

EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 23 December 2024

To the President and Members of the EFTA Court

Written Observations

submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*) and Romina Schobel, Deputy Director of the EEA Coordination Unit (*Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), acting as agents of the Government of the Principality of Liechtenstein,

in Case E-25/24

Dartride AS v Norwegian State

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.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour to submit the following observations:

I. Question referred to the EFTA Court

The Eidsivating Court of Appeal has stayed its proceedings in order to refer the following questions to the EFTA Court:

1. *Do the EEA Agreement and [the principle of] State liability under EEA law entail that the State can be liable for damages for errors by the courts in the application of the EEA rules?*
2. *If question 1 is answered in the affirmative:*
 - a. *Which decisions by national courts can trigger liability for EEA States?*
 - b. *Is it compatible with EEA law for the possibility of filing a lawsuit concerning damages for errors by the courts in their application of the EEA rules to be subject to fulfilment of conditions laid down in the third paragraph of section 200 of the Courts of Justice Act?*

II. Factual background of the case

1. With regard to the facts of the present case, the Liechtenstein Government would like to refer to the summary of the facts provided by the Eidsivating Court of Appeal in its request for an advisory opinion.

III. Legal framework

2. By way of introduction, the Liechtenstein Government considers it appropriate to briefly outline the legal framework relevant to answer the question referred for a preliminary ruling:

EEA Agreement

3. In its following Written Observations, the Liechtenstein Government will refer to the following recitals and articles of the EEA Agreement:
4. Recital 4 establishes the goal of creating a dynamic and uniform EEA founded on shared rules, equal competition conditions, effective enforcement mechanisms including judicial measures, and ensuring equality, reciprocity, and a balanced distribution of benefits, rights, and obligations among the Contracting Parties.
5. Recital 15 outlines the goal of the Contracting Parties to ensure a uniform interpretation and application of the EEA Agreement, while respecting the independence of the courts. It emphasizes the aim of achieving equal treatment for individuals and economic operators in relation to the four freedoms and competition conditions.
6. Article 1 establishes the purpose of the EEA Agreement to foster balanced and fair trade and economic relations between the parties, ensuring equal competition and common rules, to create a homogeneous EEA. It outlines key objectives, including the free movement of goods, persons, services, and capital, along with undistorted competition and cooperation in areas like research, environment, education, and social policy.
7. Article 6 ensures that provisions of the EEA Agreement, identical in substance to EU Treaty rules, are interpreted and applied in line with relevant Court of Justice of the European Union (hereinafter referred to as the 'Court of Justice') rulings issued before the EEA Agreement's signature date.

Surveillance and Court Agreement

8. The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as 'Surveillance and Court Agreement') lays down the tasks and competences of the EFTA Surveillance Authority and the EFTA Court.
9. With regard to the case at hand, Article 34 of the Surveillance and Court Agreement must be considered relevant. Article 34 of the Surveillance and Court Agreement allows the EFTA Court to provide advisory opinions on interpreting the EEA Agreement. Courts or tribunals in EEA EFTA States may request such opinions if needed to decide a case. EEA EFTA States can restrict this right to final-instance courts through national legislation.

Treaty on the Functioning of the European Union

10. In its following Written Observations, the Liechtenstein Government will refer to the following articles of the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU')¹:
11. Article 267 TFEU grants the Court of Justice jurisdiction to deliver preliminary rulings on the interpretation of the EU Treaties and the validity and interpretation of acts adopted by EU institutions, bodies, offices, or agencies. When such questions arise before national courts of EU States, these courts may request a ruling if it is necessary to decide the case. However, if the case is before a court whose decisions are not subject to further appeal under national law, it is obliged to refer the matter to the Court of Justice.
12. Article 340 TFEU establishes the state liability rules of the EU and its institutions.

¹ OJ C 326, 26.10.2012, p. 47.

IV. Legal analysis

13. With its first question referred to the EFTA Court, the Eidsivating Court of Appeal enquires whether the EEA Agreement and the principle of state liability under EEA law establish that the EEA EFTA State may be held liable for damages resulting from judicial breaches of EEA law.
14. To address this question, it is necessary to first outline the key principle of EU state liability, as it serves as the basis for a corresponding concept under EEA law. EU state liability refers to the liability of EU States for damages suffered by individuals as a result of a breach of EU law attributable to the EU States.
15. EU treaty law contains no explicit provision regarding the liability of EU States for breaches of EU law, unlike the liability of the EU institutions itself, which is explicitly regulated in Article 340 TFEU. The principle of state liability was developed through the case law of the Court of Justice. In its landmark *Francovich* judgment² in 1991, the Court of Justice established the right of individuals to claim compensation for damages caused by an EU State's breach of EU law. The Court of Justice clarified that the liability of EU States is a fundamental principle that arises from the nature of EU law.
16. The starting point of this jurisprudence was the liability of EU States for the non-implementation of a directive. Such liability arises when the directive aims to confer individual rights, its provisions clearly define the content of these rights, and there is a direct causal link between the breach of the directive and the damage suffered. The Court of Justice has reaffirmed and significantly advanced this case law through a series of landmark rulings.³

² Judgment of the Court of Justice of 19 November 1991 in case C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, ECLI:EU:C:1991:428.

