Reykjavík, 23 December 2024

To the President and Members of the EFTA Court

Written Observations

submitted pursuant to Article 20 of the Statute of the EFTA Court and
Article 90 of the Rules of Procedure of the EFTA Court by

the Government of Iceland

represented by
Mr. Hendrik Daði Jónsson, Legal Adviser, Ministry for Foreign Affairs,
Mr. Þorvaldur Heiðar Þorsteinsson, Legal Adviser, Ministry of Justice, and
Ms. Jóhanna Katrín Magnúsdóttir, Attorney, Office of the Attorney General,
acting as Agents in

Case E-25/24
Datride AS
v
the Norwegian State,
represented by the Ministry of Justice and Public Security

in which the Eidsivating Court of Appeal (Eidsivating lagmannsrett) has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on whether the EEA Agreement and the principle of State liability entail that the State can be liable for damages for errors by courts in the application of EEA rules and, if so, which decisions of national courts can trigger such liability and whether conditions under Norwegian national law for the awarding of damages are compatible with EEA law.

The Government of Iceland has the honour of lodging the following written observations.

I. Introduction

1. With a request dated 27 September 2024, the Eidsivating Court of Appeal ("the Referring Court") 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, on questions of interpretation of obligations arising out of the Agreement on the European Economic Area ("the EEA Agreement") which are relevant to a civil action claim for damages made by Dartride AS ("the Appellant") against the Norwegian State, represented by the Ministry of Justice and Public Security. The claim arises from a previous civil action for damages made by the Appellant against Oslo Municipality, which was dismissed by the Borgarting Court of Appeal on 19 November 2020 and for which the Supreme Court of Norway refused to grant leave of appeal, by decision of 10 March 2021 of the Appeals Committee. The Appellant claims that the dismissal, on the one hand, and the refuse to grant leave of appeal, on the other, constitute a violation of the EEA Agreement for which the Norwegian State should be held liable.

2. The Referring Court seeks the guidance of the EFTA Court on whether the provisions of the EEA Agreement and the principle of State liability, as it finds form in the Agreement, entail that a State can be liable for damages for errors by national courts in the application of EEA rules. In the event that the EFTA Court answers this question in the affirmative, the Referring Court seeks further guidance on which decisions of national courts could trigger such liability and on the compatibility with the EEA Agreement of Norwegian civil procedure law.

3. For further details on the factual background of the case, the Government of Iceland refers to the request for an Advisory Opinion.

4. The Government of Iceland submits that the scope of application of the unwritten principle of State liability is delineated by the written provisions of the EEA Agreement from which it is derived. Any potential imbalance that the substantive gap between EEA and EU legal principles of State liability may create is, in any event, remedied by the obligations for EEA States to ensure effective judicial protection of their rights under the EEA Agreement.

II. Questions Referred

5. The questions referred by the Referring Court to the EFTA Court are as follows:

> 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 EEA rules?*
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> 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 Acts.*

III. Legal Analysis

6. The questions of the Referring Court pertain to the fundamentals of the EEA Agreement: its object and purpose, the system designed to achieve them, and the legal principles governing that system.

7. The Government of Iceland submits that answering the questions referred requires an analysis of how competing principles of the EEA Agreement interact to deliver its overall objective within the parameters of the treaty structure crafted by the Contracting Parties.

3.1. The First Question

8. The principal objective of the EEA Agreement is the creation of a homogeneous European Economic Area ("the EEA") which provides for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States.[1]

9. As such, the Agreement does not entail the integration of the EFTA States into the autonomous legal order of the European Union, but rather the integration of the Union's regulatory framework for the internal market into a common instrument of public international law.

10. It follows that the legal principles and norms which are relevant to the Union legal order are not automatically transposed into the EEA Agreement. They can only apply

[1] See, *inter alia*: C-452/01 *Margarethe Ospelt* and *Schlössle Weissenberg Familienstiftung*, ECLI:EU:C:2003:493, para 29; C-897/19 *Ruska Federacija* v *I.N.*, ECLI:EU:C:2020:262, para 50.

to the extent that they conform with the Agreement's legal framework. For example, as the EEA Agreement does not entail a transfer of sovereign legislative competences to the institutions of the European Union, the principles of direct effect and primacy of European Union law cannot apply in the EEA legal context. To the extent necessary, the resulting gap between the Union legal order and the EEA Agreement is remedied by provisions and principles of the Agreement itself, in service of the objective of a homogeneous EEA. While some principles of the EEA Agreement correspond to parallel principles of Union law, the principles of the EEA Agreement are legally distinct and separate from the principles of the Union legal order.

