suggests that the decision which allegedly infringes EEA law, must concern the merits of the case. Where examination of the merits of the appeal is subject to a prior decision of admissibility, the admissibility decision is not a decision by a court adjudicating at last instance.

(59) This interpretation is supported by the context in *Köbler*. The CJEU considered whether recognising State liability for decisions by a court adjudicating at last instance was precluded on the basis that the decision has acquired the status of res judicata. Thus, the arguments in *Köbler* in this respect seems to presuppose that leave to appeal to highest court in the national legal system was granted. If the supreme court refuses leave to appeal, the decision of the court below acquires the status of res judicata.

(60) Further, the CJEU held that State liability for an infringement of EU law by a decision of a national court adjudicating at last instance can only be incurred in the exceptional case where the court has manifestly infringed the applicable law.[54] This statement, as well as the relevant factors to determine whether the court manifestly infringed applicable law, suggest that the case must have been reviewed on the merits by the court adjudicating at last instance.

(61) Arguably, the objective of (even greater) judicial protection could imply that State liability for judicial decisions should encompass decisions by a court adjudicating at last instance to refuse leave to appeal. However, the Köbler doctrine is in itself limited. The principle applies subject to certain conditions. As detailed in section 2.2, decisions by a national court against whose decision there is a right to appeal under national law are excluded and state liability is reserved for the exceptional case where the national supreme court has manifestly infringed the applicable law.

(62) Those limits seem to reflect a balancing of conflicting interest. On the one hand, there is the individuals' need for reparation. On the other, the decisions of the court adjudicating at last instance must be sufficiently reprehensible.[55] The protection of rights derived by individuals from EU rules and the need to obtain reparation cannot extend to situations where the court adjudicating at last instance has not examined the merits of a case.

(63) Further, the CJEU has emphasised that courts adjudicating at last instance have the task of ensuring at national level the uniform interpretation of rules of law. The principle of legal

[54] *Köbler* para. 53
[55] Compare the factors excusable vs. inexcusable in the Opinion of Mr Advocate General Léger in *Traghetti* para. 70-75.

precedent (stare decisis), under which a decision by a superior court is a binding precedent that the court itself and all inferior courts must follow, also imply that the case must have been reviewed on the merits by the court adjudicating at last instance. This principle does not apply to decisions to refuse leave to appeal nor to decisions by the court below the supreme court. At least under Norwegian national law, a decision to refuse leave to appeal by the Appeals Committee of the Supreme Court is not a decision on the merits. Nor is it a judicial precedent with any weight as a legal source.[56]

(64) Finally, the Government notes that it is common in the EU/EFTA States to make leave to appeal to a supreme court subject to leave. The CJEU confirmed in *Kubera* that EU law does not preclude Member States from establishing procedures for granting leave to appeal or other selection or "filtering" systems for bringing matters before the national supreme courts. The implementation of such systems must, however, meet the requirements deriving from EU law, particularly from Article 267(3).[57]

(65) It therefore remains to be assessed whether the obligation pursuant to Article 267(3) TFEU to refer a question to the CJEU means that decisions by a supreme court to refuse leave to appeal may trigger State liability under the Köbler doctrine in the EU.

(66) As set out by the CJEU in *Lyckeskog*, and confirmed by *Kubera*, if a question arises as to the interpretation or validity of a rule of EU law, the supreme court is obligated pursuant to Article 267(3) TFEU to refer a question for preliminary ruling either at the stage of examination of admissibility or at a later stage.[58] To include admissibility decisions or decisions to refuse leave to appeal by the court adjudicating at last instance within the Köbler doctrine would, therefore, only be to ensure alignment with the obligation to make a reference under Article 267(3) TFEU and provide a sanction for non-compliance by that court.

(67) As set out above, neither the wording of the Köbler doctrine nor its context or objective imply that decisions to refuse leave to appeal by a court adjudicating at last instance is included. Further, *Lyckeskog* and *Kubera* concern the obligation to make a reference for a preliminary ruling in Article 267(3) TFEU, not State liability for judicial decisions under the Köbler doctrine.