³ Judgment of the Court of Justice of 5 March 1996 in 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; Judgment of the Court of 8 October 1996 in joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland*, ECLI:EU:C:1996:375.

17. Additionally, the Court of Justice established that state liability in the EU applies to the actions and omissions of the organs of all three branches of government: executive, legislative, and judicial. In the *Köbler* case⁴ in 2003, and subsequently confirmed in the *Traghetti del Mediterraneo SpA* judgment⁵, the Court of Justice explicitly found that the principle of state liability also extends to judicial activities of courts adjudicating at last instance⁶.
18. Having established, that the principle of state liability is an EU doctrine which enables individuals to claim damages from an EU State and which was established by the European Court of Justice, the question now is whether the same principle applies within the legal framework of the EEA.
19. As in the EU the EEA Agreement also does not contain an express provision on state liability. However, following the Court of Justice, the EFTA Court in its *Sveinbjörnsdóttir* judgment⁷ early on concluded that *'it follows from all the forgoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage cause to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible.'*⁸ The EFTA Court deduced this principle of state liability from the homogeneity objective and referred to the need for effective judicial protection of individual rights as well as the principle of loyalty.⁹
20. Since the *Sveinbjörnsdóttir* judgment in 1998 the EFTA Court had to give advisory opinions in a couple of cases concerning state liability and reaffirmed its case law.

⁴ Judgment of the Court of 30 September 2003 in case C-224/01, *Gerhard Köbler v Republik Österreich*, ECLI:EU:C:2003:513.

⁵ Judgment of the Court of Justice of 13 June 2006 in case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*, ECLI:EU:C:2006:391.

⁶ Judgment of the Court of Justice, C-224/01, paragraph 33 et. seq..

⁷ Judgment of the EFTA Court of 10 December 1998 in case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland*, [1998] EFTA Ct. Rep. 95.

⁸ Judgment of the EFTA Court, E-9/97, paragraph 62.

⁹ Judgment of the EFTA Court, E-9/97, paragraph 60.

21. However, unlike the Court of Justice, the EFTA Court has not yet decided a case on state liability for judicial wrongdoing. Therefore, the question as to whether the principle of state liability in the EEA encompasses breaches of EEA law caused by the national courts adjudicating at last instance remains.
22. In view of the Liechtenstein Government, the answer to this question is clear: The principle of state liability within the EEA does not encompass breaches of EEA law caused by the national courts adjudicating at last instance.
23. To demonstrate conclusively why the principle of state liability under EEA law does not extend to breaches of EEA law committed by national courts adjudicating at last instance, one first has to analyse the EU legal situation and case law of the Court of Justice to clarify the legal basis for state liability for judicial breaches of EU law. Subsequently, it has to be analysed if the EU legal situation can be transferred to EEA law or whether there are reasons precluding such a transferal.
24. As elaborated earlier the Court of Justice in the *Köbler* case in 2003 explicitly found that the principle of state liability also extends to judicial activities. This was subsequently confirmed in the *Traghetti del Mediterraneo SpA* judgment and been reaffirmed in more recent case law, particularly in the *Tomášová* judgment¹⁰ of 2015 and the *Hochtief Solutions Magyarországi Fióktelepe* judgment¹¹ of 2019.
25. The Court of Justice based the principle of state liability for judicial activities *inter alia* on the role played by the judiciary in the protection of rights derived by individuals from EU law and the principle of legal protection of individuals. Primarily, the Court of Justice however relied and called upon Article 267 TFEU and the obligation of courts against whose decisions there is no judicial remedy under national law to make a reference to the Court of Justice.

¹⁰ Judgment of the Court of Justice of 28 July 2016 in case C-168/15, *Milena Tomášová v Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.*, ECLI:EU:C:2016:602.

¹¹ Judgment of the Court of Justice of 29 July 2019 in case C-620/17, *Hochtief Solutions AG Magyarországi Fióktelepe v Fővárosi Törvényszék*, ECLI:EU:C:2019:630.

26. In its *Köbler* judgment the Court of Justice stated that:

Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

*Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur and Factortame*, cited above, paragraph 35).¹²*

27. Following the assessment of the legal situation established by the Court of Justice and the legal basis the Court of Justice relied upon to establish this principle, it has to be assessed whether this legal situation can be transferred to EEA law or whether there are reasons precluding such a transferal.

28. The effective functioning of the EEA internal market relies on the uniform interpretation and application of common rules¹³. Furthermore, the EFTA Court has deduced the principle of state liability from the homogeneity objective. Accordingly, the state liability obligation of the EEA EFTA States is grounded in the objective of maintaining homogeneity and there would be no foundation for an equivalent principle under EEA law in the absence of the EU law principle of state liability.