11. This is the case for the principle of State liability under the EEA Agreement. It is settled case-law of the EFTA Court that a Contracting Party to the EEA Agreement is "obliged to provide for compensation for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible."[2] While the principle of State liability is not reflected in the text of the Agreement, the EFTA Court has held that it constitutes an "integral part of the EEA Agreement" which is derived from the "homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities".[3]

12. The conditions which must be met for a Contracting Party to be held liable for violations of its obligations under the EEA Agreement are harmonious with the conditions under the EU principle of State liability: "firstly, the rule of law must be intended to confer rights on individuals and economic operators; secondly, the breach must be sufficiently serious; and, thirdly, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party".[4]

13. While the two principles overlap, they are legally distinct and serve different functions. As the case-law of the EFTA Court has established, the principle of State liability under the EEA Agreement follows from the central legal principle of homogeneity, which serves the Agreement's objective of establishing a homogeneous EEA. Within the Union legal order, the principle of State liability is "regarded as a necessary corollary of the direct effect of [Union law]".[5]

14. The EFTA Court underscored this distinction in its ruling in the *Karlsson* case where it elaborated that "[t]he 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 Court of Justice of the European [Union] of the principle of State liability under

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2 E-4/01 *Karl K. Karlsson hf.* v *The Icelandic State*, para 25.

3 E-9/97 *Erla María Sveinbjörnsdóttir* v *Iceland*, para 60.

4 *Sveinbjörnsdóttir* (n 3) para 66; *Karlsson* (n 2) para 32; E-2/12 *HOB-vín ehf.* v *Áfengis- og tóbaksverslun ríkisins*, para 121.

5 *Karlsson* (n 2) 27; cf. Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* v *Bundesrepublik Deutschland* and *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1996:79, para 22.

[Union] law. Therefore, the application of the principles may not necessarily be in all respects coextensive."[6]

15. The Government of Iceland submits that any further elaboration of the principle of State liability under the EEA Agreement is thus not contingent on how the parallel EU principle develops in service of the direct effect of Union law, but rather on its consistency with the provisions and principles of the EEA Agreement.

i. Application of State liability to judicial acts

16. The Appellant submits that the principle of State liability under the EEA Agreement should be interpreted as also including liability for judicial acts, as the Court of Justice held is the case for the corresponding principle under Union law in its landmark judgement in Case C-224/01 *Köbler*. As is explained in the Request for an Advisory Opinion, the Appellant argues that "it is logical, on the basis of an *in concreto* interpretation of the EEA Agreement and the Agreement's objectives of homogeneity, loyalty, effective legal protection for individuals and effective enforcement, as it does in EU law."[7]

17. In its judgment in *Köbler,* the Court of Justice ruled that the liability of a Member State for breaches of Union law committed by national courts adjudicating at last instance is governed by the same conditions as those establishing State liability in general. First, the rule of law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious and three, there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured party.[8]

18. The Court of Justice further acknowledged that regard must be had to 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 be incurred only in exceptional cases where that court has manifestly infringed the applicable law.[9] The finding in Köbler was based, in particular, on the absence of a possibility of appeal against a decision of a national court of last instance, and on the fact that those courts are subject to an obligation under Article 267 of the Treaty on the Functioning of the European Union ("the TFEU") to refer a question of the interpretation of Union law to the preliminary ruling of the Court of Justice. Subsequent case law, such as *Ferreira da Silva*, have highlighted the continuing importance of the preliminary reference mechanism and the conditions under which a failure to refer constitutes a breach of Union law.[10]

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6 *Karlsson* (n 2) 30.

7 Request for an Advisory Opinion, page 9.

8 C-224/01 *Gerhard Köbler* v *Republik Österreich* ECLI:EU:C:2003:513, paras 51-52.

9 *Köbler (n 8) paras 53 and 56.*

10 C-160/14 *João Filipe Ferreira da Silva e Brito and Others* v *Estado português* ECLI:EU:C:2015:565.

19. In assessing whether the *Köbler* doctrine can find application under the EEA Agreement, the Government of Iceland recalls that State liability is not in its own right an independent principle of the EEA Agreement, but a corollary of that of homogeneity.