(68) Even if decisions to refuse leave to appeal by the court adjudicating at last instance were to be included in the Köbler doctrine in the EU, this could hardly apply under a principle of State liability for judicial decisions under EEA law. The EEA Agreement does not impose an obligation on national courts adjudicating at last instance to make a reference for a preliminary ruling, neither at the stage of examination of admissibility nor at a later stage. If

[56] See to this effect, Judgment of the Supreme Court of Norway of 26 January 2013, Rt-2011-105, para. 35, and Judgment of 11 December 2014, Rt-2014-1192, para. 41
[57] *Kubera* para. 31
[58] *Lyckeskog* para. 18 and *Kubera* para. 59

the Köbler doctrine in the EU encompasses decisions to refuse leave to appeal, State liability for judicial decisions under EEA law cannot be construed in the same way in the absence of a provision like Article 267(3) in the EEA Agreement.

### 2.4 Conclusion

(69) On this basis, the Government submits that if State liability for infringements of EEA law by decisions of national courts exists under the EEA Agreement, it is limited to decisions by a court adjudicating at last instance. Decisions by a court adjudicating at last instance means a decision on the merits by a national court of last resort against whose decisions there can be no appeal under national law.

## 3 QUESTION 2(B)

### 3.1 Introduction

(70) By question 2(b), the national court asks whether it is compatible with EEA law that a claim for damages for infringements by national courts in their application of EEA law is subject to fulfilment of conditions such as those laid down in Section 200, third paragraph of the Court Act.

(71) Section 200, third paragraph of the Court Act states that a claim for damages for judicial decisions cannot be brough unless:

(a) the decision is repealed or amended;

(b) the decision is lapsed with the effect that it cannot be subject to an appeal; or

(c) a public official has been found guilty of a criminal offence in connection with the decision.

(72) The provision does not per se preclude a claim for damages for misapplication of EEA (or other) law in decisions by national courts but makes a claim for damages subject to the fulfilment of the alternative conditions therein. As national law does not preclude a claim for damages for infringements of EEA law in judicial decisions, the Government contends that EEA law does not preclude such a provision.

### 3.2 National procedural autonomy subject to the principles of equivalence and effectivess

(73) In *Köbler*, the CJEU held that, subject to the existence of a right to obtain reparation founded directly on EU law where the conditions set out therein are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In other words, the application of the Köbler doctrine must be

ensured through the national procedural framework in each Member State. The conditions for reparation for loss and damage laid down by national legislation must not be less favourable than those relating to similar domestic claims and must not be framed in such a way as to make it in practice impossible or excessively difficult to obtain reparation.[59]

(74) That the conditions for loss and damage are subject to national procedural law is also confirmed by case C-432/05 *Unibet.* Here, the CJEU stated that the principle of effective judicial protection is a general principle of EU law.[60] Under the principle of cooperation, it is for Member States to ensure judicial protection of an individual's right under EU law.[61] In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.[62] The Treaty did not intend to create new remedies in the national courts to ensure the observance of EU law other than those already laid down by national law.[63] It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for individual's right under EU law.[64]

(75) Accordingly, EFTA States must ensure effective judicial protection. The conditions for reparation for loss and damage for breach of EEA law in judicial decisions is, however, subject to the principle of national procedural autonomy. Those conditions must comply with the principles of equivalence and effectiveness and the assessment of whether they do, must be based on an assessment of the national system of remedies as a whole.

(76) This is also confirmed by case C-168/15 *Tomášová.* Here, the CJEU reiterated that where the conditions for a State liability to incur is satisfied, it is on the basis of national law that the State must make reparation for the consequences of the loss or damage caused. The conditions laid down by national law in this respect must not, however, be less favourable than those relating to similar domestic claims or framed as to make it, in practice, impossible or excessively difficult to obtain reparation.[65] The rules on the assessment of damage caused by a breach of EU law are, therefore, determined by the national law of each Member State, subject to respecting the principles of equivalence and effectiveness. Importantly, the CJEU stated succinctly and unequivocally that the same applies to the relationship between a

[59] *Köbler* para. 58
[60] Judgment of the Court (Grand Chamber) of 13 March 2007 in Case C-432/05 *Unibet* [2007] ECR I-2271 para. 37
[61] Ibid para. 38
[62] Ibid para. 39
[63] Ibid para. 40
[64] Ibid para. 41
[65] *Tomášová* para. 38, referring to *Francovich* para. 42; *Köbler* para. 58; Judgement of 24 March 2009 in *Danske Slagterier*, C-445/06, EU:C:2009:178, para. 31; Judgment of 25 November 2010 in *Fuß*, C-429/09, EU:C:2010:717, para 62, and Judgment of 9 September 2015 in *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, para. 50.