29. This principle of homogeneity establishes a presumption that provisions with identical wording in the EEA Agreement and EU law should be interpreted consistently. Specific circumstances, such as differences in scope and purpose, can, however, justify deviations in interpretation between EEA law and EU law.¹⁴

¹² Judgment of the Court of Justice, C-224/01, paragraph 34-35.

¹³ Recital 4 and Article 1 of the EEA Agreement.

¹⁴ Judgment of the EFTA Court of 8 July 2008 in case E-09/07, *L'Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norg*, paragraph. 27.

30. It is the role of the EFTA Court to ensure that provisions of the EEA Agreement, which are substantively identical to those of the EU Treaties, are interpreted consistently across the EEA States. At the same time, the EFTA Court must acknowledge and respect differences in scope and purpose between the EEA Agreement and the EU Treaties, ensuring that deviations in interpretation are made where appropriate.
31. Hence, it has to be assessed whether there are reasons and differences in substance which preclude a transferral of the principle of state liability for breaches of EEA law caused by the national courts to the EEA.¹⁵
32. Since the principle of state liability for breaches of EU law caused by the national courts was established by the Court of Justice it is imperative to also consider the following in this assessment: the case law was established after the date of signature of the EEA Agreement. This is important as, according to Article 6 of the EEA Agreement and Article 3 of the Surveillance and Court Agreement, case law of the Court of Justice established after the date of signature of the EEA Agreement solely has to be taken into due account¹⁶.
33. Considering the elaborations concerning the Court of Justice reasoning for such a judicial state liability the following differences between the EU Treaty and the EEA Agreement preclude a transferral of the principle to the EEA:
34. Contrary to the EU States, the EEA EFTA States have **not transferred legislative power or judicial power** to the EFTA Institutions. The independence of the courts is central in the EEA Agreement, as showcased by Recital 15 to the EEA Agreement specifically referencing the independence of the courts.
35. Furthermore, it should be emphasized that Advisory Opinions issued by the EFTA Court are, as a matter of law, **not legally binding on national courts**.

¹⁵ Judgment of the EFTA Court of 10 December 1998 in case E-3/98, *Herbert Rainford-Towning*, [1998] EFTA Ct. Rep. 205, paragraph 21.

¹⁶ in so far as the provisions interpreted are identical in substance to the provisions of the EEA Agreement.

36. Moreover, neither the EEA Agreement nor the Surveillance and Court Agreement imposes an obligation on national courts, whose decisions are not subject to appeal under national law, to **refer cases to the EFTA Court**.
37. In contrast to Article 267 TFEU on which the Court of Justice heavily relied upon to establish this principle, Article 34 of the Surveillance and Court Agreement explicitly does not establish an obligation to make a reference to the EFTA Court. The importance of Article 267 TFEU is further showcased by the fact that state liability for courts in the EU solely concerns national courts adjudicating at last instance. Consequently, this only concerns the national courts who are subject to the obligation to make a reference to the Court of Justice.
38. It is also important to note, that this obligation to refer cases to the Court of Justice has further consequences. This obligation is an important part of the assessment as to whether the national court has manifestly infringed EU law. The Court of Justice explicitly states that non-compliance by the national court with the obligation to make a reference is an important factor to consider.¹⁷
39. This underscores that the level of integration achieved under the EEA Agreement is less extensive than that established under the EU Treaties.¹⁸ These differences between the EU law and the EEA law have also been acknowledged by the EFTA Court. In the *Karlsson* case¹⁹ the EFTA Court stipulates that *'the application of principle of state liability may not necessarily be in all respects coextensive'*²⁰ with the developments of the case law of the Court of Justice.

¹⁷ Judgment of the Court of Justice, C-224/01, paragraph 55.

¹⁸ Judgment of the EFTA Court of 28 September 2012 in case E-18/11, *Irish Bank Resolution Corporation Ltd v Kaupþing hf*, [2012] EFTA Ct. Rep. 592, paragraph 57.

¹⁹ Judgment of the EFTA Court of 30 May 2002 in case E-4/01, *Karl K. Karlsson hf. v The Icelandic State*, [2002] EFTA Ct. Rep. 240.

²⁰ Judgment of the EFTA Court, E-4/01, paragraph 30.

40. The outlined considerations and the significant differences that have been highlighted make it unequivocally clear that there is no identical or even substantially comparable legal basis in this case.


41. As a result, it is evident that the principle of state liability for breaches of EU law by national courts cannot be transferred to the EEA Agreement. Attempting to do so would ignore the specific legal distinctions and contextual factors that fundamentally separate the Treaties and the EEA Agreement.

V. Conclusion

42. Following the above observations, the Liechtenstein Government considers that the question referred to the EFTA Court for an advisory opinion should be answered as follows

The EEA Agreement and the principle of state liability under EEA law do not establish that the EEA EFTA State may be held liable for damages resulting from judicial breaches of EEA law.

On behalf of the Liechtenstein Government


Dr. Andrea Entner-Koch
Director
EEA Coordination Unit




Romina Schobel
Deputy Director
EEA Coordination Unit