20. The case-law of the EFTA Court and the Court of Justice have settled that the imperative of homogeneity under the EEA Agreement means that it is not only the Agreement's main objective, but also its central legal principle. The principle has a legal basis in the fourth and fifteenth recitals to the Agreement as well as Articles 1(1), 6, 102 and Chapter 3 of Part VII thereof. These provisions are, as the case-law holds, intended to ensure as uniform an interpretation of the EEA Agreement as possible throughout the EEA.[11]

21. Naturally, the principle entails that there is a presumption that provisions of the EEA Agreement which are identical to corresponding provisions of Union law are to be interpreted homogeneously. It further entails that divergences between the two legal frameworks are to be interpreted towards a homogeneous outcome across the EEA, where such an outcome has a legal basis in the EEA Agreement and conforms with its setup and principles.

22. It follows from the above that, although the principles of State liability under Union and EEA law are built on substantively different legal foundations, there is, at the outset, a presumption that they should be interpreted harmoniously.

23. The two principles can be applied almost indistinguishably to violations by States of their obligations under Union law, on the one hand, and EEA law, on the other, which stem from the conduct of the executive and legislative branches. The fundamental differences between the mechanisms for judicial control under the EU legal order and the EEA Agreement necessitate that the scope of the two principles of State liability cannot be equally far reaching in respect of judicial acts.

ii. The principle of judicial independence under the EEA Agreement

24. The EFTA Court's rationale for the existence of the principle of State liability in *Sveinbjörnsdóttir* was, in part, constructed on the strong emphasis which the EEA Agreement places on the role of individuals as the holders of judicially enforceable rights.

25. The importance of the role of the courts in "providing for adequate means of enforcement including at the judicial level" and enabling the realisation of the important roles of individuals in the EEA "through the exercise of the rights conferred on them by [the EEA] Agreement and through the judicial defence of these rights" is affirmed by the fourth and eighth recitals to the Agreement, respectively.

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11 See: (n 1); cf. *Sveinbjörnsdóttir* (n 11) para 60.

26. Crucially to the question of the Referring Court, provisions of both the Agreement's preamble and operative part make abundantly clear the fundamental importance that the principle of judicial independence holds to the setup of the EEA Agreement, which is evidenced by the fact that it is the only principle of EEA law which expressly limits the application of the principle of homogeneity.

27. The fifteenth recital to the EEA Agreement reads as follows:

"WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;"

28. This is further expressed in Article 106 of the Agreement, which establishes a system of judicial dialogue between the EFTA Court, the Court of Justice of the European Union and the Courts of last instance of the EFTA States "[i]n order to ensure as uniform an interpretation as possible of [the] Agreement, in full deference to the independence of the courts".

29. The legal significance of these provisions is further elucidated by the absence of corresponding provisions in the primary law of the European Union. The reason for this is the structural differences between the judicial system of the European Union, which is the judicial authority of an autonomous legal order, and the EEA Agreement which, as an instrument of public international law structurally partitioned with a two-pillar system, is characterised by its judicial pluralism.

30. Inherent to any system of justice founded on the rule of law is the axiom that there can be no fault without judgment. In fact, the premise of civil law liability is founded on the presumption of there being a court with competence to adjudicate on the matter. It follows that any notion of holding a State liable for the judgments of its national courts, that is to adjudicate on the adjudicator, raises material challenges which are difficult to reconcile with widely recognised principles of justice.

31. The most prominent of these principles is the doctrine of *res judicata* which holds that a matter exhaustively decided by a competent court is settled and not subject to further litigation. The doctrine contributes to securing legal certainty and legal stability within a jurisdiction and it constitutes a foundational principle of many legal systems, including those of Iceland and other Contracting Parties to the EEA Agreement.

32. The compatibility of State liability for judicial acts with the doctrine of *res judicata* was addressed by the Court of Justice in *Köbler*, which concluded that "recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*" in particular as "the principle of State liability inherent in the Community

legal order requires … reparation, but not revision of the judicial decision which was responsible for the damage."[12]

33. The Government of Iceland submits that this finding of the Court of Justice is only legally coherent in the context of the judicial system of the European Union.