claim for reparation for such damage and other remedies which could be provided for in the legal order of the Member State concerned.[66]

(77) Both the conditions and the relationship between a claim for damages and other remedies or actions under national law are, therefore, governed by the national law of each EFTA State, subject to the observance of the principles of equivalence and effectiveness. The Government contends that this means that a direct or primary recourse to a claim for damages for infringements of EEA law in decisions by national courts under national law is not required provided that national law ensures an effective judicial protection of an individual's rights by an alternative or primary remedy.[67]

### 3.3 Re-opening of court cases as an effective, primary remedy

(78) Pursuant to litra a of Section 200, third paragraph of the Court Act, a claim for damages for judicial decisions can be brought if the decision has been repealed or amended. A decision can be repealed or amended through ordinary judicial remedies, such as an appeal, or through extraordinary judicial remedies, such as the re-opening of a court case. As set out above, the Köbler doctrine is limited to decisions by a court of last resort against whose decisions there can be no appeal. Accordingly, a claim for damages for infringements of EEA law in decisions by a national court adjudicating at last instance, would require that the court case is re-opened first.

(79) Under Norwegian procedural law, the conditions for re-opening final and enforceable decisions that conclude the hearing of the claim are set out in Section 31-1 of Disputes Act. It is for the national court to interpret and assess those conditions pursuant to the principles of equivalence and effectiveness.

(80) In this respect, the Government notes, however, that those conditions do not discriminate between claims based on national law and claims arising out of EU law. They, therefore, respect the principle of equivalence.

(81) Further, when assessing the effectiveness of the national conditions for re-opening court cases compared to a claim for damages for infringements of EEA law in decisions by a national court adjudicating at last instance, the limitations of re-opening court cases must be balanced against the limitations on a pure or primary claim for damages for infringements of EU law in judicial decisions. In that context, the national court must take into account that the conditions for State liability under the Köbler doctrine are strict and the scope of the application of the principle is narrow.[68]

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[66] *Tomášová* paras. 39-41 and the second answers in para. 42

[67] The EFTA Surveillance Authority is of the same opinion it is Decision No 131/21/COL of 23 April 2021 closing a complaint case arising from an alleged failure by Iceland to comply with the principle of State liability for judicial breaches of EEA law.

[68] In this respect, the Government refers to the Authority's assessment in Decision No 131/21/COL of 23 April 2021 page 13.

(82) The remedy of re-opening court cases also has an advantage over a pure or primary claim for damages. While a claim for damages provides for economic compensation, the re-opening of a court case can provide for substantive protection. In addition, if a court case is re-opened and the decision is repealed or amended, individuals concerned are not prevented from bringing a claim for damages against the Norwegian state for loss suffered resulting from the national court's breach of EEA law in that decision. In that case, a double remedy would be available to the aggrieved individual, substantive and economic.

(83) The Government, therefore, submits that the re-opening of court cases may be an effective, alternative remedy to a claim for damages, provided that the conditions do not make re-opening impossible or excessively difficult to achieve which it is for the national court to determine.

## 4 PROPOSED ANSWERS TO THE QUESTIONS

(84) The Norwegian Government respectfully submits that the questions should be answered as follows:

1. The EEA Agreement and the principle of State liability under EEA law does not entail that an EFTA State can be liable for damages for infringements of EEA law by decisions of national courts.

2. If question 1 is nevertheless answered in the affirmative:

a. State liability for infringements of EEA law by decisions of national courts is limited to decisions by a court adjudicating at last instance, i.e., decisions on the merits by a national court of last resort against whose decisions there can be no appeal under national law.

b. The rules on the assessment of damage caused by a breach of EEA law are determined by the national law of each EFTA State, subject to [respecting] the principles of equivalence and effectiveness. The same applies to the relationship between a claim for damages and other remedies which could be provided for in the legal order of the EFTA State concerned. EEA law, therefore, does not per se preclude a provision such as Section 200, third paragraph of the Court Act, pursuant to which a claim for damages for judicial decisions by national courts is subject to fulfilling conditions therein.

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Oslo, 23 December 2024

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