34. Pursuant to Article 267 of the TFEU, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaties and on the validity and interpretation of acts of the Union. While this procedure is available wherever such a question arises before any court or tribunal of a Member State, it is compulsory for the courts and tribunals against whose decision there is no judicial remedy under national law.

35. The preliminary reference procedure is a characterising feature of the Union legal order, by which the national courts of the EU Member States are integrated with the judicial bodies of the European Union in a hierarchical structure within which the same legal dispute can be settled as a matter of law. On the other hand, the EEA Agreement does not entail judicial convergence. Rather, the Agreement establishes a system of dialogue between competent courts with jurisdictions that complement each other in the service of homogeneity, but which do not overlap. This complementarity is most clearly reflected in the EFTA Court's advisory jurisdiction through which it guides the competent courts of the EFTA States in the interpretation of EEA law.

36. These differences distinguish the Union legal order from the EEA Agreement in terms of the capacity of each to accommodate State liability for judicial acts in conformity with fundamental principles of justice, including *res judicata*. State liability of this sort necessitates that a court within a judicial system must determine that the judgment of a higher court within the same judicial system was a wrong that must be repaired.

37. In *Köbler*, the Court of Justice held that this is not itself incompatible with *res judicata* since a liability claim would be a separate legal question on the compatibility of a judgment with the law of the European Union.[13] In adjudicating on such a claim, a lower national court or tribunal of a Member State has recourse to the preliminary reference procedure to enable it to settle matter without prejudicing the *stare decisis* of a superior court, and therewith the coherence of that Member State's judicial system.

38. Indeed, the entire logical coherence of the principle of State liability applying to judicial acts is to remedy violations by the courts of last instance of the Member States of their obligation to make a preliminary reference to the Court of Justice. The judgment in *Ferreira da Silva*, in particular, illustrates that the availability of the preliminary reference mechanism is indispensable to extending the application of

12 *Köbler* (n 8) para 39.
13 *Köbler* (n 8) paras 38-39.

State liability to judicial acts in conformity with principles of justice.[14] That mechanism is indispensable in enabling a lower court to adjudicate on whether the judgment of a higher court caused loss or damage to an individual, without which a liability claim cannot be ruled upon.

39. In the absence of the preliminary reference procedure, the situation of an EFTA State is substantially different as the question of liability in each case will always be settled within the same judicial system that settled the original contested judgment. A lower court cannot, in its own right, hold the State liable for the judgment of a superior court without infringing *res judicata*.

40. Such an application of State liability in the context of the judicial setup of the EEA Agreement, which is tailored to respect the constitutional systems of the Contracting Parties, is not possible without undermining the independence of the national courts. It is consequently precluded by the principle of judicial independence under the EEA Agreement.

41. With reference to the foregoing, the Government of Iceland submits that the first question of the Referring Court must be answered in the negative.

iii. Remedial effects of other principles of EEA law

42. While the EEA Agreement does not entail State liability for judicial acts, this does not mean that rights conferred by the EEA Agreement are afforded less protection than corresponding rights under Union law.

43. Here, the Government of Iceland refers to the clear guidance which the EFTA Court has already provided with regard to the obligations that the Contracting Parties to the EEA Agreement have under the principles of effectiveness, equivalence and effective judicial protection.

44. This is evidenced, most recently, by the EFTA Court's judgment in *Kristjánsdóttir* where it held that:

> *"It is settled case law that in the absence of EEA rules governing the matter, in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. Such rules must respect the principles of equivalence and effectiveness. This entails that the procedural rules governing actions for damages arising from the infringement of the rules of the EEA Agreement must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness). EEA law requires, in addition to observance*

[14] *Ferreira da Silva* (n 10) paras 21 and 45.

of the principles of equivalence and effectiveness, that national legislation does not undermine the right to effective judicial protection."[15]

45. In this regard, the Government of Iceland considers it useful to share with the EFTA Court how, in the absence of State liability for judicial acts, national procedural law in Iceland has been articulated to protect rights conferred by the EEA Agreement in a manner which upholds the principles of effectiveness, equivalence and effective judicial protection.

46. As has been elaborated above, the doctrine of *res judicata* is incorporated into the Icelandic legal order by Act No. 91/1991 on Civil Procedure ("the Code of Civil Procedure") and Act No. 88/2008 on Criminal Procedure ("the Code of Criminal Procedure").

47. Article 116 of the Code of Civil Procedure states that a judgment constitutes the binding resolution of the claims in a dispute between the parties to a case, and their legal successors. A substantively equivalent rule is set out in Article 186 of the Code of Criminal Procedure. Both provisions stipulate that a claim that has been judged on the merits may not be raised again before the same court or a court of the same rank, except as expressly provided in each respective Act.

48. Sections XXVIII and XXIX of the Code of Civil Procedure and Sections XXXIV and XXXV of the Code of Criminal Procedure govern the conditions under which judgments may be reopened. As regards civil cases, Article 193 of the Code of Civil Procedure allows for such reopening where a party has significant interests (Icelandic: *stórfelldir hagsmunir)* at stake, and one of the following two conditions are fulfilled:

    a) *strong probabilities, based on new documents or information, exist that the facts of the case were not clear while the case was being processed and the party is not at fault and that the new documents or information will lead to a different conclusion in important aspects of the case; or,*

    b) *strong probabilities exist that new documents or information, which does not pertain to the facts of the case, will lead to a different conclusion in important aspects of the case.*[16]

49. Similar conditions are included in the relevant sections of the Code of Criminal Procedure.

50. In the preparatory works for the current legislative framework, which was introduced into Icelandic law by Act No. 47/2020 on the Court on Reopening of Cases, it is explained that the terms *new documents or information* are open-ended and can, in

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15 E-3/24 *Margrét Rósa Kristjánsdóttir* v *Sjúkratryggingar Íslands* para 53; cf. E-11/12 *Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG* para 121.

16 Unofficial translation.

particular, include the findings of international courts such as the European Court of Human Rights or the EFTA Court.[17]

51. It follows, for example, that a judgment of the EFTA Court concerning the interpretation of EEA law could constitute new information, and consequently serve as a basis for the reopening of a settled claim. In such cases, where a previous judgment on the merits would be reversed upon review in favour of a claimant, that claimant could subsequently lodge a claim against the State for the award of damages.

52. It should furthermore be noted that some of the provisions of Act No 47/2020 were informed by dialogue between the Government and the EFTA Surveillance Authority, under the auspices of the Authority's Case No 75004.[18] In the Case, the Authority had argued that the exclusions under Icelandic law of State liability for "damages caused to individuals by breaches of EEA law by a court adjudicating at last instances" amounted to a failure to fulfil the "obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement".[19]

53. While the Government of Iceland has always maintained that judicial acts are excluded from scope of the principle of State liability under the EEA Agreement, it has enacted legislative changes which broadened the criteria for the reopening of cases, in recognition of the importance of ensuring that full effect is given to the principles of effectiveness, equivalence and effective judicial protection.

54. In its Decision No. 131/21/COL of 23 June 2021 closing Case No 75004, the EFTA Surveillance Authority accepted that, in the absence of State liability for judicial acts, the provisions of Icelandic law governing the reopening of cases provide individuals and undertakings with alternative and equally effective remedies.[20]

55. With reference to the above, the Government of Iceland submits that any potential imbalance in the enjoyment of rights under the EEA Agreement and Union law, due to the fact that the principle of State liability does not extend to judicial acts, is remedied by the obligations which the principles of effectiveness, equivalence and effective judicial protection impose upon the Contracting Parties.

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17 Explanatory Memorandum to the Legislative Bill on the amendment of the Act on Courts, Act on Civil Procedure and the Act on Criminal Procedure (the Court on Reopening of Cases), Document No 685, Item No 470 of the 150TH Legislative Assembly of the Althing 2019-2020, <https://www.althingi.is/altext/150/s/0685.html>.

18 Relevant correspondence of the Government of Iceland and the EFTA Surveillance Authority relevant to Case No 75004 are annexed to these Written Observations.

19 Reasoned Opinion of the EFTA Surveillance Authority in Case No 75004 (Annexed to the Written Observations), para 3.

20 EFTA Surveillance Authority Decision No 131/21/COL of 23 June 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, pages 11-12.

3.2. The Second Question

56. The Government of Iceland reaffirms its view that the principle of State liability is precluded by the provisions and principles of the EEA Agreement from extending to judicial acts.

57. However, if the EFTA Court were to answer the first question of the Referring Court in the affirmative, the Government is of the view that such State liability should be settled in a comparable manner under EEA law and Union law. As the Court of Justice held in *Brasserie du Pêcheur*, it is incumbent on the individual to show "reasonable diligence" in avoiding loss before claiming compensation.[21] It follows that, in a judicial context, an individual must have availed themselves of all judicial remedies of appeal available under national law before a question of State liability can arise.

58. In *Köbler*, the Court of Justice held that liability resulting from a decision of a national court was subject to three conditions. First, the infringed rule must be intended to confer rights on individuals. Second, the breach must be sufficiently serious and third, there must be a direct causal link between the breach of the obligation and the damage suffered by an injured party.

59. This means that any purported liability resulting from a decision of a national court could only occur in exceptional circumstances where a court had, in no uncertain terms, manifestly infringed EEA law. When assessing whether an infringement is manifest, regard must be had of the degree of clarity and precision of the rule infringed, whether that infringement was intentional and finally, whether the supposed error of law was inexcusable.

60. The Court of Justice acknowledged in *Köbler* that regard must be had to the specific nature of the judicial functions to the legitimate requirements of legal certainty.

61. The Government of Iceland submits that it follows from the conditions set out above that State liability for a judicial act could only arise in respect of a judgment on the merits by a court of last instance.

62. As regards procedural decisions of national courts, for example decisions not to grant leave of appeal, the Government of Iceland submits that such legal questions should be addressed under the principles of effectiveness and equivalence, as well as the principle of national procedural autonomy.

63. Finally, the Government notes that, in point (b) of the second question, the Referring Court asks the EFTA Court to advise on the compatibility with EEA law of conditions established under national procedural law for filing of a civil liability claim against the state for judicial errors.

64. At the outset, the Government of Iceland recalls that national procedural law is not harmonised under the EEA Agreement. Any scrutiny of the compatibility of provisions

[21] *Brasserie du Pêcheur* (n 5) paras 84-85.

of national law in this field must give due consideration to the principle of national procedural autonomy and the high margin of discretion which the Contracting Parties to the EEA Agreement retain in that regard.

65. In the absence of express EEA rules in this field, the Government of Iceland recalls that it is for the legal system of each Contracting Party to lay down the detailed procedural rules governing action for safeguarding the rights that individuals and economic operators derive from EEA law. These rules must respect the principles of equivalence and effectiveness. It follows that procedural rules which give effect to rights derived from the EEA Agreement must not be less favourable than those governing similar actions for rights under national law. Further, such rules must not render practically impossible or excessively difficult the exercise of rights conferred on individuals and undertakings by provisions of the EEA Agreement.

66. The Government of Iceland submits that it is for the national court to undertake an assessment of whether the national procedural rules are compatible with the provisions of the EEA Agreement.

IV. Answer to the Questions Referred

67. The Government of Iceland respectfully submits that the EFTA Court answer the questions from the referring court as follows:

> *"1. The scope of the principle of State liability under the EEA Agreement, as a corollary of the principle of homogeneity, is subject to the principle of judicial independence and, as a result, does not extend to the application of EEA rules by national courts. Nevertheless, the principles of effectiveness, equivalence and effective judicial protection require the Contracting Parties to ensure the full enjoyment by individuals and undertakings of the rights conferred by the EEA Agreement.*
>
> *2. a) If the principle of State liability under the EEA Agreement entailed that the State could be liable for judicial acts (quod non), it would be limited to judgments on the merits by courts of last instance.*
>
> *b) It follows from the principle of national procedural autonomy that it is for the Contracting Parties to the EEA Agreement to lay down the detailed procedural rules governing the safeguarding of rights which individuals and economic operators derive from EEA law, in compliance with the principles of effectiveness, equivalence and effective judicial protection."*

For the Government of Iceland,

Hendrik Daði Jónsson Þorvaldur Heiðar Þorsteinsson Jóhanna Katrín Magnúsdóttir

Agents